Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts

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FINAL REPORT
Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts

With an executive summary of the main points

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Executive summary

1. The Centre for the Study of European Contract Law (CSECL) and the Institute for Information Law (IViR), both affiliated to the Law Faculty of the University of Amsterdam, were commissioned to conduct this study entitled "Digital content services for consumers". This is the final report of the study. It contains the comparative analysis of the 11 country reports, which were the subject of Report I – Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain, the United Kingdom, Norway and the United States and a Law & Economics analysis of selected aspects pertaining to digital content contracts. Furthermore, it develops recommendations for possible future rules on digital content contracts. The research was concluded on 1 June 2011.

2. The comparative analysis shows that there is uncertainty as to the classification of digital content contracts as contracts for the provision of goods or services. Our analysis shows that although much attention is paid to this distinction, in practice it is only in very few cases that this distinction really matters. In this report, we try to overcome the distinction by developing a *sui generis* regime for digital content contracts and, in particular, by developing tailor-made rules there where there is a specific need for such rules.

3. The analysis further shows that there is a tendency to take the specific characteristics of digital content contracts into account when interpreting general information obligations. More controversial is whether consumers need to be informed about potential usage restrictions as a result of the application of Digital Rights Management or technical protection measures. It appears that a duty to inform consumers about such measures (but also about matters of interoperability, the processing of personal data, etc.) will flow more readily from unfair commercial practices regulation. In addition to the information obligations in general consumer and contract law, sector-specific information obligations may apply that originate from media law, communication law, e-commerce law, and data protection and copyright law. Such legislation tends to require very specific information about very specific aspects of digital content. The interaction between these general and sector-specific obligations has so far received little or no attention. More generally, little attention is paid to the particular form, language and means consumer information is administered. This gives rise to the question to what extent issues such as "information overload" or aspects of information quality, noise reduction and user friendliness must play a more prominent role for pre-contractual information obligations to be effective.

4. Member States have a tendency to exclude or restrict the availability of the right of withdrawal for digital content contracts. They either apply the exemption in the Distance Selling Directive on service contracts where performance has begun with the consumer's express consent, or the exemptions under that Directive for goods that have been unsealed or which by their nature cannot be returned. However, the analysis shows that it is questionable whether the latter two exemptions can be relied on. It is argued that the provisions on digital content contracts in the Council's General Approach[1] and the text suggested by the European Parliament's IMCO committee[2] regarding the future Consumer

[1] Council of the European Union, General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010.
[2] European Parliament, Plenary endorsement of the IMCO committee's opinion of 24 March 2011.

Rights Directive solve some problems, but raise others.[3]

5. From the analysis it becomes clear that the conformity test, developed under the Consumer Sales Directive, as such seems fit to be used also with regard to digital content and in practice is applied in the legal systems included in this study, irrespective of the classication of the contract. The same holds true for the consumer sales remedies. This does not mean that applying the conformity test to digital content is without problems. In fact, it is often uncertain what the consumer may reasonably expect from the digital content. An objective yardstick to determine whether these expectations have been met often does not (yet) exist because of the relatively new character of digital content, the many different types of digital content, the high level of product differentiation, licensing practices and conditions, and the rapid market and technological developments. The consumer's legitimate expectations are to a large extent influenced by statements from the side of the industry. However, such statements cannot undermine the legal expectations consumers may have of the digital content. These may be based on previous experiences with digital content or similar experiences with traditional, tangible goods, which may resemble the digital content now purchased, or on more abstract notions such as public order and the protection of privacy or fundamental rights. The report further identifies several types of conformity problems. Most pertain to problems regarding accessibility, functionality and compatibility, the quality of the digital content, and security and safety matters.

6. Finally, the analysis shows that specific attention is needed concerning the position of minors. Member States' legislations differ to a large extent, which is problematic given the importance of the relatively high number of digital content contracts with minors and the potentially cross border character thereof. This seems to lead to a high level of legal uncertainty as to the validity of these contracts, which is particularly burdensome on traders. It is argued that harmonisation in this area is required.

7. On the basis of the comparative analysis and extensive desk research, and mostly supported by the Law & Economics analysis, suggestions are made indicating how digital content contracts could be dealt with in a possible future legislative instrument. The recommendations include the application of (consumer) sales law to digital content contracts, with some specific provisions for digital content contracts. These include a tailor-made rule with regard to the right to withdraw indicating that the cooling-off period starts when the contract is concluded, the exclusion of rules regarding price in case of gratuitous digital content contracts, and the introduction of a right to make a limited number of private copies, subject to express derogation by the trader. Furthermore, it is suggested that deviations from copyright law, infringement of privacy rights and bundling provisions be deemed or presumed to be unfair. Specific recommendations are made regarding the content and form in which pre-contractual information must be made available to the consumer. Finally, specific provisions regarding the protection of minors are introduced.

[3] The European Parliament voted on the text of the Consumer Rights Directive as agreed in informal trilogues with the Council and the Commission on 23 June 2011 http://www.europarl.europa.eu/document/activities/cont/201106/20110624ATT22578/20110624ATT22578EN.pdf . However, since the final text of the Directive was not yet available at the time when this Report was being finalised, it was not possible to include references to it or to analyse it.

List of abbreviations

AAC	Advanced Activity Concept
ACGM	Autorità Garante della Concorrenza e del Mercato (Italian Competition Aunthority)
ACLE	Amsterdam Centre for Law & Economics
AG	Advocate-General Amtsgericht (Germany)
APIG	All Party Internet Groups
Ap. Roma Sez.	Court of Appeal Rome
BBC	British Broadcast Corporation
BGB	Bürgerlich Gesetzbuch (German Civil Code)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BIS	Business Innovation and Skills
CA	Court of Appeal (England) Cour d'appel (French Appeal Court)
Cass. Civ.	Cour de Cassation, Chambre Civile (with number of Chambre)
Cass. com	Cour de Cassation, chambre commerciale
Cass. Crim.	Cour de Cassation Chambre Criminelle
Cass. Sez.	Supreme Court of Cassation (Italy)
c.c.	Civil Code
CLCV	Consumption, Housing and Environment - Consommation, Logement et Cadre de vie
CFREU	Charter of Fundamental Rights of the European Union
CRD	Consumer Rights Directive
CSECL	Centre for the Study of European Contract law
DCFR	Draft Common Frame of Reference
DRM	Digital Rights Management
DVD	Digital Video Disc
ECCN	European Consumer Center's Network
ECHR	European Convention for the protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Reports
ed	editor
edn	edition
eds	editors
etc	etcetera
EU	European Union
EULA	End User License Agreement
et al	and other
et seq	and the following
GMbH	Gesellschaft mit Beschränkter Haftung (limited liability company)
HADOPI	High Authority of Diffusion of the Art Works and Protection of the (Copy)Rights on Internet

HR	Hoge Raad (Dutch Court of Appeal)
HoL	House of Lords
IAP	Internet Accsess Provider
INDICARE	Informed Dialogue about Consumer Acceptability of DRM Solutions in Europe
IPR	Intellectual Property Right
IViR	Institute for information law
LG	Landesgericht (Germany)
NCC	National Consumer Council
MP3	MPEG Layer-3 sound file
OFT	Office of Fair Trading
OLG	Oberlandesgericht (Higher Regional Court of Appeal, Germany)
PECL	Principles of European Contract Law
Rb	Rechtbank (Dutch District Court)
SaaS	Software as a Service
SAP	Sentences of Provincial Audiences (Spain)
SGA	Sale of Goods Act
SGSA	Supply of Goods Act and Services Act
STSS	Sentence of High Tribunal (Spain)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TGI	Tribunal de Grande instance (French first or second instance Court)
TPM	Technical Protection Measures
UNESCO	United Nations Educational, Scientific and Cultural Organization
UrhG	Urhebergesetz (German Copyright Act)
UCC	User Created Content
UCC	Uniform Commercial Code
UCITA	Computer Information Transaction
UMT	Universal Mobile Telecommunication System
UWG	Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act)
RLOPD	Reglamento de desarrollo de la Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal (Spanish Personal Data Protection Act)
Trib.	Tribunale (District Court)
WBP	Wet bescherming persoonsgegevens (Dutch Data Protection Act)
XCP	eXtensible Content Protection

1. Introduction

1.1 General introduction

The consumption of digital content has become an integral part of the daily life of Europe's digital consumers of all ages, professions and levels of experience. More and more digital services serve consumers' demand for information, education, entertainment and communication: music downloads, online gaming, online publishing and the purchase of e-books, subscriptions to podcasts, webcast and streaming services, et cetera. By demanding and consuming these services, digital consumers are the engine of the information economy. Growing consumer demand for all kinds of digital content stimulates the digital content sector to become one of the most dynamic, innovative and prospering economies within and outside the European Union.

Active participation in digital markets requires trust and confidence, also and especially on the side of consumers. Digital consumers will only embrace the digital economy if they can be confident that services are safe (e.g. that they are free from viruses, malware and spyware) and meet their expectations, and if they can trust that their legitimate interests and rights are respected, also online. It is the task of a stable, effective legal framework to ensure that consumers get the service information they need, that the services they purchase comply with their expectations, that they can expect a high level of quality and safety, that digital content is supplied under fair conditions, and that in case of conflict they are able to enforce their rights, also across national borders. As a result, consumer law has an important role to play in fostering the digital economy: to let consumers know that they do have rights, also online, and to make sure that these rights are adequate and effective.

The legal protection of consumers of digital content was also a central theme during the preparation of the proposal for a Directive on Consumer Rights.[4] During the course of this process, it became again apparent that the issue of extending consumer law to apply to digital content is as difficult as it is controversial. On the one hand, particularly the digital industry highlighted the differences between digital content and tangible goods. Digital content products are never static and their functioning depends much on their technical environment. On the other hand, though the expectations and legitimate interests of consumers of goods and digital content may differ, the latter should still be able to expect a similar high level of protection. Accordingly, the European Parliament has called on the Commission to thoroughly examine the ways in which consumers of digital content are

[4] *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (hereinafter 'proposal for a Consumer Rights Directive of 8 October 2008'). In the Council's General Approach,the Council has suggested to drastically narrow its scope; see Council of the European Union, General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010, Interinstitutional File 2008/0196 (COD). The European Parliament, in the Plenary endorsement of the IMCO committee's opinion of 24 March 2011, retained the broad scope of the proposed Consumer Rights Directive, but determined that with regard to sales remedies the directive would be based on minimum harmonisation.

protected, and to determine whether or not there is a need to adopt one or more specific legislative instruments or to extend existing consumers law to digital content.[5]

Throughout this study we employ the following definition of digital content: "all digital content which the consumer can access either on-line or through any other channels, such as a DVD or CD, and any other services which the consumer can receive on-line". This definition was prepared by Europe Economics in the first part of this study (Lot 1).[6] As will become clear from the comparative analysis in Part 2 and the recommendations made in Part 4 of this study with regard to defective digital content, the question whether this digital content was stored on a tangible medium or not is not particularly relevant when determining whether or not the digital content is in conformity with the contract and which remedies may apply if this is not the case.

The objective of this study is to provide an overview of the rights of digital consumers before, at the moment of and after concluding contracts for the provision of digital content under the relevant consumer protection rules in general consumer and in information law. The study analyses the extent to which these rights are appropriate and prepared to protect the rights and legitimate interests of digital consumers. In doing so, it pays special attention to the experiences and problems of digital consumers that have been identified by Europe Economics in the final part of their aforementioned study.[7] Based on these findings, on desk research as well as earlier research in related projects, the study proposes draft rules for the protection of the digital consumers. We aim to achieve a balanced approach, which takes into account the interests of both consumers and the digital industries. In our suggestions of how to optimize the legal protection of digital consumers, we take into account new, innovative answers to consumer problems that are enabled through digital technologies. Some of the suggestions have subsequently been subjected to a Law & Economic (L&E) analysis. The methodology adopted for the analysis thus combines comparative law with L&E analysis. The comparative part of the research was based on a functional method. National reporters were asked to fill out an elaborate questionnaire on the legal framework for digital content contracts for consumers in their countries (Finland, France, Germany, Hungary, Italy the Netherlands, Poland, Spain, the United Kingdom, Norway and the United States). For a wide range of topics, they indicated whether and, if so, how consumers of digital content are protected in their legal systems. The national reports provided the basis for the comparative analysis of the solutions to consumer problems in the selected legal systems. Selected parts of the results of the comparative analysis were then assessed from an L&E perspective.

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[5] European Parliament, *Resolution of 21 September 2010 on completing the internal market for e-commerce* (2010/2012(INI)). Similarly, in the text adopted by the Council of the European Union on 10 December 2010, in recital (10d) the Council calls for the Commission to examine the need for harmonised detailed provisions regarding digital content contracts and, if necessary, to propose such provisions.

[6] Europe Economics, *Digital content services for consumers: Assessment of problems experienced by consumers (Lot 1)*, Report 1, 2010 (hereinafter: Europe Economics 2010, Report 1).

[7] Europe Economics, *Digital content services for consumers: assessment of problems experienced by consumers (Lot 1), Report 3 Assessment of consumers' experience and possible problems*, Final Report, London: 2011 (hereinafter 'Europe Economics 2011, Report 3').

When drafting the possible draft rules, the Draft Common Frame of Reference (DCFR) was taken as a starting point. The reason for choosing the DCFR as a starting point is that at present there is no uniform set of binding rules at the European level on which the proposed draft rules could build. The consumer acquis is currently under revision and when this report was being finalised the discussions on the proposal for a Consumer Rights Directive had not yet been finalised.[8] Of course, the text of the original proposal, the text suggested in the Council's General Approach of 24 January 2011,[9] and the text suggested by the IMCO committee of the European Parliament as endorsed by the European Parliament on 24 March 2011[10] were taken into account, but these texts differ so substantively that it was likely that these texts would change fundamentally before a final version of the proposal was adopted as a Directive. On the other hand, the (Academic) Draft of the Common Frame of Reference was already published in 2008-2009[11] and may be seen as a coherent – albeit not undebated – set of rules, which may at one point, form the basis of legislative activity by the European legislator. In this context, it should be mentioned that the results of the Expert Group on European Contract Law that was appointed by the Commission[12] have not been included in the analysis presented in this Report, since they were published after the analysis was concluded.

This section will now briefly map the factors to consider when studying "digital consumer law" (section 1.2), the differing and sometimes even contradictory conceptions of the consumer (section 1.3), the main concerns of consumers in digital content markets (section 1.4) and the applicable legal framework (section 1.5).

1.2 Consumers in digital content markets

There are a number of factors or parameters that characterize the situation of consumers in digital content markets. Digital consumer law must take these factors into account; reflect the challenges that arise for the application of existing consumer law and the concerns of digital consumers.

1.2.1 Shopping in an intangible economy

Probably one of the most evident characteristics of digital content markets is the move from predominantly tangible goods towards intangible products. Instead of printing and selling a tangible book in a bookstore it is now also possible to "print" the same book in electronic

[8] The European Parliament voted on text of the Consumer Rights Directive agreed in informal trilogues with the Council and the Commission on 23 June 2011 http://www.europarl.europa.eu/document/activities/cont/201106/20110624ATT22578/20110624ATT22578EN.pdf . However, since the final text of the Directive was not yet available at the time when this Report was being finalised, it was not possible to include references to it or to analyse it.

[9] Council's General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010.

[10] European Parliament's plenary endorsement of the opinion of the IMCO committee of 24 March 2011.

[11] C. von Bar et al (eds.), Principles, definitions and model rules of European Private Law. Draft Common Frame of reference (Full edition), Munich: Sellier European law publishers, 2009.

[12] A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback, 3 May 2011, http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm (last consulted on 12 May 2011).

form and offer it for download. Music can be offered for sale in the form of (tangible) CDs but also in form of MP3s, etc. Games are played increasingly online, ringtones purchased via the mobile phone. As was, for instance, pointed out during the consultation on the Commission's Green Paper on the Review of the Consumer Acquis and elsewhere, intangible digital content goods or services may have many things in common with tangible products (the content to begin with).[13] Yet, they do not fit well into the traditional consumer law framework, where many rules are designed for a tangible economic, such as the rules in consumer sales law, the provisions about the right of withdrawal, or certain remedies, such as the right to demand repair or return a product. In particular the fact that digital content is excluded from the application of consumer sales law was mentioned as one of the "major deficits" of the present legal situation.[14]

1.2.2 Doing business online

With the digitization of content and the tools for its production, distribution of entertainment and information is increasingly shifted from the physical to the online domain. More recently, mobile business has begun to conquer the consumer market, assisted by expanding transmission capacities of mobile networks as well as the escalating functionality of mobile "phones". Digital content is offered via a plethora of different business models, and an end to the innovation and development in this sector is not yet in sight. Consumers can choose between "on-demand" offerings,[15] "near-on-demand" content,[16] on-demand downloading,[17] streaming,[18] webcasting,[19] IP-based TV,[20] the subscription to purchase of e-books, e-journals and newspapers, social broadcasting,[21] cloud computing,[22] and many, many more. Similarly varied are the forms of payment. Content can be delivered as pay-per-download, pay-per-bundle, pay-per-use, pay-per-source (e.g. a specific title), pay-per-day, flat access fee, subscription, price, advertisement financed, or free of charged.

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[13] Cf. also M.B.M. Loos, '*Review of the European Consumer Acquis'*, GPR Praxis, *Zeitschriften zum Gemeinschaftsprivatrecht,* Munich: Sellier. European law publishers 2008, p. 38-39.

[14] The European Consumer Centers' Network, *The European Online Marketplace: Consumer Complaints 2008-2009*, August 2010, p. 21. (hereinafter 'ECC-Net 2010').

[15] Consumers can decide when to watch a specific movie or other type of content.

[16] Digital content is offered in time intervals, e.g. hourly or every ten minutes.

[17] Digital content is delivered from the providers' servers to the customers' digital devices, e.g. a computer or digital video recorder.

[18] Digital content is stored on the distributors' servers and can be delivered to users individually as they access it. However, no permanent copy remains on the consumers' hardware. The streaming process only leaves an ephemeral copy of the file on the users' devices. When the application or device used to access the stream is turned off, the ephemeral copy is deleted.

[19] Digital content is streamed over the Internet (as opposed to proprietary IP-based networks). It can be accessed over a conventional web browser or client software such as RealPlayer, Windows Media Player or Apple's iTunes.

[20] IP-based TV (IPTV) is offered within proprietary networks, as opposed to the publicly available Internet (cf. webcasting above). Consumers need hard- and software provided by the distributor to access IPTV services on their TV screens or similar devices.

[21] Community-oriented video offers that integrate elements of social networking. Non-professional users play a central role in content creation and distribution.

[22] Provision of digital content and software via the Internet. The content or software is stored on the server of the trader, not on the consumer's computer.

A new and increasingly valuable currency in digital content markets is personal data. Many services that are seemingly offered "for free" finance their services through the collection and re-use of (personal) data of consumers, for example for purposes of targeted advertising or reselling consumer data. From the point of consumer law and policy, this raises definitional questions ("remuneration", "commercial transaction" or "economic service") as well as questions of more political nature, namely of how to protect consumers' privacy in a digital environment.[23]

1.2.3 New ways of contracting

With the online economy also new ways of contracting have made their entrance, for example by simply clicking on a form, or by way of shrink-wrap or click-wrap licenses. The validity of these contracts has been subject to legal controversies ever since. In other situations, it might not even be clear if a contract has been concluded, for example when using the services of a search engine as unregistered user. While problems of contract formation in electronic environments are not specific to digital content contracts, these problems become more acute in relation to one-off experience goods, such as purchasing movies or music online.

1.2.4 The hybrid character of digital content

Not all digital content is offered (exclusively) online or via mobile networks, of course, and this is why many digital content offers combine the characteristics of sales of goods and the provisions of services. For example, software sales may involve (1) the sale of a physical copy of the software; (2) an online (automated) update service; and (3) a real-time (remote) software support service. To complicate matters, many content services offered digitally are framed as so-called end user license agreements that suggest that consumers are not purchasing any goods or services at all, but are merely engaging in transactions involving the use of intellectual property. How are such hybrid services to be legally classified?

1.2.5 Diversification of the distribution chain

Digital content is increasingly offered by resellers. There is a wide variety of digital content service platforms for all types of content, including online content aggregators, mobile operators, physical retailers' web portals, traditional broadcasters' portals, Internet service providers. Often, these parties do not (or not exclusively) offer own content, but that of third parties (content producers, application and game writers, etc.). The result is a diversification of the distribution chain, which also has implications for the protection of the interests of consumers, as well as the application of consumer law. Although the phenomenon of resellers is not specific to the digital content realm, the sheer mass of digital content and services offered via some platforms, the difficulty to trace traders in the digital realm, coupled with issues of jurisdiction do add an edge to the legal uncertainty and confusion consumers can experience.

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[23] Cf. e.g. German Federal Ministry of Food, Agriculture and Consumer Protection, *Charter Consumer Sovereignty in the digital world*, 2007, stresses the importance of data protection as (also) a future consumer policy issue, available online at http://ec.europa.eu/information_society/eeurope/i2010/docs/high_level_group/consumer_charter_germany.pdf (last visited April 28, 2011)(hereinafter 'Charter Consumer Sovereignty 2007').

1.2.6 Mine, yours, theirs – conflicting conceptions of property

Closely related to the classification of goods and services in traditional consumer law is the possibility to "possess" goods and to transfer ownership in goods once they have been purchased. Many rules in consumer law are triggered by the physical exchange of property, and consumers, once they have made a purchase , normally expect that they also own it and can use it as they see fit. Most items of digital content, however, are also protected by a layer, or multiple layers of intellectual property rights: copyright, neighbouring rights, database rights, trademark law, et cetera. As a result, even if a consumer "bought" content, she may not own it because it is still subject to intellectual property rights, and it is up to rightholders (within certain boundaries) to determine the ways in which the content can be used.[24] Intellectual property rights can not only influence the classification of digital content as good or service, but also the application of consumer law (under which conditions are usage restrictions in end user contracts fair, what are the legitimate expectations of consumers, would consumers need to be informed about possible usage restrictions).

1.2.7 De-standardizing consumer expectations

Consumer protection law normally presupposes offers of standardised goods or services to a homogenous consumer market. For digital content, there is not yet a standard of what the main characteristics of an e-book, a film download, a game, or a mobile phone application are. Neither is there any common agreement which level of functionality consumers are entitled to expect. With digital content in general, and intangible digital content products such as e-books or MP3s in particular, it is primarily the usage rules that determine what a consumer can do with a book or a piece of music. Some e-books can be copied, printed and forwarded to friends; others will only play on selected devices, cannot be copied or borrowed or printed. How restrictive these usage rules can be is a matter of copyright law, but maybe even more so of contract law and 'private rulemaking'.[25] Obviously, such "de-standardization" has normative ramifications, since consumer law is traditionally based on protecting reasonable (standardised) consumer expectations.

1.2.8 Digital content goods and services are more than "just" goods or services

"Cultural goods and services should be fully recognised and treated as being not like other forms of merchandise". This statement from the UNESCO, parts of an Action Plan on Cultural Policies for Development,[26] is representative for a broader sentiment that digital content is different from other consumer goods, such as cars, hair-dryers or instant coffee. Digital content is often a form of cultural expression and an important ingredient of personal development and self-expression, social and political participation, cultural adhesion and the exercise of fundamental rights, such as the right to exercise one's freedom of expression. With this comes a responsibility for the legislator to create the conditions

[24] Cf. also BEUC, Digital Products, *How to include them in the Proposal for a Consumer Rights Directive*, Position Paper, Brussels: 2010, p. 3 (hereinafter 'BEUC 2010').

[25] Extensively on this question: L. Guibault, *Copyright Limitations and Contracts - An Analysis of the Contractual Overridability of Limitations on Copyright*, Den Haag: Kluwer Law International 2002.

[26] Adopted on occasion of the Stockholm Conference 30 March-2 April 1998, available online at: http://portal.unesco.org/culture/en/files/35220/12290888881stockholm_actionplan_rec_en.pdf/stockholm_actionplan_rec_en.pdf (last visited April 28, 2011).

that digital consumers can exercise their fundamental rights and fully benefit from the various forms of digital content. In other words, the distribution and consumption of digital content (services) is subject to a range of prominent public interest objectives regarding the accessibility, safety and availability of digital content. Many such public interests are articulated in sector-specific rules in e.g. audio-visual law, copyright law, telecommunications law, data protection and e-commerce law that also govern the production, distribution and consumption of digital content. This situation raises questions regarding the interaction between general and sector-specific rules to protect the interests of consumers, as well as the role that such public interest can play in the interpretation of general consumer law.

The public interest in the accessibility, availability and usability of digital content, however, also radiates into consumer law and policy. As the German Charter Consumer Sovereignty in the Digital World phrases it, "[t]he increasing importance of digital media calls for a comprehensive consumer policy concept and the formulation of clear consumer rights regarding the use of digital services. One essential goal is equal access to a wide spectrum of cultural expressions in accordance with the UNESCO Convention on the protection of cultural diversity."[27]

1.2.9 Fundamental rights in the digital era

In relation to the public interest that digital content serves the legal framework for consumer contracts, concerning digital goods or services, it encompasses fundamental rights and freedoms, such as digital consumers' rights to respect for privacy and freedom of expression. While such fundamental rights have originally been developed to protect citizens against the State, a tendency is emerging in contract law adjudication in various European countries to consider disputes between private parties in the light of fundamental rights recognised in national Constitutions and international treaties.[28] This development starts from the assumption that the rules of private law should comply with the values of the constitutional order.[29] From this perspective, legislators have to make sure that provisions of law, including those of private law, comply with rights laid down in national Constitutions and international treaties. Courts verify whether contracts respect fundamental values and, indirectly, assess the constitutionality of the relevant rules.

For European contract law, this means that Directives should respect the rights that form part of the 'constitutional traditions common to the Member States' and of 'international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories'.[30] In this context, the European Convention for the Protection

[27] Charter Consumer Sovereignty 2007, p. 1.
[28] C. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, The Netherlands: Kluwer Law International 2008.
[29] Cf., O.Gerstenberg, 'Private law and the new European constitutional settlement', *European Law Journal* 2004, p. 766.
[30] Cf. ECJ 14 May 1974, case 4/73, *ECR* 1974, p. 491 (Nold v Commission); ECJ 21 September 1989, case 46/87, *ECR* 1989, p. 2859 (Hoechst).

of Human Rights and Fundamental Freedoms (ECHR) is of particular importance.[31] Moreover, the Charter of Fundamental Rights of the European Union has gotten a binding status with the coming into force of the Lisbon Treaty.[32] The European courts should make sure that these rights are complied with in specific cases.

As regards digital content contracts, legislation in the field of information law as well as consumer law should in principle take into account several fundamental rights of the parties involved: the consumer, the author and the supplier/copyright holder of digital information services.[33] The consumer may refer to such rights as privacy,[34] non-discrimination[35] and, possibly, freedom to receive information.[36] The author of a copyright protected work, on the other hand, may invoke (unwritten) personality rights. Finally, the supplier/copyright holder – who in some cases is the same as the author – may rely on the right to enjoy one's property[37] to protect his investment in digital content goods or services. The European legislator has to balance these rights in the legal framework for digital content contracts, for instance when defining rules on the validity of the contract or its standard terms (e.g. in case they infringe privacy rights), consumer expectations and conformity (e.g. whether the consumer is allowed to make copies of the digital content) and the protection of minors (e.g. the protection of minors from harmful materials).[38]

1.3 Differences in consumer conceptions

Traditional consumer law strongly hinges on the juxtaposition of two parties, traders and consumers. Most EU consumer law Directives define the consumer as 'a natural person who is acting for purposes which are outside his trade, business and/or profession'.[39]

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[31] Art. 6 (2) and (3) Treaty on European Union. See ECJ 22 October 2002, case C-94/00, *ECR* 2002, p. I-9011 (Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes).

[32] Art. 6 (1) Treaty on European Union.

[33] C. Mak, 'Fundamental Rights and the European Regulation of iConsumer Contracts', *Journal of Consumer Policy* 2008, p. 425-439.

[34] Art. 8 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[35] Art. 14 ECHR.

[36] Art. 11 (1) of the Charter of Fundamental Rights of the European Union (CFREU).

[37] Art. 1 of the 1st Protocol to the ECHR.

[38] ECJ 14 February 2008, case C-244/06, *ECR* 2008, p. I-505 (Dynamic Medien Vertriebs GmbH v. Avides Media AG).

[39] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, O.J.E.C. L 95, 21 April 1993 (hereinafter: 'Unfair Terms Directive'); Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997, L 144/1999 (hereinafter: 'Distance Selling Directive'); Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7.7.1991 (hereinafter:'Consumer Sales Directive'); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter 'E-Commerce Directive') and Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services (hereinafter: 'Distance Marketing of Financial Instruments Directive'). Cf. the Notes to Article I.-1:105 DCFR ("Consumer" and "business") for an overview of definitions used in EU Directives; C. von Bar et al (eds.), *Principles, definitions and model rules of European Private Law-Draft Common Frame of reference (Full edition), Volume I*, Munich: Sellier European law publishers, 2009, p. 94-100 (hereinafter referred to as: Von Bar 2009a).

Consumer law sets basic rules for the bargaining game between "persons acting as consumer in the marketplace and their counterparts, the businesses."[40] One feature of digital technology is that it substantially lowers the threshold for anyone to become a producer and distributor of digital content (services). Various software programs are available (often for free) that allow even amateurs to produce e.g. video or music content of high quality, and all that is needed to distribute that content is access to the Internet. Traditional sources of revenues are no longer reserved for solely the professional players. The consequence is that also individual amateurs finance their blogs or selling of digital content with advertisement, micro-payment or through the generation of traffic, and that it becomes increasingly difficult to determine if they still act outside their trade, business or professions. The difficult question is at which point do individual amateurs turn into producers, and hence are obliged to respect (also) consumer protection law and lose the protection of consumer law themselves in their relations with (other) professional parties.

Digital content questions consumer conception in more than this respect. While digital consumers are confronted with a range of problems modern consumer law should address, digital technologies also empower at least some of them to ensure the realization of their own interests. The Internet offers access to a number of rather effective information tools, such as review sites, user reviews, blogs, search engines and comparison tools. Other technical solutions, such as default settings, Privacy Enhancing Technologies, filters, meta data are first elements of what could become "consumer protection by design". Who are the weak and protection-needy and who are the strong in the new digital content markets? One category of users that demonstrate the evident confusion of whom to protect and whom to empower is the underage consumer. For a long time, there was a tendency in law to regard minors as particular vulnerable and only restricted able to participate in commerce. In reality, underage digital consumers form an important part of the digital content markets.[41] , and their experience with, and knowledge about the Internet and digital content at times can defy the image of the "weaker" party.

The "consumer" is one of the main protagonists in general consumer law. The same consumer is not a consumer but a citizen in the sector-specific laws that also apply to the consumption and distribution of digital content. As citizens, digital consumers are protected by a number of important fundamental rights, as the right to freedom of expression,[42] the right to privacy[43] or to the protection of a plural media offer[44]. As citizens, consumers are also subject to specific cultural and social information policies, such as social inclusion and universal access. The two differing conceptions of the user meet in the case of the digital content, which is subject to both, general and sector-specific "consumer" law. Occasionally, this can be a cause of frustration and concerns of experts in both, the area of consumer and of sector-specific law such as copyright law or media law. The influence of "consumerism" on copyright, media or data protection law has been frequently complained

[40] T. Whilhelmson, 'Consumer Law and the Environment: From Consumer to Citizen', *Journal of Consumer Policy*, 1998-21, p. 45-46.
[41] Cf. also ECC-Net 2010, p. 24.
[42] Art. 10 ECHR; Art. 11 CFREU.
[43] Art. 8 ECHR; Art. 7 and 8 CFREU.
[44] Art. 11 CFREU.

about as the beginning of the end of public information policy. According to *Sunstein*, "if law and policies are "bought", in the same way that soap and cereal are bought, the idea of political sovereignty is badly compromised."[45] Equally, the integration of a citizen and fundamental rights perspective into consumer law raise concerns about the politicization of consumer law and infusing it with incompatibly and possibly contradictory policy objectives.[46] As *Scammel* characterizes the discussion: "typically, 'citizen' and 'consumer' are considered opposite categories, the first outward-looking, embracing public interest, the second, self-interested, inward-looking and private".[47] Having said this, there are others, such as *Collins* and *Sujon*, who try to demonstrate that though the terms of "citizen" and "consumer are often considered as rival and exclusive there is "no necessary or intrinsic incompatibility between the systems of values they represent."[48] *Collins* and *Sujon's* optimistic stance receives further backing from the growing literature about 'political consumerism'[49] and the 'citizen-consumer'. [50]

1.4 Consumer concerns

The following section will look into some of the main concerns of digital consumers. Since the problems that consumers encounter have been subject to an extensive report on the course of the overall study, this section will concentrate on mapping the most important concerns.

1.4.1 Access

On the top of the list of problems consumers experienced with digital content, access problems held the first place. A recent study shows that one third of the most recent problems experienced revolved around access.[51] The ability to access digital content has important implications for consumers' participation in cultural, political, social and economic life.[52]

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[45] According to *Sunstein*: If law and policies are "bought", in the same way that soap and cereal are bought, the idea of political sovereignty is badly compromised", C. Sunstein, *Republic.com 2.0*, New Jersey: Princeton University Press 2007, p. 40, musing further that: "we will disserve our own aspirations if we confound consumer sovereignty with political sovereignty".

[46] Wilhelmsson 1998, p. 52ff.

[47] M. Scammell, 'Citizen consumers: towards a new marketing of politics?', in: J. Corner, D. Pels (eds.), *Media and the restyling of politics: consumerism, celebrity and cynicism*, London: Sage Publishing 2003, p. 117-137.

[48] R. Collins & Z. Sujon, 'UK broadcasting policy: the "long wave" shift in conceptions of accountability', in: P. Baldi/U. Hasebrink (eds), *Broadcasters and Citizens in Europe, Trends in Media Accountability and Viewer Participation,* Bristol: Intellect Books 2007, p. 33 & 40.

[49] E.g. *Soper* who makes the argument that: "a politics of consumer products which for growing number of people implies the need to think politically privately. This politicized what we have traditionally conceived as private consumer choice and erases the division between the political and economic spheres", K. Soper, 'Conceptualizing needs in the context of consumer politics', *Journal of Consumer Policy* 2006 (29), p. 355, 367, referring to M. Micheletti, 'Politics in the Supermarket: Political Consumerism as a Form of Political Participation', *International Political Science Review* 2005(26), p. 245ff.

[50] Scammel 2003; H. Keum, N. Devanathan, S. Deshpande, M. Nelson, D. Shah, 'The Citizen-Consumer: Media Effects at the Intersection of Consumer and Civic Culture', *Political Communication* 2004-21, p. 369ff.

[51] Europe Economics 2011, Report 3, p. 75-76.

[52] N. Helberger, *Controlling access to content. Regulating Conditional Access in Digital Broadcasting*, Den Haag: Kluwer International 2005, p. 35ff. & 57ff.

Access issues present themselves in many facets. There are *technical access issues*, such as the ability to play, listen and watch digital content on different kinds of brands in relation to consumer equipment. Compatibility between consumer devices and technical formats (e.g. MP3, AAC, WMA, ATRAC 3) or Digital Rights Management technologies (DRM) [53] play a prominent role in this context, as does the issue of convergence, that is the ability to transmit and receive the same content via different transmission technologies (cable, satellite, Internet, UMTs, etc.). Closely related are issues of *social exclusion*, e.g. exclusion of consumers who cannot afford a subscription to certain transmission technologies, services or the purchase of certain consumer hardware (e.g. iPod),[54] but also exclusion of consumers with special needs. One example is the transformation of digital content into formats that are accessible for people with visual or hearing impediments, which can be in conflict with copyrights (form of unauthorized copying) or DRM technology.[55] Access issues concern not only direct access of consumers to contents, but also the unhindered functioning of *access intermediaries*, such as public libraries, archives, search engines, etc. whose function it is to make contents accessible or findable for consumers.

Issues of accessibility of content are raised in situations where access to a particular piece or service of digital content is made conditional upon the purchase of additional products or services (*bundling*). Occasionally, this can lead to *lock-in or lock-out* situations. For example, some companies operate an online music download service, using their own DRM technology: music purchased from these companies can only be processed by a music player offered by those same companies, and not by any other music player. Some of these companies refuse to licence their DRM technology to competing download service providers. As a result, the accessibility and availability of an increasing amount of digital content that is offered behind "closed gates" becomes a matter of having (and/or being able to afford) the 'right' software and hardware. Lock-in situations are not created through technology alone, however. Also the difficulty to switch between different social networks, subscription contracts and providers can result in lock-in situations. Last but not least, individual as well as public interest objectives are also at stake in realizing the availability of access to services from other Member States and with regard to *cross border contracts.* Consumers can be faced with user restrictions through the use of region codes embedded in DVDs and Blu-ray discs and players. A DVD or Blu-ray disc bought in one region cannot be played in another region if the DVD or Blu-ray player enforces the region codes. This

[53] DRM systems *manage* access to content by combining technical measures with a payment mechanism. DRM-based business models ensure that consumers pay for actual use of content, and that the content is protected and cannot be accessed by unauthorized users. DRM systems are based on digital technologies that describe and *identify* content, and *enforce* rules set by right holders or prescribed by law for the distribution and use of content.

[54] Cf. European Council, *Fight against poverty and social exclusion: common objectives for the second round of national Action Plans*, Brussels, SOC 470, 25 November 2002, Annex to Annex 2, objective 2 (a).

[55] D. Mann, 'Digital Rights Management and People with Sight Loss', *INDICARE Monitor* 2006 (2-11), 27 January 2006, with further references, available online at http://www.indicare.org/tiki-read_article.php?articleId=170 (last visited June 8, 2011).

has been another problem consumers frequently mentioned, and one that can seriously hamper the functioning of an Internal Market for Digital content Services.[56]

The accessibility of digital content is also a prime target on the EU Lisbon Agenda: "Businesses and citizens must have access to an inexpensive, world-class communications infrastructure and a wide range of services. Every citizen must be equipped with the skills needed to live and work in this new information society. Different means of access must prevent info-exclusion. The combat against illiteracy must be reinforced. Special attention must be given to disabled people. Information technologies can be used to renew urban and regional development and promote environmentally sound technologies. Content industries create added value by exploiting and networking European cultural diversity. Real efforts must be made by public administrations at all levels to exploit new technologies to make information as accessible as possible."[57]

1.4.2 Choice and diversity

The ease with which consumers can switch between services and (technical) platforms can also affect consumers' choice. The fact that consumers have choice, however, is a necessary prerequisite for a consumer policy that is largely oriented towards principles of party autonomy and market competitions. For the individual consumer, the ability to avoid services that do not respond to her interests or respect their rights is one, if not the most important way to protect her interests, and to exercise power in the digital market. At the same time, the ability to switch between and access different services is a stimulus and precondition for functioning competition.[58] Restrictions of consumers choice are thus not only of concern to individual consumers, but also to public policy.

Closely related to the possibility to access digital content and to exercise choice is the aspect of media diversity. A well-balanced diet of media content from different speakers, viewpoints, ideas and ideals is the matrix for cultural exchange, democratic participation and personal self-deployment. The primary goal of European media policies is then also to ensure that viewers have access to pluralistic media content. Such are the demands from people's fundamental right to freedom of expression, which "will be fully satisfied only if each person is given the possibility to form his or her opinion from diverse sources of information".[59] Consumers ability to benefit from media diversity is seriously limited if they are not free to choose between a variety of different sources of content.

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[56] European Commission, Communication from the Commission to the European Parliament, the Council and the Committee of the Regions, A digital Agenda for Europe, COM/2010/0245 f/2 */, 26 August 2010; Europe Economics 2011, Report 3, p. 166-167; N. Helberger, 'Refusal to Serve Consumers because of their Nationality or Residence - Distortions in the Internal Market for E-commerce Transactions?', Briefing Note, European Parliament's Committee on Internal Market and Consumer Protection, January 2007.

[57] European Council 23 and 24 March 2000, Presidency conclusions, paragraph 9.

[58] Charter Consumer Sovereignty 2007, p. 1; Helberger, 2005, p. 67ff.; H.-W Micklitz, A. Oehler, *Statement on the Subject Area of Consumer Policy in the Digital World, by the Scientific Advisory Board on Consumer and Food Policies at the Federal Ministry of Food, Agriculture and Consumer Protection*, November 2006, p. 21.

[59] Council of Europe, *Recommendation No. R(99)1 of the Committee of Ministers to Member States on Measures to Promote Media Pluralism*, Strasbourg.

1.4.3 Usage restrictions

Consumers do have certain expectations regarding digital content. Two categories of expectations can be distinguished. The first category includes being able to perform certain usages that consumers are already accustomed to from traditional media. Examples include the ability to play a CD on different devices, for example a CD player, a car audio system or a computer (consumptive use) or to make private copies.[60] Consumers become concerned when they experience that DRM, and the contractual conditions they enforce, restricts these forms of usage. A second category includes new forms of usages that are brought to consumers by digitization, e.g. the ability to forward digital contents, share it electronically with friends, access digital content, use it on different devices, etc.[61] From the perspective of consumers, digitization adds new usage possibilities, the ability to make better quality copies or the possibility to transform digital music into MP3 files. To some extent this attitude is stimulated by the content industry itself, for example by advertising CD quality as superior and by marketing MP3 players. Consumers expect certain customary features of digital products, even if they have to pay extra for them.[62]

In reality, the usability and functionality of digital content will often be subject to restrictions of the ability to copy, print, forward, share or otherwise use digital content. Restrictions can be the result of contractual conditions (e.g. in the Terms of Use) or technical restrictions through the use of Digital Rights Management and/or Technical Protection Measures. The term Technical Protection Measure often denotes a measure primarily aimed at preventing or restricting the reproduction of the protected content (*copy protection*). For this purpose, files are marked in one way or another with data instructing the equipment that copying the file is not allowed ('flagging', 'tagging', 'watermarking'). Whereas access protection systems make *all* possible uses – including copying – impossible for unauthorized users, copy protection measures merely prevent copying. The terms Technical Protection Measure and Digital Rights Management (DRM) are often used rather indiscriminately. However, these terms should indeed be distinguished.[63] The fundamental difference is that TPMs generally are designed to *impede* access or copying, while DRM systems do *not* impede access or copying *per se*, but rather create an environment in which various types of use, including copying, are only practically possible in compliance with the terms set by the right holders. Accordingly, DRM systems are typically able to offer broader functionality than simply protect content against unauthorised access or copying. [64]

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[60] N. Dufft et al., INDICARE, *Digital Music Usage and DRM*, *Results from a European Consumer Survey 26-28* (2005), p. 16, 23, available online at http://www.indicare.org/tiki-download_file.php?fileId=110 (last visited April 28, 2011).
[61] N. Dufft et al., INDICARE, *Digital Video Usage and DRM, Results from a European Consumer Survey 26-28* (2006), available online at http://www.indicare.org/tiki-download_file.php?fileId=170 (last visited April 28, 2011), p. 25-26.
[62] Dufft 2005, p. 29; Dufft 2006, p. 26.
[63] L. Guibault & N. Helberger, *Copyright Law and Consumer Protection*, Report for the European Consumer Law Group, February 2005, p. 8-9.
[64] Guibault & Helberger, 2005, p. 9.

1.4.4 Consumer information and transparency

The second most commonly experienced problem is the lack of information or the low quality of information provided,[65] but also the fact that key information is often obscured, for example hidden away in lengthy terms of use.[66] At the same time, when talking about consumer protection in digital content markets, the need for more transparency is probably the most frequently made suggestion of how to improve the situation for consumers.[67]

Consumers experience a lack of, or incompleteness of, legal information regarding instructions on how to report problems to suppliers, the cancellation policies, the terms of use, the license agreements, and the information on the warranty.[68]They also encounter difficulties understanding information provided, due to the complexity and technicality of the language as well as the length of the information provided. Other studies demonstrate that users are badly informed e.g. about the usage of cookies and behavioural advertising strategies.[69] Lacking information on charging and payment structures as well as product bundling were other problems identified.[70] Transparency of contractual or technical restrictions is another concern in this context. Surveys among digital music users and digital video content users found that a majority of the users of digital music or video offerings felt not adequately informed about eventual usage restrictions or the fact that DRM is used to enforce such conditions. [71]

1.4.5 Privacy

According to a recent survey in Germany, 87% of consumers interviewed were concerned about their rights to privacy when shopping online.[72] This finding stands in sharp contrast to the findings of the survey that was performed by Europe Economics in a project adjacent to the present study. According to this survey, only 2% of the problems experienced during

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[65] Europe Economics 2010, Report 1, p. 46-47; ECC-Net 2010, p. 24ff.

[66] ECC-Net 2010, p. 24ff.

[67] All Party Parliamentary Internet Group 2006, All Party Parliamentary Internet Group, 'Digital Rights Management', Report, June 2006, available online at http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management.html (last visited April 28, 2011), paragraphs 97 - 105, 113; BEUC 2004: DRM - BEUC Position paper, X/025/2004, Brussels, 15.9.2004 OECD, 'Report on Disclosure Issues Related to the Use of Copy Control and Digital Rights Management Technologies', April 2006, available online at http://www.oecd.org/LongAbstract/0,2546,en_2649_34223_36546423_119666_1_1_1,00.html (last visited April 28, 2011).

[68] Europe Economics 2011, Report 3, p. 46 ff.

[69] L. Kool, A. van der Plas, N. van Eijk, N. Helberger, B. van der Sloot, *A bite too big. Knelpunten bij de implementatie van de cookiewet in Nederland*, Report for the Dutch Regulatory Authority for the Telecomsector, 2011.

[70] Europe Economics 2011, Report 3, p. 94, 108, 163.

[71] Dufft 2006, p. 34; Dufft 2005, p. 42. Cf. the BEUC, 'Digital Rights Management, Position Paper contributed to the informal consultation of the final report of High Level Group on DRM of the European Commission', DG Information Society, Brussels; cf. also the submissions by the Consumentenbond, and CLCV in: European Commission 2002, 'Dialogue on Digital Rights Management Systems (DRMS). Working Group 1: The User Perspective', Draft Minutes, Brussels, 18 July 2002. High Level Group on Digital Rights Management 2004, Final Report. March - July 2004, Brussels.

[72] See http://www.vzbv.de/mediapics/infratest_dimap_umfrage_verbraucherschutz_25_08_09.pdf.(last visited April 28, 2011) Cf. also Which? (2010), 'online privacy – targeted web ads under spotlight', 26 May 2010; see also Micklitz & Oehler, 2006, p. 14, stressing the importance of privacy. ECC-Network 2010, p. 23.

the past 12 months were related to privacy.[73] The apparent contradiction in the valuation of privacy problems can be possibly be explained by the fact that, while it is probably true that consumers are (very) concerned about their privacy in abstracto, in practice they will find it difficult to identify threats to their privacy, or recognise privacy issues as the source of problems they experience. In other words, while users may complain e.g. about receiving personalised advertising, they are not necessarily aware that this is (also) a potential privacy issue and problem with respect to the protection of their personal data. Also, users are often not or only to a limited extent informed about potential privacy threats.[74]

1.4.6 Fair contracting

Similar to the situation with privacy, the fairness of contractual terms is a much cited consumer concern, and frequently referred to in particular by consumer representatives.[75] Yet, only 2% of the problems mentioned in the survey related to unfair contract terms.[76] Again, it needs to be noted that it can be difficult if not impossible for laymen to recognise the unfairness of contractual terms. Yet, there is evidence that the fairness of contractual conditions that are imposed on consumers is not always beyond doubt. Suspicious provisions include:

- The reservation to unilaterally change the terms and conditions of the contract. As a consequence, the provider of digital content reserving the possibility to do so can change the number of copies of a song a consumer is allowed to make even after the consumer bought the song and downloaded it onto her computer.
- Wide ranging disclaimers through which liability for several types of damage on consumer hardware or software is excluded.
- The vendor may place restrictions on the possibility of criticizing the product publicly.
- Through the sale of the product the vendor will be able to monitor usage behaviour.
- The product only works with software and/or hardware provided by the same vendor or a supplier preferred by the vendor.
- Suppliers of software reserve the right to update software remotely and without warning.

1.4.7 Security and safety

Security and safety issues are a concern, also and particularly in the online environment, where viruses, malware and other corruptive technology can spread easily and in no time. Security concerns were also raised in context with DRM technology. DRM systems may be in conflict with other software installed on a computer. Since most DRM systems and the relevant online services need an Internet connection, they are relatively open for external attacks, but can be hardly controlled by consumers in this respect. Accordingly, consumer organisations demand that DRM software should not hamper or limit the use of other

[73] Europe Economics 2011, Report 3, p. 75.
[74] Cf. e.g. N. Dufft 2005, p. 42-43.
[75] Cf. BEUC 2010, p. 10-12; Charter Consumer Sovereignty 2007; Europe Economics 2011, Report 3, p. 151-152; ECLG 2005.
[76] Europe Economics 2010, p. 47.

protection software on consumers' computers.[77] As a general demand, market players should not confront consumers with immature technology.[78] The technical design of digital content should not bring new vulnerabilities into customers' computing equipment and that the systems must enable consumers to set their own policies and levels of security for own machines.

The security and safety of consumers' hardware and software is not only a concern of consumers, it is also in the interest of society as a whole: "For information technology to also function reliably in the future it is important to make people increasingly aware of the importance of IT security."[79]

1.5 The relevant legal framework

This Report will combine insights from contract and consumer law with those from sector-specific law, mostly in the field of information law.

1.5.1 Contract and consumer law

Digital content contracts concluded by consumers on the national level in the first place seem to fall within the scope of the general rules of contract law of the EU Member States. A more controversial question is to what extent also rules of consumer sales law apply to these contracts, since consumer sales law is mostly limited to the sale of tangible goods. Digital content distributed on CDs or DVDs will therefore normally fall within the scope of consumer sales law, while digital content distributed in an intangible form may not, unless national law extends its consumer sales law provisions to it by analogy. This report will examine this and other questions surrounding the applicable legal framework in depth and by means of a comparative analysis.

The on-going Europeanisation of national contract laws and consumer laws further affects the framework for digital content contracts. Directives in the field of consumer law have had an important impact on the harmonisation of consumer laws in Europe, tackling such diverse matters as unfair terms, distance selling and consumer sales contracts. The question is to which extent these measures can adequately deal with the developments regarding the supply of digital content to consumers.

Finally, digital content contracts are likely to be affected by the further development of the European internal market. Following the Commission's initiatives to enhance the coherence of the *acquis communautaire* in the field of consumer contract law, a new Consumer Rights Directive is on the way. Moreover, a Draft Common Frame of Reference has been developed to stimulate the further development of European contract law in general.

[77] BEUC, Consumentenbond, and CLCV at DRM Working Group 1 (2002).
[78] As brought forward by M. van der Velde (Consumentenbond, The Netherlands) at the second workshop of the DRM consultation procedure of the European Commission's DG Information Society.
[79] Charter Consumer Sovereignty 2007.

1.5.2 Sector-specific 'consumer law'

The marketing and consumption of digital content is not governed by contract and consumer law alone. Intellectual property law, telecommunications law, audio-visual law or e-commerce law lay down the rules for the production and dissemination of digital content and form another source of rights and obligations for providers of digital services as well as consumers.

Sector-specific (digital) consumer protection rules are scattered over different sector-specific laws. For example, telecommunications, data protection law, media and e-commerce law all have extensive rules in place that dictate which information consumers should receive about products and services. Data protection law,[80] which protects the fairness of the processing of consumer's personal data, leans heavily on the model of "informed consent". Articles 10 and 11 of the Data Protection Directive impose extensive information duties on data controllers,[81] and processing of personal data is only lawful within the boundaries of what the consumer has consented to.[82] In media law, and here in particular the specific rules that govern broadcasting and other video services,[83] informing the consumer about sponsoring, product placement, harmful content but also the identity of the service provider, is an important tool to protect the interests of consumers. For broadcasting and video services, media law also provides for extensive rules concerning marketing and advertising. Telecommunications law does not deal with the distribution of digital content itself, but rather the transport of such content via electronic communication services.[84] It is therefore only indirectly relevant for this study. Yet, in order to be able to

[80] The core of European data protection law and the protection of personal data are Art. 8 of the Charter of Fundamental Rights of the European Union and two directives: Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data *OJ* L 281, 23/11/1995 p. 0031-0050 (hereinafter 'Data Protection Directive') and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector OJ L 201/37 (31.07.2002), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws *OJ* L 337/11 (18.12.2009)(hereinafter ' e-Privacy Directive').

[81] Including information about the identity of the controller, the purpose of the processing, the (categories) of recipients of the data, and the rights of the data subject.

[82] Or the processing must be necessary for reasons outlined in Art. 7(b)-(f) of the Data Protection Directive.

[83] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (hereinafter 'Audiovisual Media Services Directive') *OJ* L 95/1 (15.04.2010).

[84] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services *OJ* L 337/37 (18.12.2009) and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No

receive and consume digital content, consumers need to have access to the respective transmission infrastructure (be it the Internet, broadcasting or mobile networks). Moreover, telecommunications law has some of the most developed 'digital consumer protection' rules in the traditional sense, and here in particular its rules on consumer information and transparency. This is why telecommunications law can serve as an important source of inspiration and experience when talking about digital consumer issues. Telecommunications law, together with E-Commerce Law,[85] also provides for elaborate provisions about the conclusion, content and termination of contracts. These rules can be complemented by rules in (national) laws with respect to the content of service contracts and contractual clauses that must be deemed unfair.

The interface between on the one hand contract law and consumer law, and on the other hand sector-specific information law is a topic that has been often overlooked when discussing the legal position of the digital consumer. This is also why there has been yet little research in or experience with the consistency of the different consumer protection rules within information law and in their relation to the more general rules of consumer law. Still widely unexplored is the extent to which the so protected rights or legitimate expectations of consumers are also relevant when applying and interpreting general contract law and consumer law. Can consumers evoke consumer law if the author of digital content receives fair compensation under national copyright law for private copying activities, while private copying possibilities are in fact excluded either contractually or by way of Technical Protection Measures (TPMs), or if digital consumer equipment is, contrary to the relevant rules in telecommunications law, not interoperable? Is the making of private copies a reasonable expectation of consumers when downloading digital content? Are clauses in contracts that require users to agree to the far-reaching collection of personal data and monitoring of their consumption behaviour fair and enforceable, even if such practices are in conflict with data protection law? And is it an unfair commercial practice if consumers are spammed or otherwise exposed to invasive advertising practices that are prohibited under information law?

There are other reasons to also look into sector-specific consumer law before formulating suggestions of how to improve the legal situation of consumers. In order to get a comprehensive overview of all applicable rights, obligations and protected interests it is necessary to look at both, general and sector-specific consumer law. Second, copyright law, audio-visual law, e-commerce law, data protection and telecommunications contribute to shaping the conditions in digital content markets, and all these laws have been or are subject to repeated reviews with, among others, the goal to improve the situation of the digital consumer. Also for this reason, it is instructive to also study sector-specific laws. Finally, without a solid knowledge of (consumer protection provisions) in sector-specific information law, it is not possible to understand how sector-specific and traditional consumer and contract law interact.

2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, *OJ* L 337/11 (18.12.2009)(hereinafter 'Citizen Rights Directive').

[85] In particular the E-Commerce Directive.

2. Analysis

2.1 Classification

2.1.1 Introduction

In this section, we discuss the classification of digital content for purposes of consumer contract law. Classification of digital content as a good or as a service is essential as it often determines the answer to questions such as whether information duties apply, and if so, which information must be disclosed; whether the provider of the digital content may be held liable for hidden defects or lack of conformity; which remedies are available for which type of deficiency; and whether the consumer may invoke a right of withdrawal etc.

2.1.2 Position of problem in European consumer law

European consumer law has largely structured itself around a key distinction, originating from EU primary law and the four freedoms, between goods and services[86]. This distinction is discernable in many of the European consumer directives, whereby different legal consequences are attached to a consumer contract depending on whether the transaction relates to a good or a service. The distinction between goods and services is certainly one of the main features of the Consumer Sales Directive, [87] for it only expressly covers tangible moving items.[88] This means that the protection granted to consumers pursuant to this Directive, including the provisions on guarantees and remedies for non-conformity, does not extend to services. The Distance Selling Directive contains no definition of 'goods' or 'services',[89] but it does provide for different rules in relation to the trigger point for the exercise of the right of withdrawal and for the exemption hereto.[90] Both of these examples show that the protection enjoyed by consumers in relation to the digital content they purchase may depend on and vary according to its classification as a good or a service. In view of the different legal consequences that are attached to consumer contracts relating to goods or services, the dichotomy is bound to give rise to legal uncertainty. Part of the

[86] See M. Schmidt-Kessel, *The application of the Consumer Rights Directive of digital content* (January 2011), DG Internal Policies, Policy Department A, Economic and Scientific Policy, IP/A/IMCO/NT/2010-17, PE 451.491, p. 5 available at http://www.europarl.europa.eu/document/activities/cont/201101/20110113ATT11670/20110113ATT11670EN.pdf (last visited on 5 July 2011).

[87] Art. 1 point 2 (b) Consumer Sales Directive.

[88] European Commission, *Green paper on guarantees for consumer goods and after-sales services*, Brussels, 15 November 1993, COM(93) 509, p. 7, available online at http://aei.pitt.edu/932/01/consumer_guarantees_gp_COM_93_509.pdf (last visited April 28, 2011).

[89] Some authors argue that the duality between goods and services in the Distance Selling Directive serves as an implicit distinction between tangible and intangible supply. Cf. R. Bradgate, *Consumer rights in digital products* (2010) p. 58, available online at http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products (last visited April 28, 2011) (hereinafter 'Bradgate 2010').

[90] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts - Statement by the Council and the Parliament Art. 6 (1) - Statement by the Commission Art. 3 (1), first indent. Cf. H. Schulte-Nölke, A. Börger, *Distance Selling Directive (97/7) Consumer Law Compendium – Comparative Analysis*, p. 548, available online at http://www.eu-consumer-law.org/consumerstudy_part2_en.pdf (last visited April 28, 2011).

uncertainty originates from the fact that the concepts of 'goods' and 'services' lack uniformity, both at European and national level, especially as to the requirement of 'tangibility'. Moreover, and possibly even more problematic, is the fact that the classification of a contract as a service contract does not provide a concrete answer as to which rules would apply to the contract. Services have since long been an underdeveloped area of law. Even though many of the existing codifications of contract law contain some provisions that might form the basis of a general system of services,[91] most of these provisions are only of a rudimentary nature. Moreover, they often apply only insofar as the contract has not been regulated elsewhere in the national legislation. In many legal systems, one or two models have developed with a more general scope, in particular on the basis of the contract for work or the mandate contract. However, the exceptions to the scope of these rules are numerous and more or less accidental, whereas the set of rules developed on the basis of such models are anything but exhaustive.[92] In short, the regulations on service contracts generally are a patchwork of rules that were developed by legislators or courts on an *ad hoc* basis without taking into account similar or opposite rules developed for other services, let alone similar developments in other legal systems.[93]

Moreover, the *acquis communautaire* in the area of service contracts is only of a rudimentary nature. At the EU level, some directives have introduced regulations in separate sectors of services, but only a few apply more or less across the board.[94] The 2006 Directive on services in the internal market (hereinafter referred to as; the Services Directive)[95] does not apply to major types of services[96] and in principle does not affect the contractual relations between the service provider and the client.[97] As a consequence, the Services Directive hardly contains any substantive rules that bear an effect on the contract between a service provider and its client.[98] The principal exceptions are the information requirements of Article 22 of the Services Directive.[99] Moreover, whereas the proposal for a Consumer Rights Directive[100] contains extensive rules on consumer sales contracts,

[91] For instance, Art. 675 of the German c.c., Art. 1779 French c.c. and Art. 7:400 ff Dutch c.c.

[92] Cf. on German law C. Wendehorst, 'Das Vertragsrecht der Dienstleistungen im deutschen und künftigen europäischen Recht', *Archiv für die civilistische Praxis* 204 (2006), p. 205 ff; H. Unberath, 'Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens', *Zeitschrift für Europaisches Privatrecht* 2008, p. 750-754.

[93] Cf. M.B.M. Loos, 'Chapter 33, Service contracts', in: A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak, C.E. du Perron (eds.), Towards a European Code Civil., fourth revised and expanded edition, The Hague/London/New York/Nijmegen: Kluwer Law International/Ars Aequi Libri 2011, p. 757-759.

[94] The most important of these are the Distance Selling Directive, the E-Commerce Directive and the Unfair Terms Directive.

[95] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *OJ* 2006, L 376/36 (hereinafter referred to as: Services Directive).

[96] Art. 2 of the Directive lists services such as financial services, electronic communications services and networks, transport services, services of temporary work agencies, healthcare services, audiovisual services, gambling, services of notaries, bailiffs and other official authorities, social services and private security services.

[97] Cf. the preamble to the Directive under (90).

[98] There are some, though. Cf. M. Schauer, 'Contract law of the services directive', *European review of Contract law* 2008/1, p. 1 ff; C. Barnard, 'Unravelling the services directive', *Common Market Law Review* 45 (2008), p. 323 ff.

[99] Cf. Art. 22 of the Directive, in particular paragraph (1) under (a) and under (f)-(k).

[100] Proposal for a Consumer Rights Directive of 8 October 2008.

consumer service contracts are largely unregulated. Only the Draft Common Frame of Reference[101] contains a more or less extensive regulation of service contracts in Book IV.C., but this set of rules certainly is far from being generally accepted.[102] Therefore, it is safe to say that when a contract is classified as a 'service contract', this basically implies that it is uncertain what the rights and obligations of the parties are under the contract.

This is different if the contract is classified as a sales contract, as in all Member States sales law has developed over time into a fairly coherent set of rules – which, however, was created primarily with tangible goods in mind. Whether these rules, or the rules pertaining to consumer sales contracts, may be applied to digital content contracts, is also uncertain.

A crucial issue in the context of this study is therefore to determine to what extent digital content falls, if at all, under the category of goods or services for the purpose of consumer contract law. Content as music, movies, books, video games or software can be delivered either on a tangible medium such as a CD, DVD, USB stick etc. or through electronic means. It has been argued that the medium in which the digital content is embodied essentially contributes to the determination of the tangible or intangible nature of the content: a movie on a DVD would be tangible, whereas the same movie downloaded through the Internet would be intangible.[103] While the distinction between goods and services can intuitively be made between a movie distributed on a CD and one made available through the Internet, it is quite a challenge to apply this distinction to a vast array of forms of online or off-line distribution of digital content that are neither true good nor pure service. For example, how to classify the acquisition of an Internet game with a monthly subscription? The transaction comprises three elements: the installation software to install the game locally, the player account and the online subscription. All of these elements are in principle necessary to play the game on official servers. The installation software could qualify as a digital good, whilst the subscription as a service. The player account and its content are stored at a distance and cannot be downloaded on a personal device. The account may be passive, i.e. not come with an active subscription, which means that the object of such a transaction is not per se the passing of the subscription. Computer applications can also fall under digital goods, but may require constant access to the Internet and upkeep from the trader to be of any use. There is a clear service element, just as in the case of anti-virus software, which needs constant updating to be of any real use.

A fundamental characteristic of digital content is that, contrary to the vast majority of conventional goods and services, most of it is protected under intellectual property law, be it copyright law, database law or related rights law.[104] Indeed, the on-going discussion in consumer protection law regarding the nature of digital content finds a strong echo in the rules on copyright. A basic tenet of European copyright law is that ownership of a physical copy of a work does not grant any ownership in the copyright on the work embodied in the

[101] And its predecessor, the Principles of European Law on Service Contracts. Cf. M. Barendrecht, C. Jansen, M. Loos, A. Pinna, R. Cascão and S. van Gulijk (eds.), *Principles of European Law: Services Contracts*, Munich: Sellier European Law Publishers 2007.
[102] Cf. for instance, the criticism expressed by Unberath 2008.
[103] Report I (Germany), p. 86 and 87.
[104] Schmidt-Kessel 2011, p. 5.

physical object. For example, a purchaser of a book or videotape becomes the owner of the physical copy embodying the work, but only a licensee of the copyright in the work. Copyright owners enjoy under European copyright law the exclusive right of reproduction and of material and immaterial communication to the public.[105] The right of material communication to the public is also known as the right of distribution and concerns the control of the distribution of the work incorporated in a tangible article. This right is exhausted by the first sale, or other transfer of ownership in the Community, of the original of a work or copies thereof by the rightholder or with his consent. The copyright holder has therefore the exclusive right to distribute his work on a CD, DVD or USB stick. Once the work is sold on such a tangible medium, the purchaser becomes the owner of the physical object and has a license to use the work embodied in it. In application of the exhaustion doctrine, the purchaser of this tangible embodiment of the work may resell it, destroy it or give it away.

The copyright rules differ entirely, however, when dealing with the immaterial communication to the public of digital content. In such a case, the work is not embodied in a tangible medium, and the distribution right is not applicable. The exclusive right to communicate the work to the public includes the right to make it available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. The Information Society Directive specifies that the holder's exclusive rights are not exhausted by any act of communication to the public nor of making available to the public.[106] According to this Directive, 'the question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject matter, which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.'

The expression 'on-line services' as used in the Information Society Directive would seem to essentially refer to interactive modes of communication, in particular to the act of making a work available the public in such a way that members of the public may access them from a place and at a time individually chosen by them. The expression should also be read in conjunction with the provisions of the E-Commerce Directive, as Recital 16 of the Information Society Directive would suggest.[107] One may therefore contend that on-line services would cover the making available of a movie, whether it is in an interactive way or

[105] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* 2000, L 167/10 (interchangeably referred to hereinafter as 'Copyright Directive' or 'Information Society Directive').
[106] Copyright Directive, Art. 3(3); cf. also ECJ 18 March 1980, case 62/79, *ECR* 1980, p. 881 (Coditel v. Ciné Vog Films et al.).
[107] Cf. also Art. 1(2)(a) of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, *OJ* 1998, L 217/18, where 'service' is defined as: 'any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

not. Anytime a movie is provided online, including when the consumer makes a copy thereof, it may not be resold or otherwise transferred to another consumer without the copyright holder's authorisation.[108] For the purpose of the exhaustion doctrine, copyright law therefore draws the line between material and immaterial forms of communication to the public, e.g. between a work that is distributed in a tangible medium and one that is communicated to the public via ether, satellite, cable or Internet.

The classification of digital content under consumer contract law could follow a similar, but not necessarily identical, line. In practice, it proves very difficult to determine which types of digital content are sufficiently 'tangible' from the perspective of consumer contract law to fall under the definition of 'good' so as to open the door to a right of withdrawal and remedies in case of hidden defects or non-conformity. Arguably, the classification of digital content pursuant to consumer contract law may need to occur on a case-by-case basis. Not all digital content can be qualified as a good, and not all digital content falls under the definition of service. Nevertheless, the formulation of concrete criteria towards the definition of digital content as a good or a service would help to create a framework within which the respective rights and obligations of both consumers and traders of digital content are better circumscribed. The following comparative analysis will help identify how digital content has been classified so far and under which circumstances. In any case, the classification of digital content should be such that it survives the test of time.

2.1.3 Comparative analysis

The classification of digital content has given rise to some debate when examining those Member States. where attempts have been made to assess to the benefits of applying the rules of consumer sales law. As we shall see below, consumer sales law often requires goods to be tangible, while in others, they may be tangible or intangible. The fact that digital content is supplied on a physical medium, such as a CD or DVD, or the absence of such a physical medium may influence the nature of the content and the applicability of the rules on consumer sales law.[109] The fact that digital content is not construed as a good does not necessarily prevent the applicability of consumer sales law, however, as some countries may have extended the reach of consumer sales law, for example by making it applicable to other categories beyond goods.[110] In rare cases, digital content is construed as rights and/or services or as a *sui generis* item.[111]

To make the issue of the classification of digital content more palatable, the question is couched in terms of the purchase of software, since computer programs can be acquired on a CD or DVD; or it can be downloaded or streamed from online channels.[112] As a consequence (or as an indication) of the qualification of the contract, do the rules applicable to the purchase of software on a CD or a DVD differ from those applicable to the purchase

[108] For a critical approach to this question, cf. Eric Tjong Tjin Tai: 'Exhaustion and Online Delivery of Digital Works*' European Intellectual Property Review* 2003 p. 207.
[109] Cf. for example Report I (Germany), p. 86 and 87.
[110] Report I (France), p. 41; Report I (The Netherlands), p. 210ff.
[111] Report I (The Netherlands), p. 211.
[112] Bradgate 2010. For the purposes of this report, it is assumed that most consumer transactions concern standard software and not customized software, for which a different regime of liability may apply.

of software through an online channel? Leaving the issue of the non-conformity of the digital content to section 2.7 of this report, it can still be illustrative to consider how the failure to function of the software is treated in each case: is recourse under consumer sales law available in both circumstances?

In France, the nature of the purchase of software remains uncertain.[113] The classification of the purchase of a CD or DVD containing software is not envisaged by French law, and case law as well as literature diverge on the matter.[114] Some decisions and authors consider the operation to be a sales contract,[115] while others see it as a variant of a contract of hiring[116], and yet others consider it to be a *sui generis* operation.[117] If the purchase of software were considered to be a good, it is probable that judges would consider digital content, even if embedded on a CD or DVD, to be intangible.[118] Many provisions of the Consumer code apply to goods, without specifying whether or not the goods must be tangible or intangible. However, although the Consumer code does contain a specific rule, which covers defects in a good in consumer sales contracts, the "legal warranty of conformity", such warranty only applies to movable *tangible* goods. It is very likely a judge will consider a flaw in software to be a flaw affecting an *intangible* good, thus excluding any recourse to the said warranty. On the other hand, the Consumer Code does provide for an automatic liability of the professional towards the consumer for the correct execution of the contract, insofar as the good was purchased at a distance.[119] Also, sales law, such as claims for non-conformity[120] or the warranty against hidden defects[121] would most likely be available to the French consumer.[122]

In Germany, the question as to whether the transfer of software against payment constituted a sales contract was first discussed in the context of software in tangible form, i.e. pre-installed on a computer or a CD ROM. Initially, the debate centred on the question of whether digital products in tangible form *are* goods so that sales law would have applied directly. The German Federal Supreme Court has, at this early stage, decided that they should at least be treated *like* goods, with the clear intention to bring them under the sales law regime related to non-conformity and to remedies.[123] The issue has been settled with the reform of the law of obligation. Indeed, the German Civil code now foresees that the

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[113] *Lamy Droit de l'Informatique et des Réseaux* (2009), n°809ff., especially n°820.
[114] Ibid.
[115] French Supreme Court (Cour de cassation), *LCE c/ Artware*, Mai 22, 1991, n° 89-11390; French Supreme Court (commercial chamber), Mai 9, 1995, no. 93-16.539; French Supreme Court (commercial chamber), April 2, 1996, no. 94-17.644 ; French Supreme Court (1 civil chamber), January 30, 1996, no. 93-18.684 ; French Supreme Court (commercial chamber), November 25, 1997, *Bulletin civil IV*, no. 318; Court of Appeal Paris, 25th chamber, section B, June 22, 2001, *Communication commerce électronique* (2001) 25, note L. Stanc; CA Bastia, November 19, 2002, no. 2002/00772; J. Huet, "De la vente de logiciel ", in *Le droit privé français à la fin du XXe siècle, Mélanges Catala,* Litec (2001) 799ff.
[116] A. Hollande, X. Linant de Bellefonds, *Pratique et droit de l'informatique*, 5e éd., Delmas (2002), n°503.
[117] E. Montéro , *Les contrats de l'informatique et de l'internet*, Larcier (2005), p.77.
[118] Report I (France), p. 42-43.
[119] Art. L. 121-20-3 of the French Consumer code.
[120] Art. 1603 ff. French c.c.
[121] Art. 1641ff. French c.c.
[122] Report I (France), p. 41.
[123] Cf. German Supreme Court BGHZ 102, 135, at 144.

provisions on 'the purchase of things apply with the necessary modifications to the purchase of rights and other objects'.[124] This was explicitly meant to apply to software, amongst others. Taking this further, it was then discussed whether or not this also applies to software that was transmitted online. Here, the problem obviously arises that without a CD ROM or DVD, there is no ownership to software (in the sense of property law) that could be transferred.[125] Nevertheless, the courts have applied sales law in many instances, with certain adaptations.[126] The prevailing opinion in Germany has concurred with this line of reasoning in the case law.

The application of German consumer sales law to digital content raises additional difficulty, mainly because most of the rules of the consumer sales directive, notably the provisions on conformity and remedies, have been extended to non-consumer sales contracts. Only the trader's redress, the reversal of the burden of proof, some features of the consumer guarantee, and the mandatory nature of the rules are reserved to consumer sales contracts. However, the rules are only mandatory for consumer sales contracts, and the scope of application of the specific consumer sales rules are restricted to "tangible movable items". Some German authors have argued that data becomes part of a tangible product and is therefore itself tangible once it has been transmitted to the consumer's hardware. They have therefore proposed to apply the mandatory consumer sales law derived from the Consumer Sales Directive to the online purchase of music, software and the like.[127]Also, in answer to the argument that the purchase of software, even on a CD or DVD, should be seen as licensing contracts, the German Supreme Court[128] held that copyright-related issues in a contract are merely of an ancillary nature but do not determine the type of contract otherwise, and rejected the separation of the work from the good in which it is incorporated. Thus, where software on a CD or DVD is flawed, a consumer can take recourse to consumer sales law[129]. As for software supplied online, case law as to whether the rules of the German Civil code[130] that are reserved to consumer sales contracts apply is not yet available.

In Italy, standard software, whether on a tangible medium or not, may according to Italian courts be qualified as a movable object intended for the consumer.[131] The consumer may have recourse to consumer sales law. In case of a defect, the consumer-purchaser has to report the lack of conformity of the software within two months from the date of the

[124] Art. 453 German c.c.
[125] Cf. OLG Nuremberg, CR 1993, 359, at 360.
[126] For the irrelevance of the handing out of a tangible product see in particular German Supreme Court, *Neue Juristische Wochenschrift*, 2007, 2394.
[127] Cf. S. Lorenz, in: Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 5th ed., Munich: C.H. Beck, Art. 474, no. 10. For software: B. Grunewald, in: Erman, Bürgerliches Gesetzbuch, 12th ed., Cologne: Dr.Otto Schmidt, 2008 Art. 474, no. 3. Cf. also G. Spindler, L. Klöhn, 'Neue Qualifikationsprobleme im E-Commerce', *CR* 2003, 81, at 85, who reject the idea that software is a tangible product (once received) but still want to apply consumer sales law by analogy.
[128] Cf. German Supreme Court, *Neue Juristische Wochenschrift* 2007, 2394; consenting J. Marly and N. Jobke, Zur Rechtsnatur der Softwareüberlassung im Rahmen eines ASP-Vertrages, *LMK* 2007, 209583.
[129] Report I (Germany), p. 87.
[130] Art. 474 ff German c.c.
[131] Trib. Monza Sez. IV, 01-03-2005, D.A. c. S. s.r.l., in *Banca dati De Agostini*, 2005.

discovery of the defect[132]. However, the Court of Appeal of Rome[133] has clarified that tailor-made application software for the production of a database was a service contract. In such a case, the rules of consumer sales law are inapplicable. In this case, the rules on contracts for work were to apply.[134]

In the Netherlands, consumer sales law may be applied to standard software on a tangible medium (CD or DVD), also in case of defect to the software. This seems to be the prevailing opinion in legal doctrine.[135] In a recent judgment[136], which turned on the question whether the producer of software could still invoke its copy right against the (professional) buyer of software, the District Court of Dordrecht confirmed this view by indicating that sales law applies to the contract whereby not only computers but (also) the (much more valuable) installed software were transferred. Concerning standard software supplied online, according to leading authority, sales law may be applied by way of analogy[137]. For others, standard software, be it supplied on a tangible medium or not, is to be construed as 'rights'.[138] This implies that to such contracts,[139] sales law is applied 'to the extent that this conforms to the nature of the right'.[140] There is no established authority indicating whether, if this view were followed, this would mean that the specific provisions on consumer sales law would or would not apply as mandatory law.[141] In a recent judgment[142], the Court of Appeal of Amsterdam, in a case in which the software failed to function properly as a consequence of a flaw in the software, not in the CD or DVD itself, underlined – in accordance with the common opinion in the Netherlands[143] – the fact that the software was not a good.[144] The Court held that sales law nevertheless applied.[145] However, since the case concerned two professional parties, the Court did not discuss the applicability of the specific protective provisions of consumer sales law.

In Norway, digital content on a tangible medium may be construed as a good within the meaning of the Consumer Act[146] and Sale of Goods Act[147]. Consumer sales law is thus applicable. Digital content supplied online will be treated as a service, excluding the

[132] Art. 1519 *sexies* French the c.c., now in the Title III French Consumer code.
[133] Ap. Roma Sez. II, 02-03-2006, R. s.r.l. e al. c. I. s.r.l., in *Banca dati De Agostini*, 2006.
[134] Art. 1667 II Italian c.c.
[135] Cf. the leading commentary on sales law: Asser-Hijma 2007, no. 203, with references. Cf. also M.Y. Schaub, 'Digitale muziek, DRM en de thuiskopie: biedt het consumentenrecht uitkomst?', *Tijdschrift voor Consumentenrecht en handelspraktijken* 2006-2, p. 42.
[136] District Court Dordrecht 11 August 2010, *LJN* BN3863.
[137] Asser-Hijma 2007, no. 203, with references.
[138] In the sense of Art. 3:6 Dutch c.c.
[139] By virtue of Art. 7:47 Dutch c.c.
[140] E.D.C. Neppelenbroek, 'De aanschaf van standaardsoftware en de toepasselijkheid van het kooprecht', *Vermogensrechtelijke Analyses* 2005/2, p. 24-25, with references.
[141] T.H.M. van Wechem, 'Downloaden van muziek, enkele consumentenrechtelijke verstrooiingen…', *Tijdschrift voor Consumentenrecht* 2006/4, p. 106, argues that the contract to download music over the Internet is to be considered as a consumer sales contract.
[142] Court of Appeal Amsterdam, location Arnhem, 1 June 2010, *LJN* BM6320.
[143] Asser-Hijma 2007, no. 196.
[144] In the sense of Art. 3:2 Dutch c.c.
[145] By virtue of the provision of art. 7:47 Dutch c.c.
[146] Forbrukerkjøpsloven, LOV 2002-06-21 nr 34: Lov om forbrukerkjøp.
[147] Kjøpsloven, LOV-1988-05-13 nr 27: Lov om kjøp.

application of (consumer) sales law. The Consumer Act may arguably be applied by way of analogy insofar as it could be considered as a codification of general principles of law. However, there is no authority on this matter.

In Poland, the scope of consumer sales law is limited to tangible goods between a professional seller and a consumer buyer.[148] In the Polish legal literature, this provision has been interpreted strictly: the law should not be applied either to other (non-sale) contracts on the basis of which a consumer becomes an owner of a good or to sale contracts pertaining to intangible goods. The predominant view is thus that consumer sales law would be available with regards to the eventual physical medium on which software may be supplied because it is a tangible good,[149] but not to the software itself, which is perceived as an intangible good.[150] There is however no case law to this respect. The provisions of the Polish Civil code relating to sales law[151] are applicable to digital content, as they apply to the sale of either tangible or intangible goods as well as to the sale of rights. More specifically, in case of a defect, recourse may be made to general liability rules for faults in goods bought.[152] Also general rules on non-performance may apply.[153] In many cases, such a purchase of software will be combined with the purchase of license to exploit that software (service contract). The grounds for liability for faults in the software could then be found only in the contractual relationship between the parties.

Spain has a provision on the right of withdrawal relating specifically to digital content. Indeed, according to the Spanish Consumer code,[154] the right to withdraw will not be applicable (unless there is agreement to the contrary) to contracts on the electronic supply of computerized files, when those files may be downloaded and reproduced immediately and permanently.[155] In the absence of any specific dispositions, the provisions of the Spanish Civil code may be applied to a *contract for services*[156] (e.g. the provision of information services), *contract for work*[157] (services of *streaming*, *video on demand*, etc.) *lease of goods*[158] and *sale contracts.*[159] The section of the Spanish Consumer code

[148] By virtue of Art. 1 of the *Ustawa o szczegolnych warunkach sprzedazy konsumenckiej, Dz.U.02.141.1176, the* law of 5 September 2002 on the Special Conditions of the Consumer Sale
[149] Supreme Administrative Court (*NSA*) case of 24 November 2003 (FSA 2/03); E. Letowska, *Prawo umow konsumenckich*, p. 385; E. Habryn-Motawska, *Niezgodnosc towaru konsumpcyjnego z umowa sprzedazy konsumenckiej*, p. 23 and M. Pecyna, *Ustawa o sprzedazy konsumenckiej*, p. 43 -44.
[150] Report I (Poland), p. 281-282.
[151] Art. 535-581 Polish c.c.
[152] Art. 556-576 Polish c.c.
[153] Art. 471ff. Polish c.c.
[154] Art. 102 'c' of the Spanish Royal Legislative Decree 1/2007, of November 16, which approves the revised and consolidated text of the General Law for the Protection of Users and Consumers and other complementary laws (TR-LGDCU)(hereinafter 'Spanish Consumer Act'). This law currently includes the regulation of distance contracts (arts. 92-106, implementation of Directive 97/7/EC) and those of sales of consumer goods (arts. 114-127 implementation of the Consumer Sales Directive)
[155] Cf. also Law 34/2002, of June 11, on Information Society Services and E-Commerce (LSSICE), a national measure on the transposition of Directive 2000/31/EC. Although this does not exclusively circumscribe digital content, its provisions are very relevant in this context and are habitually applied to digital content.
[156] Art. 1542-1545 and 1583-1587 Spanish c.c.
[157] Art. 1542-1545 and 1588-1600 Spanish c.c.
[158] Art. 1543, 1545 and 1546-1582 Spanish c.c.
[159] Art. 1445-1537 Spanish c.c.

implementing the rules on the sale of consumer goods of the consumer sales directive [160] goes beyond the ambit of the directive, as it covers consumer 'products' as defined in a very broad manner[161] and not only consumer 'goods' in the sense of the directive, i.e. tangible movable objects. Though this is debated[162], one may contend that digital content falls under the notion of products and that the said provisions are applicable to them.

Under UK law, the essential characteristics of a contract for the sale of goods are set out in the Sale of Goods Act, according to which 'a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price'.[163] As the *Bradgate* report explains:

> Unless therefore the contract has as its objective the transfer of property in goods from one party (the seller), to another, (the buyer) it is not a contract for the sale of goods and falls outside the SGA. However, as demonstrated earlier in this report, a contract, which involves the supply of goods but is not a sale *may* fall within the ambit of the SGSA, in which case the customer has the protection of implied terms identical to those implied by sections 12 to 15 SGA *in relation to the goods supplied*.[164]

In both the Sale of Goods Act[165] and the Supply of Goods and Services Act[166] the definition of goods includes 'all personal chattels other than things in action or money'. A physical medium such as a CD or DVD is clearly goods, and if such a medium (or any computer hardware) is supplied along with software under a single contract this has been held (in the English Court of Appeal) to be a contract for the sale or supply of goods[167]. If this is the case, then the statutory implied terms as to description, quality and fitness will apply[168]. Scottish case law follows this line, saying that such a contract should not be seen as one for the sale or supply of goods; but, rather, as a contract *sui generis*[169]. If this is the case, then the courts might well invoke the general principles of common law leading to a similar result as those that would be applicable under the Sale of Goods Act or Supply of Goods and Services Act. These would require the hardware and software package as a whole to be reasonably fit for its intended purpose.[170] But at any rate, such contracts do not seem to be

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[160] Title V in Book II *Garantías Y Servicios Posventa,* Art. 114-127 Spanish Consumer code.
[161] Art. 6 Spanish Consumer Act, where 'product' is defined as any movable good or chattel in the general sense of Art. 335 of the c.c.
[162] Report I (Spain), p. 309.
[163] Sale of Goods Act 1979, Art. 13-15 (contracts for the sale of goods), henceforth: SGA and Supply of Goods and Services Act 1982, Part 1 (supplies of goods other than sales, e.g. hire, bailment, barter, work and materials contracts) henceforth: SGSA.
[164] Bradgate 2010.
[165] Art. 61 SGA.
[166] Art. 18 SGSA.
[167] *St Albans City and District Council v International Computers Ltd.* [1996] 4 All ER 481 CA*; Toby Construction Products Pty Ltd. v Computer Bar (Sales) Pty Ltd.* [1983] 2NSWLR 48.
[168] Whether those deriving from the SGA or from the SGSA.
[169] *Beta Computers (Europe) Ltd. v Adobe Systems (Europe) Ltd.* 1996 SLT 604, Lord Penrose.
[170] Cf. generally *Young/Marten Ltd v McManus and Childs* [1969] 1 AC 454 and *Judge Thornton QC, in Watford Electronics Ltd. v Sanderson [2001] 1 All ER (Comm) 696.*

viewed as service contracts. Whether or not such contracts are technically viewed as being for goods or as *sui generis*, outcome based standards seem to apply.

Where the software has been transferred without any durable medium being involved, the definition of 'software' in a particular contract has been held to mean that goods are being supplied; although if the software is being licensed and not sold (as is typically the case) the contract would be viewed as one for the supply (rather than sale) of goods.[171] This would mean that the statutory implied terms as to description, quality and fitness from Supply of Goods and Services Act, Part 1 would apply. At the same time, one view is that there is neither a sale nor a supply of goods in any case where software is all that is being supplied.[172] This would mean that the statutory implied terms as to the description, quality and fitness of the goods would not apply. However, even if this is the case, it does not seem that such a contract will necessarily be treated as being a contract for a service either. So the implied term of a service contract as to reasonable care may not apply. Pure software contracts may be treated as contracts *sui generis*. This being the case, it is possible that the courts would imply (at common law) similar implied terms to those applicable under the Sale of Goods Act or Supply of Goods and Services Act to goods; i.e. essentially to the effect that the software is reasonably capable of achieving its intended purpose.[173] Note that an overriding uncertainty is that the abovementioned cases dealt with business-to-business contracts, not business-to-consumer contracts; so that it is very hard to predict exactly what would be decided in relation to the latter case.

In the US, transactions in goods are covered, *inter alia*, by Article 2 of the Uniform Commercial Code (UCC). Goods are defined as 'things' that are 'movable'[174]. 'Thing' is a word of deliberate vagueness. Service transactions on the other hand are governed by the common law of contracts. Performance standards for services -which contemplate the imperfections of human services - are lower than for goods, although in other ways the common law may produce the same results as UCC Article 2. There is a tendency in the US to view digital products as goods more than services, thus applying UCC Article 2, although with some thought that digital products might be *sui generis*. Article 2, drafted in the 1950s prior to the digital era, has nothing explicit on whether to cover digital components on hardware and digital products on disks, but its application to software on hardware or on a disk is common. Hard goods with digital components are often treated as goods without even identifying that the digital elements create any issue. UCC Article 2 is used for digital products, particularly software, because it works reasonably well for many issues, such as contract formation, performance standards, warranties, and damage remedies. 'Thing' in the sense of Article 2 may – though there are some arguments opposing this – encompass electronic copies, whether on a disk or downloaded. Downloading could be considered a form of moving thing, and it is common that Article 2

[171] *Cf. Judge Thornton QC, in Watford Electronics Ltd. v Sanderson [2001] 1 All ER (Comm) 696.*
[172] *St Albans City and District Council v International Computers Ltd.* [1996] 4 All ER 481, CA, *per* Sir Iain Glidewell at 493.
[173] *Cf. Judge Thornton QC, in Watford Electronics Ltd. v Sanderson* [2001] 1 All ER (Comm) 696.
[174] Sections 2-101, 2-105(1) UCC.

be applied to it, whether directly or by analogy as persuasive authority, though there are cases challenging this interpretation[175].

Also, producers often call digital content contracts transactions licenses. The American Law Institute Principles cover software contracts no matter what the nominal transaction type[176]. Article 2's scope provision refers to 'transactions in goods,' but its other sections mostly apply to buyers and sellers, so arguably licensors and licensees are not covered, although the courts are not prone to make this distinction[177]. State consumer protection statutes frequently have a broad scope and there is no reason to decide whether goods, services, neither, or both are involved, for example when a statute covers trade or commerce.

2.1.4 Digital content as a service or *sui generis* contract

The legal nature of software, as a specific category of *digital content*, remains unclear. In case of a defect in the software contained on a tangible medium, all countries under review, with the exception of Finland, apply the rules of (consumer) sales law. They do so either directly, by analogy, or through an extension of the reach of (consumer) sales law. More specifically, consumer sales law is applied in France, Germany, Italy, The Netherlands, Norway, Spain and the UK. Ordinary sales law is not applied in Spain, but it is in the US. However, when the law requires goods to be tangible, the requirement of tangibility most likely excludes software purchased online from this classification (e.g. Norway, France, and Poland). Moreover, while certain countries dissociate the digital content from the medium on which it is supplied for the sake of classification (Poland, France), others consider them as a single operation (Germany, UK, US). In many countries, the argument has been put forward that the purchase of software could be considered as a license agreement, which may hinder the application of (consumer) sales law. This position is highly controversial.[178]

In Finland, consumer sales provisions cannot be applied to software on a tangible medium (CD/DVD) because the main subject matter is a service. The same goes for software supplied online. The provisions of the end-user license agreement (EULA) will be applied.[179] In France, software could be seen as a service according to the legal doctrine.[180] In such an instance, Book II of the Consumer code relating to conformity is applicable. Also, if the services are purchased at a distance, the aforementioned automatic liability regime of the consumer code is applicable.[181] The classification of software as sui generis has found support in the French legal literature.[182] In Hungary, the purchase of software is construed as a license agreement (right of use), regardless whether it is put on a tangible

[175] *Specht v. Netscape Communications Corp*., 306 F.3d 17 (2nd Cir. 2002), opinion by Judge Sotomayor, now Justice Sotomayor of the U.S. Supreme Court.
[176] Cf. section 1.06(a)(covering software contracts whether to sell, lease, license, access, or otherwise transfer or share).
[177] *Micro Data Base Systems, Inc. v. Dharma Systems, Inc*., 148 F.3d 649, 651-54 (7th Cir. 1998).
[178] Cf. BEUC 2010, p. 5ff.
[179] Report I (Finland), p. 7.
[180] Hollande & Linant de Bellefonds 2002, n°503.
[181] Art. L. 121-20-3 French c.c.
[182] Montéro 2005, p. 77.

medium.[183] The provisions of the Hungarian Civil code are likely to apply, though no case law on the issue is yet available.

In Italy, some literature suggests applying the rules on lease contracts to software, perceived as a license agreement.[184] In this case, if at the moment of the delivery, the leased good is affected by defects that considerably decrease the suitability for the use agreed upon, the consumer can request the cancellation of the contract or a reduction of the price, unless the consumer was aware or could have easily been aware of the defects. The provider has to compensate the lessee for the loss resulting from the defects of the good, unless he proves that he was not aware of the defects at the moment of delivery, without any fault on his part[185]. Also, as mentioned above, the Court of Appeal of Rome[186] held that tailor-made software for the production of a database was a service contract, rendering consumer sales law inapplicable.

In the Netherlands, a minority opinion construes standard software, whether supplied on a tangible medium or not, as 'rights'. According to this view, (even) contracts where standard software is contained on a CD or DVD would not be considered as sales contracts because of the applicability of copyright law. These authors come to very divergent classifications of the contract.[187] According to some authors, standard software, whether supplied on a tangible medium or not, should be qualified as a (specific type of) service contract. The type of service contract is unclear.[188] Finally, the Dutch Supreme Court, on appeal of a judgment by the Amsterdam Court of Appeal and after a preliminary ruling by the Court of Justice of the European Union, has qualified the contract by which a customer was supplied with standard software, put on the market and recorded on a carrier, and which was subsequently customized to that purchaser's specific requirements as a service[189] in tax law[190], even if separate prices were charged for the standard software and the customization service. It should be noted, however, that this was not a consumer case and did not just pertain to the supply of standard software.

Software, whether or not it is fixed on a physical medium, may also be considered in Spain as a *licensing agreement for a non-customized use of a computer program*, and not a sales contract, since no transfer of real property takes place. In regard to the applicable law, the license terms will rule the rights and obligations of the consumer (number of copies permitted, simultaneous running on distinct computers, reproduction limitations, etc.) and the general provisions of the Spanish Civil code regarding contracts will govern the topics which are not foreseen in the contract terms. As regards defects to the software as a

[183] Report I (Hungary), p. 119.
[184] Art. 1578-1579-1581 Italian c.c.
[185] Report I (Italy), p. 161 and 162.
[186] Ap. Roma Sez. II, 02-03-2006, R. s.r.l. e al. c. I. s.r.l, in *Banca dati De Agostini*, 2006.
[187] Cf. Neppelenbroek 2005, p. 14-17 and p. 22-23 who in this sense follows the majority view as expressed by Asser-Hijma.
[188] Cf. Report I (The Netherlands), p. 207 for further detail.
[189] Dutch Supreme Court 2 June 2006, *LJN* AX6436, *BNB* 2006, 279 (Levob Verzekeringen B.V et al.) after preliminary ruling by the ECJ 27 October 2005, case C-41/04, *ECR* 2005, p. I-09433 (Levob Verzekeringen BV v. Staatssecretaris van Financiën)..
[190] For the specifics of the case, see Report I (The Netherlands), p. 208 and 209.

consequence of an error which is not attributable to the hardware or medium, sales law is not applicable, but rather a series of regulations that are not just applicable to this, but to any form of distribution of market assets including the licensing contract for use of software.[191] Among these are the rules on lack of conformity, as introduced into the Spanish Consumer code as a result of the Consumer Sales Directive, and the provisions on defective products and services, in the case of non-contractual damage caused by the defective character of the software itself.[192]

In the UK, a Scottish Court of Appeal has held that a physical medium such as a CD or DVD supplied along with software under a single contract should not be viewed as one for the sale or supply of goods; but, rather, as a contract *sui generis*[193]. This could also be the case when the software is not supplied on a tangible medium.[194]

2.2 Prosumers

2.2.1 Introduction

Thirty years ago the term 'prosumer' was used for the first time to describe a new type of consumer that is simultaneously a producer. Back in the 1980's the prosumer stood for the increasing influence consumers were expected to have on the form of the products they purchase, which would become ever less standardised and ever more customized.[195] Today, the word has come to denote a broader range of developments, mostly in the sphere of digitization. The term is no longer solely a fusion of the word consumer and producer, but also of consumer and professional.[196] Because of rapid technological innovation highly sophisticated, powerful tools have come within reach of an ever-wider public. With the advent of the Internet local, small-scale production or provision of services could suddenly go global. Traditional consumers increasingly morphed into producers of their own products or services using (semi-)professional equipment.

The positive results of this development, such as the enhanced mobility of trade and the emancipation of consumers come at a price. Because borders are easily crossed in the online-environment the prosumer's activities are often governed by a patchwork of legal regimes. In addition to that, small online traders suddenly operate out in the open. A house-based handyman having no privacy policy on her website may discover that he is visibly in breach of law.

And then there is another difficult issue to deal with. When is a prosumer professional enough to qualify as such, implying that the prosumer may no longer invoke consumer protection herself, and must face consumer protection laws being invoked *against* him? Which criteria should be applied to properly distinguish amateurs from their bigger

[191] According to the leading authorities, although not exempt from controversy.
[192] Art. 128 -149 Spanish Consumer Act.
[193] *Beta Computers (Europe) Ltd. v Adobe Systems (Europe) Ltd.* 1996 SLT 604, Lord Penrose.
[194] Bradgate 2010, p. 35.
[195] Cf. A. Toffler, '*The Third Wave*,' New York: Bantam Books 1980.
[196] Cf. P. Swire, 'When Should "Consumers-as-Producers" Have to Comply With Consumer Protection Laws?' in *Journal of Consumer Policy*, (31) 2008-4, p. 473-487.

colleagues? As their hybrid name 'prosumer' already betrays, they often constitute complicated borderline cases.

The comparative analysis will primarily focus on the criteria states apply to categorize the prosumer. The prefix 'pro' will generally be understood as an abbreviation of 'professional' (making this the pivot of the inquiry) and not of 'producer', which is already presupposed. However, in one legislative example coming from France the prosumer enjoys protection in the quality of a 'producing' entity (of editorial services), while the proper way to set amateurs apart from professionals is not elaborated upon. This terminological change will again be addressed in the relevant paragraph.

Another subject treated in this analysis is the possible differentiation within the group of professionals. If a prosumer is deemed 'professional' by just the narrowest margin, it might be undesirable to unrelentingly declare all strict legislation fully applicable. In the second section the various approaches to this regard will be examined.

2.2.2 The 'prosumer', an amateur party or a professional?

The categorization of prosumers appears to be a difficult task in nearly all examined countries. Various criteria have been developed to tell private, small-scale sales apart from professional ones. When comparing the jurisdictions involved, it becomes clear that the relevant aspects do not differ very much in nature, but rather in number. Some states base their appraisal on a few core principles, while others take into account a whole range of circumstantial evidence as well. However, irrespective of the approach one takes, certain interpretative efforts seem to be inevitable when classifying the borderline cases that 'prosumers' often give rise to.

Before discussing the criteria in greater detail, it may be helpful to signal one fundamental question that overarches nearly all 'secondary' inquiries: what defines *professionalism*? Although this term can be defined in many ways, three aspects appear frequently among the various countries. The first one regards profit making, or at least the attempt thereof. The second one is about the organisational structure of the commercial activity/entity. The last aspect is the frequency of the transactions: do they have an incidental or rather a systematic character?

In *Finland*, the relatively small number of criteria that define whether a party is professional or not, are (almost) identical to the three basic aspects mentioned above.[197] The same is true for *France*, where these criteria have developed out of case law.[198] It is important to note, however, that these conditions don't have to be met cumulatively. A 2006 case, for example, showed that a prosumer can qualify as a professional, even when her business has a non-organised form.[199] The last country that fits well within this group adhering to the common, threefold definition is *Hungary*. In Hungarian law profit making, although not an absolute requisite, together with continuous or frequent trading activity are

[197] An example about the practical application of these criteria can be found in Report I (Finland), p. 8.
[198] Report I (France), p. 44.
[199] Correctional Tribunal, *Mulhouse*, *Ministère public c/ Marc Didier W*., January 12, 2006, n° 122/2006.

strong indications for professionalism.[200] In addition to that, a (somewhat) sophisticated organisational structure may satisfy the criterion of being an apparent commercial operator.

As mentioned earlier, not all countries apply a similar benchmark. In many jurisdictions slight or significant variations on the trio 'profit-organisation-frequency' can be found. In *Spain* for example, strict application of the law would put prosumers nearly inevitably on par with professional operators.[201] However, some scholars argue that the abovementioned criteria of frequency and an organisational structure should be part of the consideration as well.[202] Until further case law appears, the issue still remains unsettled.

More certainty can be found in the *Polish* approach towards prosumers offering digital content. In comparison to other countries, here the situation seems relatively clear-cut. Neither the form nor the frequency of trading are mentioned as decisive factors, but solely the (intention) to make profit out of the activity.[203] This also means that a prosumer offering content free of charge will never qualify as a professional.

Quite the opposite is the *German* position. According to the German Supreme Court[204] profit is not necessary for a prosumer to be viewed as a professional party. Crucial, on the other hand, is that independent and planned activities took place to offer goods or services on the market for a certain time. Since the case involved a horse breeder (and not a prosumer offering digital content) some reserves should be made. But given its potential value as a reference for future cases, it is worthwhile to discuss some further considerations as well. Important, for example, is that the court emphasized the relevance of the consumer's perspective in the assessment. Another point of interest in this case was a specification of the term *trade* by means of some 'indicators,' such as the professional impression of the Internet presentation, the types of goods sold (whereby new goods and many goods of the same kind point at trade) and the often-heard frequency of transactions.

In comparison, the number of relevant aspects in *Norway* seems rather small, at least when it comes to prosumers offering digital content. In such a case, they are very likely to fall within the category of traders, irrespective of the consumer's perception. Yet outside the field of these services the well-known trinity of criteria plays a pivotal role again.[205]

The last country to be mentioned here is *The Netherlands*. Here, as in Germany, case law focuses on the way the prosumer presents herself.[206] This aspect, together with the number of contracts (whereby more transactions lead to a higher probability of being classified as a

[200]The definitions of 'frequent' and 'profit-making' are quite broad: a few months or very small payments already qualify as such.
[201] Report I (Spain), p. 318.
[202] S. Cámara Lapuente, 'Comentarios al art. 4 TR-LGDCU,' in S. Cámara Lapuente (ed.), *Comentarios a las normas de protección de los consumidores*, Madrid: Colex 2010, with arguments based on the some articles of the Code of Commerce and Art. 92.1 (= Art. 2.1 Directive 97/7/EC) and 115.1.b TR-LGDCU (= 22 Directive 90/314/EC) and section F of the LSSICE's Appendix.
[203] Report I (Poland), p. 283.
[204] German Supreme Court, *Neue Juristische Wochenschrift*, 2006, p. 2250, 2251.
[205] Report I (Norway), p. 256.
[206] See for case law Report I (The Netherlands), p. 211, footnote 458.

trader) will have great weight in the determination of the applicable regime. Profit is important to the extent that a counterperfomance is necessary for a content service to qualify as a sales contract.

This section will conclude with a brief description of the situation in the *United Kingdom*. In contrast with the selections of criteria described above, the British approach takes into account nearly all circumstances to establish whether the consumer acted in the course of business or not. This list includes, besides the principles already discussed, the use of business premises, the use of a business name, business literature; advertising; buying in bulk; selling for profit goods that have been purchased for resale and profit rather than selling goods that were originally bought for private use; selling goods that were originally used in a business owned by the seller; keeping accounts; paying business rates of tax; and the income from these transactions being a notable part of the income of the seller.[207] As one might infer, these are just possible factors in an open-ended test, rather than an exhaustive enumeration.

2.2.3 Differentiating within the group of professionals

Once a prosumer has been classified as a professional, another question arises: is a prosumer subject to exactly the same rules as other professionals, or is there room for any differentiation? After all, the 'professional consumer' may still differ considerably from the 'big professional.'

Finland, Italy and Spain explicitly exclude the possibility of differentiation; once a party falls within a certain category, it has to abide by the applicable rules.[208] But in many other countries some leeway exists, in one form or another.
A very clear example can be found in Germany, where the level of care imposed on the seller may be alleviated somewhat by the courts. Again a case[209] outside the realm of digital content is cited, but the potential value of analogous cases be repeated: in a private context the seller of a used car may rely on the mileage shown by the odometer, while a commercial party would be obliged to verify that no manipulation occurred. Similar observations come from *Hungary*, *Norway* and *The Netherlands*.[210] In all these countries the interpretation of the seller's legal obligations may depend (to a certain degree) on aspects as expertise and the degree of professionalism.

Strictly speaking, the *United Kingdom* belongs to the first group of jurisdictions in which no differentiation is possible. Though, as the British report rightly pointed out, the highly flexible test to determine whether a party is professional or not gives some margin of appreciation in the early stage of classification.

[207] For more criteria see Report I (United Kingdom), p. 358.
[208] Report I (Finland), p. 8; Report I (Italy), p. 165; Report I (Spain), p. 318
[209] Cf. German Supreme Court, *Neue Juristische Wochenschrift* 1998, 2207 (commercial sale), versus German Supreme Court, *Neue Juristische Wochenschrift*, 1984, 1454 (private sale).
[210] Report I (Hungary), p. 121; (Norway), p. 257; (The Netherlands), p. 212.

In France interesting provisions can be found in e-commerce law, which stipulates some special provisions for editorial services.[211] As regards the providers of editorial services, a distinction is made between persons delivering a public communication service on a professional basis and those who operate in a non-professional way. While the former has to disclose a considerable amount of information, consisting in details about the company, the managing editor and the provider, the latter 'only' has to publish her (nick) name and the provider's contact information. This means that at least the 'producing consumer' benefits from a less strict regime. However, this doesn't answer the question as to the obligations of the (semi-)*professional* producing consumer.

2.3 Information obligations

2.3.1 Introduction

2.3.1.1 General introduction

Consumers attach value to being properly informed. In the survey conducted in the course of this study, lack of information figured prominently at the second place (after access issues) among the most frequently mentioned problems that consumers experienced. The survey also demonstrated that there can be a considerable gap between the information consumers expect, and the information they actually receive. Variations between different kinds of digital content add to the complexity of the problem.

Disclosure of critical product characteristics and enabling consumers to make informed choices is also a matter of the realization of public interest objectives in promoting competition, innovation and user-friendliness. In consumer law and policy, consumer information rules are widely acknowledged as one of the single most important tools to realize consumer policy objectives. The primary goal of these rules is to improve consumer autonomy and freedom of choice. The prevailing image of the European consumer in EU law is that of the "average" consumer who is "reasonably well informed and reasonably observant and circumspect"—a concept developed by the European Court of Justice. This average consumer, provided she is adequately informed, is well equipped to address her own needs and preferences and is able to search among the services and products that are publicly available for those that best meet her needs. Informing consumers is thus also a form of empowering consumers as catalysts of functioning competition, which is another reason that explains why the rules on consumer information are integral to EU consumer law.

2.3.1.2 Some particularities of digital content

For consumers it is often difficult if not impossible to anticipate the characteristics and value of a piece of music, a film or a game before they have experienced it (experience good). And while some information, e.g. title or length of a film, might still be relatively easy to find, others, such as journalistic or artistic quality are difficult to judge for most consumers, even after they have consumed a digital content product or service (credence

[211] Art. 6 and subsections of the Law for confidence in the digital economy (Loi pour la confiance dans l'économie numérique, hereinafter 'LCEN').

good). This is one reason why consumers of digital content need to rely on accurate and comprehensive information about a digital content before they are able to make an informed purchasing or downloading decision.

The need for pre-contractual information about digital content goods or services is further re-enforced by two of their essential features: technology and eventual property rights in the content. With a traditional book, the form determines its functionality – a book can be opened and closed at will, read as many times as one wishes, taken along on vacation, lent to a friend or left behind in the park without anyone noticing. This is different with e-books. The functionality of an e-book, or any other piece of digital content, is a combination of licensing conditions and technology. Unlike with traditional books, in the case of e-books rightholders can, and do specify the number of copies that a consumer is allowed to make, if it can be printed or lent to others, on which devices it can be played, how long a user can "possess" the book. With the help of Digital Rights Management, monitoring and other technologies, enforcement of these conditions is directly implemented in the file itself and becomes part of its functionality. Some contents, predominantly films, can be played only in certain regions, others only a certain number or period of time. The terms and conditions of usage can vary from publisher to publisher, and even from item to item. In addition to usage restrictions, monitoring technologies allow following the user, and learning more about who she is and how she uses a digital content, for example through the use of cookies. These all are possible features of digital content that, due to the complexity of the underlying technology but also the licensing conditions, consumers are usually not able to find out easily themselves. These features, however, can influence the purchasing decisions of consumers, and their experience of digital content, once purchased.

Producers or vendors of digital content have commonly more information about characteristics, functionality, licensing conditions, etc. than consumers, a situation that is referred to as 'information asymmetries'. Information asymmetries can be one reason why consumers are not able to find the goods and services that match their preferences, or find it difficult to make truly informed choices. In other words, information asymmetries are a potential and important source of market failure. Disclosure requirements are the classic response to information asymmetries.

2.3.1.3 Information needs of digital consumers

Purchasers of digital content have specific information needs, in addition to the commonly acknowledged items of consumer information (such as price, terms of delivery, etc.):

Accessibility

In the "age of access", the accessibility of a product (here: digital content) is not any longer self-evident, even in situations that consumers did pay the required price and complied with all their obligations under a contract. One important factor that influences consumers' ability to access digital content are the hard- or software requirements of that content. Another, occasionally related factor is whether access to a particular piece of content is made conditional upon the purchase of additional products, such as a specific player hardware (e.g. iPod, iPad, Nokia telephone, X-Box), offline version of a journal, club membership, or a specific software, or acceptance of other, not always equally visible

modalities of performance (e.g. acceptance of cookies, usage of tracking and personalization strategies). An example is the recent discussion about e-books, and the fact that some e-books can only be purchased from a particular supplier and for very specific hardware devices. Due to the complexity of the technology, respectively the underlying business model, this information is generally not easily available for consumers. Other examples are services that will not be provided if users refuse to accept cookies, or the existence of proprietary software in MP3 players that make it difficult if not impossible for consumers to switch to another service without the incurrence of (unreasonable) high costs.

Functionality (including user instructions)
The functionality of digital content is determined by its technical design and the implementation of various content control technologies, such as Digital Rights Management, Technical Protection Measures, region codes, tracking software, etc. Surveys among digital music consumers and digital video content users found that a majority of users of digital music or video offerings felt not being adequately informed about eventual usage restrictions or the fact that DRM is used to enforce such conditions. For example, the majority of users (79%) that bought digital music in a digital music store in 2005 did not know whether the music they purchased was DRM-protected or not. In addition, 71% of users did not know whether any usage restrictions applied. An additional 16% did know that usage was restricted, but were not well informed about the details of the restrictions.[212] Similar findings were revealed for users of digital video content.[213]

Licensing conditions
To the extent that digital content is protected by intellectual property rights, the conditions of consumption of that content are subject to licensing. It is the rightholder who can determine what consumers can legitimately do with certain content, and the licensing conditions can vary from trader to trader, and even from item to item. Due to the lack of a common standard, consumers depend on information from suppliers about the applicable licensing conditions. As demonstrated in the consumer survey that was conducted within the scope of this study (Lot 1), 31 to 61 % (depending on the service in question) of users of individual digital content indicated that they were not informed about the license agreement.[214]

Privacy
Privacy is a growing concern about digital consumers and their representatives. Access to, and consumption of digital content is often accompanied by the collection and processing of personal data, and many services that are allegedly “for free” in fact “charge” consumers in form of personal data. Without additional information, it is for consumers difficult if not impossible to assess who collects which information for what purposes.

Quality guidelines, professional standards and codes of conduct
In Europe, there is a growing emphasis on self- and co-regulation as a means to improve the quality (e.g. editorial policies, community guidelines, etc.) and safety of digital content

[212] Dufft 2005, p. 38.
[213] Dufft 2006, p. 33.
[214] Europe Economics 2011, Report 3, p. 36..

(e.g. in terms of privacy protection, suitability for minors, etc.) as well as the conditions according to which digital content is marketed (e.g. advertisement). The resulting codes and guidelines can influence consumer's legitimate expectations regarding digital content. Despite their increasing prominent role, they are not always equally easily accessible or even available to consumers elsewhere.

Legal information
For consumers as laymen, it is particularly difficult to come by relevant legal information pertaining to the market of digital content, particularly in the cross border context. The survey that was conducted in the context of this study produced evidence that there can be a considerable gap between the information that consumers expect to receive regarding cancellation policies and instructions how to report a problem to the trader, and the actual information they got. Also, a need was felt for more transparency regarding the actual remedies available as well as penalties that could be imposed in case digital consumers were dissatisfied with the performance or other aspects of a digital content service.

Not only the content, but also form and presentation are important
Disclosure requirements, in order to be effective, need to respect the cognitive limitations of consumers, as well as their restricted time and attention. The problem of "information overload" is arguably particularly critical in digital content markets. Here consumers are often confronted on a daily basis with an abundance of digital contents to choose from, but also with a variety of terms of use, usage and privacy policies, etc. Consequently, it is not only the content but also the form and style that determine whether information obligations are actually an effective and appropriate response to problems that consumers may encounter in digital content service markets. Aspects of presentation are particularly relevant in situations in which consumer access information with the help of devices with limited screen space, such as mobile phones or MP3 players. Accordingly, when analysing the scope of existing information obligations in the member states examined, this section will also give particular attention to requirements regarding form and presentation.

An aspect that can influence the presentation of consumer information is the addressee and the question of whether her education, mental ability and experience require additional attention for the way information is presented. The audience for digital content is extremely heterogeneous, ranging from young children to the elderly, low- and highly educated people from different cultural and linguistic backgrounds, etc. Truly effective consumer information would take into account individual vulnerabilities and inequalities between the different addressees.

Another aspect that can influence the presentation is the legal expertise of the addressee. Some features of digital content can conflict with rights and protected freedoms of consumers, e.g. there right to privacy, protection of their property or freedom of expression. Insofar, consumers, in order to be able to make informed decisions, may not only depend on factual but also on certain legal information that enables them to assess a service upon its characteristics and value. A notorious example was the Extended Copy Protection technology XCP that, unnoticed by the user, was able to recognise and registers the CD that is played on a computer, identifies the IP number of the computer, and reported user

behaviour back to the firm. Even if consumers were informed about the characteristics of that particular DRM, judging its acceptability also required a rudimentary notion of their legal rights under copyright law and data protection law. Consumers, as layman, will often not have that information. This triggers the question of whether some information (e.g. about usage restrictions or privacy implications) needs to be framed in a way that helps users to place information about e.g. restrictions in the context of their rights and legitimate expectations.

It is also worth noting, however, that the on-going vigorous initiatives to promote media literacy, might have the effect that certain consumers soon rise above the standard of the 'average consumer' and indeed do acquire a certain standard of legal and technical knowledge. A future question is what, if any, implications the 'media literate viewer' standard will have for the duty to inform.

Sections 2.3.2 to 3.2.6 will provide a comparative analysis of the information obligations in general and sector-specific (audio-visual media law, e-commerce law, data protection law, copyright law) in the countries examined. The analysis leans heavily on the different national reports. Since the depth and intensity of the national reports varies on the different questions, this section cannot ambition to give a complete, detailed overview of the different national laws. It rather strives to provide a general indication of the character and extent of information obligations in the examined countries.

Section 2.3.2 looks at the scope and content of information obligations in general consumer and contract law and in sector-specific law (2.3.2). In section 2.3.3 we will examine how information obligations are divided between platform operators and individual service providers. Section 2.3.3 is dedicated to the question to what extent the law provides, implicitly or explicitly, room to differentiate between 'normal users' and particularly vulnerable users. Section 2.3.4 explores to what extent member states determine form (2.3.4.1) and language (2.3.4.2) of consumer information, and 2.3.5 will look into the legal consequences of the breach of general consumer law and sector-specific consumer law in relation to information duties.

2.3.2 Scope and content of information obligations

2.3.2.1 General consumer law

For digital content, the information rules in the Distance Selling Directive, the Service Directive and the E-Commerce Directive are particularly relevant. All states examined have implemented the transparency and information obligations that flow from these directives. Consequently, providers of digital content are obliged in all the member states examined to comply with the general information obligations that these directives prescribe. It is worth noting that the extent of the information duties does depend on the applicability of these rules to digital content. In some countries, there is discussion to which extent the specific rules apply. For example, the Hungarian correspondent expressed doubts whether the rules on distance selling actually apply to digital content. The German correspondent questioned the applicability of the Service Directive to online services. The classification question has

been addressed in section 2.1 of this report, and shall not be further dealt with in this section.

Wilhelmsson[215] distinguishes 5 different types of pre-contractual information duties in the European acquis communautaire, which service providers in all countries that have implemented the EU rules are bound to observe:

Information about the contracting party: identify/name of supplier, geographical address and (electronic) contact details, VAT and registration numbers, professional title and information about eventual multidisciplinary activities and partnerships

Performance related information: main characteristics of the goods and services, information on after sales services and guarantees, arrangements for payment, delivery, performance and complaint handling, the commercial character of communications, clear identification of promotional offers, competitions and games;

Price related information: Prices or the manner in which they are calculated, whether they are inclusive or exclusive taxes, eventually delivery costs and the costs of using the means of distance communication, where it is calculated other than at the basic rate, the period for which the offer or the price remains valid;

Term related information: minimum duration of the contract, conditions for its termination, general conditions and clauses, insurances and guarantees, applicable professional rules and codes of conduct, and means of accessing them, the availability of dispute settlement procedures and information of how to access detailed information on characteristics and conditions of use of dispute settlement procedures;

Legal information: Responsible supervisory authority or point of contact (Service Directive), professional bodies and the existence of contractual clauses, if any, used by the provider concerning the law applicable to the contract and/or the competent courts.

The concrete rules can be scattered over different laws, depending on how the directives have been implemented. For example, in the Netherlands, all general information duties can be found in the Dutch Civil Code, while in Poland, information obligations can be found in the Law on the provision of Services through Electronic Means, the Law on the protection of some consumer rights and liability for damage caused by dangerous products (implementing the Distance Selling Directive), as well as in the Polish Civil Code. Only few correspondents pointed to information obligations that would exceed those provided for by European law. For example, when implementing the Distance Selling Directive the Polish legislator extended the information obligations to the provision of information about complaint procedures and the right to terminate the agreement. Probably even more relevant for consumers of digital content is another provision in Polish law that obliges sellers to attach an instruction of how to use a good, if such an instruction is necessary for

[215] T. Wilhelmsson, Private Law Remedies against the Breach of Information Requirements of EC Law, in: R. Schulze, M. Ebers and H. C. Grigoleit, Informationspflichten und Vertragsschluss im Acquis communautaire, Mohr Siebek: Tübingen 2003, p. 245, 250.

its proper use. The provision of this information is considered a contractual duty, failure of which can give rise to a claim of non-performance and liability. In France and Spain, providers are also obliged to provide a telephone number, again an obligation that goes beyond the scope of the Distance Selling Directive.

None of the countries examined so far has adopted specific obligations in its general consumer and contract law provisions about digital content products for consumers (but see section 2.3.2.2 about sector-specific law). A number of national reports, however, indicated that judges are likely to interpret the general rules in a way that can also take into account specific interests of consumers of digital content.

This is particularly true with regard to matters of interoperability and compatibility. Two approaches can be distinguished. In the Netherlands and Germany, consumers would need to be informed if a digital content service or product cannot be used with common hard- and software. This is probably also the situation in Norway, where consumers, unless informed otherwise, may reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and software, according to the general principles of loyalty requirements and the principles of fairness in Norwegian contract and consumer law. By contrast, in Finland, Hungary and Italy, consumers would have to be informed far more specifically about the respective soft- and hardware requirements as "main characteristics" of the product or service. In Finland, compatibility constitutes a "main characteristics" consumers need to be informed about before conclusion of a contract. Failure to do so could give rise to a defect product claim. More elaborate was the response of the Italian report, which explained that in Italy, the law would require that consumers of software are informed about, inter alia, the description of the program; the identification number; technical features; hardware compatibility and users instructions, according to the general principles of good faith and in interpretation of the notion of "normal use" as provided for in the Italian Consumer Code. Germany and France are, as far as it can be gathered from the questionnaires, the only countries (of the countries examined) in which some case law exists regarding the duty to inform consumers about matters of interoperability and compatibility of digital content products. The cases in France actually dealt with providers of CDs and DVDs. The court found a duty to inform consumers about possible incompatibilities between the DVD/CD and consumers' equipment. Importantly, the court also found in one case that sole reference to the fact that technical anti-copying measures (as the cause of the incompatibilities) are in place is not enough to avoid liability. Consumers cannot be expected to know what concrete restrictions are in place. In response, it imposed on EMI Music France the fairly specific obligation to label its CDs – in 2.5 mm characters: "Attention cannot be listened on all players or car radios". It is worth noting that the French case law eventually resulted in a legal amendment of the French copyright code, as will be described more elaborately under section 2.3.2.2 .

Unfair commercial practice law might be the source of additional, indirect obligations to inform consumers about possible incompatibilities to the extent that these may affect the purchasing decisions of consumers. In a substantial number of countries (namely Finland, France, Italy, Netherlands, Norway, Poland, and the UK) not informing users about proprietary standards that prevent them from switching to other services or hardware could

be considered an unfair commercial practice. This is particularly true in situations in which the average consumer would have reason to expect that there will be no compatibility problem. Interestingly, the Dutch correspondent suggested that one indicator that might lead consumers to believe that a service or product is fully or only limited compatible is the price. In particular where the price was relatively low, this could be considered a reason for consumers to expect limited compatibility. Even in situations in which the trader did inform consumers about incompatibilities, this could still constitute an unfair commercial practice if the information supplied is unclear, unintelligible, ambiguous or untimely.

More controversial is the question of whether the presence of technical protection measures is also an essential characteristic consumers would need to be informed about. This has been answered e.g. in the affirmative for Germany. It should be noted, however, that German copyright law provides a special obligation to inform consumers about the presence of technical protection measures. With this provision in mind, the German report concluded that consumers were entitled to expect the absence of any technical protection measures if not explicitly informed about their presence. That the situation can be very different in case no such specific information obligations exist has been demonstrated in the French case law. In France, the Court of Appeal of Paris decided that restrictions to the ability of making private copies were not considered an essential characteristic. It is worth noting, though, that this decision was taken before France followed the German example and complemented its copyright law with a rule an obligation to inform consumers about the presence of technical copy restriction (see in more detail section 2.3.2.2) in a clear, understandable and noticeable way. A latter rule probably settled the matter for good by requiring that "the essential characteristics of the authorized use of a work or a protected object, made available through a service of communication to the public online, are brought to the attention of the user in a way which is easily accessible". It is worth noting that in the provision explicitly refers to the provisions in copyright law as well as to the general information duties in the consumer code.

Interestingly, while the national reports were hesitant to acknowledge a duty to inform about usage restrictions under contract and consumer sales law, a majority did mention an indirect duty to inform consumers about the existence of technical copy restrictions under unfair commercial practice law. In Finland, France, Germany, Italy, Norway, Poland, and UK failure to inform about technical usage restrictions could be considered an unfair commercial practice. Although the use of TPMs is generally and rightly so not considered an unfair commercial practice in itself, the failure to inform consumers about the presence of eventual usage restrictions (making copies, region coding could be considered a misleading omission. A precondition is that presence or absence of such restrictions can be deemed relevant with regard to the consumer's decision whether or not to enter into a contract.

Arguably, information about the licensing conditions is already covered by the obligation in general consumer law to specify in the terms of contract the rights and obligations of both contracting parties, and make the terms available to consumers before the conclusion of the contract.

Regarding professional standards and codes of conduct, the Service Directive, and the national rules that implement it, require traders to inform consumers upon their request about any codes of conduct to which the provider is subject and the address at which these codes may be consulted by electronic means, specifying the language version available; as well as how to access detailed information on the characteristics of, and conditions for, the use of non-judicial means of dispute settlement (Art. 22 (1)e and (3) d and e of the Service Directive). Once a trader has indicated that he is committed to a certain code of conduct and fails to comply, this can be considered a misleading commercial in the sense of Article 62(b) of the Unfair Commercial Practice Directive. What is missing until now is a provision mandating the general transparency and availability of codes of conducts and other pieces of co- and self-regulation.

Regarding possible implications of digital content products for consumers' privacy, it is worth noting that data protection law already obliges traders to provide consumers with information prior to the processing of their personal data. It would exceed the scope of this study to evaluate to what extent the established concept of informed consent still provides adequate protection of digital consumers' privacy, and in cases it does not, whether this is a failure of the rules or the lack of effective enforcement. It is important to stress, however, that when interpreting general notions such as "main characteristics", "fairness", "conformity" etc. judges must also take into account these sector-specific rules (for more detail, see 2.3.2.2).

2.3.2.2 Sector-specific consumer law

In addition to the information obligations in general consumer and contract law, sector-specific law also requires sellers to inform consumers about a number of aspects or characteristics of digital content products, respectively the way they are distributed and marketed. To the extent these aspects have been harmonised by European law, these specific information obligations can be found in the national laws that implement the acquis communautaire.

Identification of advertisement, sponsorship and product placement

With the implementation of the recently amended Audiovisual Media Service Directive, traders of not only broadcasting but also certain "broadcasting like" on-demand services (also online) will have to inform consumers about the presence of sponsorship and product placement agreements.

Moreover, both the Audiovisual Media Service Directive and the E-Commerce Directive stipulate a duty to clearly separate editorial content from commercial communications. The primary goal of these rules is to protect the editorial independence of the media and the ability of consumers to judge for herself whether external influences have shaped a program. The separation principle, however, also entails an element of consumer protection, namely to avoid consumer being misled by "editorially camouflaged advertisement". E-Commerce law further requires that promotional offers, competitions and games are easily identifiable as such, and that the conditions, which are to be met to qualify or participate, must be presented clearly and unambiguously.

Specific information about the service provider
In addition, the Audiovisual Media Service Directive introduced a new information obligation for providers of broadcasting or on demand services, namely to inform recipients about the name of the media service provider; the geographical address at which the media service provider is established; the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner; where applicable, the competent regulatory or supervisory bodies. This provision resembles a similar provision in the E-Commerce Directive.

Interestingly, in addition to these rules, both Finland and France seem to have further-reaching transparency requirements for editors. According to Finnish Law, a publication, periodical and/or network publication shall contain information on the identity of the publisher/broadcaster, but also on the responsible editor. Also in France, the law requires providers of broadcasting services to make far more extensive information available, namely: the name of the provider, his headquarters' address, the name of his legal agent and of his three major shareholders, the name of the publication's editor and of his managing editor, the list of publications issued, and of the other audio-visual media services provided [e.g. information on media ownership], and, last but not least, the price when the service gives rise to compensation. Editors (of e.g. Websites or newspapers) must inform the public about their family name, first name, address, phone number, eventual registration and number, headquarters, the name of the publication's director and managing editor, the name, address and phone number of the provider who is in charge of the storage of the information, videos, etc. Interesting is also that, to the knowledge of the author, the French law is one of the first to also stipulate (though less stringent) information duties of non-professional editors, such as bloggers, private website owners, publishers of videos on YouTube, etc. Such private editors are "only" obliged to inform the public about their name (may be an artistic name) and the address of the Internet service provider who stores the information. Also, if the seller is a non-professional, the contract will not fall under the Code of consumption, with the consequence that she has to provide less detailed information, mainly information about the concluded contract. Norway requires providers of information society services beyond the rules in the E-Commerce Directive, to inform about the relevant rules of conduct, where these can be obtained electronically, whether an agreement will be filed by the service provider and whether it will be accessible, the technical means of finding and correcting typing errors before orders are made and the languages in which the agreement may be entered into.

Technical protection measures
Whereas it is yet uncertain whether consumers need to be informed under general consumer law about the presence of technical protection measures or Digital Rights Management (see section 2.3.2.1) , two member states, and possibly soon a third one, included such an obligation into their national copyright laws. According to Article 95d (1) of the German Copyright Act, works that are protected by technical protection measures must be accompanied with clearly visible information about the characteristics of the technical protection measure. French law goes further and stipulates in addition that technical protection measures may not affect interoperability or the "free use of the work". "Free use of the work" could also cover the ability of making private copies. As already mentioned,

the law expressly requires service providers to inform consumers about usage restrictions as well as limited interoperability as essential characteristics. In the UK, a proposal from the All Party Parliamentary Internet Groups (APIG) is pending to introduce a law requiring that consumers be warned through labelling as to possible restrictions on their use of digital content.

Specific information about transmission quality: telecommunications law
In the course of the latest amendment of the so called telecom package, an additional set of information obligations has been added that is potentially also of relevance to consumers of digital content. It is worth noting that (European and national) communications law does provide probably for the most elaborate sector-specific pre-contractual information obligations. These provisions, however, address exclusively the relationship between consumers and providers of so called publicly available communications networks and services. This is why they do not immediately affect the relationship between consumers and traders of digital content. Having said that, in order to be able to receive digital content, consumers need to be connected to a transmission network, be it a satellite or mobile network, cable or terrestrial. Part of the latest series of amendments is a rule that obliges providers of communication services to inform subscribers of "any change to conditions limiting access to and/or use of services and applications, where such conditions are permitted under national law in accordance with Community law, and "provide information on any procedures put in place by the provider to measure and shape traffic so as to avoid filling or overfilling a network link, and on how those procedures could impact on service quality." Obviously, any measures that concern network management also affect the ease and speed with which digital content products can be delivered to the consumer.

Privacy
The Data Protection Directive requires that data subjects must be provided with information about the identity of the controller of their personal data, the purposes of the processing of the data and the recipients of the data. This is confirmed by the Spanish, the Dutch and the Polish report. In Poland, consumers also have a right to use Internet services anonymously or under a nickname, unless this would impede with the well functioning of the service.

Furthermore, personal data may only be processed on legitimate grounds. One of the most important grounds is the consent of the data subject. This is defined as any freely given specific and informed indication of one's wish by which the data subject signifies her agreement to personal data relating to her being processed. The informed consent is thus an important factor in the legitimate processing of personal data.

Also relevant to digital consumers is the so-called "Citizens Rights Directive". Part of the European communications framework, it amended articles 5.3, 6.3 and 11.3 of the e-Privacy Directive, regarding cookies, direct marketing and value added content services and the prior information and consent of the consumer. The directive introduced for cookies and spam so called op-in procedure, in contrast to an op-out procedure where the data subject has the right to terminate such conduct only after it started. Since the

implementation date of the Citizens Rights Directive has not yet passed, most country reports except for the Dutch one remain silent on this topic.

2.3.2.3 Information obligations in case of platforms that offer third party services

Views differ strongly in the member states of how to approach the responsibility to inform consumers in case of platforms. Services such as iTunes, Ovi or Amazon offer a platform for, inter alia, third party traders of digital content. Probably the most relevant question in the context of information obligations is whether platform provider is required to inform consumers about the identity, contact details, privacy policies, etc. of the third party content provider. For instance, would online music stores, such as the Apple iTunes Store or the Nokia Ovi Store, be required to inform consumers per each item of digital content which trader is responsible how that party may be contacted? From the perspective of consumers, the situation can be confusing. Consumers may also tend to put a certain measure of confidence in the reputation and alleged trustworthiness of a platform.

Member States appear to handle different approaches to this question. Most legal systems require the provider of the third party trader to provide such information. A number of member states, however, share the responsibility between platform and third party trader. According to the Finnish report, the obligation to inform users about their identity and contact information applies to both, platforms such as the Nokia OVI Store or Apple's iTunes and the individual providers of services or applications. In Hungary, the provider of the platform is merely required to inform the consumer of the possibility that a third party may offer services to the consumer. Polish law goes further, as it requires the operator of the platform to provide the consumer with a possibility to clearly identify the third party providing the digital content. The same holds true for Spain, where the operator of the platform is required to provide the consumer with the relevant information of any party on whose behalf it acts. At the other end of the spectrum, in France it is primarily the platform operator who is responsible that the information requirements are observed with, also by third party service providers.

2.3.2.4 Differentiation according to the intended receiver

In a number of European countries, the scope and intensity of the information obligations can vary, according to who the intended recipient is. In France, the intensity of the information obligations varies according to the level of knowledge of the contracting party and the envisaged field. The obligation is stronger if the contract party is a consumer rather than a professional, a minor rather than a fully capable adult, etc. Interestingly, the French report also indicated that the intensity and duty of care with regard to information obligations is greater "when it comes to informatics because of the high complexity of products and services and the general lack of information of users in that field. Also in Germany, a particular vulnerability that is known to the contracting party may trigger a higher level of pre-contractual (information) duties. In Poland, too, courts seem to take into account special vulnerabilities of consumers when determining the extent and form in which information needs to be provided. And the Italian law even provides for an express provision according to which "the information or performances, directed to minors […], shall not take advantage of their natural credulity or lack of experience and their sense of loyalty."

2.3.2.5 Form and language in which the information is to be provided

Form

France is one of the countries that have invested more extensive thought on the form and clarity in which information should be provided. According to French law, a contract must be clear and understandable and noticeable. It is not understandable if letters are too small. Also, as mentioned earlier, the Tribunal de Grande Instance de Nanterre found in one case that sole reference to the fact that technical anti-copying measures (as the cause of the incompatibilities) are in place is not enough to avoid liability. Consumers cannot be expected to know the exact practical consequences of the application of TPMs, and in particularly the incompatibilities they can cause. In response, it imposed on EMI Music France the obligation to label its CDs – in 2.5 mm characters: "Attention cannot be listened on all players or car radios". Labelling solutions have also been suggested in the UK. At the point of writing, a proposal from the APIG is pending to introduce the obligation to warn consumers by means of a label as to restrictions on their use of digital content.

According to the Italian Consumer Code, information shall be provided in a way 'appropriate to the means of distance communication techniques used, and especially with due regard to the principles of good faith and fairness in commercial transactions, assess in accordance with the standard of the "particularly vulnerable consumer"'. According to Polish law, information should be presented in an "unambiguous, clear and easily comprehensible way".

Specifically for the online context, Spanish law knows a provision saying that providers of electronic communications services must publish the standard contract terms in a place that is easily accessible within the web page of the provider. More generally, the obligation to provide consumer information is fulfilled if that information has been published at the trader's website. Another question is if linking to another page is sufficient to comply with the form requirements. There is some controversial discussion in Germany to this extent, regarding the question of whether or not a link to another webpage satisfies the requirements of Article 312c BGB. In France, where the question had been raised as well, the Court of Appeals of Versailles determined that linking to another website can be an effective way of information consumers provided the link is clearly visible. Hyperlinks seem to be also accepted in Poland.

A specific question regarding form and presentation is how consumers can be effectively informed via devices with only limited screen place. In Spain, for services designed for being accessed through a device with reduce format screens, the obligation to inform is understood to be fulfilled when the Internet address where that information is available is provided in a permanent, easy, direct, and exact way. Similarly, in Finland, in case of mobile purchases pre-contractual information can be given also by means of a web page. Precondition is that the web address is specified during the mobile interaction. French law, to, has acknowledged the special situation of m-commerce. The law foresees the possibility for the legislator to issue a decree concerning the form contractual conditions are transmitted in a way that satisfies the requirements of mobile communication equipment. To this date, no such decree has been issued.

Language
An often underestimated factor for effective consumer information is the language it is provided in. The survey, which was performed in the course of this study, indicated that particularly in smaller countries, or countries with less widely used languages, the fact that information was provided in a foreign language was cited by up to 59 % (Hungary) of consumers as a reason for not understanding the information they were presented with. This finding confirms earlier investigations that highlighted to importance of language obstacles particularly in the context of cross border commerce.

A number of countries determine the language in which (contract) information should be made available to consumers. In France, contracts must be in French. Finnish law requires that information should be written in Finnish in case where the service is specifically directed to Finnish consumers. In Italy, the Italian language must be used upon request from the user. Also Hungarian law requires that information is provided for in Hungarian.

2.3.2.6 Legal consequences in case of a breach of the information obligations

Breach of the information obligations in general consumer law
Breach of information obligations can have several legal consequences. In situations in which the trader does not supply the consumer with the necessary information concerning the contractual terms, or not in a sufficiently clear and understandable way ("plain, intelligible language", according to Article 5 of the Unfair Terms Directive), the respective term, or under certain circumstances the contract as a whole could be considered invalid. For example, in Poland, contractual terms, which the consumer did not have a chance to get herself acquainted with prior to the conclusion of the contract, are to be considered unfair. Some countries, such as Germany and Italy, provide the possibility to file a claim for damages, although, as the German report pointed out, in practice it might be difficult to ascertain the actual damage. As the Finnish and Spanish reports pointed out, failure to properly inform consumers about the terms of a contract can also lead judges to interpret the respective terms in favour of the consumer. Even if a consumer has not entered into a contract yet, she still may invoke extra-contractual liability. In France as well as in Italy, in some cases, judges also have considered that the violation of the obligation of information of the professional renders the contract voidable because such an obligation is one of public policy of protection.

Providing that consumer sales law applies failure to inform consumers about certain essential characteristics that may influence their reasonable expectations can also give rise to a claim of non-conformity. It is worth noting that because traders can easily avoid liability under the rules of non-conformity by pre-emptively informing consumers prior to purchase that a CD cannot be copied, a file not be played, etc., consumer information can be used, in principle, to gradually degrade the general standard of what consumers ought to be able to expect from digital content. A matter for further consideration is to what extent this practice could be considered an unfair commercial practice.

More generally, the omission of information that consumers need to make informed transactional decisions (e.g. about the presence of DRM or limited interoperability), or the provision of false and misleading information can lead to claims under unfair commercial

practice law. The Norwegian and the Dutch reports both indicated that the clarity and non-ambiguity of the information can become a relevant aspect when considering the fairness of a commercial practice or contract. In addition, the Norwegian suggested that confronting consumers with information in excess might eventually be considered an abuse of the duty to inform and qualify for an unfair commercial practice claim, according to Article 22 of the Marketing Control Act. According to this provision, the clarity of information is an important factor in the assessment of the fairness of a commercial practice.

Finally, in case traders fail to inform consumers about the right to withdrawal, the period in which consumers are able to exercise that right is prolonged to three months. In Italy, this is also the case if the trader provides incomplete or wrong information that does not allow the correct exercise of the right of withdrawal.

Breach of the information obligations in sector-specific consumer law
Media law, telecommunications and copyright law usually do not provide for private law remedies in case of breach of the information obligations. Instead, administrative or under certain circumstances even criminal sanctions may be imposed by judges, respectively the responsible regulatory authorities. Under data protection law, if consumers have not been properly informed, the subsequent collection and processing of personal data is unlawful. Next to administrative sanctions, national data protection laws must provide remedies for individual users.

A question that has yet received little attention in scholarly discussion or case law but that might be of considerable practical relevance for the legal position of the digital consumer is whether consumers could invoke private law remedies in case of breach of sector-specific consumer information obligations (in e.g. copyright law or data protection law). A number of country reports pointed to a possible role of unfair commercial practice law. For example, the OLG Munich had regarded the non-indication of technical protection measures as a misleading practice in the sense of the previous version of the German unfair competition law. Accordingly, there are reasons to expect that non-compliance with Article 95d(1) of the German Copyright Act (Urhebergesetz, UrhG), which has been introduced afterwards, would be considered by courts an unfair commercial practice in the terms of the revised Article 4 no. 11 of the Unfair Competition Act (UWG). A few country reports also indicate the availability of general contract law and consumer law remedies in case sector-specific information obligations have been breached.

2.4 Formation of contract

2.4.1 Introduction

The vast majority of contracts concluded in relation to digital content are non-negotiated contracts, presented to the consumer at a distance on a ‘take-it-or-leave-it’ basis. Where the consumer would not accept the contract or the terms thereof, either no contract is concluded at all or the consumer is simply prevented from making use of the service even if the contract has been concluded. Although a vast array of European directives address one

aspect of the formation of contract or another[216], the validity and binding character of non-negotiated contracts concluded in the online and mobile environment are, in some jurisdictions, still unclear. In addition, the disparity and sometimes contradictory requirements of the relevant rules tend to create confusion for the national lawmaker. Uncertainty regarding the formation of electronic and mobile contracts is detrimental to the interests of both the consumer and the trader, for it creates barriers to the deployment and use of digital content. In the following pages, we analyse the several elements that play a role in the formation of an electronic contract, highlighting the areas of remaining uncertainty and identifying where these issues have been addressed successfully. These elements include the transparency and comprehensibility of the contract terms, the availability of the terms, the validity of the standard terms concluded via electronic means, the manifestation of assent on the part of the consumer, as well as the confirmation by the trader of the existence of the contract.

2.4.2 Transparency and comprehensibility of contract terms

Provisions relating to the transparency and comprehensibility of standard terms essentially derive from the provisions on unfair contract terms and distance selling. Three elements contribute to the transparency and comprehensibility of contract terms: 1) the language used to write the terms; 2) the possibility to take notice of the terms before the conclusion of the contract; and 3) where terms are specially onerous or unusual, a high degree of prominence may be required for incorporation.

With respect to the language used to write the terms, the Unfair Contract Terms Directive contains a general requirement according to which terms offered to the consumer in writing must always be drafted in plain, intelligible language.[217] This requirement is completed by a rule stating that where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. The Distance Selling Directive further requires that the information referred to therein, the commercial purpose of which must be made clear, be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used.[218] While these rules have been implemented across the Member States examined in the context of this report, the question arises whether special measures have been adopted in the national legislation to cater for the needs of the digital environment.[219]

Whereas no particular problem arises concerning the transparency and comprehensibility of terms presented on the Internet, transparency and comprehensibility can become an issue when using mobile phones or other small communication devices to conclude a contract, because of their very limited display and storage possibilities. The law of most Member States is silent on this point. In the Netherlands, for example, the regulation regarding transparency and comprehensibility of contract terms in relation to the channel is primarily

[216] Unfair Terms Directive; E-Commerce Directive.
[217] Art. 5 Unfair Terms Directive and Article II. – 9:402 DCFR (Duty of transparency in terms not individually negotiated).
[218] Art. 4 paragraph 2 Distance Selling Directive.
[219] Art. 6(2) Polish Law on protection of some consumer rights, Art. 385(2) Polish c.c., Art. 1337 Italian c.c.

directed to websites.[220] Although the Dutch legislator has not specifically regulated other channels, the legislator has acknowledged the fact that transparency and comprehensibility of contract terms can be at stake when the nature of the channel does not make transmission of contract terms possible. Given this problem, the legislator has determined that if the channel does not allow for the transmission of contractual terms[221], the trader has to inform the consumer before the conclusion of the contract where the terms can be consulted, and on request send the terms by electronic means or in a different way. An example of a different way, according to legislator, is sending a text message to the mobile phone, in which reference is made to the website that lists the terms of the contract.[222]

In Finland, no channel specific provisions directly address transparency and comprehensibility of contract terms. However, the limitations of mobile handsets have been taken into consideration in case of pre-contractual information on distance selling. The Finnish Consumer Protection Act states that the information shall be supplied in a manner suitable of the distance communication used, clearly, comprehensibly and in a manner that makes clear the commercial purpose of the information.[223] In case of mobile purchases the complementary pre-contractual information can be given e.g. on web page provided that the web address is specified during the mobile interaction. Similarly, Spanish law also provides that pre-contractual information must be presented "via techniques appropriate to the means of communications used", inasmuch as while the provider will have designed her services "to be accessed through devices with a small or reduced-size screen, the obligation (…) is understood as being met when the provider facilitates in a way that it easy, direct and accurate the Internet address where the information is made available to the addressee".[224] In France, with respect to mobile commerce, the information duties and the transmission of the contractual conditions are meant to be satisfied on mobile communication terminal equipment following the modalities prescribed by decree[225]. To this date, no decree has been taken.[226]

Concerning the possibility to take notice of the terms, the law of the majority of Member States commonly requires that traders give the other party a reasonable opportunity to take notice of the standard terms before the conclusion of the contract. In addition to this rule, general common law rules in the UK provide that terms are only incorporated into a contract where either (i) they are in a document signed by the consumer, or (ii) where there is no signature, the consumer has had 'reasonable notice' of their existence. In general, in

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[220] *Bijl. H.TK*. 2001/02, 28 197, nr. 3, p.7. Cf. also H. van der Werff, *Mobiel op juridisch golflengte*, Amsterdam: Otto Cramwinkel, 2004, p. 76.

[221] Art. 6:234(2) Dutch c.c. This article has been written for standard terms, not being core terms, and not specifically for information duties about the main characterises of the contract and pre-contractual information. According to the legislator this article can, however, be used in the context of providing information if electronically delivering information is not possible on the basis of Art. 6:227b (2) Dutch c.c..

[222] *Bijl. H.EK*. 2003/04, 28 197, C, p. 12.

[223] Art. 3 Finnish Consumer Protection Act.

[224] Art. 27.1 Spanish Consumer Act and Art. 27.1 LSSICECE.

[225] Art. 28 LCEN.

[226] Assemblée Nationale, 23 janvier 2008, *Rapport d'information déposé en application de l'Art. 86, alinéa 8, du Règlement par la commission des affaires économiques, de l'environnement et du territoire sur la mise en application de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique et présenté par M. Jean Dionis du Séjour et Mme Corinne Erhel.*

neither case does it matter that the terms are transparent as such. So, the 'reasonable notice' rule does not require transparency of the terms; simply an opportunity to be aware of their existence.

With regard to surprising terms, the law of a number of Member States regard such terms as not incorporated into the contract even if the standard terms as such are, unless particular attention was drawn to them before the conclusion of the contract.[227] The surprising character of terms may also derive from their place within the standard terms. Under Hungarian law, for example, the trader must call the other party's attention to the contract term that differs from the general rules and standards. Without warning this contract term will not be part of the contract of the parties. These rules are very clear: should the general terms and conditions not be made available, they will be not part of the contract of the parties. The burden of proof shall lie on the professional party making use of the term: she has to prove that the general terms and conditions were made available to the consumer, as well as that a warning was made to the "surprising rules", all provisions which differs from the rules of the Civil Code or from other laws, were elaborated to the client (consumer) and all those, general contract terms, including surprising rules were accepted. If the enterprise fails to do so, the general contract term and/or the "surprising clause" are, according to Hungarian law, not part of the contract.[228] In Italy, any unfair clause shall necessarily be accepted in writing.[229] Thus, it should be possible for the consumer to become fully aware of the meaning of the clause at the time when she expressly "accepts" the unfair clause, by filling in an appropriate form, pre-arranged on an e-commerce website.

In the UK, where terms are specially onerous or unusual, a high degree of prominence may be required for incorporation (although this principle does not apply to signed documents, where the general rule that signature incorporates the terms still stands). [230] In *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd*,[231] a clause required payment of a very high "fine" where the goods were retained beyond the agreed 14-day period. The Court of Appeal stated;

"If one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party."[232]

It seems likely that the same approach would be taken in click-wrap cases. In other words, while clicking will incorporate the terms in general; it will not be taken to have incorporated any terms found to be particularly onerous or unusual, unless these have been given special prominence.

[227] In Germany, cf. Art. 305c paragraph (1) German c.c.
[228] Report I (Hungary), p. 128.
[229] Art. 1342, paragraph 2 French c.c. and Art. 30 and following French Consumer code.
[230] *Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] QB 433 (Dillon LJ, at 438-439).
[231] [1989] QB 433.
[232] Dillon LJ, [1989] Q B 433, at 438-439. Also see Lord Denning in *Spurling* v. *Bradshaw*, [1956].

2.4.3 Availability of contract terms

Several European directives deal with the trader's obligation to make the contract terms available to the other party prior to the conclusion of the transaction. Some of these actually overlap each other and can lead to contradictory results. The E-Commerce Directive states that contract terms and general conditions provided to the recipient must be made available in a way that allows her to store and reproduce them. Similarly, the DCFR states that terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.[233] Moreover, if a contract is to be concluded by electronic means, the party supplying any terms, which have not been individually negotiated, may invoke them against the other party only if they are made available to the other party in textual form.[234] The Services Directive[235] requires that Member States ensure that the information, which a provider must supply, is made available or communicated in a clear and unambiguous manner, and in good time before conclusion of the contract or, where there is no written contract, before the service is provided. In other words, all terms should be made available to the consumer before the conclusion of the contract. Specific rules exist concerning the distance marketing of financial services[236], according to which "the supplier shall communicate to the consumer all the contractual terms and conditions and the information referred to in Article 3(1) and Article 4 on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer". Moreover, the supplier must fulfil her information obligation immediately after the conclusion of the contract, if the contract has been concluded at the consumer's request using a means of distance communication, which does not enable providing the contractual terms and conditions and the information in conformity with the directive.[237]

The laws of the Member States comply with these requirements, although in some cases, reconciling different requirements proved to be a challenging task for the legislator.[238] The Hungarian E-Commerce Act states providers of information society services must make available to the recipient the general contract terms and conditions concerning the information society service they provide in a way that allows the recipient to store and reproduce them.[239] Similarly, the Polish Civil Code states that in case a standard form agreement has an electronic form it has to be delivered to the other party prior to the conclusion of the contract in a way that it can be stored and easily accessed.[240]

By contrast, the German legislator has extended the requirements of Article 5 (1) of Directive 2002/65/EC on the distance marketing of financial services to all distance

[233] Article II. – 9:103 (1) DCFR (Terms not individually negotiated).
[234] Article II. – 9:103 (2) DCFR (Terms not individually negotiated).
[235] Art. 22 (4) Services Directive.
[236] Art. 5 (1) Distance Marketing of Financial Services Directive.
[237] Art. 5 (2) Distance Marketing of Financial Services Directive.
[238] Art. 12 (3) Italian E-commerce act and Art. 53 Italian Consumer code.
[239] Art. 5 (1)Hungarian E-Commerce Act.
[240] Art. 384 (4) Polish c.c.

contracts. Accordingly, the trader must communicate to the consumer the contract including the standard terms at the latest with the delivery of the goods or services.[241] This must be in text form, which excludes the mere making available on Internet. In contrast, an e-mail satisfies the requirements of the law.[242]

In Italy, the existence on the web of a contractual text, intended for the conclusion of electronic contracts entails the possibility, for the consumer, to reproduce it and save it, so that, where the rule is correctly applied, a document of reference shall still exist, and can be reproduced by the consumer; in relation to which the same constructive procedures provided for the traditional contracts shall apply. The possibility that the document cannot be reproduced would imply the invalidity of the contract for violation of a special rule, resulting in the ineffectiveness of a potentially unfair clause towards the consumer.[243]

In the Netherlands, the consecutive implementation of the different directives has led to a statutory conundrum.[244] The law requires the trader to give the consumer a reasonable opportunity to consult the terms before the conclusion of the contract. A reasonable possibility is given if the seller or trader has made these standard terms and conditions available to the other party before or at the conclusion of the contract. The standard contract terms may be provided in writing, but they may also be provided by electronic means, provided that the other party is enabled to store them and examine or reproduce them afterwards. If this is not reasonably possible, it also suffices to notify the other party before the conclusion of the contract where the standard terms and conditions can be read by electronic means, and that they will be sent to the other party by electronic means or in another way upon first request.[245] Yet, where the contract was not concluded by electronic means, the standard terms may be provided by electronic means only with the other party's explicit agreement.[246]

It is uncertain how these provisions relate to the specific provisions included in the Civil Code as implementation of the Services directive.[247] Information must be provided in due time before the conclusion of the contract if the contract is concluded in writing, or before the performance of the service if no written contract is available. This would imply that the information may also be provided when the contract is being performed, which would mean that the other party would not be able to access the standard terms before the conclusion of the contract. This suggests that it would be much easier for a service provider to perform its duty to provide the standard terms than it is for a seller – who must comply with the ordinary rules of the Civil Code. This, in turn, points to the fact that the classification of the contract as a sales contract or a service contract becomes relevant again

[241] Art. 312c paragraph (1) German c.c. with art. 246(2)(1) no. 1 Einführungsgesetz zum Bürgerlichen Gesetzbuche, in der Fassung der Bekanntmachung vom 21.09.1994 (*BGBl*. I S. 2494, ber. 1997 I S. 1061) zuletzt geändert durch Gesetz vom 24.07.2010 (BGBl. I S. 977) m.w.v. 30.07.2010.
[242] Art. 126b German c.c.
[243] Report I (Italy), p. 174.
[244] Report I (The Netherlands), p. 217.
[245] District Court Utrecht, 2 September 2009, LJN BJ7081, where the court declared the nullity of a standard form contract that was not presented to the other party before or during the conclusion of the transaction.
[246] Art. 6:234 Dutch c.c.
[247] Art. 6:230a-230f Dutch c.c.

through the backdoor. This discrepancy has been raised in Parliament and confirmed by the Minister of Security and Justice, who has announced that the omission will be corrected.[248]

2.4.4 Validity of non-negotiated contracts concluded via electronic means

A contract is concluded, without any further requirement, if the parties intend to enter into a binding legal relationship or bring about some other legal effect; and reach a sufficient agreement. The intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party.[249] Consent is presumed to have been given if two conditions are met: first, the trader has to indicate to the consumer that license terms are applied; and second, the consumer has to be offered a reasonable possibility to examine the terms before or at the time of concluding the transaction. These requirements also apply to electronic contracts. According to the E-Commerce Directive[250], Member States must ensure that their legal system allows contracts to be concluded by electronic means. In particular Member States must ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means. On these grounds, electronic contracts are generally enforceable under Italian, Norwegian and Spanish law.

The main issue is whether the consumer knows that she is concluding a transaction when the non-negotiated contract is presented in the form of a 'click-wrap' or 'browse-wrap' agreement. The term 'click-wrap' is derived from the 'shrink-wrap' licence, which determines that a consumer, by opening the plastic wrapping around a certain product (such as software on a CD) accepts the contract terms related to the purchase of the product. In a 'click-wrap' licence, the terms of the licence are presented to the user electronically, and the user agrees to these terms by clicking on a button or ticking a box labelled 'I agree' or by some other electronic action. For instance, depending how the click-wrap licence is technically set up, the consumer's consent may be required either at the download or at the installation of the software, or sometimes at both stages. The most recent way to present standard terms to the consumer is the 'browse-wrap' licence, where the terms of the agreement are simply accessible via a hyperlink on the website of the trader. Contrary to the 'click-wrap' method, the consumer does not get, by the 'browse-wrap' licence, the possibility to 'agree' to the terms by actively clicking on a button or ticking a box. Instead, the user is presumed to assent to the terms by merely using the website. Paradoxically, the website must be used in order to read the contract, or even become aware of its existence.[251] Whether the presentation of licence terms through click-wrap or browse-wrap

[248] *Bijl. H.EK.* 2010-2011, 31 358, no. G, and 31 859.
[249] Article II. – 4:102 DCFR (How intention is determined).
[250] Art. 9 (1) E-Commerce Directive.
[251] L. Guibault, T. Rieber-Mohn, P.B. Hugenholtz, *Study On The Implementation And Effect In Member States' Laws Of Directive 2001/29/EC On The Harmonisation Of Certain Aspects Of Copyright And Related Rights In The Information Society*, Amsterdam, Institute for Information Law, February 2007, Part I at 140ff.; M. Kretschmer, E. Derclaye et al., *The Relationship between Copyright and Contracts*, Research commissioned by the Strategic Advisory Board for Intellectual Property Policy, London (UK), July 2010, 2010/04, available online at http://www.ipo.gov.uk/ipresearch-relation-201007.pdf (last visited April 28, 2011).

is sufficient to give rise to a legal act is a question that receives varying answers in the different jurisdictions examined.

Acceptance through browse-wrap is not settled in French law. In French law, the conclusion of contracts by electronic means is governed by the Civil Code[252]. Specifically, the provisions regulate the process of contract conclusion: the offeree must have had the opportunity to verify the details of the order and its total price, and to correct any errors, before confirming it to express her acceptance. Moreover, the offeror shall acknowledge receipt without undue delay and by electronic command that has been well addressed. Browse-wrap licenses would pose difficulty under French law both with regards to the timing of the presentation of the terms to the consumer and to the trader's obligation to acknowledge receipt of the order.

In Finland there is no case law considering the validity of click-wrap or browse-wrap contracts. In accordance with general contract principles these contracts are deemed to be valid if the consumer has given her consent (e.g. by clicking on the "accept" button) before concluding the contract. In Germany, contracts including standard contracts can of course be concluded by electronic means. The click-wrap issue merely relates to the incorporation of the standard terms into the contract. In order to include the standard terms, the user of the standard terms must bring them to the attention of the other party and must give the other party a reasonable opportunity to take note of the standard terms. The crucial factor is time: this must take place before the contract is concluded.[253] Thus, if the standard terms are presented after software has been purchased and downloaded, they are not incorporated into the contract.

In the Netherlands, the validity of browse-wrap and click-wrap agreements is assessed according to the main principles of contract law concerning the formation of contract (will/reliance theory).[254] Where the consumer has accepted the applicability of standard terms by assenting to the licence, the contract is considered to be valid. The Court of Appeal of The Hague took most uncertainty away regarding the validity of electronic contracts under Dutch law, in a case opposing Dell Computer B.V. to the consumer group HCC in a collective action procedure on the validity of some of the standard contract terms used by Dell.[255] The validity of click-wrap licenses has been upheld in a few cases, insofar as it could be shown that the consumer had had the opportunity to become aware of and actively acquiesce to the general conditions of use prior to the conclusion of the contract.[256] Judges are more reluctant to accept the validity of browse-wrap licenses. For example, the judge of the District court of Alkmaar decided that although consumers could acquaint themselves with the general conditions via the website and the link "General Info", it could

[252] Art. 1369-4ff. French c.c.
[253] Art. 305 paragraph 2 German c.c.
[254] Cf.P.H. Blok & T.J.M de Weerd, 'Shrink-wrap licenties en click-wrap licenties zijn aanvaardbaar', *Computerrecht* 2004/3 and M.W. Scheltema, T.F.E Tjong Tjin Tai, 'Overeenkomsten sluiten door openen en klikken?', *Computerrecht* 2003/4.
[255] Court of Appeal The Hague, 22 March 2005, *Computerrecht* 2005/43, *Tijdschrift voor Consumentenrecht* 2005/4, p. 150 with case notes by M.Y. Schaub and M.B.M. Loos.
[256] District Court Alkmaar, 10 April 2006, LJN:AZ1613, NJF 2007, 252.

not be said that the conditions were contained behind a clearly identifiable link. The general conditions were therefore not binding on the consumer.[257]

There is a discussion in Polish legal literature on how to regard click-wrap and browse-wrap contracts. Whether it suffices to make the standard contract terms accessible on the Internet site (then click-wrap contract would be validly concluded) or whether the consumer needs to have the standard contract terms delivered to her via electronic means, i.e. via e-mail. Most Polish authors choose for such an interpretation of this article that 'delivery' is necessary, thus click-wrap or browse-wrap contracts would not be validly concluded with consumers[258]. Such contracts would be valid if concluded between professional parties. However, such interpretation leads to a result, which cannot be reconciled with the Polish Civil Code, according to which in case of doubt about the fairness of contractual provisions, such provisions are presumed to be unfair if the consumer had no opportunity to get to know prior to conclusion of contract. This means that under certain reasonable circumstances such terms may be allowed in the contract. But this is not properly reflected in writings of the doctrine.[259]

Although the UK does not have an identical concept of unconscionability as in the United States, UK case law shows that the courts have, in traditional (non-electronic) contracts, held that whilst minimal notice may be sufficient for straightforward or reasonable terms, onerous clauses need more notice. Therefore, in electronic transactions relevant issues will include the prominence of notice that there are terms, prominence of the link to terms, the ease with which they may be accessed as well as the size and form of the writing used . Particularly when one party attempts to insert clauses limiting the other party's access to justice, such as mandatory arbitration clauses, which are very common in shrink-wrap agreements. Therefore simply getting a customer to click to accept terms does not necessarily mean that the terms are incorporated and enforceable.

2.4.5 Manifestation of assent to the terms of a standard form agreement

According to the DCFR, the intention of a party to enter into a binding legal relationship or bring about some other legal effect is to be determined from the party's statements or conduct as they were reasonably understood by the other party.[260] Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.[261] In other words, standard terms may become binding on the consumer not only through express consent, but also through implicit manifestation of assent, e.g. by taking the service in use. This general

[257] District Court Alkmaar 2 May 2007, *LJN* BB2428, *NJF* 2007, 380; cf. A.M. van Hekesen, 'Contracteren op basis van de Wet elektronische handel', *Ondernemingsrecht* 2002-9, p. 258.
[258] T. Szczurowski, *Udostepnienie wzorca umowy w postaci elektronicznej*, PPH 2005/07/36.
[259] Cf. Office of Competition and Consumer Protection, Guide to unfair commercial practices, p. 7 (in Polish, available online at http://www.uokik.gov.pl/download.php?plik=2152 (last visited: April 28, 2011); M. Jagielska, Nowelizacja Kodeksu cywilnego: kontrola umów i wzorców umownych, available online athttp://www.monitorprawniczy.pl/index.php?mod=m_artykuly&cid=20&id=1696 (last visited April 28, 2011).
[260] Article II. – 4 :102 DCFR (How intention is determined).
[261] Article II – 4 :204 DCFR (Acceptance).

rule exists in all Member States.[262] Some uncertainty arises in certain jurisdictions, however, with respect to the acceptance of standard terms presented in the form of a browse-wrap licence, where the continued use of the website is presumed to constitute acceptance on the part of the consumer.

In Germany, consent is required for the incorporation of standard terms[263], but it can be implied from the consumer's actions, such as using a webpage after having been directed to the existence of standard terms (always provided that there was a reasonable opportunity to take notice of them). In Hungary, all acts, involved in a click-wrap or a browse-wrap can basically constitute an acceptance and can be deemed as acceptance of the contract terms offered by the provider, unless the consent is affected by mistake, error or coercion.

In Italy, the conclusion of an electronic contract is treated in the same way as the conclusion of standard terms[264]. This provision deals with the conclusion of contracts through forms. The Italian Supreme court ruled that even though there was no written form to be filled in, the reproduction of an electronic document or "file" prepared by the trader and intended to be used for an undefined number of relationships, constitutes a "standard form".[265] In order to solve the problem of acceptance of unfair or surprising clauses, it has been suggested to confer the consumer a username and password, subject to registration of her personal data. Such possibility, however, seems to fall short of the Italian provisions on digital signatures.[266] Whether therefore, an online contract in the form of a click-wrap licence containing an unfair or surprising term is valid, is open to discussion. In light of the Italian case law, it is appears doubtful whether acceptance by mere use or one timing click would be considered as sufficient to meet the requirements imposed by the law, and more specifically the written acceptance requirement referred to in Article 1341 Civil code.[267]

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[262] Cf. Report I (Finland), p. 13; Report I (Germany), p. 93; Report I (Hungary), p.130 (the acknowledgment of receipt must be sent within 48 hours of the placement of the order); Report I (Netherlands), p. 220; Report I (Spain), p.324 ; Report I (United Kingdom), p. 364.

[263] Art. 305 (2) German c.c.

[264] Art. 1342 Italian c.c.

[265] Italian Supreme Court, 22 March 2006, n. 6314 (in Contratti, 2006, p. 445, commented by Minassi).

[266] D lgs. 7 March 2005, n. 82, Art. 21 para. 1 and 2, according to which: "1. Electronic documents, which shall contain an electronic signature, in terms of evidence is freely assessable in court, in view of its objective characteristics of quality, safety, integrity and immutability. 2. The electronic documents signed with digital signature or another type of electronic signature, has the effect provided for in Article 2702 of the c.c. The use of the signature device is assumed to originate from the holder, unless she can prove otherwise.", available online at http://www.lavoro.gov.it/NR/rdonlyres/7A2A2754-B284-4D7D-9888-E1A69295F0EB/0/20050307_DLGS_82.pdf (last visited April 28, 2011).

[267] Justice of the Peace Partanna, 1rst February 2002, in Contratti (I), 2002, 10, p. 869 ss., commented by G. CASSANO – I. P. CIMINO, On-line contract and protection of the weak party: the conclusion of an on-line sales contract does not imply an unreserved acceptance of the clauses contained in the general conditions published on the web, as the d.P.R. n. 513 of 1997, although recognising the quality of private deed to the electronic document, does not constitute any exception to the regulation on unfair terms referred to in Art. 1341, paragraph 2 French c.c.

In France, while standard form contracts are generally formed by the meeting of an offer and acceptance,[268] the rules introduced in the Civil Code as a result of the implementation of the E-Commerce Directive set out distinct rules for the conclusion of electronic contracts concluded with consumers. The French Electronic Commerce Act introduced a system, unique in Europe, of 'double click' acceptance: a first click to pass the order, the second click, to confirm the order and express the consumer's acceptance ("I have read and accept the terms of the contract"). The trader must thereafter acknowledge receipt of the order and acceptance. This double-click system is required for all electronic contracts, whether entered into for free or at cost. Only contracts concluded by means of direct email exchange between the trader and the consumer are exempted from this formality. Consequently, acceptance of standard terms would seem to occur under French law only if expressly manifested, which raises doubt as to the validity of browse-wrap licenses.

In the Netherlands, an express manifestation of assent to standard terms is not required for a binding contract to be concluded or for the applicability of the standard terms. With regard to the latter, it suffices that the consumer knew or ought to know that the other party made use of standard terms and did not oppose their application.[269] Whether or not the consumer had read the standard terms prior to the conclusion of the contract, is irrelevant.[270] The validity of the acceptance of the general conditions by the other party must be assessed on the basis of the provisions on offer and acceptance and the formation of contracts in general. The party must have accepted the terms and conditions as a whole – the set of contract terms rather than the individual terms – for these to be incorporated into the contract.[271]

In Norway, the terms of a standard form agreement are binding on the consumer provided that the trader has reasonable grounds to believe that the consumer has accepted the standard terms and conditions. Whether the standard form agreement is binding on the consumer must be assessed on a case-by-case basis. There is no general rule stating that an express manifestation of assent to these terms is necessary. In principle non-negotiated contracts may also be held to be binding upon the consumer following an implicit manifestation. In case the consumer is aware of the non-negotiated terms prior to conclusion of the contract, or the seller has taken reasonable steps to draw the consumer's attention to them, the standard form agreement will normally be considered as accepted and binding on the consumer.

The Polish Law on protection of some consumer rights and liability for damage caused by dangerous products regulating the distance selling determines that prior consent of the consumer is needed to make her an offer via electronic means.[272] The Law on Provision of Services through Electronic Means states that, in case the law requires the consent of the

[268] Lionel Thoumyre, 'L'échange des consentements dans le commerce électronique', *Lex Electronica, vol. 5, n°1, printemps 1999.* Ordonnance n° 2005-674 du 16 juin 2005 relative à l'accomplissement de certaines formalités contractuelles par voie électronique, J.O du 17 juin 2005, NOR: JUSX0500112R.
[269] Dutch Supreme Court, 21 September 2007, *NJ* 2007, 565 (Kwekerij De Engel/Enthoven Electra).
[270] Art. 6:232 Dutch c.c.
[271] Valk, *Tekst&Commentaar Vermogensrecht*, comment on Burgerlijk Wetboek Boek 6, Art. 232.
[272] Polish Law on protection of some consumer rights and liability for damage caused by dangerous products regulating the distance selling, Art. 6 Section 3.

consumer, that consent may not be implied from any other statement of the consumer.[273] It is for the trader to prove that this consent has been given. Consent has to be clearly given and pertains only to the activities specified by the trader (i.e. for which she asked to receive consent). Moreover, there is a possibility to withdraw consent previously given.[274]

In Spain, contracts concluded via electronic means are valid and legally binding whenever a correct formation of contractual will has existed, according to the terms listed in the following section. In any event, acceptance must fall to the "object and cause [consideration] that constitute the contract".[275] Regarding express or tacit acceptance of a contract, confusion exists surrounding the nature of contractual acceptance via use of electronic means, especially those formalized through browsing, to the extent that some scholars have claimed that browsing constitutes a tacit acceptance of a contract. It is paradoxical to note that one of the common acts from which an implicit declaration of assent can be inferred in other contexts (the execution of acts on the part of the user implying the performance of the provisions of the contract), ceases to be a mere trace or indication of possible consent, to become a pre-established form of acceptance. From a Spanish perspective, the way that the links to the standard terms tend to be written ("terms of use", "conditions of use", etc.) in the cases of click-wrap and browse-wrap does not support the existence of an offer open to acceptance, but rather a unilaterally imposed and non-negotiable set of terms. In contracts that are configured this way, the use of the service need not be evaluated in Spanish law as an alternative means of tacit consent or *facta concludentia*. Such usage does not constitute implied will or *indicio voluntatis*, but an express declaration of consent. As the doctrine indicates, this occurs "when the deponent communicates to the recipient her declaration with the suitable signs in order to communicate her thoughts"[276]. These signs do not need to be verbal, and sometimes non-verbal behaviour may amount to a declaration of consent as well.

Under UK law acceptance of the terms of a contract may be made by express intimation, or implicitly by conduct.[277] Therefore, a consumer may be taken to have accepted the terms of an offer by using the service etc. In Scotland, Lord Penrose, of the Scottish Outer House of the Court of Session, examined the validity of a "shrink-wrap" agreement in the case *Beta Computers (Europe) Ltd v. Adobe Systems (Europe) Ltd*.[278] Defendant, Adobe Systems, placed a telephone order with Beta Computers for the supply of Informix software. The software was delivered subject to a shrink-wrap agreement. Adobe never opened the packaging and decided to return the software after delivery without payment. Beta refused to take back the software and sued for the price. Lord Penrose rejected Beta's claim holding

[273] Art. 4 Law on Provision of Services through Electronic Means.
[274] J. Gołaczyński, *Komentarz do art.4 ustawy z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną (Dz.U.02.144.1204)*, [w:] J. Gołaczyński, K. Kowalik-Bańczyk, A. Majchrowska, M. Świerczyński, Ustawa o świadczeniu usług drogą elektroniczną. Komentarz, Oficyna, 2009.
[275] Art. 1262 Spanish c.c.
[276] Díez-Picazo, L., *Fundamentos de Derecho Civil*, vol. I, Thomson-Civitas, Cizur Menor, 2007, p. 175.
[277] Report I (United Kingdom), p. 365; *Brogden v. Metropolitan Railway*, (1877) 2 Ap. Cass. 666.
[278] 1996 SLT 604; 1996 SCLR 587 ; cf., Robertson S J A, 'The Validity of Shrink-Wrap Licences in Scots Law Beta Computers (Europe) Ltd v. Adobe Systems (Europe) Ltd', Case Note, 1998 (2) *The Journal of Information, Law and Technology (JILT)*, available online at http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_2/robertson (last visited April 28, 2011) .

that there was no agreement between the parties as the software had not been opened, thus the terms of the licence could not be enforced, and the goods could be returned. Since this case is based on a concept alien to English law, that of *jus quaesitum tertio*, where two parties can confer an enforceable right upon a third party who is not a party to the contract, it only has precedence in Scotland. Should this or a similar issue arise in England and Wales, *Beta v. Adobe* may hold some persuasive authority, however.

The issue may be different if a party has clicked a button signifying acceptance of terms and conditions, or continued to browse a website after reasonable notification of the terms; "click-wrap" or "browse-wrap" agreements. There is, as yet, no definitive case law from the UK on this. There is consensus that the growing body of US case law may well be followed in the UK, at least for click-wrap agreements. This shows that clicking or continuing to browse/shop after reasonable notice will amount to an acceptance.[279] That is, if the customer has had the opportunity to view the terms, irrespective of whether this opportunity was taken up.

2.4.6 Confirmation of existence of the contract

As mentioned above in section 2.4.3, the Distance Selling Directive puts a general obligation on the user of standard terms to confirm specific information on a durable medium in good time during the performance of the contract, and at the latest at the time of performance.[280] The Directive allows for the exemption that the supplier does not have to provide confirmation for services, which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which she may address any complaints.[281] The E-Commerce Directive completes this provision by requiring that in cases where the recipient of the service places her order through technological means, the trader has to acknowledge the receipt of the recipient's order without undue delay and by electronic means. Both provisions have been implemented at national level,[282] including in the UK where the obligation of the trader, flowing from the Distance Selling Directive, to provide specific information regarding the contract has been implemented virtually word-for-word in the Consumer Protection (Distance Selling) Regulations.[283] In addition, the trader's obligation to acknowledge

[279] Cf., Hotmail Corp. v. Van Money Pie Inc 1998 US Dist LEXIS 10729 (D N Ca., 16 April 1998).
[280] This information includes: written information on the conditions and procedures for exercising the right of withdrawal, within the meaning of Art. 6, including the cases referred to in the first indent of Art. 6 (3); the geographical address of the place of business of the supplier to which the consumer may address any complaints; information on after-sales services and guarantees which exist; the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.
[281] Cf. Schulte-Nölke/Börger 2010, p. 501ff.
[282] Report I (Finland), p.14; Report I (Germany), p. 93; Report I (Hungary), p.130 (the acknowledgment of receipt must be sent within 48 hours of the placement of the order); Report I (Netherlands), p. 220; Report I (Spain), p. 324 (confirmation must be sent, in the period of twenty-four hours following receipt of acceptance).
[283] Consumer Protection (Distance Selling) Regulations 2000, 2000 No. 2334 as modified by the Consumer Protection (Distance Selling)(Amendment) Regulations 2005, 2005 No. 689, available online at http://www.legislation.gov.uk/uksi/2005/689/contents/made (last visited April 28, 2011).

receipt to the consumer having placed an order through technological means has been implemented in Article 11 of Electronic Commerce (EC Directive) Regulations 2002.[284].

In France, in addition to the 'double click' system through which the consumer must confirm the existence and her acceptance of the contract, the law requires that "[t]he author of the offer shall acknowledge without undue delay and by electronic means the receipt of the order which has been addressed to her in this way".[285] Further obligations relating to the confirmation of the supply of pre-contractual information to the consumer are contained in the French Consumer code. Accordingly the consumer must receive in writing or on some other durable medium available to him, in good time and upon delivery at the latest, confirmation of the information required by law[286], unless the professional fulfilled that obligation before the contract was concluded. With respect to financial services, the consumer must receive in good time, and before any commitment is made, the contractual conditions and the information referred to in the code, in writing or on any durable medium available to him.[287] The concept of durable medium is not defined in the code and can potentially be anything. It shall be up to the courts to determine when a medium is deemed durable in light of technological evolution[288].

The French Electronic Commerce Act inserted into the consumer code an interesting provision which doesn't concern *per se* confirmation of information but rather conservation of information and is worth mentioning: the Consumer Code now provides that "[w]hen a contract is entered into via electronic means and involves a sum equal to or greater than an amount determined by decree, the supplier shall retain the document which embodies it for a period determined by that same decree and shall provide access thereto to the other contracting party whenever the latter so requests."[289] Such a decree has been taken[290]. The sum mentioned in the Consumer Code is at the moment of EUR 120[291]. The period of conservation is of ten years as from the conclusion of the contract when the delivery of goods or rendering of service is immediate[292].

In Italy, on the basis of the consumer protection regulation[293], the consumer has the right to receive written confirmation of the contractual terms in case of distance contracts, or on another durable means accessible to him, of all the information required by the regulation, among which is included the clearness about the essential characteristics of the service and the costs for the use of the distance communication technique, where it is considered on a different basis than the normal cost. The Justice of the Peace of Bari considered that a

[284]Electronic Commerce (EC Directive) Regulations 2002, 2002 No. 2013, available online at http://www.legislation.gov.uk/uksi/2002/2013/regulation/11/made (last visited April 28, 2011).
[285] Art. 1369-5 French c.c.
[286] Cf. Art. L. 121-19, 1 French Consumer code referring to the information required by Art. L. 111-1, L. 113-3, L. 121-18, 1 to 4 and L. 214-1 Consumer code. Cf. Report I (France), p. 52.
[287] Art. L. 121-20-10 and L. 121-20-11 French Consumer code.
[288] *Lamy Droit Pénal des Affaires* (2010) n°2539.
[289] Art. L. 134-2 French Consumer Code.
[290] Decree n° 2005-137 of 16 February 2005, *JORF* n°41 of 18 February 2005, p. 2780.
[291] Ibid., art. 1 of the decree.
[292] Ibid., art. 2 of the decree.
[293] Art. 53 Italian Consumer code. (d.lgs. 6 September 2005, n. 206).

trader has the duty to provide the evidence that it has clarified all these details to the consumer at the time of conclusion of the contract.[294] In the case of contracts concluded following an offer made via the television, the information about the right of withdrawal shall be provided in written form and no later than at the time of delivery of the goods. The law confirms the accessory duty to communicate the reception of the order, whose failure does not jeopardize the conclusion of the contract.[295] The duty to send the receipt has no remedy, not even the administrative penalty, which has led to doubt its real binding nature.[296]

2.5 Right of withdrawal

2.5.1 Introduction

In this section, we analyse to what extent a right of withdrawal could be upheld for digital content. There are some recurrent questions, which apply to all rights of withdrawal. It should be noted, however, that digital content is purchased in particular through distance contracts. Therefore, considerations pertaining to distance selling will be given particular attention and shall serve as the backbone for the analysis.

The common idea for a right of withdrawal is to obtain time to rethink the conclusion of the contract or obtain additional information.[297] When such a right is awarded to the consumer, she may go back on her decision to conclude a contract, sometimes even if that contract has already been performed by the parties. The counterpart to the contract, typically a trader (i.e. a professional seller or service provider), is not given such possibility.[298] When the consumer does exercise her right of withdrawal, all contractual obligations are extinguished.[299] Typically, the consumer need not give any reason for her withdrawal. In particular, she need not show non-performance on the part of the trader. The exercise of the right of withdrawal is often enclosed in a determined period of time (the cooling-off period). The right of withdrawal is usually meant to protect a party who, in a particular context or a particular type of contract is thought to require protection. Finally, it is often of a mandatory nature, inasmuch as parties may not agree to amend the rules on the right of withdrawal to the disadvantage of the party, which it benefits.[300]

At European level, over the last decade, rights of withdrawal have mushroomed in the field of consumer law. Currently, a right of withdrawal in favour of the consumer is foreseen in the Directives on Doorstep Selling,[301] Life Assurance,[302] Timeshare,[303] Distance Selling,[304]

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[294] Cf. Report I (Italy), p. 175 citing Justice of the Peace of Bari, 5 May 2009, n. 3488, Giurisprudenzabarese.it 2009.
[295] Art. 13 paragraph (2) Italian Consumer code (d.lgs. 70/2003).
[296] Report I (Italy), p. 175.
[297] Von Bar et al. 2009a, p. 354.
[298] Cf. M.B.M. Loos, 'Rights of withdrawal', in: G. Howells, R. Schulze (eds.), *Modernising and Harmonising Consumer Contract law*, Munich: Sellier :European law publishers, 2009, p. 241.
[299] Cf. ECJ 22 April 1999, case C-423/97, *ECR* 1999, p. I-2195 (Travel Vac SL/Anselm Sanchís), n^{os}. 57-58.
[300] Cf. Von Bar et al. 2009a, p. 346-347.
[301] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, *OJ* 1985, L 372/31 (hereinafter:'Doorstep Selling Directive').

Distance Marketing of Financial Services,[305] and Consumer Credit.[306] It should be noted, however, that these directives use different terms to indicate the right of withdrawal.[307]

The Draft Common Frame of Reference contains a general regulation of the right of withdrawal in its Book II, Chapter 5. It should be noted that under the DCFR, the right of withdrawal is regulated in general contract law due to the (potentially) overarching nature of rights of withdrawal.[308]

Finally, the proposal for a Consumer Rights Directive[309] contains a uniform regulation of the right of withdrawal for distance contracts and doorstep selling contracts, which with regard to the right of withdrawal, shall merge and replace the current Distance Selling and Doorstep Selling Directives.

2.5.2 Justifications for the award of a right of withdrawal

The general idea behind the right of withdrawal in existing Directives is that the consumer is placed in a specific situation of contract formation, which requires her to benefit from the protection offered, by the right of withdrawal.[310] In doorstep selling, for example, it is thought to be necessary to protect consumers from aggressive commercial practices.[311]In life assurance, it is linked to the complexity of the contract.[312] In timeshare, it is both.[313]

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[302] Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, *OJ* 1990, L 330/50 (hereinafter: Second Life Assurance Directive).

[303] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, *OJ* 2009, L 33/10 (hereinafter: Timeshare Directive).

[304] Distance Selling Directive.

[305] Distance Marketing Of Financial Services Directive.

[306] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *OJ* 2008, L 133/66 (hereinafter 'Consumer Credit Directive').

[307] The directives speaks of the right to 'renounce' the effects of the contract (Art. 5 (1) Doorstep Selling Directive), of the right to 'cancel' the contract (Art. 15 (1) Second Life Assurance Directive) or of the right 'to withdraw' from the contract (Art. 6 (1) Timeshare Directive, Art. 6 (1) Distance Selling Directive, Art. 14 Consumer Credit Directive, and Art. 6 (1) Distance Marketing of Financial Services Directive). In German, the directives use terms such as 'zurücktreten' and 'widerrufen'; in French, terms such as 'le droit de renoncer', 'le droit de résilier' and 'le droit de rétraction' are used. The diverging terms do not imply a difference in meaning, but are rather the expression of a lack of a unitary *system* of European contract law, cf. J. Büßer, *Das Widerrufsrechts des Verbrauchers. Das verbraucherschützende Vertragslösungsrecht im europäischen Vertragsrechts*, Frankfurt am Main/Berlin/Bern/Bruxelles/New York/Oxford/Wien: Peter Lang, 2001, p. 123.

[308] Cf. Von Bar 2009a, p. 345.

[309] Proposal for a Consumer Rights Directive of 8 October 2008.

[310] Von Bar et al. 2009a, p. 346.

[311] Recital 3 and 4 of the Preamble to the Doorstep Selling Directive.

[312] Von Bar et al. 2009a, p. 347.

[313] Von Bar et al. 2009a, p. 347, and recitals 7 and 11 of the Preamble of the Timeshare Directive. Cf. on the functions the right of withdrawal is to fulfill extensively M.B.M. Loos, 'The case for a uniformed and efficient right of withdrawal from consumer contracts in European Contract Law', *Zeitschrift für Europäisches Privatrecht* 2007, p. 9-11; Loos 2009, p. 246-251.

In the case of distance selling, one of the driving forces behind the promotion of distance selling is the desire to remove barriers to cross border trade.[314] It is thought that there are some factors, which may discourage the consumer from purchasing at a distance, which a right of withdrawal may help to overcome. In distance selling, the consumer is not physically present at the trader's business premise and parties may not see each other face-to-face at the moment of conclusion of the contract. This means that consumers are not in direct contact with the trader and cannot discuss the transaction face-to-face. This would impede the possibility for the consumer to make an informed decision. The consumer should thus be allowed to cool-off (hence the 'cooling-off period') and/or to obtain additional information.

Furthermore, for goods, it is argued the consumer may not inspect and test the good as she could in store.[315] For this reason, it is though that the consumer should have the possibility to return the good purchased at a distance after having handled it for inspection and testing. This is one of the reasons, which arguably justifies that the cooling-off period for goods in the Distance Selling Directive begins on delivery of the goods.

For services under the Distance Selling Directive, the cooling-off period starts already at the moment when the contract is concluded.[316] Moreover, as the consumer may no longer withdraw from the contract if she has given her consent for the performance of the service prior to the end of the cooling-off period, in the case of services an ex post quality assessment is not possible.[317] For financial services concluded at a distance, the consumer may not withdraw from contracts whose performance has been fully completed by both parties at the consumer's express request before the consumer exercises her right of withdrawal.[318] If performance has not yet been completed, the consumer may withdraw but can be required to pay an amount which shall not exceed an amount in proportion to the extent of the service already provided in comparison with the full coverage of the contract.[319]

These justifications have been criticized.[320] Firstly, one might wonder why a differential regime as to testing exists under the Distance Selling Directive between goods and services, as no assessment of quality after performance has begun is possible for services, but seen as essential in the case of goods. One proposed argument could be that services cannot be tested in store either, whereas goods can. However, one could imagine services, which could be tested in store, e.g. by giving a demonstration. Conversely there are goods, which cannot be tested, even in a store, given their volatile nature. The argument that services are not returnable would not hold either, seeing that restitution of services is possible, and has

[314] Recitals 3 and 4 of the preamble to the Distance Selling Directive, Recitals 3 and 4 of the preamble to the Distance Marketing of Financial Services, and Recitals 6 and 7 of the Consumer Credit Directive.Cf. Loos 2009, p.248.
[315] H. Eidenmueller, 'Why Withdrawal Rights?', *European Review of Contract Law* 2011/1, p. 7-8.
[316] Art. 6 (1) Distance Selling Directive.
[317] Art. 6 (3) first incident Distance Selling Directive.
[318] Art. 6 (2)(c) Distance Marketing of Financial Services Directive.
[319] Art. 7 (1) first incident Distance Marketing of Financial Services Directive.
[320] Cf. Loos 2007, p. 9-11; Loos 2009, p. 248-250.

even been foreseen in case of partial performance of financial services.[321] Also, the right of withdrawal with regard to goods has led to some difficulties. A particular case is when consumers do more than simply inspect and test the good they have purchased but use it during the withdrawal period. Under current case-law from the European Court of Justice, compensation for the use of a good purchased at a distance, then returned in consequence of the exercise of the right, may however not be required by the trader.[322] This may lead to abuses (think for example of a gamer who orders graphical cards at a distance, installs them in her computer, plays a game with them in a matter of hours and then returns the cards).

Under Article II.–5:105 DCFR (Effects of withdrawal), the withdrawing consumer is not liable for any diminution in value of anything received under the contract caused by inspection or testing, but is liable for any diminution of value caused by normal use.[323] This is also the direction taken by Article 17(2) of the proposal for a Consumer Rights Directive and the texts suggested by the Council of the European Union and the responsible Committees of the European Parliament. The line between testing and using shall, however, be hard to determine.[324]

More fundamentally, one may wonder whether a right of withdrawal can fully justify the right to test, in a day and age where distance selling is seen more like (just) another distribution channel.[325] The non-testing of the good may simply be inherent to the process of a distance purchase and may fall within the reasonable expectations of the consumer. The same could be said for the lack of face-to-face advice. With regard to services, it has been argued that the face-to-face context in many cases does not enable for a more enlightened decision than through distance purchases and that most of the decisive information for entering a service contract can just as well be transmitted at a distance.[326] In this sense, one might wonder whether a differential regime for distance selling of services is really justified. Another argument, which has been put forth, is that the introduction or maintenance of a right of withdrawal would enable the consumer not to engage in difficulties as to whether or not the goods delivered or the services rendered are in conformity with the contract. That argument could however also apply to contracts concluded in a regular shop, which does not justify a differential regime between distance and other purchases.[327]

As regards distance selling of financial services, it has been argued that the information asymmetry does not result so much from the means of communication but rather from the often complex nature of the financial services. Here, the right of withdrawal could be justified because of the complexity of the object of the transaction and not so much the means by which it is acquired.[328]

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[321] Cf. Art. 7 (1) first incident Distance Marketing of Financial Services Directive.
[322] ECJ 3 September 2009, case C-489/07, *ECR* 2009, p. I-07315 (Messner).
[323] Cf. Article II.–5:105(4) and (5) DCFR (Effects of withdrawal).
[324] Cf. also M.B.M. Loos, 'De gebruiksvergoeding bij de ontbonden koop op afstand: het onderscheid tussen "gebruiken" en "uitproberen"', *Nederlands Tijdschrift voor Europees Recht* 2010-1, p. 27-31.
[325] Loos 2009, p. 250.
[326] Von Bar et al. 2009a, p. 389.
[327] Loos 2009, p. 250.
[328] Loos 2009, p. 251.

It seems uncertain that elimination of barriers to cross border trade will be better achieved through the introduction or maintenance of a right of withdrawal in distance selling; as such a right does not take away barriers such as diverging tax rates and different languages.[329]

Arguably, the maintenance of a cooling-off could be justified especially in the online context, but for different reasons than the ones put forth above. Firstly, the Internet has greatly accelerated the contractual process. Contracts can be concluded almost anywhere and rather hastily. This may justify the need for a time of reflection. Also, the readability of websites is not always optimal, and the consumer may not be fully aware of the new technological ways to manifest one's consent inasmuch as she may have entered a contract without knowing it. This could be dealt with through information obligations or formation of contract,[330] but a right of withdrawal offers a quick and easy way to back out of the contractual relationship. Also, consumers may be faced online with a substantial amount of unfair commercial practices.[331] In some national systems, the consumer may not be allowed to directly invoke in court the provisions relating to unfair commercial practices.[332] A right of withdrawal would offer the possibility to back out of the contract, for example, without having to prove consent was flawed.

2.5.3 Cooling-off periods in existing EU law, the DCFR and the proposal for a Consumer Rights Directive

2.5.3.1 The duration of the cooling-off period

Withdrawal periods in Community law range from seven days to fifteen, and in some specific cases may reach thirty days.[333] The lack of a common withdrawal period may lead to legal uncertainty and may be confusing for all economic actors, consumers and business alike.[334] However, recently more uniformity is developing. Both Article II-5:103 DCFR (Withdrawal period) and Article 12 of the proposal for a Consumer Rights Directive make use of a withdrawal period of 14 days. The same length of the cooling-off period has recently been introduced in Article 14 of the 2008 Consumer Credit Directive and Article 6(3) of the 2008 Timeshare Directive, and had already been introduced in Article 6(1) of the 2002 Distance Marketing of Financial Services Directive. It therefore seems that the period during which the consumer may withdraw from the contract is converging.

This is not yet the case in so far as the cooling-off period is extended due to a breach by the trader of the information obligations. In the next section it will be explained that in the case of doorstep selling, a timeshare contract, a consumer credit contract and a distance contract

[329] Loos 2009, p. 249.
[330] Von Bar et al. 2009a, p. 389.
[331] R. Tigner, 'Online Astroturfing and the European Union's Unfair Commercial Practices Directive', Unité de Droit Economique, ULB (2010), available online at http://www.droit-eco-ulb.be/fileadmin/fichiers/Ronan_Tigner_-_Online_astroturfing.pdf (last visited April 28, 2011).
[332] Chr. Twigg-Flesner *et al*., *An analysis of the application and scope of the Unfair Commercial Practices Directive*, A report for the Department of Trade And Industry, 18 May 2005, available online at http://www.bis.gov.uk/files/file32095.pdf (last visited April 28, 2011).
[333] Art. 35 Second Life Assurance Directive.
[334] Loos 2009, p. 246.

pertaining to financial services the cooling-off period only starts when the information is provided. This would seem to imply that the extension of the cooling-off period would be indefinite if the information is not provided at a later stage. However, the 2008 Timeshare Directive nevertheless indicates that even if the information is never provided, the cooling-off period ends when a year and 14 calendar days have passed. With regard to doorstep selling contracts the European Court of Justice has determined that national law may provide that the cooling-off period does end when a month has passed after both parties have fully performed their obligations under the contract.[335] It may be argued that the same would apply for financial services contracts which were concluded at a distance and consumer credit contracts, as neither the Doorstep Selling Directive nor the Distance Marketing of Financial Services Directive or the Consumer Credit Directive contains any specific rules on this matter, and there does not seem to be a convincing reason why the ECJ would allow a national law extinguishing the right of withdrawal in the case of doorstep selling but not in the case of distance marketing of financial services or consumer credit contracts.

The situation is quite different with regard to distance selling contracts. Under the Distance Selling Directive, the cooling-off period does start to run, but the cooling-off period itself is extended with three months if the information is not provided.[336] If however, during this three month period, the information is supplied, the 'normal' cooling-off period of seven working days commences.

The latter approach is taken over in Article 13 of the proposal for a Consumer Rights Directive and applied for doorstep selling contracts and distance contracts alike and even further restricted by indicating that the extension only applies if the consumer is not informed of her right of withdrawal. In the text suggested by the Council, the cooling-off period is extended with six months, whereas the extension is even one year in the text suggested by the European Parliament's plenary endorsement of the IMCO committee's opinion of 24 March 2011. The latter approach is also taken in Article II.–5:103(2)(b) DCFR (Withdrawal period). Unlike the other texts, the text suggested by the Council also extends the cooling-off period if some other important information than that on the right of withdrawal is not provided – such as information about the main characteristics of the goods or services and the price. Each of these provisions indicate that when the information is provided within the extended cooling-off period, the 'normal' cooling-off period of fourteen calendar days starts to run.

2.5.3.2 Starting point for and end of the cooling-off period

Whereas the duration of the cooling-off period is converging, this is not the case for its starting or ending point. In the Doorstep Selling Directive, the cooling-off period starts when the contract is concluded and the consumer has received written notice from the trader of her right of withdrawal.[337] Therefore, as the ECJ confirmed in the *Heininger*-case, the cooling-off period does not start before the consumer is informed of her right of

[335] Cf. ECJ 10 April 2008, case C-412/06, *ECR* 2008, p. I-02383 (Hamilton/Volksbank Filder).
[336] Cf. Art. 6 (1) second incident, Distance Selling Directive.
[337] Cf. Art. 5 (1) and Art. 4 of the Doorstep Selling Directive.

withdrawal.[338] Failure to inform the consumer of her right of withdrawal thus implies that the cooling-off period never starts to run and therefore does not end. As a consequence, the consumer may withdraw from the contract, if need be, even years after the contract was concluded.[339] National law may, however, provide that the cooling-off period does end when a month has passed after both parties have fully performed their obligations under the contract.[340] Similarly, in the case of a distance contract pertaining to financial services and in the case of a consumer credit contract, the cooling-off period only starts when the contract is concluded and the trader has fulfilled her information duties.[341] Again, if the information has not been provided, the cooling-off period does not start to run. The same is true under the 2008 Timeshare Directive.[342]

The situation is very different with regard to distance selling. Here, the breach of information obligations does not impede on the start of the cooling-off period. In the case of distance selling of tangible (physical) goods, the cooling-off period starts when the goods are delivered, whereas in the case services are purchased at a distance, the cooling-off period already starts when the contract is concluded (and even ends when the contract, with the agreement of the consumer, is performed during the cooling-off period). In both cases, again, the trader's failure to live up to her information duties does not delay the start of the cooling-off period, but does lead to a limited extension of the cooling-off period.[343] It must be noted that the Distance Selling Directive does not define any of these terms in its text. As regards goods, this means that any express requirement of tangibility is absent. An overarching difficulty has been to asses to what extent digital content should rather fit in one or the other category. When digital content is provided on a tangible medium, it is generally accepted to fall under the provisions governing goods. If not, both the application of provisions on goods and services has been proposed.[344] However, as will be demonstrated infra, whichever qualification is chosen will, in many member states, nonetheless lead to the exemption/disappearance of the right of withdrawal once performance has begun.

Under Article II.–5:103(2) DCFR (Withdrawal period), an attempt has been made to harmonise the starting point of the cooling-off period: according to this provision, the cooling-off period ends fourteen days after the latest of three moments:
(a) the time of conclusion of the contract,
(b) the time when the consumer receives from the other party adequate information on the right to withdraw; or
(c) in the case of the delivery of goods, the time when the goods are received.

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[338] Cf. ECJ 13 December 2001, case C-481/00, ECR 2001, p. I-09945(Heininger/Bayerische Hypo- und Vereinsbank AG), nos. 44-48.
[339] In the Heininger case, the consumers withdrew from the contract almost 8 years after the contract was concluded.
[340] Cf. ECJ 10 April 2008, case C-412/06, *ECR* 2008, p. I-02383 (Hamilton/Volksbank Filder).
[341] Cf. Art. 6 (1) of the Distance Marketing of Financial Services Directive and Art. 14(1) of the Consumer Credit Directive.
[342] Cf. Art. 6 (2) of the 2008 Timeshare Directive.
[343] Cf. Art. 6 (1) of the Distance Selling Directive.
[344] Cf. throughout Report I.

The absence of information regarding the right of withdrawal therefore impedes on the start of the cooling-off period. The distinction between goods and services, however, has been upheld. Moreover, the breach of *other* information obligations than as regards the right of withdrawal does not impede on the start of the cooling-off period.

In Article 12(2) of the proposal for a Consumer Rights Directive, an attempt to harmonise even the cooling-off period under the Doorstep Selling Directive and the Distance Selling Directive is not undertaken: in the case of doorstep selling, the cooling-off period starts when the contract is concluded or confirmed to the consumer in writing, in the case of distance selling of services, it starts from the day of conclusion of the contract, and in the case of distance selling of goods, the cooling-off period starts at delivery. Different from the current situation under the Doorstep Selling Directive and the DCFR, the fact that the information obligations are not met, does not prevent the start of the cooling-off period, but only leads to an extension of the cooling-off period with a maximum of three months after the trader has performed all other obligations under the contract.

Article 12(2) of the text suggested by the Council in its General Approach[345] is slightly more sophisticated than the original proposal by the Commission. It breaks away from the distinction between doorstep selling and distance selling and merely looks at the object of the contract. In the case of service contracts, the cooling-off period starts at the day after the conclusion of the contract, in the case of sales contracts, the cooling-off period starts at the day after the consumer has taken delivery. However, specific rules are introduced in the case of cases of sales contracts which are performed in batches (the cooling-off period starts when the last batch is delivered) and the case where goods regularly are delivered during a fixed period of time (the cooling-off period starts after the first delivery). A specific provision is introduced in the case of contracts for the supply of water, gas, electricity and district heating: in these cases, the cooling-off periods ends fourteen days after the day on which the contract was concluded.[346] With this specific rule, the Council ensured that the classification of such contracts as sales contracts or services contracts is irrelevant with regard to the starting point for the cooling-off period. Article 13 adds that in the case of a breach of the most important information obligations (including the information on the main obligations and on the existence and modalities of the right of withdrawal), the cooling-off period does not end before six months have elapsed after its start in accordance with Article 12(2). In so far as the information is provided within the six months period, the normal fourteen days commences.

From recital (10d) introduced by the Council it follows that in the case the digital content is burned on a tangible medium, the contract is considered to be a contract for the delivery of goods, i.e. a sales contract. Other contracts for the supply of digital content are classified as services contracts, but the recital indicates that the right of withdrawal is excluded. Article 19(1)(j) of the text suggested by the Council, however, makes clear that this is the case only

[345] Council's General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010.
[346] Cf. in particular Art. 12(2)(f) of the text suggested by the Council. This text may be downloaded at http://register.consilium.europa.eu/pdf/en/10/st16/st16933.en10.pdf (last visited April 28, 2011).

when performance of the contract has begun with the consumer's prior express consent. In as far as this is not the case, the cooling-off period starts when the contract is concluded.[347]

In the text suggested by the European Parliament, recital (11e) distinguishes between contracts by which the consumer obtains the possibility to use the digital on a permanent basis or in a way similar to the physical possession, which are classified as goods, and other types of contracts. According to this text, in the case of (digital) goods the cooling-off period would start to run at delivery. In the case of (digital) services, however, the cooling-off period would start to run when both the contract is concluded and the consumer receives a copy of the signed contract document on a durable medium, if different from the day of conclusion of the contract.[348]

2.5.3.3 Exclusions of the right of withdrawal in distance contracts

As said above, the consumer in principle has the right to withdrawal from a distance contract. There are however some exemptions to this right of withdrawal, as enumerated in Article 6 of the Distance Selling Directive.

In the context of digital content, a first exemption may be relevant where the contract is to be classified as a contract for the provision of services. Article 6(3), first incident, of the Distance Selling Directive indicates that when performance of such a contract has begun with the consumer's agreement before the end of the cooling-off period. This implies, for instance, that when a contract for the live streaming of, for instance, football matches has commenced with the consumer's consent during the cooling-off period, the consumer loses her right of withdrawal.

However, in so far as the contract is not classified as a contract for the provision of services, other exemptions may apply. The second exemption thus relates to 'goods which, by reason of their nature, cannot be returned'.[349] If a given good cannot be returned, the consumer loses her right of withdrawal. In this regard, a distinction is often drawn between digital content which is made available on a tangible medium and digital content which is not. The former, it is argued, may be returned because the medium on which it is made available may be returned, while the latter cannot. This is not fully accurate. Digital content can be returned, irrespective of whether it is provided on a tangible medium or not. For example, a downloaded piece of music could be uploaded and deleted. More important is whether or not the digital content may be returned without the risk that the consumer retains a copy of the digital content. This is possible – if not prevented by the use of Digital Rights Management – both where the digital content is made available on a tangible medium and where it is made available otherwise, e.g. by way of enabling the consumer to download the information. As digital content can be returned, it seems untenable to argue that the nature of digital content stands in the way of an exclusion of the right of withdrawal.

[347] Cf. Art. 12 (2)(a) of the text suggested by the Council.
[348] Cf. Art. 12 (1a) and (2) of the text suggested by the European Parliament.
[349] Art. 6 (3) third incident Distance Selling Directive.

A third exception relates to the unsealing of certain types of goods which were sealed on delivery and unsealed by the consumer. According to the Distance Selling Directive, the right of withdrawal shall not apply for the supply of audio or video recordings or computer software which have been unsealed by the consumer.[350] It must first be noted that this exemption only applies to audio or video recordings or computer software. This exemption was set in place because the industry feared that the consumer would be able to order the said goods at a distance, copy them, and then withdraw from the contract. And since under the Distance Selling Directive, the consumer can only be required to pay for resending the good, this meant the consumer would have a copy of the good which she did not pay for, almost free of charge. Many national systems have transposed this exemption in a very pre-digital acceptation and have not modified it since. Indeed, in many legal systems, the process of unsealing refers to the action of taking a wrap off a physical good. Electronic seals are not encompassed in the definition. For example, the Notes to the DCFR indicate that the exemption in Latvia covers the situation where 'the consumer opened the packaging'[351], in Poland 'the consumer has removed the original packaging',[352] in Czech, 'the consumer damages the original packaging'.[353] This could imply that digital content which is protected only by an electronic seal would not fall under this exemption.

Nevertheless, some countries have dealt with the issue of the downloading of digital content under the unsealing exemption. In Spain for example, it is foreseen that the right of withdrawal shall not apply to contracts for the supply of sound recordings or videos, disks or software that have been unsealed by the consumer and user, as well as to contracts related to electronic files, supplied electronically, that can be downloaded or reproduced immediately for a permanent use.[354] And in France, there is an on-going legal initiative which offers to amend the said exclusion (which for now is exactly that of the Distance Selling Directive and is reproduced in the Consumer Code[355]) and provide that the right of withdrawal shall be excluded for the supply of audio or video recordings or computer software which do not constitute the inseparable accessory of a good or service, when the consumer has the possibility to access the recorded work or software, inter alia through unsealing or downloading.[356]

One may wonder whether the application of the exemption pertaining to unsealed audio or video recordings or computer software to downloaded digital content is in conformity with the Distance Selling Directive. It should be recalled that the unsealing exemption applies to

[350] Art. 6 (3) fourth incident Distance Selling Directive.
[351] Latvian Cabinet Reg. 207, Art. 15(4), as referred to in Von Bar 2009a, Note 19 to Art.5:201 (Contracts negotiated away from business premises), p. 402.
[352] Art. 10 (3), (2) of the Polish Consumer Protection Act, as referred to in Von Bar 2009a, Note 19 to Art.5:201 (Contracts negotiated away from business premises), p. 402.
[353] Art. 53(7)(d) Czech c.c., as referred to in Von Bar 2009a, Note 19 to Art. 5:201 (Contracts negotiated away from business premises), p. 402.
[354] Cf. Report I (Spain), p. 327; cf. Art. 102 (c) of the Spanish Consumer Act.
[355] Cf. Art. L. 121-20-2 of the French Consumer code.
[356] Cf. Report I (France), p. 74 ; cf. Assemblée Nationale, 16 December 2009, Rapport fait au nom de la commission des affaires économiques sur la proposition de loi de M. Jean-Pierre Nicolas, Mme Laure de la Raudiere, Mm. Bernard Gerard et Jean-Michel Ferrand et plusieurs de leurs collègues, visant à renforcer la protection des consommateurs en matière de vente à distance, available online at http://www.assemblee-nationale.fr/13/rapports/r2166.asp#P433_138626 (last visited April 28, 2011).

certain types of digital content which were provided sealed and only subsequently were unsealed by the consumer. It could be argued that if the digital content is provided without a seal or if the seal has not yet been broken by the consumer, the right of withdrawal remains. Downloading in itself cannot be equaled to unsealing. Moreover, downloaded digital content *can* be accompanied by an electronic seal, e.g. by providing the digital content in the form of a zip file which is protected by a password or a serial number key. Downloading is in fact equivalent to delivery.[357] In particular, a sweeping exemption for all digital content provided electronically (as is the case in Spain) appears to be broader than the current unsealing exemption which only applies to certain types of digital content.

Under the DCFR, with regard to the right of withdrawal digital content is excluded once the digital content is or can be downloaded. Whereas Article II-5:201(3)(b) DCFR (Contracts negotiated away from business premises) codifies the exemption of the right of withdrawal for services if performance has begun, at the consumer's express and informed request, before the end of the cooling-off period. Moreover, Article II-5:201(3)(d) DCFR (Contracts negotiated away from business premises) adds the exclusion of the right of withdrawal if the business has exclusively used means of distance communication for concluding the contract with a consumer for the supply of audio or video recordings or computer software which were unsealed by the consumer, or which can be downloaded or reproduced for permanent use, in case of supply by electronic means. Both in the case of certain digital goods and digital services these contracts are therefore excluded from the application of the right of withdrawal, however, in the case of digital services this is the case only if performance has already begun *and* the consumer was informed of and gave express consent to the fact that the early performance would end her right of withdrawal. Moreover, where the digital content would be classified as a digital good but not as audio or video recordings or computer software, the exemption would not apply, and the cooling-off period would start to run only upon delivery. With this, arguably the consumer would be entitled to withdraw from the contract if the purchased digital content would consist of an e-book.

In the proposal for a Consumer Rights Directive, two exemptions from the Distance Selling Directive which could apply to digital content contracts are taken over from it, but a third is not: Article 19(1)(a) of the proposal excludes the right of withdrawal in the case of services where performance has begun during the cooling-off period with the consumer's prior express consent, whereas Article 19(1)(e) indicates that the consumer also loses her right of withdrawal in the case of sealed audio or video recordings or computer software were supplied and the consumer has unsealed them. The exemption for goods, which by their nature cannot be returned to the consumer, is not taken over in the proposal.

In the text suggested by the Council of the European Union, the exemption for sealed audio or video recordings or computer software which were unsealed by the consumer is kept, but the general exemption for services contracts where performance has begun during the cooling-off period with the consumer's prior express consent is deleted. However, Article 19(1)(j) introduces a similar exemption for 'services contracts concluded by electronic

[357] Cf section 2.7.

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'. This implies that the right of withdrawal for digital services is excluded when the consumer has explicitly agreed with early performance. The opinion adopted by the Parliament's Committee on the Internal Market and Consumer Protection, however, introduces a different exclusion, by indicating in its Article 19(1)(ha) that the right of withdrawal is excluded in the case of 'the supply of digital content once the consumer has started to download this digital content'. Whereas the provision suggested by the Council seems to be applicable also to streaming contracts and online gaming contracts that are immediately and fully performed, this is uncertain with regard with the exemption suggested by the Committee on the Internal Market and Consumer Protection. On the other hand, the text suggested by the Council seems not to apply in the case where the contract is not *fully* performed during the cooling-off period, for instance in the case of a subscription.[358]

As indicated above, under the existing Distance Selling Directive the right of withdrawal is excluded if performance has begun and the consumer has agreed to early performance. However, the requirement of 'agreement' by the consumer is not further qualified. The absence of such qualification has led to different approaches in the Member States as to the question of whether the right of withdrawal is also excluded if the consumer has consented to early performance without having been informed of that right. On the one hand, one could argue that in such a case the sanction of extension of the cooling-off period for breach of the information obligations should apply, which would mean that the consumer would still have the right to withdraw after performance has begun. On the other hand, it could also be argued that since consent has been given for performance before the end of the cooling-off period, the right of withdrawal should be excluded even though the consumer was not made aware of its existence.

In Finland, Norway, and Spain[359] the consumer retains her right of withdrawal if she was not informed of the fact that by consenting to the early performance of the contract, she would lose her right of withdrawal. If the consumer subsequently indeed withdraws from the contract, the consumer is most likely required to pay a price for the value of the service in Finland.[360] Similarly, in Norway, the law foresees that the consumer shall pay for the services rendered and any material used, whose value, if not otherwise agreed, shall be determined according to normal market price.[361] However, in Spain the consumer is not required to pay for the use of the service.[362]

On the other hand, the consumer would lose her right of withdrawal even though she was not informed of the right of withdrawal in Italy, The Netherlands, and Poland.[363] The same

[358] It should be noted that in so far as the subscription pertains to the supply of e-newspapers or e-magazines, the exclusion of Art. 19(1)(f) of the text adopted by the Council could be applied. This provision could, however, not be applied in the case of other subscriptions to digital content.
[359] Report I (Finland), p. 16; Report I (Norway), p. 262; Report I (Spain), p. 328.
[360] Cf. Report I (Finland), p. 16.
[361] Report I (Norway), p. 262.
[362] Report I (Spain), p. 328.
[363] Report I (Italy), p. 180; Report I (The Netherlands), p. 224; Report I (Poland), p. 290-291.

is true in Germany in case both parties have fully performed their obligations under the contract, but otherwise the consumer retains her right of withdrawal.[364]

This matter is not explicitly resolved under the proposal for a Consumer Rights Directive: the proposal merely requires the consumer's consent to be given prior to the start of the performance, and express. Whether or not the consumer loses her right of withdrawal if she was not informed of its existence, is not clarified. This is different under the text suggested by the Council: Article 17(4) of this text indicates that in the case of withdrawal, the consumer does not have to pay for the services rendered in so far as the trader had not informed the consumer of the fact that in the case of withdrawal she would have to pay for the services already rendered or where services were rendered without the consumer's prior consent. From this text one may deduce that if the consumer was not made aware of the existence of the right of withdrawal, she does not lose her right of withdrawal and in the case she has exercised that right she need not pay for any services rendered.

The result is the same under the DCFR, but that text is even more explicit in this sense. Article II-5:201(3)(b) DCFR (Contracts negotiated away from business premises) indicates that in order for the right of withdrawal to be excluded, the consumer's consent must be 'express *and informed*' (emphasis added). The latter addition indicates that the consumer would not lose her right of withdrawal if she had not been informed of its existence. Moreover, Article II. – 5:105(5) DCFR (Effects of withdrawal) clarifies that in this case the consumer would not have to pay for the services rendered before the withdrawal.

2.6 Unfair terms

2.6.1 Introduction

Most contracts relating to digital content are presented to the consumer in the form of non-negotiated agreements. This implies that the consumer cannot substantively influence the content of the contract between her and the provider of the digital content service. As a result, the balance between the parties' rights and obligations under the contract may be unequal, generally to the detriment of the consumer. A term included in a standard form contract is generally regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the other party.[365] In order to determine the fairness of a licence term that purports to restrict the privileges normally recognised to consumers under the copyright act or the consumer's right to privacy, courts would have to consider all the circumstances that prevailed at the time of conclusion of the contract. However, the judicial review of the fairness of contractual terms does not apply to the assessment of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader's main contractual obligation. This raises the question what *is* the main contractual obligation under a contract pertaining to a digital product? In the following pages, the fairness of certain clauses that are typically found in licenses attached to digital products will be discussed, more specifically clauses that restrict the possibility to make private

[364] Report I (Germany), p. 96.
[365] Cf. Art. 3 (1) Unfair Terms Directive.

copies, those that restrict the right of privacy, as well as other (presumably unfair) clauses mentioned in the national reports.

2.6.2 Restricting the possibility to make a private copy through digital contract

With respect to restrictions to the possibility of making private copies of copyrighted content, the issue can be approached from three angles: the exception of private copy under copyright law, the matter of non-conformity (see section 2.7), and information duties (section 2.3). With respect to the exception of private copy, it must be pointed out at the outset that European copyright law expressly excludes any possibility for the lawful user, e.g. the consumer, of an electronic database to make a private copy.[366] According to the Computer Programs Directive, the right of the lawful user, e.g. the consumer, is restricted to making a back-up copy of the software insofar as such a copy is necessary for that use.[367] The right to make a private copy of all other categories of works protected by copyright is governed by the Information Society Directive[368], which allows Member States to adopt an optional exception or limitation to the right of reproduction in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures to the work or subject-matter concerned. All Member States examined in this study have implemented this exception, with the exception of the UK.

The Information Society Directive provides for additional protection of the rightholder against the circumvention of TPM's designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any related right.[369] In practice, the application of a TPM on a work pursuant to the Directive may result in preventing the consumer from exercising the exception of private copy recognised in that same Directive. This will happen, for example, each time a rightholder will protect her work by means of any anti-copy device: in this case, the anti-copy technique will prevail over the provisions of the copyright act.

The Information Society Directive contains very few provisions referring to the conclusion of contractual licenses as a means to determine the conditions of use of copyright protected works. Recital 53 and Article 6(4) of Directive 2001/29/EC both deal with the use of TPM's to ensure a secure environment for the provision of interactive on-demand services. With respect to the private copy exception, Article 6(4) second paragraph provides that Member States

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[366] 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. 20–28.

[367] Art. 5(2) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ 2009, L 111/16 (hereinafter 'Computer Programs Directive').

[368] Art. 5(2)(b) Directive 2001/29/EC on Copyright and Related Rights in the Information Society , *OJ* 2001, L 167/10 (hereinafter 'Information Society Directive').

[369] Cf. art. 6 Information Society Directive. on this, cf. M.M.M. van Eechoud et al., *Harmonizing 'European Copyright Law – The Challenges of Better Lawmaking'*, Alphen aan den Rijn: Kluwer Law International, 2009.

> "may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions."

Member States are therefore under no obligation to take action in respect to the private copying exception. Moreover, if the rightholder designs her TPM in such a way that private copies are possible, then Member States are not allowed to intervene on the basis of Article 6(4). And, as the text of Recital 52 states, rightholders may in any case use TPM's to control the number of reproductions in accordance with Article 5(2)(b) and Article 5(5). TPM's that are used to control the number of reproductions receive equal protection according to Article 6(4) subparagraph (3).[370] Not all Member States examined in this study have taken advantage of this provision. In the Member States that have implemented it, the number of copies that can be made for private use is usually not specified in the law. This decreases transparency for on-demand content providers and consumers alike. In those Member States where the private copying exception is not enforceable against TPMs, one can expect the debate to continue.

The fourth paragraph of Article 6(4) of the Information Society Directive takes away the obligation of rightholders and Member States to ensure that the beneficiaries of certain enumerated limitations are given the means to exercise such limitations in respect of works protected by a TPM, whenever such works are "made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them". While this provision establishes a rule of precedence between the use of contractual arrangements and the application of technological protection measures, no rule has been established anywhere in the Directive concerning the priority between contractual arrangements and the exercise of limitations on rights. In practice, the exclusion extends to any work offered 'on-demand', covering any work transmitted over the Internet, as long as the user is able to choose and initialize that transmission. In view of the fact that most works offered on-demand through systems that rely on the conclusion of contracts and the application of TPMs, the scope of this provision is potentially very broad, reducing as much the scope of the measures taken by Member States under paragraph 2 of Article 6(4) of the Directive to provide beneficiaries of the private copying exception with the means to exercise them.

The provisions of the Unfair Contract Terms Directive [371] cover mass-market licenses for the use of copyrighted material, provided that the conditions of application are met. However, the Directive gives no indication of what is to be considered as the 'main subject matter of a contract'. A licence term may be deemed essential if it is of such substantial significance that without them the contract would not have been formed or that there would

[370] S. Dusollier, 'Droit d'auteur et protection des oeuvres dans l'univers numérique: droits et exceptions à la lumière des dispositifs de verrouillage des 'œuvres'. Brussels : Larcier 2005, p. 175.
[371] Unfair Terms Directive, p. 29-34.

be no proper manifestation of intention. In other words, the term must be *objectively* essential. Such essential terms are thus excluded from the definition of a 'general condition' included in a non-negotiated contract, thereby escaping judicial review. In the absence of any relevant court decision on the issue, it is still unclear whether a term that restricts the privileges normally granted to users under copyright law would be considered as pertaining to the main subject matter of the licence.

French law is among the few examples in Europe where attention was paid to this matter.[372] Playability and interoperability are not envisaged by legislation or case law through the scope of unfair contract terms but through the scope of non-conformity of the digital product. Indeed, beyond the *contractual* restrictions (be it to readability, interoperability or copying) there usually lies a *technical* restriction which physically prevents the user from infringing the contract. The whole debate revolves around these technical restrictions. In contrast to any other Member State of the European Union, France took this issue into account when implementing the Information Society Directive.[373]

The French Intellectual Property Code provides that TPMs are allowed provided they do not affect interoperability or the free use of the work.[374] "Free use of the work" means that the CD or DVD, for example, can be played. Private copy could be included in the "free use of the work", but this case is specifically treated in another provision of the Intellectual Property Code. Yet another provision was added to the code, which foresees that measures restricting the exception to private copy must be brought to the attention of the user. According to that provision, the provider has to inform the consumer about restrictions on playability (that is to say interoperability, usage restrictions…) and on private copy because of the use of DRM. This article does not impose requirements of form for this information. But, if the contract is concluded with a consumer, this information has to be clear, understandable, and noticeable.[375] Moreover, the law of June 12, 2009 inserted yet another provision, which provides that "the essential characteristics of the authorized use of a work or a protected object, made available through a service of communication to the public online, are brought to the attention of the user in a way which is easily accessible, in accordance with Article L. 331-10 of the present code and Article L. 111-1 of the consumer code".[376] Thus restrictions to the exception of private copy are now part of the essential

[372] Cf. G. Gomis, "L'influence des mesures techniques sur les pratiques contractuelles ", 49 *RLDI* (2009) 73. Grand Instance Tribunal Nanterre, 15th Chamber, Mai 31, 2007; Appeal Court Versailles, *Françoise M., UFC-Que Choisir c/ SA EMI Music France,* April 15, 2005 ; Grand Instance Tribunal Paris, April 30, 2004; Appeal Court Paris, 4th Chamber B, April 22, 2005, French Supreme Court, 1st civil Chamber, February 28, 2006; Appeal Court Paris, 4th Chamber, section A, April 4, 2007; J. Martin, *Rémunération pour copie privée et mesure de gestion électronique des droits*, report prepared for Conseil supérieur de la propriété littéraire et artistique, Paris, 2006.

[373] Cf.: G. Westkamp et al., *Study on the Implementation and Effect in Member States' laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Part II: The Implementation of Directive 2001/29/EC in the Member States*, report to the European Commission, DG Internal Market, London, Queen Mary Intellectual Property Research Institute February 2007.

[374] Loi n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, *JORF* n°178 du 3 août 2006, p. 11529, Art. L. 331-5.

[375] Cf. Art. L. 111-1 ff. French Consumer code.

[376] Cf. Art. L. 336-4 French Intellectual Property code.

characteristics of a work (the aforementioned decisions with regards to the right to private copy concerned situations prior to the laws of 2006 and 2009). Also, one will notice the express reference made to the general information duty to the consumer established by the consumer code.

The Finnish regulation on unfair contract terms in consumer contracts is in many respects different from the Unfair Contracts Terms Directive. First of all, the main subject matter of the contract and the adequacy of the remuneration are taken into consideration, when assessing the fairness of the contract. Also the changes in circumstances after the conclusion of the contract are taken into consideration in favour of the consumer.[377]. So in accordance with Finnish law a (any) term of a contract can be regarded unfair irrespective of whether it is classified as "the main obligation". In Finland there is no case law addressing the unfairness of contract terms restricting private copying or setting region limitations.

Like in Finland, even core terms may be tested for fairness under Spanish law[378]. If the license for use of digital content accepts different configurations (simple reproduction –streaming–, reproduction and filing in a predetermined number of devices, etc.), what appears certain is that clauses such as that cited, which tend towards ensuring a right for the producer or titleholder (specifically, the rights of exploitation of the work) more than defining the positive content of the main obligation (reproduction, reproduction and incorporation into a device, use in several machines, etc.), it seems they may not be classified as a main obligation.[379] Insofar as the contract contains standard terms preventing the consumer to copy a music file or restricting its playability to only a certain region, such terms will be subjected to the unfairness test of the Unfair terms directive. So far, such clauses have not been considered unfair by courts.[380] In Spain, the legislation on intellectual property rights even indicates that, when certain conditions are met, traders are allowed to impose such access control technologies. Terms that respect such conditions will not be considered unfair. The prior arguments are supported by the Spanish case law, which obiter dicta, in the assessing of the legality of the installation of modchips in videogame consoles (among others, SAP Las Palmas of March 1, 2010[381] and SAP Valencia of March 7, 2008[382]) underlines as lawful uses of said games skipping over the device restrictions in order to be able to "play with original games from other countries or use safe copies of original games". For the same reasons (legal validity of TPMs in the Intellectual Property Code) it will not be possible to consider the use of this type of clause as unfair contract terms.

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[377] Cf. the Finnish Consumer Protection Act, Chapter 4, Sections 1 and 2.
[378] ECJ 3 June 2010, case C-484/08, n.y.r. (Caja de Ahorros/Ausbanc).
[379] This argument is supported in the provisions of arts. 160 and 161 TRLPI (intellectual property).
[380] L. Guibault, 'Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment', *Journal of Consumer Policy* (31) 2008/4, p. 409.
[381] 'Sentencia AP de Las Palmas (Sección Segunda) de 1 de marzo de 2010' Not yet published available online at http://www.bufetalmeida.com/580/modchips-swapmagic-dvdconsolas.html (last visited April 28, 2011).
[382] ARP 2008\250.

In Germany, these issues have not yet been dealt with by courts. Generally speaking, German courts interpret the term 'core obligations' in a narrow sense, thus exempting only a very limited number of terms from the unfairness control. For example, insurance contracts frequently exclude insurance coverage in specific situations. German courts usually argue that a clause in an insurance contract only is a core term if the contractual promise cannot be determined without this clause. Otherwise it merely modifies the contractual promise and is subject to the fairness test.[383] Since the purchase of online music or movies is regarded as a sales contract (even if the purchaser's right to use the goods is heavily restricted),[384] sales law with its obligation to transfer property (or anything that would come anywhere near) would be the default rule for the main obligation, whilst limitations to this would be regarded as secondary and therefore as subject to the law of unfair contract terms.[385] Whether or not a contractual term that reduces playability would be considered unfair has not yet been decided.[386]

In Hungary, the restriction on the right to make a private copy of a work does not relate to a "main obligation" of the contract, unless otherwise agreed by the parties. The right to make a private copy under the Copyright Act is not an absolute right; it is only an exception on the copyright of the rightholder and cannot be applied extensively.[387] If the restriction on the use of the work is not reflected in the fee paid, it can be deemed to be an unfair term. The Copyright Act further provides that the authorisation to reproduce a work permits the user to fix the work in a video or phonogram or copy it by way of computer or onto electronic data media *only if this is expressly stipulated*.[388] The making of a private copy of the copyright protected product must comply with the so-called three-step test, based on Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement. These restrictions were incorporated into the Hungarian Copyright Act and two further conditions are required: (1) any free of charge use shall be made bona fide; (ii) using of this right cannot be abusive and can be used in accordance with its function.

In Italy, the Copyright Act permits the making of copies of phonograms and videograms only, and on any carrier, provided that the copying is carried out by a natural person for the sole purpose of personal use and without an intent to make profit or for any direct or indirect commercial purpose.[389] The reproduction must comply with technological protection measures applied, i.e. the user must follow the dispute resolution procedure foreseen in the Act. Importantly, the Italian legislator has transposed Article 6 (4)(4) of the Information Society Directive by specifying that the provision referred to in paragraph (1) shall not apply to works or other subject-matter made available to the public so that

[383] Cf. German Supreme Court, *Neue Juristische Wochenschrift* -RR 1993, 1049.
[384] Cf. German Supreme Court, CR 1997, 470, at 472. Cf. also AG Ansbach, CR 1995, 278, at 279.
[385] Cf. also C. A. Baus, *Verwendungsbeschränkungen in Softwareüberlassungsverträgen*, Cologne: Dr. Otto Schmidt, 2004, p. 30ff.
[386] Cf. Kretschmer, Derclaye, et al. 2010.
[387] Art. 33(3) Hungarian Copyright Act.
[388] Art. 47(2) Hungarian Copyright Act.
[389] Art. 71sexies (1) Italian Copyright Act; cf. G. Westkamp, *Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Part II: Implementation of Directive 2001/29/EC in the Member States*, Centre for Commercial Law Studies Queen Mary, University of London, February 2007, p. 287.

everyone can access them from a place and time individually chosen by them, when the work is protected by technological measures, or when access is allowed on the basis of contractual clauses. This pertains to both interactive services as mentioned under the Information Society Directive *and* to agreements which stipulate conditions for access in general. This is in contrast to most Member States where reliance on limitations cannot be contractually avoided. The Italian Act, as regards contracts detailing condition for use, thereby gives rightholders an exceedingly powerful instrument which is outside the scope of both Article 5(2)(b) and Article 6(4)(4) of the Information Society Directive. The effect is not only to limit the scope of the private use exception (which is limited to videograms and phonograms anyway) but also to introduce a more general notion connoting that immediate contractual stipulations discard and pre-empt existing limitations.[390] A contractual restriction on the right to make a private copy would therefore hardly ever be deemed to be unfair under Italian law.

In Norway, a clause restricting the right to make a private copy is probably allowed. In case such a clause is not considered as a main obligation, it is possible that it could be declared unfair in certain circumstances pursuant to the Marketing Acts rules on unfair contractual terms or the Contracts Act.[391].

In the Netherlands, although courts interpret the term 'core obligations' in a narrow sense, thus exempting only a very limited number of terms from the unfairness control, [392] a restriction on the consumer's right to make a private copy of work would most likely not be held unfair. The main reason for this assertion is that although the Dutch Copyright Act does grant consumers a right to make private copies[393], this right is not mandatory. Moreover, the circumvention of a TPM with a view of making a private copy constitutes a tort.[394] The legislator has not deemed it necessary to adopt appropriate measures to allow consumers to exercise the right of private copying (or any other limitation on copyright), where the rightholder has copy-protected his work and does not allow private copies to be made.

The term 'main obligation' in the Polish Civil Code is to be interpreted narrowly and is supposed to apply e.g. to price and quantity of the good, but not quality of the good. It does not seem likely that such a contractual term would be considered as a main obligation.

In the UK, there is no clear guidance from the courts as to whether such terms will be classified as core terms. The House of Lord's (now: the UK Supreme Court's) view in the First National bank case (2001)[395] was that a 'restrictive' approach should be taken to the main subject matter and price exclusions; although their decision in the recent bank charges

[390] Italian Supreme Court, penal affairs, III, 8 March 2002, n. 15968.
[391] LOV 1918-05-31 nr 04: Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (Act relating to conclusion of contracts), section 37 (or eventually the general clause in section 36).
[392] Dutch Supreme Court, 19 September, 1997, *NJ*, 1998, 6 (Assoud/SNS), and Dutch Supreme Court 21 February 2003, *NJ* 2004, 567 (Stous/Parkwoningen Hoge Weide).
[393] Art. 16 (b) to (ga) Dutch Copyright Act.
[394] Art. 29a (4) Dutch Copyright Act.
[395] House of Lords, in *Director General of Fair Trading v First National Bank plc* [2001, p. 52.

case (*Abbey National and others v DGFT*)[396], holding bank charges to be excluded price terms, might suggest a more 'business oriented' approach. The Office of Fair Trading (OFT) would be unlikely to consider such terms to be 'central to how the consumer perceives the bargain'. However, there has been a lot of debate concerning the fairness and transparency of the use of such technology.

The United Kingdom's All Party Parliamentary Internet Group published a report in 2006,[397] dealing with the following key issues:

- A recommendation that the Office of Fair Trading (OFT) bring forward appropriate labelling regulations so that it will become clear to consumers what they will and will not be able to do with digital content that they purchase.
- A recommendation that OFCOM publish guidance to make it clear that companies distributing Technical Protection Measures systems in the UK would, if they have features such as those in Sony-BMG's MediaMax and XCP systems, run a significant risk of being prosecuted for criminal actions.
- A recommendation that the Department of Trade and Industry (now BIS) investigate the single-market issues that were raised during the Inquiry, with a view to addressing the issue at the European level.
- A recommendation that the government do not legislate to make DRM systems mandatory.

Consumer Focus (a UK wide consumer interest statutory body) is also concerned about a lack of protection with respect to end user's rights-

> "There is also an unfair balance between protection of the end of user's rights and protection of copyright holders. Intellectual Property Rights (IPRs) allow technological (Digital Rights Management) and territorial restrictions placed on products to protect copyrights holders. Whereas consumers are granted limited rights which result in uncertainties over legal use of the digital content they buy and interoperability of equipment used. Consumer Focus recommends the examination of both (1) applicability of End User Licensing Agreements (EULA) under the Unfair Contract Terms regulations including third party agreements, and (2) transparency of terms and conditions in contracts with provisions for Digital Rights

[396] *Office of Fair Trading v Abbey National plc and Others* [2009] United Kingdom Supreme Court 6, [2009] England and Wales Court of Appeal 116, [2008] England and Wales High Court 875 (Comm.).
[397] All Party Parliamentary Internet Group, *"Digital Rights Management": Report of an Inquiry by the All Party Internet Group*, London, June 2006, p. 15 and ff., available online at http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management.html (last visited April 28, 2011).

Management (DMR) software, with a focus on interoperability clauses and the protection of consumer's confidentiality."[398]

However, despite these recommendations one of the last acts of the Labour Government was to enact the Digital Economy Act 2010 (in force June 2010),[399] which has created a highly controversial system of law which aims to first increase the ease of tracking down and suing persistent infringers of copyright material. Moreover, it will subsequently permit the introduction of "technical measures" to potentially terminate infringers' Internet connections. In other words, the Government has adopted a digital rights management system to protect the rightholder, but this statute offers no protection or clarification of use and interoperability to the consumer user of digital services as per the recommendations above.

2.6.3 Fairness of contractual restriction to right of privacy

All country reports confirm that contractual terms are considered unfair if they are in breach with privacy standards. As the Hungarian report states, privacy rights are generally considered absolute and cannot be waived. Any contractual term restricting these rights will be null and void.[400] There are a number of reasons why contractual terms pertaining to the privacy of the consumer may be declared unfair. Most important are the breach of the information duty, the required legitimate ground for data processing and the requirements concerning the fair and secure data processing.

Fair data processing: The Data Protection Directive requires personal data to be processed both fairly and lawfully.[401] For example, when a company stores the personal data of its customers, it must take technical measures to minimize the risk of data leaks.[402] The Citizens Rights Directive has amended the e-Privacy Directive so that Article 4 of the e-Privacy Directive, concerning the security of data processing, requires providers to take appropriate technical and organisational measures to guaranty the safety of its services.[403] Providers should in ensure that (i) only authorized personnel have access to personal data,

[398] Consumer Focus response to the European Commission's consultation on 'Post-i2010: priorities for new strategy for European information society (2010-2015)', UK, October 2009, p. 6-7, http://www.consumerfocus.org.uk/assets/1/files/2009/11/i2010digitalstrategyConsumerFocusresponse.pdf

[399] See http://www.legislation.gov.uk/ukpga/2010/24/contents (last visited April 28, 2011).

[400] Hungarian c.c. section 75(3). Italian code: Title X, Electronic Communications, Art. 121-134. The Finish report refers to Th. Wilhelmsson, *Vakiosopimus ja kohtuuttomat sopimusehdot*, 2008 p. 152. Art. 6:233 Dutch c.c.; Polish Supreme Court (*SN*) 6 October 2004 (I CK 162/04), Regional Administrative Court in Warsaw (*WSA*) of 31 March 2006 (II SA/Wa 2395/04) and the Polish Supreme Administrative Court in Warsaw (*NSA*) 30 March 2006 (I OSK 628/05). Spanish Constitution of 1978. Art. 86 Spanish Consumer Act.

[401] Art. 6 Data Protection Directive.

[402] Art. 16 and 17 Data Protection Directive.

[403] Cf. also the Framework Directive (Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (hereafter 'Framework Directive')) as changed by the Better Regulations Directive (Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services).

(ii) personal data is sufficiently protected and (iii) a security policy is implemented.[404] Furthermore, personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.[405] This requirement can be problematic when Internet companies such as Facebook[406] include terms in their *privacy policy* or *terms of use* which hold that the company may gather, process and sell all personal information about a data subject that he has shared, shares or will share anywhere on the Internet. This requirement might also be problematic with regard to the placing of cookies with the aim of behavioural targeting. If obtained, the data subject's consent relates to the infinite gathering of personal data about him, since most cookies have a termination data of ten years or more.[407] Furthermore, the gathered personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.[408] This again may be relevant in case of overly broad contractual terms or unspecified use of cookies. Finally, personal data must be accurate, kept up to date and kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Contractual terms in which the consumer is asked to renounce her rights will commonly be regarded as unfair. The French,[409] the Dutch[410] and the British[411] report refer to unfair contractual terms in relation to a lack of transparency or a lack of an explicit and legitimate purpose for data processing.

Consent: The second important contractual unfairness may relate to the required legitimate ground for the processing of personal data.[412] One of the most important grounds is the consent of the data subject. The consent of the data subject is defined by the Data Protection Directive as any freely given specific and informed indication of her wishes by which the data subject signifies her agreement to personal data relating to her being processed.[413] The Citizens Rights Directive has amended the e-Privacy Directive so that for the legitimate placing of cookies, prior consent of the data subject is needed.[414] Contractual

[404] Citizens Rights Directive recital 57. Cf. also recitals 60, 61 and 69 of the Citizens Rights Directive and recital 20 of the e-Privacy Directive. Also, the newly implemented Art. 14bis of the e-Privacy Directive may be of importance.
[405] Art. 6 Data Protection Directive.
[406] Report I (Norway), p. 263.
[407] Art. 5.3 e-Privacy Directive as amended by the Citizens Rights Directive.
[408] Art. 6 Data Protection Directive.
[409] Grand Instance Tribunal Paris, April 05, 2005, 1 social chamber, 04/02911.
[410] *Bijl. Handelingen II* 1997/1998, 25 892, nr. 1-3, p. 10 en 65-68. Cited in: L.A.R. Siemerink, *De overeenkomst van internet service providers met consumenten*, Deventer: Kluwer 2007', p. 66.
[411] Transparency is viewed in the UK as a key factor in determining whether there has been a violation of good faith (cf. Lord Bingham, in particular, in the First National Bank case, above, n 50. See also OFT, Unfair Contract Terms Guidance (2001)(Introduction), p. 2 and S.55 of the Data Protection Act 1998.
[412] Art. 7 and 8 Data Protection Directive.
[413] Art. 2 (h) Data Protection Directive.
[414] There is a debate whether or not consent may be given by the browser settings of a computer. Recital 66 of the Citizens Rights Directive holds that 'Where it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application. The enforcement of these requirements should be made more effective by way of enhanced powers granted to the relevant national authorities.' This has led some countries to believe that browser settings which accept cookies may suffice to satisfy the conditions of Art.

terms in which the required consent of a data subject is overly broad are to be considered as unfair. The German report confirms that overly broad consent may be considered an unfair term.[415]

Information: Finally, there are a number of information duties in the Data Protection Directive. First of all, it is important to note that consent is defined as an informed consent of a data subject. Therefore, information provided to consumers must be clear and comprehensible.[416] Also, the cookie provision in the amended e-Privacy Directive earlier referred to requires companies that place cookies to provide data subjects with clear and comprehensive information about the purposes of the processing of their personal data.[417] Finally, the Data Protection Directive requires that data subjects must be provided with information about the identity of the controller of the personal data, the purposes of the processing of the data and the recipients of the data.[418] Both the French[419] and the Dutch[420] report explicitly refer to the fact that terms in which these information duties are denounced or not adequately complied with are considered to be unfair.

2.6.4 Other (presumably) unfair clauses

The grey and black lists presented in annex to the Directive on unfair contract terms are meant to give an indication of the clauses that may be regarded as abusive or unfair. Of course, several of these (presumed) unfair clauses are relevant in the case of the purchase of digital content, including terms restricting remedies for non-performance, or binding a consumer to a long term contract without the possibility of cancellation/termination. But such terms are not specific to the digital nature or the particular circumstances surrounding the purchase of digital products. Among the clauses appearing in the grey and black lists that could provide relief to a consumer purchasing a digital product, is the one relating to the formation of the contract that 'irrevocably bind[s] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract'. In most jurisdictions examined, case law is only starting to emerge on the fairness of clauses included in contracts for digital products. Moreover there is a general absence of debate concerning other clauses that could be judged unfair in the specific case of the *digital* consumer. Nevertheless, some of the national reports do identify a number of interesting issues that are worth mentioning in the pages below.

According to the Finnish report, contract clauses can be considered unfair, and therefore void, if they limit the trader's liability for in whole or in part breach of contract. Unfair disclaimer can be foreseen in warranty clauses, limiting or excluding guaranty for quality defects, good functioning or being the service fit for purposes.[421] Similarly, in Italy,

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5.3 e-Privacy Directive, available online at https://nodpi.org/2009/11/23/uk-and-12-other-member-states-issue-statement-on-telecoms-reform-package/ (last visited April 28,, 2011).

[415] H. Wegmann, 'Anforderungen an die Einwilligung in Telefonwerbung nach dem UWG',,*Wettbewerb in Recht und Praxis*, 2007, 1141, at 1145. OLG Brandenburg, CR 2006, 490.

[416] Art. 2 (h) Data Protection Directive.

[417] Art. 5.3 e-Privacy Directive as amended by the Citizens Rights Directive.

[418] Data Protection Directive art. 10. Cf. also art. 11.

[419] Art. 226-16 à 226-24 French Penal code and Grand Instance Tribunal Paris, June 6, 2003, n°0205001163.

[420] http://www.cbpweb.nl/Pages/uit_z2003-0163.aspx (last visited April,18, 2011).

[421] Report I (Finland), p. 17.

contracts concluded over the Internet frequently contain clauses aiming to limit or exclude trader's liability for system dysfunctions. The Internet provider, moreover, has the duty to point out in the contract that downloading or programs of files through Internet must occur under the exclusive control and liability of the customer. These clauses can be considered unfair, and therefore void, if they limit liability in whole or in part for breach of contract.[422]

In France, the Consumer Code states that in contracts concluded between a professional and a non-professional or consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair.[423] Unfair terms are deemed to be null and void. Black and grey lists of unfair terms have been decreed by the Council of State upon advice of the Unfair Terms Committee.[424] Already in 1991, the French Supreme Court recognised an autonomous power to the judge to declare a term unfair and deprive it of its efficiency without a decree having done so beforehand.[425] In 2008 this power was enshrined in the Consumer Code.[426] One will recall that the *Pannon*[427] case unequivocally makes the *ex officio* declaration of unfairness mandatory. Case law provides many illustrations of unfair terms in digital content contracts. To name just a few, have been declared unfair the terms which: require consumers to contact the professional before exercising their right of withdrawal; or which foresee other causes of exemption in addition to absolute necessity.[428]

Finally, the French Unfair Terms Committee issues recommendations concerning the suppression or modification of terms which present an unfair character[429]. Such recommendations[430] may guide the judge in determining the unfair nature of terms under review. Regarding digital content, one will particularly notice recommendations:

- 08-01 on the supply of trips offered through the Internet.
- 03-01 concerning IAPs.
- 07-01 concerning triple play.
- 07-02 concerning the sales of movable goods through the Internet.

The Committee may deliver an opinion (avis) when seized by a judge, the minister in charge of consumer affairs, or by interested professionals. It can also do so of its own volition[431].

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[422] Report I (Italy), p. 183.
[423] Art. L. 132-1 Consumer code.
[424] Decree n° 2009-302 of 18 March 2009 concerning the implementation of Art. L. 132-1 French Consumer code.
[425] French Supreme Court, Mai 14, 1991, n°89-20.999. *Bulletin civil I*, n°153.
[426] Loi n° 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs, *JORF* n°0003 du 4 janvier 2008, p. 258, hereinafter referred to as: Chatel law . Cf. Art. L. 141-4 French Consumer code.
[427] ECJ 4 June 2009, case C-143/09, *ECR* 2009, p. I-4713 (Pannon GSM Távközlési Rt. v Nemzeti Hírközlési Hatóság Tanácsa).
[428] Grand Instance Tribunal Bordeaux, March 11, 2008, CCE 2008, comm. 69.
[429] Art. L. 534-3 French Consumer code.
[430] Available online at http://www.clauses-abusives.fr/recom/index.htm (last visited April 28, 2011).
[431] Art. L. 534-2 French Consumer code.

In Germany, the Federal Supreme Court dealt with the possible unfairness of a standard term in a contract on a computer game (Half-Life 2) on DVD, according to which the game (which was then played online) could only be used after having been activated with a particular number that the purchaser was not allowed to pass on to a third person. Thus, reselling was made factually impossible. The suing consumer association had argued that this term was unfair since it violated the principle of exhaustion.[432] The Federal Supreme Court held that the term was not unfair. The court argued that it was allowed, under the contract, to pass on the property on the DVD, it was merely useless since it could not be used for playing the game online. Moreover, the conditions were set out in sufficient clarity on the cover of the DVD.[433] It should be added in this context that the majority of German courts have held that the principle of exhaustion merely applies to physical works (including software on a computer)[434] but not in an online-context.

In the Netherlands, the district court of Rotterdam[435] examined *ex officio* a clause in a contract with a phone provider for the reception of television, Internet and telephony. When installing the equipment for reception of the service it appeared that defendant did not have the right ISRA connector. Under a clause in the terms of the provider this was at the risk of defendant. This clause was automatically reviewed by the magistrate and held unreasonably burdensome.

In Poland, the Court of Protection of Competition and Consumers rendered several decisions in favour of the consumer. In a case of 3 March 2010, the court deemed as unfair a clause in the standard contract terms of the Internet shop according to which 'this set of rules may be changed by the seller in the future'.[436] In another case, the court deemed unfair clauses in the standard contract terms of the Internet shop according to which 'all changes to this set of rules bind the consumer as of the moment of their publication online, which obliges the consumer to keep up to date with these rules'; and another one according to which 'despite doing our best, we cannot guarantee that published online technical data are free of mistakes and errors, however, if such they cannot give rise to our liability'.[437]

The Polish Court of Protection of Competition and Consumers also deemed unfair a clause in the standard contract terms of a company providing paid Internet addresses to consumers that stated: 'price for the service has to be paid for the whole period of time and is not returnable in case the consumer cancels the services at an earlier date'.[438] In yet another case, the court deemed as unfair two clauses used by a company 'Iplay' in its 'Regulation of provision of services consisting of making available online music-word files'.[439] The clauses were as follows: 'in case a consumer takes actions which are in accordance with

[432] Art. 17 paragraph 2 German Copyright Act.
[433] German Supreme Court, *Wettbewerb in Recht und* Praxis 2010, p. 1174.
[434] Cf. German Supreme Court, BGHZ 145, 7.
[435] District Court Rotterdam,18-06-2010, 1096749, BN5171.
[436] Court of Protection of Competition and Consumers, 3 March 2010 (Sad Ochrony Konkurencji i Konsumentow)(XVII Amc 715/09).
[437] Court of Protection of Competition and Consumers, 29 October 2009 (XVII Amc 574/09).
[438] Court of Protection of Competition and Consumers 26 March 2008 (XVII Amc 265/07).
[439] Court of Protection of Competition and Consumers 28 December 2007 (XVII Amc 99/07).

this regulation but would deem to be undesirable by Iplay, Iplay will notify the consumer about this via e-mail with a demand of immediate cease of undertaking these actions. If the consumer does not immediately follow the Iplay's demands, Iplay will consider such a behaviour of the consumer to constitute a violation of this regulation'; 'termination of the contract for reasons on the consumer's side does not result in return of the payments already made by the consumer at the iplay.pl website'.

The UK case *St. Albans City and District Council* v. *International Computers Ltd*[440] pertained to the exclusion of liability for defective software. It concerned the use of a limitation clause seeking to limit the defendant seller's liability to £100,000. An error in the software supplied led the claimant to suffer a loss of £1,314,846. Scott Baker J held that the clause was subject to the 'reasonableness test' under the Unfair Contract Terms Act 1977 (this regime exists alongside the regime implementing the Unfair Terms Directive and applies to business to business transactions such as this as well as business to consumer transactions). It was held that the provision on the liability arising in contract and the "reasonableness test" for clauses applied. The Court found the limitation clause to be unreasonable, after considering the unequal bargaining strength of the parties, a failure by for the defendant to justify the low limitation figure of £100,000 in comparison to the risk involved, and that the defendants had adequate insurance to cover the full loss and so were better placed to bear the loss. Clearly, there is likely to be an even higher threshold of fairness in consumer cases; whether under the 1977 Act or the regime implementing the Unfair Terms Directive.

The UK *Office of Fair Trading* (OFT) has produced further guidance with a list of terms that it considers could be unfair on the basis either of the 'indicative list' in Annex 2 of the Unfair Terms in Consumer Regulations 1999 or the general test of unfairness (implementing the Unfair Terms Directive indicative list and general test). These examples have been selected from cases where OFT took action under the Regulations.[441] Nothing on the OFT's list of examples contains anything exclusive to digital services, but a number of the examples given could be relevant in the digital context.[442] Among these, terms restricting the use of services such as having to have a game console connected to the Internet in order to be able to play the game, or having a digital satellite television recorder connected to the satellite receiver in order to watch programs already recorded. These do not really match any of the paragraphs on the indicative list; yet they are potentially unfair on application of the general test of unfairness.

2.7 Failure to perform properly

In this section, we will address the performance of the trader and the problems arising from the non-performance thereof. We will analyse in more detail the problem of non-conformity, i.e. the situation where the trader has provided the consumer with digital content, but this digital content does not meet the consumer's reasonable expectations. An attempt will be made to identify possible situations of non-conformity.

[440] [1996] 4 ALL ER 481.
[441] A1. P.3, Annex.
[442] Report I (United Kingdom), p. 369.

2.7.1 Time for performance

The parties are of course free to determine the time for delivery. In practice, the parties most often will have agreed upon the moment of delivery. In the case of contracts concluded online, it is standard procedure for most traders that the expected period for delivery is indicated on the trader's website. In the case of digital content contracts, in particular where no physical medium is provided, the consumer may normally expect that performance will take place within the period indicated on the website.

Where the parties have neither explicitly, nor implicitly made arrangements as to the time of performance, the question arises when performance is due. At present, Article 7(1) of the Distance Selling Directive, Article III.–2:102(3)(Time of performance) of the Draft Common Frame of Reference (DCFR) and Article 22(1) of the proposal for a Consumer Rights Directive all provide that in such a case performance must be rendered within 30 days after the conclusion of the contract. This provision is intended to trigger the rules on non-performance without the need for the consumer to set an additional period for performance and as such is intended to deal with the consequences of *late* delivery.[443] However, it seems ill-drafted with regard to the question whether the consumer may require earlier performance in the situation where such is feasible for the trader. It should be noted that this is almost always the case for digital content, where performance normally can take place immediately or shortly after the conclusion of the contract. It is submitted that the current provisions of the Distance Selling Directive, the DCFR and the proposal for a Consumer Rights Directive are not fit to be used with regard to digital content contracts.

The text suggested by the European Parliament's Committee on the Internal Market and Consumer Protection only brings a slight improvement. Article 22(1) of this text indicates that delivery must take place 'as soon as possible but not later than within a maximum of thirty days from the day of the conclusion of the contract'. This is still far away from the normal situation in the Member States, where performance is normally due either within a reasonable period after conclusion of the contract or even immediately.[444] In this sense, the provision suggested by the Council of the European Union seems better suited to reflect the normal situation for sales contract. This provision states that unless agreed otherwise, performance must take place 'without undue delay after the conclusion of the contract'.[445]

2.7.2 Place of performance and delivery of digital content

The trader must enable the consumer to make use of the digital content. When the contract neither explicitly nor implicitly determines the place of performance, Article III.–2:201(1) DCFR (Place of performance) determines that delivery takes place at the trader's place of business. This default rule is in line with the situation in most Member States, where either the trader's place of business or, which in most cases amounts to the same, the place where the goods are located or the place of the trader's seat is the place where performance must

[443] Schmidt-Kessel2011, p. 14.
[444] Cf. von Bar et al 2009a (Notes 2 and 3 to Article III.–2:102 DCFR (Time of performance), p. 728.
[445] Cf. Art. 22 (1) of the text of Council of the European Union, General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010; available online at http://register.consilium.europa.eu/pdf/en/10/st16/st16933.en10.pdf (last visited April 28, 2011).

take place.[446] The default rule has been clearly written for the tangible world, with traditional goods and services in mind. It seems, however, to be incompatible with the digital environment, where in most cases no tangible goods need to be delivered or services rendered in nature.

In practice, however, most of the time the parties (explicitly or impliedly) have determined the place where performance must take place. With regard to contracts for digital content, different places for performance may be indicated as the place of performance depending on the type of digital content and the manner in which the digital content is stored or made available to the consumer.

Where the digital content is stored on a tangible good as physical medium, the obligation to deliver the digital content in practice means that the DVD, CD or USB stick on which the digital content is stored is to be handed over to the consumer. When the contract was concluded in a retail shop, in accordance with the normal rule for the delivery of tangible goods, the place of performance will most often be the place of business of the trader – i.e. the retail shop where the transaction takes place. The parties may, however, also agree to delivery at the consumer's home address. This is typically also the place of performance when the contract is concluded online or by the phone and the consumer is to provide her home address in order to facilitate the delivery of the physical medium on which the digital content is stored. Delivery is then completed when the consumer has obtained physical control over the goods, Article IV.A.–2:201 (1) DCFR (Delivery) indicates. Paragraph (2) of that Article provides that when the parties have agreed that the digital content would be sent by carrier, delivery takes place by handing over the goods to the (first) carrier and by transferring any documents to the consumer that are necessary for the consumer to take over the goods from the carrier.[447] However, Article IV.A.–5:103 DCFR (Passing of risk in a consumer contract for sale) provides that if the goods are destroyed, lost or damaged during carriage, the risk thereof is still on the trader, implying that the trader must still perform its obligations under the contract.[448] The above equally applies in cases where the consumer must make use of hardware or software to be provided by the trader in order to access the digital content. Then, too, delivery is completed only when such hardware or software is provided to the consumer.

It is more difficult to determine the place of performance in case the digital content is not stored on a physical medium. In these cases, it is not so much the physical address of one of the parties, but rather the place from where the consumer may access the digital content – be it the consumer's mobile phone, her laptop or desktop computer, or another device. It is submitted that in all these types of contract, the place of performance is the place indicated

[446] Cf. Von Bar et al. 2009a, Notes 5-8 to Article III.–2:101 DCFR (Place of performance), p. 724.
[447] Cf. also M.L. Rustad, *Software Licensing*, New York: Oxford University Press, 2010, p. 589 (hereinafter:: Rustad 2010).
[448] Cf. Von Bar et al 2009a. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (Full edition), Volume 2,* Munich: Sellier European law publishers, 2009, Comment C to Article IV.A.–5:103 DCFR (Passing of risk in a consumer contract for sale), p. 1378-1379. (Hereinafter 'Von Bar et al. 2009b'). Cf. also Rustad 2010, p. 589; M. Vetter. 'Les conséquences de la livraison tardive d'un bien en exécution d'un contrat de commerce électronique', *Juriscom.net* le 16/10/2009, available online at http://www.juriscom.net/uni/visu.php?ID=1145 (last visited April 28, 2011).

by the consumer, if only by providing the number of the mobile phone or the IP-address of the computer.

A division can be made between different types of digital content. In the situation where the trader is required to send the digital content herself to the consumer, either the place of residence of the trader, or an address indicated by the consumer could be considered as the place of performance. Such an address may include a mail inbox, a computer's IP-address or a mobile phone number. Similarly, when the digital content may be downloaded from the trader's website, one could argue that the place of performance is the place of residence of the trader. However, for both types of contracts, more relevant is when the digital content is 'delivered' to the consumer. For these types of contract, the provision of the digital content may be considered as the functional equivalent of delivery.[449] Both types are characterized by the fact that the digital content is to be stored on the consumer's hardware. For that reason, performance is completed only when the digital content has reached the consumer's hardware (or: the hardware indicated by the consumer) and the consumer has been given the possibility to store the digital content on her hardware. It is submitted that in such situations, the place of performance is the place where delivery is completed, i.e. the address indicated by the consumer at the moment when the contract is concluded.

The situation may appear different when the trader need not enable the consumer to store the digital content herself, but is merely required to provide the consumer access to the digital content. This is, for instance, the case when the consumer subscribes to an online edition of a newspaper or a database, but also in the case where the consumer is given access to online gaming, or other programs on the trader's server (i.e. software-as-a-service or cloud computing) without actually allowing the download of the information. More or less the same applies when the trader has offered to provide the consumer with digital content that may be used only once – e.g. in the case of streaming of a movie on the basis of pay-per-view. In both these cases, delivery may take the form of providing the consumer with a user identification number or a password that enables access to the licensed database.[450] Delivery then takes the form of communication of the necessary identification data to the consumer. The place for delivery of this data may be considered the place of performance of the contract. Where no identification data need to be communicated to the consumer, performance is completed only when the consumer is enabled to access the digital content from the hardware indicated by the consumer. The place for performance, again, is therefore the address indicated by the consumer.

In many of these cases, performance and delivery take place when the consumer is able to access the digital content. When the consumer tries to access the digital content – as the case may be: after having received the necessary data for identification – but is refused access, this may be regarded as the total or partial non-functioning of the digital content, in much the same way as is the case when a DVD can't be played in a DVD player due to technical protection measures. This is therefore to be seen as a problem of non-conformity. The same is true if the consumer may access the digital content, but the digital content

[449] Cf. Rustad 2010, p. 583.
[450] Cf. Rustad 2010, p. 583.

nevertheless does not meet the reasonable expectations the consumer had when concluding the contract.

2.7.3 No transfer of ownership, but enabling enjoyment of the digital content

In the case where digital content is provided on a tangible medium, the trader is obliged to transfer the ownership of the tangible medium.[451] This obligation is typically performed when the physical medium is delivered to the consumer. In this case, the digital content is typically transferred to the consumer on a permanent basis for permanent use.[452] The same applies when the digital content is sent to the consumer or may be downloaded by him. In other types of contract, the digital content is only made available to the consumer for a limited period of time or a limited number of access attempts.[453] It should, however, be noted that a *transfer* of the digital content, in the strict sense, does not occur, as the trader does not provide the consumer with the original data (which therefore remains under her control) but only a copy of that original data – which copy nevertheless normally is of the same quality as the original data.[454] However, as this does not cause any misunderstandings and is in accordance with common parlance, the expression 'transfer of the digital content' is nevertheless used throughout this section.

The trader is, moreover, typically *not* required to transfer the ownership of the digital content itself, or more specifically, of the intellectual property rights associated with the digital content.[455] In contrast, the consumer is provided with a license to use the digital content.[456] Conclusion of the contract then implies that the consumer is made aware of the existence of such intellectual property rights and, more importantly, that the trader cannot be held liable *for the mere fact* that a third party argues that its intellectual property rights are infringed. Nevertheless, the consumer may reasonably expect that she will be able to peacefully enjoy the use of the digital content in accordance with its ordinary use. Where the consumer is not informed of restrictions as to the normal use of the digital content and rights of third parties have not been cleared or stand in the way of the consumer's peaceful enjoyment of the digital content, this constitutes a non-conformity for which the trader is liable.[457]

2.7.4 Application of the conformity test in general

The fact that the trader is typically not required to transfer the ownership of the digital content does not mean that in practice sales law may not be applied to digital content contracts. To the contrary, in particular in case of software contracts, provisions of sales

[451] It should be noted that in some legal systems, ownership automatically passes at the moment when the sales contract is concluded. In such legal systems, the passing of ownership is not an obligation of the seller, but a legal effect of the contract. Cf. Von Bar et al. 2009b, Note 2 to Article IV.A.–2:101 DCFR (Overview of obligations of the seller), p. 1255.
[452] Cf. also Schmidt-Kessel 2011, p. 4.
[453] Ibid., p..4.
[454] Ibid., p. 3, 6.
[455] Ibid., p. 3.
[456] Cf. also Bradgate 2010, p. 5, no. 26. Cf. also Rustad 2010, p. 578.
[457] Cf. also Article IV.A.–2:305 Article (Third party rights or claims in general).

law are generally applied, either directly or by way of analogy, as also Article IV.A.–1:101 DCFR (Contracts covered) demonstrates.[458]

Even though the classification of contracts is complicated, in practice, legal systems do not differ much in their approach as to how to determine whether or not the digital content is in accordance with the contract. In most legal systems, the question whether or not the digital content is in conformity with the consumer's legitimate expectations is answered on the basis of a functional, objective perspective. In practice, this means that the conformity test is applied as it has developed under the Consumer Sales Directive with regard to 'ordinary' consumer goods.[459] Generally, it should be noted that the conformity test appears to be flexible enough to take into account the differences between the different contracts pertaining to digital content – in much the same way as the conformity test is flexible enough to be applied to such differing goods as cars, furniture, toys and foodstuffs.[460] Moreover, Member States have broad experience in applying the different implied terms embodied in the conformity test of the Consumer Sales Directive and the general rules on defective goods in sales law to contracts whereby digital content is permanently transferred – e.g. cases where the digital content is stored on a tangible carrier, or sent by the trader or downloaded by the consumer for permanent use by the latter.[461]

The consumer's expectations may be based on a demonstration of its qualities, properties and capabilities by the trader in a retail shop, at a trade show or at the consumer's house. Where, after the purchase, the digital content appears not to have the capabilities ascribed to it during the demonstration this constitutes non-conformity of the digital content, Article IV.A.–2:302 lit c DCFR (Fitness for purpose, qualities, packaging) provides.[462] Similarly,

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[458] Cf. also, for the US, Rustad 2010, p. 535-537.

[459] See also more generally Th. Wilhelmsson, 'The solution of the Consumer Sales Directive', in: H. Collins (ed.), *The forthcoming EC Directive on Unfair Commercial Practices. Contract, consumer and competition law implications*, The Hague/London/New York: Kluwer Law International, 2004, p. 235, who argues that there is no obvious reason to treat the marketing of goods and services differently.
Similarly, in the US Art. 2 UCC, developed for the sale of tangible goods, is applied to software contracts. Art. 2-314 UCC contains a provision on the implied warranty of merchantability, which is phrased in much the same manner as the conformity test of Art. 2 Consumer Sales Directive. Art. 403 of the Uniform Computer Information Transactions Act (UCITA) extend the test to cyberspace; cf. Rustad 2010, p. 571, 583. It should be noted, however, that UCITA has proven to be a rather unsuccessful attempt to codify the law of e-commerce contracts. In 2002, UCITA had been enacted in 2 US States, but 3 States had enacted laws to invalidate any choice of law provision that would make UCITA applicable to a citizen of that state. It is thought unlikely that UCITA will achieve widespread acceptance, cf. J. Winn, J. Haubold, 'Electronic Promises: Contract Law Reform and E-Commerce in a Comparative Perspective', 27 *European review of Private. Law* 2002, p. 567, available online at http://www.law.washington.edu/Directory/docs/Winn/Electronic_Promises_Revised.pdf (last visited April 28, 2011).

[460] The US report indicates that there is serious uncertainty as to the level of quality the consumer may expect, cf. Report I (US), p. 412. In this sense also The European Consumer Centres' Network, *The European Online Marketplace: Consumer Complaints 2008 – 2009. A summary and analysis of consumer complaints reported to the European Consumer Centers' Network* (hereinafter referred to as: referred to as: ECC Network 2008-2009), p. 22-22. However, in particular for software the same quality standards as for tangible goods apply, cf. Rustad 2010, p. 628.

[461] Cf. Schmidt-Kessel 2011, p. 13, with further references.

[462] Cf. also Rustad 2010, p. 625.

the digital content will not conform to the contract if it does not meet the descriptions provided or statements made by the seller[463] or a public statement made by the producer (e.g. on the producer's website),[464] or if it is not properly packaged or labelled.[465]

The consumer is required to prove that the digital content does not conform to the contract, i.e. does not meet her legitimate expectations. She normally is helped by the conformity test's sub-rule that the digital content must be fit for its ordinary (or: normal) purpose. When the digital content is not fit for that purpose, it does not conform to the contract. In Poland, the Supreme Court has stressed that in order to assess this, not only the technical requirements are to be taken into account, but also other reasons that would make the digital content unfit for its purpose or would constitute a default, diminishing its value or usability.[466] This does, however, not mean that applying the conformity test is easy in the case of digital content contracts. Rather the opposite is true: different from tangible goods, it is often uncertain *what* the consumer may reasonably expect from the digital content.[467] The sub-rule of the 'ordinary purpose' points to a standard against which the use this consumer wants to make of the object of the contract is measured. The problem for digital content contracts is that such a standard often does not (yet) exist. This is caused by a number of things. Firstly, digital content contract are a relatively new phenomenon. Secondly, there are very different types of digital content and there is a high level of product differentiation. Adding to the resulting diversity are the varying licensing practices of and licensing conditions offered by the different providers of digital content. Moreover, the market for digital content is largely set by its technical environment and the continuing rapid developments, which means that what is at one moment state-of-the-art is outdated the next.

An important factor in practice is the fact that the legitimate expectations of the consumer are to a large extent influenced by statements from the side of the industry. For instance, where the trader has informed the consumer before the conclusion of the contract that the producer has made use of technical protection measures preventing the possibility to make a private copy of the digital content or the possibility to use the digital content on another medium, it is questionable whether the consumer may still expect to be able to make private copies or to use the digital content on another medium. Statements by the industry – whether driven by restrictions of a technical nature or by business interests – indicating that a particular use of the digital content is not or only to a limited extent possible may therefore become a self-fulfilling prophecy. In this sense, the conformity test is somewhat subject to manipulation by the trader.[468] Yet, as *Rott* points out,[469] even if consumers indeed believed these statements, this still need not necessarily mean that digital content would be

[463] Cf. Rustad 2010, p. 571-572, 627.
[464] Cf. Art. 2(2)(d) Consumer Sales Directive. Cf. also Article IV.A.–2:303 DCFR (Statements by third persons) and Article II.–9:102 DCFR (Certain pre-contractual statements regarded as contract terms).
[465] Cf. Article IV.A.–2:302 lit d Article (Fitness for purpose, qualities, packaging); Rustad 2010, p. 571.
[466] Cf. Supreme Court of 27 November 2003 (III CK 115/02); cf. Report I (Poland), p. 293.
[467] Cf. P. Rott, 'Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law', *Journal of Consumer Policy* 2008/4, p. 450.
[468] Schmidt-Kessel 2011, p. 13, rightly observes that this as such is not a phenomenon specific for digital content contracts, but rather a general problem with the conformity test.
[469] Rott 2008, p. 449. In this sense also Schmidt-Kessel 2011, p. 13.

in conformity with the contract merely because they were so informed, as long as they could (nevertheless) reasonably expect to be able to do so, for instance because of the existing legislative framework.[470]

Nevertheless, it is clear that the potentially self-fulfilling prophecy of statements made by the industry as to the use the consumer may make of the digital content points to a problematic situation, both from the point of an individual consumer, and from the perspective of the effectiveness of consumer protection in the area of digital content. Given the fact that there often is no standard (yet) to indicate what constitutes 'normal use' or 'ordinary use' of the digital content, this criterion often is of little use. This implies that whether or not a consumer can benefit from the rules on non-conformity to a large extent depends on the fact whether she has been properly informed.[471]

On the other hand, the consumer's expectations will also be based on similar experiences she may have had from using traditional, tangible goods, which may resemble the digital content now purchased. Examples include the ability to play a CD on different devices, for example a CD player, a car audio system or a computer (for consumptive use) or to make private copies.[472] They are normally used to be able to use a CD or DVD in different players and therefore expect to be able to use downloaded digital content on different players as well. Digital Rights Management and the contractual conditions it enforces, restricts these forms of usage. Secondly, consumers have gotten used to the possibility to forward digital content to others and to use it on different devices, etc.[473] These experiences also shape consumers' expectations of digital content. As a result, consumers expect certain customary features of digital products, even if they have to pay extra for them.[474]

The consumer's *individual* considerations and expectations, such as the purpose for which the consumer wishes to use the content, are relevant only when two conditions have been met. First, these considerations must have been made known to the provider of the digital content prior to the conclusion of the contract. Second, the trader may not have indicated that the intended purpose would not be fulfilled by the digital content. When these conditions have been met, the consumer may rely on the digital content to be able to fulfil that purpose.[475] In this respect, it need not matter whether the contract is classified as a contract for sales or services, as the conformity test could, in principle, apply to both types of contract.[476] This is evidenced by the fact that under the DCFR the conformity test is

[470] Which may differ from one country to the next, as Rott 2008, p. 450 rightly remarks.
[471] Cf. N. Helberger, P.B. Hugenholtz, 'No place like home for making a copy: private copying in European copyright law and consumer law', *Berkeley Technology Law Journal*, 2007-3, p. 1093-1094.
[472] N. Dufft et al., INDICARE, *Digital Music Usage and DRM*, *Results from a European Consumer Survey 26-28* (2005), p. 16, 23, available online at http://www.indicare.org/tiki-download_file.php?fileId=110 (last visited April 28, 2011).
[473] Dufft et al. 2005, p. 16, shows that in 2005, 73 % of the users of digital music had shared music files with family and friends over the previous six months and 60 % with other people.
[474] Dufft et al. 2005, p. 29; N. Dufft et al., INDICARE, *Digital Video Usage and DRM, Results from a European Consumer Survey 26-28* (2006), available online at http://www.indicare.org/tiki-download_file.php?fileId=170 (last visited April 28, 2011), p. 25-26.
[475] Cf. art. 2 (2)(b) of the Consumer Sales Directive.
[476] As will be explained below.

applied in much the same manner to lease contracts[477] and services contracts.[478] Moreover, in France, the legislator has expressly determined that the rules on consumer sales contracts, including the conformity test, also apply to a contract for consumer services.[479]

Whereas individual considerations normally do not play a role when interpreting the conformity test, this is different with more abstract notions such as public order and the protection of privacy or fundamental rights. As *Rott* indicates,[480] what should be considered to be normal use of digital content is 'a normative test that allows the consideration of various factors, including shared social values, industry self-regulation, and business practice'. *Helberger* and *Hugenholtz* point also to the state of the market, the state of technology and the nature and characteristics of comparable goods and digital content.[481] The possibility to express oneself and to access opinions expressed by others is fundamental in a democratic society – as is evidenced also by Article 10 of the European Human Rights Convention – and forms an essential part of the use of digital content. If such possibility is excluded or restricted by contract terms or by the use of technology, this may limit the reasonable expectations the consumer may have of the digital content and amount to a non-conformity of that digital content.

From the legal and information policy point of view, matters are complicated by the fact that intellectual property law serves a number of additional public policy objectives that are also in the interest of consumers: the dissemination of ideas, broad participation in a social dialogue, freedom of expression of the media, protection of culture, and stimulation of progress and innovation. These public policy objectives do not target so much (the expectations of) the individual consumer as (the expectations of) a consumer in the context of the society in which she is living. In other words, from the public policy point of view, preferences depend not only on the perspective of the individual consumer but on the perspective of the society as a whole. It is at least questionable whether in a perfectly competitive market the sum of all individual consumer decisions is necessarily identical with the realization of these policy goals.[482] In this respect, it is probably not enough to rely entirely on market forces to protect social objectives; additional initiatives to improve the position of consumers may be justified.

Only in a few country reports – notably the Italian and the Spanish report – considerations such as freedom of information and expression, public order and fundamental rights (e.g. privacy, identity, and honour) are explicitly mentioned as being

[477] Cf. article IV.B.–3:102 DCFR (Conformity with the contract at the start of the lease period) and Article IV.B.–3:103 DCFR (Fitness for purpose, qualities, packaging etc.).
[478] Cf. article IV.C.–2:106 DCFR (Obligation to achieve result), and more specifically for construction, storage, design and information contracts, Article IV.C.–3:104 DCFR (Conformity), Article IV.C.–5:105 DCFR (Conformity), Article IV.C.–6:104 DCFR (Conformity), and Article IV.C.–7:105 DCFR (Conformity).
[479] Cf. Art. L. 216-1 Consumer Code; cf. Report I (France), p. 41. Cf. also Bradgate 2010, p. 2, nos. 6-7 and p. 18, no. 36, who points out that the 'reasonable expectations' test of sections 12-15 of the English Sale of Goods Act over time have been expanded by legislation to apply to all forms of contracts by which 'goods' are supplied.
[480] Rott 2008, p. 449. Compare also Wilhelmsson 2004, p. 234.
[481] Helberger & Hugenholtz 2007, p. 1085-1086, 1093.
[482] Cf. U. Reifner, 'The future of consumer education and consumer information in a market economy', in. T. Wilhelmsson, S. Tuominen and H. Tuomola, H. (eds.), *Consumer Law in the Information Society*, The Hague: Kluwer Law International 2001, p. 76.

relevant when determining whether or not the digital content contract is performed correctly.[483] Moreover, standards developed under, for instance, copyright law and data protection law may be used by courts when applying the conformity test.[484] In particular in the country reports from Italy, Spain and the US[485] it is emphasized that when copyright or data protection law is not respected, the digital content may not conform to the contract. In Italy, journalistic codes of conduct are taken into account even without explicit reference by the trader when determining whether the digital content is in accordance with the expectations the consumer may have of it,[486] whereas in Germany and Poland, provisions to protect minors under media law are included in the test whether or not the consumer's legitimate expectations of the digital content are met.[487] Such a broader interpretation of the conformity test instead of a purely functional perspective may prevent the possibility that the conformity test is in practice completely undermined by statements from the side of the industry indicating that the digital content can or may only be used in one manner and for one purpose, thus severely restricting the expectations the consumer otherwise could reasonably have of the digital content. It may be argued that when technical protection measures, licensing conditions or statements by the producer or the trader do not respect the legitimate expectations a consumer may have as a result of the existing legal situation under copyright law, audio-visual law or data protection law, they are to be left out of consideration when determining whether the digital content conforms to the contract. For instance, where technical protection measures stand in the way of private copying in a legal system where the private copying exception is accepted,[488] this would constitute a non-conformity of the digital content, unless the consumer were informed of the technical protection measures.[489] Similarly, in the case of software, insofar as the making of a back-up copy of a computer program is necessary for use in accordance with its purpose by a consumer who has lawfully purchased the software, under Article 5(2) and 8 of the Computer Programs Directive [490] the right to make a copy is mandatory and may therefore not be excluded or restricted by contract. It seems that where no such back-up copy can be made due to *technical protection measures*, this would equally constitute non-conformity of the digital content, as the consumer could reasonably expect to be able to make such a back-up copy under these circumstances.

Secondly, where the digital content displays harmful video content, which is prohibited under audio-visual law, this may also establish non-conformity. Similarly, one could argue that the principle of informed consent under data protection law, implying that digital

[483] Cf. Report I (Italy), p. 184, and Report I (Spain), p. 344.
[484] Compare Report I (Hungary), p. 136-137, Report I (Norway), p. 264. Cf. also Report I (UK), p. 368, where it is indicated that a contract term compromising the consumer may be considered unfair. Cf., however, also explicitly Report I (Poland), p. 293-294, where it is explicitly stated that standards developed in data protection law do not influence the conformity test.
[485] Cf. Report I (Italy), p. 182-183, Report I (Spain), p. 331, 347, and Report I (US), p. 412.
[486] Cf. Report I (Italy), p. Cf., however, Report I (Germany), p. 99, where it is indicated that such codes do not play an important role in Germany and that consumers would not normally be aware of them, unless the trader explicitly points at them.
[487] Cf. Report I (Germany), p. 91, 99, and Report I (Poland), p. 294.
[488] Which is the case, for instance, in Germany and Belgium, cf. Rott 2008, p. 442-443.
[489] Cf. Rott 2008, p. 447.
[490] Directive 2009/24/EC, *OJ* 2009, L 111/16.

content may not install software collecting one's personal data or information unless the consumer has consented thereto may be relied on when applying the conformity test.

One other matter is of relevance to the application of the conformity test in general: the age of the individual consumer and the age of the targeted group of consumers. The first points to the trader's knowledge of the personal circumstances of the particular consumer with whom she contracts, the latter to her knowledge of the parties interested in her product. Both when the trader is aware of the age of the individual consumer and when the average age of the targeted group of consumers gives rise thereto, the trader must take that age into account when concluding and performing the contract. For instance, when the consumer is or is expected to be a minor of a certain age, the language used in the communication with the consumer may have to be simplified in order for the minor to understand that information. Secondly, it may be that (additional) user instructions need to be provided to enable that minor to actually make use of the digital content. Where such (additional or simplified) information is not provided, this may constitute non-conformity of the digital content itself.[491] It should be noted that the same may apply to other groups of vulnerable consumers, such as seniors. Moreover, audio-visual law sets limitations also in this respect, as certain harmful video content may be distributed to adults, but is prohibited for minors. If the trader knows or has reason to expect that the contracting party is a minor, the harmful digital content is not in conformity with the contract.

2.7.5 Types of conformity problems

In practice, different types of conformity problems may be identified. These may be divided in three categories – (1) accessibility, functionality and compatibility issues, (2) bad or substandard quality, and (3) flaws, bugs and other security and safety matters. It should, however, be noted that some conformity problems can be classified as belonging to two or even more of these categories. One may think of the situation where software contains a defect or bug, with security risks as a result. Such a problem can be classified as a security matter (as it is here), but also as a quality problem. The division of conformity problems into categories does not have any legal consequences, so the precise demarcation of the borderline between the categories is of no practical importance.

From the listed categories, and in line with the fact that digital content to a large extent is an experience good, it will become immediately clear that most conformity problems in fact pertain to hidden defects, i.e. defects that the consumer cannot discover before the digital content is in fact used. The trader is required to communicate these defects before the conclusion of the contract. It is undisputable that when the trader knows or should recognise a hidden defect, and does not disclose this before the contract is concluded, the trader is liable for non-conformity.[492]

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[491] Cf. more in general with regard to user instructions also E.H. Hondius, V. Heutger, Chr. Jeloschek, H. Sivesand and A. Wiewiorowska (eds.), *Principles of European Law on Sales*, Munich: Sellier. European law publishers, 2008, Comment B and Note 6 to Art. 2:202 PEL S (Fitness for purpose, qualities, packaging), p. 194 and 200-201.

[492] Cf. Rustad 2010, p. 626-627.

2.7.5.1 Accessibility, functionality and compatibility issues

A recent study shows that access problems – where the digital content cannot be accessed at all or where access is disturbed – occur rather frequently: out of all the most recent problems consumers had experience over the last 12 months, approximately one-third related to access. In again one-third of these cases the consumers did not know why they experienced them, but in the two remaining thirds the access problems related to unexpected service interruptions by unforeseen events at the trader's end.[493] They occur most often with regard to digital content which is accessed through a computer, a mobile phone or satellite navigation systems, such as TomTom and Garmin, with no less than 32 to 38 % of all interviewed consumers experiencing such problems over the last 12 months, compared to 24-30 % of consumers reporting access problems when the digital content was accessed through other means (such as CD/DVD/Blu-ray, TV, or handheld gaming device).[494] It will be clear that such access problems constitute non-performance if the consumer was entitled to continuous access or when the digital content is not provided within the time for performance. This is true not only when technical problems stand in the way of the consumer's use of the digital content – e.g. because the digital content is to be accessed from the trader's server but that system is overloaded –, but may also be caused by Digital Rights Management.

In practice, Digital Rights Management is realized by using technical protection measures, and often re-enforced through contractual clauses in the end users' license agreement, or by a combination of both, which lead to restrictions of or control by the trader over the use of the digital content by the consumer.[495] Technical protection measures may seek to prevent the transfer of the digital content from one device to another, but also to restrict the number of times or the period during which the consumer may access the digital content. Whereas this may be perfectly legitimate,[496] it may also cause consumer detriment, in particular when consumers are unable to transfer digital content from one device to another. A study conducted in 2005 showed that a large majority of consumers purchasing digital music files considered interoperability not only important, but was even willing to pay extra if need be to keep the possibility to use the digital content on other devices. Similarly, a large majority of consumers would rather pay five times as much for a digital music file that they can listen to for as long as they like than paying for a song that they can rent for a month.[497] In this respect, it is not surprising to see that some of the larger providers have stopped using Digital Rights Management or now offer both DRM-protected digital content and, at a

[493] Cf. Europe Economics 2011, Report 3, p. 82.

[494] Cf. Europe Economics 2010, p. 55. Obviously, every day users stand more chances to experience problems; in that sense, it is not surprising that these users report more problems than infrequent users. Cf. Europe Economics 2010, p. 55-56.

[495] BEUC 2010, p. 7; cf. also N. Lucchi, *Countering the Unfair Play of DRM Technologies*, New York University school, Public law/Legal Theory Research paper series Working paper no 2007-02, p. 5-6, 31-32.Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=970995 (last consulted: April 28, 2011).

[496] For instance: in the case where the consumer is awarded a right of withdrawal, a technical protection measure could prevent the use of the digital content beyond the period during which the consumer may withdraw from the contract, and the digital content could be updated in case the consumer has not withdrawn from the contract allowing further use.

[497] Dufft et al. 2005, p. 27.

higher price, DRM-free digital content.[498] This development also shows that consumers as a group do have some power in fashioning their reasonable expectations and thus in shaping the conformity test.

When the consumer cannot access the digital content or transfer it to another device, and make use thereof in accordance with its ordinary or specifically agreed purpose, the question arises whether this constitutes non-conformity. The inability to access the digital content may be the result of the use of technical protection measures. Where this prevents the consumer from using the digital content in accordance with its normal purpose, this constitutes non-conformity – unless of course the consumer was no longer entitled to use the digital content, as may be the case where she has (rightfully) withdrawn from the contract.[499] Access problems may also be the result of an incompatibility of formats and standards used. An example would be the case where a protected music CD cannot be played in an old CD player.[500] A study conducted in 2005 showed that consumers are indeed concerned that their digital music files might not be usable on devices they buy in the future.[501]

Technological protection measures are imposed on consumers through various instruments, by including them within the operating system, the program software, or (for instance in the case of DVD and Blu-ray players) the hardware of a device.[502] Both technical protection measures and contractual clauses in the end users' license agreement are used in order to safeguard the producer's intellectual property rights, often even in cases where the intellectual property rights themselves have already been exhausted. Some examples have been given above already. Another example is the prohibition or limitation of copying (e.g. a music file may only be used on one or two computers or other devices on which the file may be played, or the consumer is not allowed to make private copies).[503] In the BEUC report, it is argued that 'In such a case, the primary purpose of the contract is defeated.'[504] This is, of course, an overstatement, for the consumer is at least entitled and enabled to make use of the product during a certain period or number of times and on (at least) one device. Nevertheless, where the consumer may otherwise reasonably expect to be able to use the product freely, unrestricted in time, in number of times of access to the product, or in the number of times she wishes to transfer the file to another device or to make a private copy, this may be considered as a non-conformity of the digital content. This is different only when the consumer, before the conclusion of the contract, was properly informed of such restrictions,[505] and such restrictions cannot be said to constitute an unfair contract

[498] Cf. for instance E. Schaafsma, 'Warner biedt drm-vrije muziek aan via Amazon', published 28 December 2007, available online at http://webwereld.nl/nieuws/49218/warner-biedt-drm-vrije-muziek-aan-via-amazon.html (last visited April 28, 2011). Cf. also Dufft et al. 2006, p. 33.
[499] Cf. also Schmidt-Kessel 2011, p. 12. As explained above, in such a case a technical protection measure preventing further use would be perfectly legitimate.
[500] Cf. Rott 2008, p. 445; cf. also Guibault et al., 2007, p. 111-112, with reference to several French cases.
[501] Dufft et al. 2005, p. 23-26.
[502] Cf. Lucchi 2007, p. 6.
[503] Cf. Lucchi 2007, p. 3, 6.
[504] BEUC 2010, p. 7.
[505] In this sense also BEUC 2010, p. 7, 9.

term, an unfair commercial practice or an unlawful restriction of fundamental rights such as the right to information or the right to privacy.

This is in line with the law of most Member States. For example, in Germany, the Copyright Act requires that insofar as digital content is protected by technical protection measures, it must be clearly labelled as such.[506] Where the technical protection measures were not clearly indicated to the consumer, this constitutes non-conformity.[507] The same would seem to apply for the UK.[508] In France, the Intellectual Property Code requires the trader to inform the consumer on the possibility to make private copies despite the use of Digital Rights Management.[509] In Spain it is argued that even though there is no explicit obligation to this extent, the fact that the use of Digital Rights Management limits the consumer's use of the product, it alters (and simultaneously defines) the essential features of the contract. As a result, the trader is required to inform the consumer thereof.[510] In Poland, while Digital Rights Management is allowed insofar as the consumer is properly informed,[511] the consumer is entitled to remove the Digital Rights Management safety measures in order to freely make use of the digital product, unless the trader proves that the consumer has removed the Digital Rights Management measures to enable unauthorized use of the good.[512] The same is true for Norway; however, the use of Digital Rights Management to restrict use to a certain region or country will probably be considered to be an unfair contract term under the Contracts act.[513] There are, however, a few legal systems, which are clearly more lenient towards the use of Digital Rights Management. This is in particular true for Hungary, where there is no need for the trader to inform the consumer of it being used.[514]

Technical protection measures are also applied to safeguard other commercial interests of the producer, e.g. securing future trade. The lack of interoperability thus created by the technical protection measure may cause the consumer to be 'locked-in' to a particular technology or service. When the consumer is locked-in to the device and technique chosen, she is more or less forced to purchase new devices of the same type if she wants to retain the use of the digital content purchased earlier once the device needs to be replaced. When the consumer was not informed of this problem prior to purchase of the digital content, this may constitute non-conformity of the digital content. If the consumer was properly informed, the rules on non-conformity will only provide relief if more abstract notions such as public order, the protection of privacy or fundamental rights, or other societal values and interests are compromised by the use of these technical protection measures. Apart from

[506] Cf. Art. 95d (1) of the German Copyright Act.
[507] Cf. Report I (Germany), p. 89, 91.
[508] Cf. Report I (UK), p. 371, 378.
[509] Art. L. 331-10 Intellectual Property code.
[510] Art. 22.1.e of the Law concerning the free access to service activities and their practice (LAASE) and Art. 60 General Law for the Protection of Users (TR-LGDCU); cf. Report I (Spain), p. 342.
[511] Cf. K. Gienas, *Systemy Digital Rights Management w świetle prawa autorskiego*, Oficyna, 2008, as referred to in Report I (Poland), p. 299.
[512] W. Machala, 'DRM a prawo wlasnosci intelektualnej', *Pr.NTech.* 2008/1/25, as referred to in Report I (Poland), p. 299-300.
[513] Cf. sections 36 and 37 Norwegian Contracts act, cf. Report I (Norway), p. 270.
[514] Cf. Report I (Hungary), p. 123. See also Report I (US), p. 405.

this, the use of such technical protection measures may constitute an unfair commercial practice or a breach of competition law, but cannot be remedied by consumer (sales) law.

The limited functionality of the digital content may also relate to the question of whether the consumer can make use of the digital content wherever and whenever she wants. This is not just a question of interoperability: it also plays a role when consumers are faced with user restrictions by the use of region codes embedded in DVDs and Blu-ray discs and players. Region codes are a technical protection measure developed by providers of movies that divide the world into six (DVD)[515] or three (Blu-ray) regions,[516] restricting the area of the world where the DVDs or Blu-ray discs can be played. As a consequence, a DVD or Blu-ray disc bought in one region cannot be played in another region if the DVD or Blu-ray player enforces the region codes. When the consumer is not properly informed of such user restrictions, the consumer may legitimately expect to be able to use the digital content also in other regions than the one in where they are purchased.

More generally, consumers may expect the digital content to function properly when it is accessed. This has since long been accepted by the German Court of Appeal of Cologne with regard to standard software. In this respect, it is rightly noted that when the digital content does not work as agreed upon, it is not in conformity with the contract, unless the trader has specified the properties or characteristics of the digital content in such a way that the consumer should have been aware of its (possible) non-functioning – for instance by indicating that the digital content is still in a test phase.[517] If the latter is the case, it may be argued that the consumer has accepted the non-functioning in much the same way as a buyer may accept the non-functioning of an old-timer car as she wishes to make use of the spare parts for the revision of another old-timer. However, when the trader has offered Beta-versions (test-versions) of an online game on the market against payment, and the consumer is not provided with the ordered and paid for digital content due to technical problems, notwithstanding the exclusion of its liability for Beta-version the trader is in breach of contract, as the warning (and thus the exclusion of liability) does not pertain to the late delivery of the digital content, but to defects and bugs in the digital content itself.[518]

One of the battlegrounds with regard to digital content is whether or not consumers are allowed to make one or more copies of the digital content for private use. Empirical research shows that consumers generally tend to expect to be able to make such private copies.[519] However, this general expectation does not rest on legally solid ground.[520] Article 5(2)(b) of the 2001 Information Society Directive provides that Member States *may* include in their legislation a 'private copy' exception or limitation, enabling consumers to make a

[515] These roughly are: (1) USA and Canada, (2) Europe, Middle-East, South Africa and Japan, (3) Southeast Asia, South Korea, Taiwan, (4) Latin America, Australia and New Zealand, (5) India, Russia, Ukraine, Central and South Asia, Africa), and (6) China and North Korea.
[516] These roughly are: (A) North and Latin America, Southeast Asia, Taiwan, South Korea and Japan, (B) Europe, Africa, Southwest Asia, Australia and New Zealand), and (C) Central and South Asia, China and Russia.
[517] BEUC 2010, p. 6.
[518] The example is taken from a consumer complaint reported in ECC Network 2008-2009, p. 24.
[519] Cf. also Dufft et al. 2005; Dufft et al. 2006.
[520] Helberger & Hugenholtz 2007, p. 1062.

copy or copies for private use, provided that the rightholders receive fair compensation. Under Article 6(1) of the Information Society Directive, technical protection measures are accepted, but Member States *may* take appropriate measures to ensure that consumers are enabled to make us of the private copy exception or limitation. However, in any case rightholders are allowed to adopt adequate measures regarding the number of reproductions the consumer may make.[521] This implies that under copyright law, an unrestricted right of private copying does not exist in any legal system in the EU. Moreover, it follows that Member States have complete discretion whether or not to adopt any rules allowing private copying. As a consequence, the majority of rules on private copying have not been harmonised in the European Union.[522] In any case it is clear that a generally recognised *right* to make private copies does not (yet) exist under European copyright law.[523]

One exception is the right of the lawful purchaser of a computer program to make a back-up copy of the program if this is necessary for its use and in accordance with its purpose, as recognised by the Computer Programs Directive. This right may not be set aside by contract. Arguably, the impossibility to make a back-up copy of a computer program due to *technical protection measures*, would constitute a non-conformity of the software, since the consumer does enjoy an explicit right awarded to her under the Computer Programs Directive and will therefore have the reasonable expectation to be able to make such a copy as part of the normal use of the software. It is important to note, however, that the right to make a back-up copy relates only to computer programs and not to other categories of works like music, video, pictures or texts, the private copying of which is governed by the Information Society Directive.

Insofar as in a given Member State private copying exception or limitation is accepted under copyright law, the question arises whether in such a legal system the exception or limitation is mandatory or may be overcome by an agreement between the producer or trader and a consumer. The Information Society Directive does not provide an answer to this question. [524] This implies that even in a legal system where a private copy exception or limitation is accepted, the possibility exists that the producer or trader contractually excludes such a possibility in part or even in full. Moreover, the private copy exception or limitation cannot be enforced insofar as the protected works are offered on-demand under

[521] Cf. Art. 6(4) second subparagraph Information Society Directive.
[522] Cf. Helberger & Hugenholtz 2007, p. 1064; Guibault et al. 2007, p. 125.
[523] Cf. in France Supreme Court 28 February 2006, *Stés Studio Canal, Universal Pictures Vidéo Fr, SEV c/ Stéphane X et UFC Que-Choisir*, where the Court wrote : 'Attendu que pour interdire aux sociétés Alain Sarde, Studio canal et Universal Pictures vidéo France l'utilisation d'une mesure de protection technique empêchant la copie du DVD "Mullholland Drive", l'arrêt, après avoir relevé que la copie privée ne constituait qu'une exception légale aux droits d'auteur et non un droit reconnu de manière absolue à l'usager, retient que cette exception ne saurait être limitée alors que la législation française ne comporte aucune disposition en ce sens'. This case is available online at http://www.juriscom.net/uni/visu.php?ID=799 (last visited April 28,, 2011). Cf. also in Belgium Court of Appeal Brussels 9 September 2005, *Test-Achats c. Industrie du disque,* available online at http://www.droit-technologie.org/upload/jurisprudence/doc/194-1.pdf (last visited April 28, 2011).
[524] Cf. L. Guibault, '*Copyright Limitations and Contracts: An Analysis of the contractual Overridability of Limitations on Copyright*', The Hague: Kluwer Law International 2002, p. 252 ff.; Helberger & Hugenholtz 2007, p. 1065; J. Schovsbo, 'Integrating consumer rights into copyright law: from a European perspective', *Journal of Consumer Policy* 2008, p. 402.

contractual terms to which the consumer has agreed.[525] It is uncertain, however, whether acceptance by the consumer of a non-negotiable standard term in a shrink-wrap-, click-wrap- or browse-wrap-license suffices.[526] Furthermore, the Information Society Directive provides where the copyright holder voluntarily designs a technical protection measure that allows some private copying, the consumer's right to private copying is exhausted with that voluntary scheme, thus preventing the Member States to further protect consumers against technical protection measures.[527] The consumer's right to make a private copy, insofar as such a right exists at all under national copyright law, can therefore easily be undermined by the copyright holder.[528]

From the above it follows that the 'non functioning' of the digital content – in this case: the absence of the possibility to make a private copy – may be the result of perfectly legitimate licensing under copyright law. However, this still does not mean that consumers do not, and may not expect that digital content cannot be copied.[529] In this respect it should be noted that where copyright law centers on the position and the rights of the copyright-holder, consumer law focuses on the position and rights of consumers.[530] Under the conformity test, it is not the legal rights of the copyright-holder, but the legitimate expectations the consumer may have of the digital content which determines whether or not the digital content is in conformity with the contract. Once it is established that the consumer could reasonably expect that she could make a private copy of the digital content, the digital content does not conform to the contract if such a copy cannot be made.

The question remains, therefore, whether and when consumers may reasonably expect that they can make a private copy. A study conducted in 2005 shows that in the case of music content stored on a CD, consumers generally do expect to be able to make a private copy, and actually do make such copies.[531] Moreover, a large majority of no less than 80% of all interviewed consumers had made a private copy of CDs they owned themselves in the 6 months prior to the interview, and 73 % perceived this to be legal under all circumstances, with 7 % thinking that this is legal under certain circumstances and only 11 % believing this is illegal.[532] That same study showed that 86% of the Internet users that have experience with digital music have almost no knowledge about Digital Rights Management,[533] and between 70-80 % of the interviewed consumer that had purchased digital music in the 6 months prior to the interview indicated that they did not know whether the music they purchased was protected by Digital Rights Management and/or whether any usage restrictions applied. Of the persons that did know that usage was

[525] Cf. Art. 6 (4), fourth subparagraph Information Society Directive.
[526] Cf. Guibault 2002, p. 252 and ff; Helberger & Hugenholtz 2007, p. 1077; Guibault et al. 2007, p. 112.
[527] Cf. Art. 6 (4) third subparagraph Information Society Directive.
[528] Cf. also Guibault 2002, p. 260; Helberger & Hugenholtz 2007, p. 1077.
[529] Helberger & Hugenholtz 2007, p. 1085, in this regard remark that the reasonable consumer expectation standard counterweighs the copyright-holder-centered norms on private copying that prevail in a copyright law analysis.
[530] Cf. Helberger & Hugenholtz 2007, p. 1078.
[531] Dufft et al. 2005, p. 16, indicates that in 2005, no less than 80% of all interviewed consumers had made a private copy of CDs they owned themselves in the 6 months prior to the interview.
[532] Dufft et al. 2005, p. 41-42.
[533] Dufft et al. 2005, p. 36.

restricted, more than half were not well informed about the details of the restrictions.[534] With regard to the awareness of Digital Rights Management, similar figures are reported in a 2006 study on digital video usage and Digital Rights Management.[535] The experience with the usage of digital video content in 2006 was much less than of digital music content in 2005,[536] but this has probably changed significantly since then with the rise of, in particular, YouTube. It is noteworthy however, that the 2006 study shows that consumers were willing to pay for the possibility to burn (in particular newly released) movies on CDs or DVDs and watch them whenever it is convenient for them without taking into consideration release dates or movie schedules.[537]

The above shows that notwithstanding the fact that traders had made use of technical protection measures preventing private copies for several years and had informed their customers thereof, this information has neither 'sunken in' with consumers, nor has it affected the expectations that consumers generally have of digital content – more specifically: of music and video files. This points in the direction that – in particular with regard to digital music content – consumers may reasonably expect to be able to make private copies (if need be: against additional payment).[538] In this respect, it should be noted that when such information is somewhat hidden in standard contract terms or in a document containing a lot of other information, the consumer has not become aware of that information and her legitimate expectations have not been altered before the contract was concluded. The trader therefore needs to specifically draw the consumer's attention to that information in order to change the consumer's legitimate expectations as to the possibility to make private copies. Obviously, this would not stand in the way of a business model under which the consumer is given the (clearly indicated) choice to download a music or video file for a low price but without the possibility to make a private copy, or to download the same file for a higher price but with such possibilities.[539] One could even argue that when and as long as in Member States levies are imposed on blank carriers in order to compensate rightholders for private copies, the consumer may expect that she has already paid for the possibility to make a private copy by paying the levies for such carriers.[540] In some legal systems, the right to make private copies is mandatory and may not be excluded by contractual or technical protection measures. This implies that the consumer cannot waive the right even if she were properly informed of any limitations to the possibility to make such a copy.[541] This may signal a broader development indicating a shift from a purely copyright (author-oriented) approach towards a more consumer-oriented approach.[542]

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[534] Dufft et al. 2005, p. 37-38.
[535] Dufft et al. 2006, p. 32-34.
[536] Dufft et al. 2006, p. 8.
[537] Dufft et al. 2006, p. 26-27.
[538] Cf. Rott 2008, p. 447.
[539] Helberger & Hugenholtz 2007, p. 1094.
[540] Cf. Helberger & Hugenholtz 2007, p. 1086-1087.
[541] This is the case in Belgium and Portugal, and to a lesser extent also in France, Italy and Spain. Cf. Guibault et al. 2007, p. 160-162; Helberger & Hugenholtz 2007, p. 1075, 1078.
[542] Cf. Schovsbo 2008, p. 402.

It should be noted that the 'non functioning' of the digital content may be the result of perfectly legitimate licensing. This raises the tricky question of what the rights of the consumer under consumer sales law are if the licensing conditions are legitimate but ignore e.g. acknowledged interests, such as the private copying exception under copyright law.

A problem also related to, but going beyond the use of technical protection measures relates to matters of interoperability and system requirements.[543] A particular trait of digital content is that it cannot be used without making use of a technical device and, in most cases, without making use of (other) software. For instance, a DVD can't be played without a DVD player or a computer, and a film that is downloaded or streamed can only be watched when the consumer has the necessary software on her computer. This means that the digital content must interact with the consumer's software and hardware. Obviously, where the trader (whether or not performing an obligation to that extent) has indicated in advance in a clear and intelligible manner that the digital content can only be played on or accessed through that device or operating system and the consumer (nevertheless) concludes the contract, the digital content is in conformity with the contract if it indeed only can be played on or accessed through that device or operating system.[544] Although such practical restrictions to interoperability may seem problematic from the perspective of competition law,[545] from the perspective of consumer contract law it is not, as long as it is communicated properly before the conclusion of the contract. In this sense, advertising statements indicating that a certain game is available for the Nintendo Wii or the Microsoft X-box, that this music file is intended to be used on an iPod or with Windows Media Player, that this e-book can be read on a Kindle or an iPad, etc., in particular when this information is repeated on the website on which the consumer places her order or in the retail shop, will bring about that the consumer may not and will not expect to be able to use the digital content on another device. Similarly, when the trader[546] indicates that this software requires a certain speed of the processor, a particular sound and graphic card, or a particular amount of free space necessary for the use of the digital content, the consumer may not expect the digital content to function properly when these system requirements are not met. This implies that when the information is given, the digital content is in principle in conformity with the contract, unless the restrictions to interoperability amount to an unfair commercial practice.

However, when such information is not given, the question arises whether the consumer could expect to be informed about such matters and whether the trader by not giving such information has delivered a non-conforming product. Whether or not an *obligation* to inform the consumer exists, is the subject of section 2.3. As explained there, even when no such obligation exists, the need for the trader to properly inform the consumer about these matters may also follow from the conformity test. This approach to information about matters of interoperability and system requirements starts from the idea that unless the

[543] BEUC 2010, p. 7.
[544] Cf. also BEUC 2010, p. 9.
[545] Cf. Rott 2008, p. 443.
[546] I.e. the seller or a person for whose statements the seller is accountable, e.g. the producer or a party engaged in marketing for either of them, Article II.–9:102 DCFR (Certain pre-contractual statements regarded as contract terms).

provider of the digital content indicates otherwise, the consumer may expect that the digital content may be used with the ordinary hardware and software, which at the time of the purchase is commonly available on the market. Where the trader does not indicate that specific system requirements have to be met and the consumer nevertheless is faced with such restrictions, this constitutes non-conformity, as the digital content would not be fit for its normal purpose. This approach is taken in, for instance, Germany and The Netherlands.[547] One may argue that the French legal system – where the rules on consumer sales and consumer service contracts are largely the same under the Consumer code – in effect also follows this approach, as clauses which demand the consumer to verify the compatibility of her hardware in relation to the offered triple play services, and which exonerate the trader from any liability in this regard, are considered to be unfair by the Unfair Terms Committee.[548] In essence, this is also the position of BEUC in its position paper on digital content.[549]

Another access problem is the situation where a consumer cannot access and use the purchased digital content without also purchasing and installing other digital content. Whether or not this constitutes a non-conformity depends on the information provided to the consumer before the conclusion of the first contract. If the consumer was properly informed, she could not reasonably believe that she could make use of the digital content without purchasing also the other digital content. In that case, the fact that the digital content requires the availability of other digital content is (just) another system requirement.[550]

2.7.5.2 Bad or substandard quality

A different type of problems consists of 'substandard products'. As indicated earlier,[551] it is often difficult to determine whether the provided digital content is of the quality the consumer could reasonably expect, as quality standards often do not (yet) exist. Nevertheless, in many cases, notwithstanding the absence of a generally applicable objective standard as to quality, it will be clear that the quality of the digital content is not in conformity with the contract. Quality problems mostly arise where the digital content is of poor visual or sound quality due to technical defects, or when the digital content is corrupted.[552] Examples of this first type of defects are defects in a music file, causing a bad quality of that music file; an example of the second is data which causes a computer system to crash.[553] In both these cases, there clearly is a conformity problem. The argument that

[547] Cf. OLG Cologne, *NJW* 1996, 1683, as referred to in Report I (Germany), p. 100. See also Report I (The Netherlands), p. 229, and in essence also Report I (Italy), p. 185.
[548] Cf. Recommendation n°07-01 concerning triple play from 7 July 2007, as referred to in Report I (France), p. 62.
[549] BEUC 2010, p. 9.
[550] It should be noted, however, that requiring the consumer to make a second purchase may constitute an unfair commercial practice or an unfair term.
[551] See further section 2.7.5.1 above.
[552] A recent study by Europe Economics shows that 14% of all problems experienced by consumers with digital content over the last 12 months related to quality matters. Of these, poor visual or sound quality, and corrupted digital content each represent one-third of all consumer complaints, whereas consumers did not know why the quality was poor in the remaining third. Cf. Europe Economics 2010, Report 3, p. 65, 72.
[553] BEUC 2010, p. 6.

complex software should be allowed to be slightly flawed was met with some scepticism by the German Supreme Court as early as 1987.[554]

An important element causing the absence of generally accepted quality standards is the rapid development of new types of digital content and of devices on which they have to operate. The mere fact that newer digital content of a higher quality – e.g. because of the use of a higher resolution – has appeared on the market does not imply that digital content that was put on the market is henceforward to be considered as substandard because of that mere fact. In this sense, an analogy may be made with traditional tangible goods, where Article 6(2) of the Product Liability Directive[555] explicitly provides that a 'product shall not be considered defective for the sole reason that a better product is subsequently put into circulation'.

However, it may well be that the newer version of the same digital content, e.g. standard software, remedies existing problems in older versions of that digital content. In that case, the older digital content may very well be considered to be substandard if that older digital content is sold to the consumer when the new digital content has been put on the market and at that time the trader does not mention that these known defects have been remedied in the newer version of the digital content.

The parties may very well have accepted that the digital content to be provided is of substandard quality, i.e. does not meet the expectations the consumer could otherwise reasonably expect. This is unproblematic, in particular, in case the consumer has clearly opted for such substandard quality. In this sense, the absence of, for instance, the possibility to make a private copy may have been accepted in order to obtain the digital content against a lower price.[556] Whereas this 'price argument' is not always convincing – in particular not when the digital content is not offered with different modalities and capabilities for different prices[557] – this is different where the consumer is offered a choice.

More problematic is the answer to the question whether a digital content may be considered non-conforming in case the product was fit for use at the moment of delivery, but is soon outdated due to technological developments. The starting point must be that the digital content can be used with an operating system and software that can be considered normal at the time the contract is concluded. What the consumer may reasonably expect in this respect, of course, differs from time to time. For instance, the consumer may nowadays no longer expect that software can be used on a computer which makes use of MS-DOS as its operating system, but she may also not expect to be able to use the software on a computer, which makes use of an operating system that is not yet commonly available on the market. However, the mere fact that the trader informs the consumer prior to the conclusion of the

[554] See BGH 4 November 1987, VIII ZR 314/86,BGHZ 102, 135, NJW 1987, 406; cf. Report I (Germany), p. 104.
[555] Council Directive 85/374/EEC, *OJ* 1985, L 210/29.
[556] Helberger & Hugenholtz 2007, p. 1094.
[557] See with regard to the acceptability of this 'price argument' to justify exemption clauses in standard contract terms M.B.M. Loos, *Algemene voorwaarden. Beschouwingen over het huidige recht en mogelijke toekomstige ontwikkelingen*, The Hague: Boom 2001, p. 119-121.

contract that the digital content has not been fully tested for its compatibility with existing hardware does not free the trader from liability. Any other view would effectively get the trader off scot-free even in cases where the consumer could reasonably expect that the digital content would function properly, e.g. in the case where the digital content does not function properly on the hardware for which it is intended to be used on.[558] In fact, if such a statement would be given effect, this would create an incentive for traders not to investigate the proper functioning of the digital content.

A related question is how long the digital content must be 'fit for use'. In practice, often consumers will be enabled to frequently update the digital content in order to cope with such developments, ensuring that the consumer may continue to make use of the purchased digital content. Where the parties have actually agreed upon such updates[559] – either for free or against remuneration – and the updates are not or no longer provided, it seems obvious that this constitutes a breach of contract.[560] This may be different in the case where the parties have not made an explicit agreement to this extent. Even then, however, it could be argued that the consumer would have to be able to make use of the digital content for a reasonable period of time. Where the normal purpose of the digital content is for it to be used for a certain period of time, and due to technological development such use is no longer possible during that period of time, this may be classified as non-conformity as well.[561] This is basically the view in Finland, Germany, The Netherlands, Norway, Poland, and Spain, insofar, of course, as the technological development could and should have been foreseen at the moment when the contract was concluded.[562] The same would apply if the trader discontinued the online service the consumer needs in order to be able to use the digital content.[563] Interestingly, in Spain, it is thought that analogous application – prescribed by a Royal Decree – of the General Law for the Protection of Users and Consumers implies that consumers would have to be able to make use of the digital content for a period of at least five years from the date that the manufacturing of the digital content is discontinued; it is, however, uncertain whether this period should run from the moment when the digital content was delivered, or from the date of the delivery of the most recent update.[564] However, it may be doubted whether that view is shared in other legal systems. For instance, the Hungarian reporter argues that unless the contract provides her with such right, the consumer is not entitled to expect updates of the digital content or conversion

[558] In this sense also Rott 2008, p. 446.
[559] Such contracts may be concluded either for a fixed period or for an undetermined period. In the latter case, both parties may terminate the contract for the future by notice, cf. Article III.–1:109(2) DCFR (Variation or termination by notice), and Chr. von Bar et al. 2009a, Comment to Article III.–1:109 DCFR (Variation or termination by notice), p. 705-706.
[560] See in particular Report I (Hungary), p. 139, Report I (UK), p. 375, and Report I (US), p. 413.
[561] Cf. Rott 2008, p. 446.
[562] Cf. Report I (Germany), p. 101, 105, Report I (The Netherlands), p. 232 – where in fact a paper by Report I (Germany) is quoted – and 237-238, Report I (Norway), p. 266, Report I (Poland), p. 294, and Report I (Spain), p. 334. See also Report I (Finland), p. 21, where the reporter defends this as her personal opinion after having stated that this matter has not been discussed in Finnish doctrine or case law.
[563] Cf. Report I (Finland), p. 24, Report I (France), p. 67, Report I (Germany), p. 105, and Report I (Poland), p. 298. In Report I (France), p. 67, it is remarked that by discontinuing the online service the trader in fact unilaterally terminates the long-term contract between the parties.
[564] Cf. Report I (Spain), p. 334 and 339-340.

software even against remuneration.[565] The case is certainly far from being settled in the United Kingdom.[566] Moreover, in Poland and Spain, where the consumer may expect to be able to use the digital content for a reasonable period, no legal obligation on the part of the provider of the digital content is recognised requiring the trader to provide conversion software in case of technological developments.[567]

On the other hand, the consumer may not reasonably expect that such updates will be available for an unlimited amount of time, even against remuneration, as at a certain point it may be commercially unviable to provide such updates if the product itself has become obsolete. The reasonable expectations of the consumer would then have to decide when her right to be able to continue to use the digital content subsides.[568] In many cases, however, it is not so much the technological developments of the hardware or of other software, but external factors which cause the digital content to become outdated. Clear examples include road map software and anti-virus programs: if these are not regularly updated, they become useless after a while. Normally, the purchase of such products includes the purchase of regular updates without further charge for a certain period of time.[569] If such further updates are not provided, this of course causes a breach of contract.[570] Statutory obligations to provide updates or after sales services are missing altogether.[571]

2.7.5.3 Flaws, bugs and other security and safety matters

The recent study by Europe Economics indicates that only a small number of consumers interviewed for that study (9 %) had experienced security problems over the 12 months previous to the interview. Of these problems, most related to spam, both in the form of email and text messages (SMS) or to digital content which either directly corrupted the device on which they were installed or left them open to viruses etc.[572] It seems clear that insofar as the digital content contains such security matters – which may potentially cause serious detriment to the consumer – it does not conform to the contract. Sending spam – i.e. unsolicited communications for the purposes of direct marketing – to consumers is illegal under Article 13(1) and (3) of the Directive on Privacy and Electronic Communications.[573] Obviously, such conduct constitutes an unfair commercial practice. However, where the consumer had given her electronic contact details for electronic mail to the trader in the context of an earlier contract, spamming is not illegal insofar and as long as the consumer does not object to receiving the unsolicited commercial communications. It could be argued

[565] Cf. Report I (Hungary), p. 139, 143. Cf. also Report I (Italy), p. 190, and Report I (US), p. 413, 416, where similar doubts are expressed.
[566] Cf. Report I (UK), p. 372, 376.
[567] Cf. Report I (Poland), p. 298, and Report I (Spain), p. 340. This may be different in the UK, Cf. Report I (UK), p. 376.
[568] In this sense explicitly Report I (UK), p. 372.
[569] Cf. Report I (UK), p. 375.
[570] Cf. also Report I (Germany), p. 104, Report I (Italy), p. 190, Report I (Poland), p. 298, Report I (UK), p. 375, and Report I (US), p. 413.
[571] Cf. in particular Report I (The Netherlands), p. 237, where it is reported that the Dutch legislator deliberately did not deal with this matter. See in this sense also Report I (Finland), p. 24, and Report I (Poland), p. 298.
[572] Europe Economics 2011, Report 3, p. 75.
[573] Directive 2002/58/EC, *OJ* 2002, L 201/37, as lastly amended by Directive 2009/136/EC, *OJ* 2009, L 337/11.

that where the consumer had given her contact details upon the conclusion of an earlier contract, but has later on objected to receiving such messages, continuing to send such messages constitutes a non-performance of that earlier contract. Still, there does not seem much need for such interpretation as the law on unfair commercial practices would be applicable anyway.

The situation is different with respect to corrupted digital content (already discussed above in section 2.7.5.2) and with flaws, bugs and defects leaving the consumer's hardware or software open to viruses and Trojan horses. Such security problems may very well constitute non-conformity of the digital content. From the side of the industry, it is argued that it is normal that complex software has some flaws, defects or bugs when it is first put on the market. In fact, automatic services updates are also used to address and remedy newly discovered flaws as quickly and as efficiently as possible.[574] The question then arises whether the fact that such flaws, bugs and defects are rather common implies that the digital content is nevertheless in conformity with the contract when such defect, flaw or bug manifests itself. Decisive is whether the digital content meets the reasonable expectations the consumer may have of the product. If it is established that these expectations are not met, the digital content is non-conforming, irrespective of whether the deviation is major or minor.[575] The key problem, however, is how to establish what the consumer may reasonably expect from the digital content. Clearly, the consumer may reasonably expect that the digital content does not cause physical injury[576] or material damage to *other* hardware or software. Where such damage occurs as a result of a flaw, bug or defect in the digital content, the trader is without doubt liable for non-conformity, as the consumer may *at any rate* expect that the digital content is safe in its use.[577]

It is submitted that the consumer may also expect that software delivered to the consumer (including technical protection measures) does not open security holes that subsequently allow viruses to break in and damage the consumer's hardware or software.[578] Similarly, when products have been on the market for a certain period, the consumer may reasonably expect that most bugs and defects have been remedied – as the industry indicates it does –, implying that when a bug or defect preventing the consumer from using the digital content for its ordinary purpose or limiting her from doing so, the digital content is not in conformity with the contract.[579] In essence, this also seems to be the position of the German courts.[580] It should be noted that this does not mean that the consumer may immediately terminate: as section 2.8.2.3 indicates, the trader will in principle be allowed to remedy the flaw within a reasonable period. Yet, most of the time the consumer will not even notice the non-conformity, as the industry after its discovery has already repaired the defect by

[574] Cf. Europe Economics 2011, Report 3, p. 184. See also Bradgate 2010, p. 15, no. 23.
[575] In this sense also BEUC 2010, p. 7.
[576] Bradgate 2010, p. 16, nos. 26-27, rightly remarks that personal injury or even death are unlikely to occur in the case of digital content purchased by consumers. This may be different where the purchaser is acting in the course of its business, e.g. a hospital purchasing software programs to be used in operating rooms or IC units.
[577] Cf. Rustad 2010, p. 626-627.
[578] Cf. Lucchi 2007, p. 13-14.
[579] See also Report I (Germany), p. 104.
[580] Cf. Court of Appeal (OLG) Cologne, CR 2000, 354; comp. also BGH, BGHZ 102, 135; see Report I (Germany), p. 104.

using automatic services updates.[581] Even though the consumer is under no legal duty to do so, it seems that the trader may in turn reasonably expect the consumer to keep her software programs updated[582] and to allow for repairs of discovered defects, flaws and bugs through automated services update.[583] Insofar as the compatibility problems are caused by other software on the consumer's hardware, it would seem to suffice if the digital content only contains a warning that specific software found on the computer interferes with the digital content, and if need be deny the consumer further access until she has remedied the problem herself.

The consumer generally will and may also expect that most bugs and defects have been remedied when the digital content itself is newly produced, but makes use of tried and tested technological techniques. For instance, bugs rendering a movie or music file unusable, whether purchased on a DVD or downloaded over the Internet, constitute a non-conformity, irrespective of whether the movie or music was just released or had been on the market since the 1990s. But even with new software, one may argue that it does not conform to the contract if the number of bugs is unusually high.[584] This may be different, however, where the consumer has been warned prior to the conclusion of the contract that the program is only in the testing phase (beta), in particular if the program is offered free of charge.[585]

The digital content itself of course has to be free from viruses. In this respect, it is of no relevance whether the virus was not yet known and therefore undetected at the time of delivery. Moreover, the consumer may also expect that the digital content does not contain such bugs that viruses may enter the operating system through the bugs in the digital content. Where such a bug nevertheless exists and as a result the consumer's computer is infected, this constitutes non-conformity. On the other hand, where a virus or Trojan horse has made use of defects or bugs in other digital content and subsequently affects the purchased digital content, the trader will not be liable, as the digital content was in conformity with the contract at the moment of delivery or performance.[586]

Security problems may also be caused by Digital Rights Management systems that conflict with other software installed on the consumer's hardware, or that create the possibility for external attacks through their Internet connection. Such security problems are largely created by the trader and can hardly be controlled by consumers.[587] It stands to reason that such security problems would be recognised as non-conformity of the digital content.

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[581] Cf. Europe Economics 2011, Report 3, p. 167. See also Bradgate 2010, p. 15, no. 23.
[582] Cf.Bradgate 2010, p. 15, no. 24.
[583] See in this respect also Schmidt-Kessel 2011, p. 14, who relates this matter to the transfer of risk, which typically co-incides with the delivery of the digital content.
[584] Cf. Rustad 2010, p. 572.
[585] See also Bradgate 2010, p. 15, no. 22.
[586] Cf. Schmidt-Kessel 2011, p. 14.
[587] Cf. N. Helberger (ed.), *Digital Rights Management and consumer acceptability, A multi-disciplinary discussion of consumer concerns and expectations, State-of-the-art report*, 2004, p. 27, available online at http://www.indicare.org/tiki-download_file.php?fileId=60 (last visited April 28, 2011).

2.7.6 Liability for providers of online platform

Some digital content products are intended to provide the consumer with the possibility to make use of third party offers. Examples are online platforms such as eBay, but also the Apple Store and the OVI Store, where apps may be downloaded for mobile phones. Insofar as the devices purchased by the consumer to enable such downloads do not function, this may constitute a non-conformity of the device. For the purposes of this report, such non-conformities are, however, not relevant. This is different where the purchased third party application does not meet the consumer's reasonable expectations.

A first question is who in such cases the contractual counterpart of the consumer is. In France, the provider of the platform is considered to be the contractual partner of the consumer,[588] implying that the operator of the platform would be contractually liable if the digital content does not meet the consumer's legitimate expectations. The same holds true for other legal systems in the case where the provider of the platform has acted in its own name (and therefore has concluded the contract with the consumer itself, rather than allowing the third party to conclude the contract),[589] or the odd case where the provider of the platform would have guaranteed the proper functioning of the third party application.[590] When the third party has concluded the contract in its own name, and the operator of the platform therefore has only acted as an intermediary, the operator normally would not be liable if the digital content provided by the third party does not meet the consumer's legitimate expectations. In most legal systems this is different only when the defect was caused by the provider of the platform,[591] or when the operator has negligently provided the third party with a possibility to make use of the platform.[592] It could be argued that the operator should also be liable in the case when the third party cannot be identified or found – e.g. when the contact details provided turn out to be wrong[593] – or if the third party is insolvent. However, such argument is not substantiated by case-law or legislation in any of the Member States included in this study.[594]

2.8 Remedies

2.8.1 Introduction

Legal rights do not provide consumers with much protection if no remedies are available to guarantee compliance with them. In other words, effective remedies are essential elements of an adequate legal framework for digital content contracts for consumers. In this context, the question arises to which extent existing remedies in contract and consumer law cover the most pertinent problems consumers face in the digital context.

[588] Cf. Report I (France), p. 63.
[589] Cf. Report I (Poland), p. 296.
[590] Cf. Report I (Germany), p. 102.
[591] Cf. Report I (Finland), p. 21-22, Report I (Hungary), p. 139, Report I (Italy), p. 188, Report I (Poland), p. 296. However, in Spain, the third party would be liable even then, see Report I (Spain), p. 335.
[592] Cf. Report I (Finland), p. 22.
[593] As to the question whether the party operating the platform may be obliged to provide the consumer with the contact details in case these were not communicated by the third party, see section 2.3.2.3.
[594] Schmidt-Kessel 2011, p. 13.

According to empirical data, the most common types of problems consumers experience with digital content concern access, lack of information and unclear or complex information.[595] The most common consequences of these problems are anger, annoyance, loss of time and inconvenience.[596] The amount of time spent on resolving problems differs from one type of digital content to the other; problems related to anti-virus software, for instance, take about twice as much time to solve as problems related to social networking sites.[597] Financial loss also depends on the type of digital content, with e-mail and social networking sites accounting for the largest amounts of loss.[598]

In this section, a comparative analysis is presented of the remedies available for non-performance of digital content contracts. In particular, it will be assessed to which extent the existing remedies give adequate answers to consumers' problems with digital content. Moreover, attention will be paid to the formal requirements consumers have to respect when invoking remedies. Finally, the specific topic of termination of long-term contracts will be addressed, since this type of contract is not uncommon in regard to digital content.

Where appropriate, reference is made to EU legislation (e.g. the Consumer Sales Directive); the proposal for a Consumer Rights Directive, the Draft Common Frame of Reference (DCFR), and provisions of national laws.

2.8.2 Available remedies, hierarchy and formal requirements

2.8.2.1 Remedies in contract and consumer law

In most countries included in the research, no specific legal remedies have been developed for the non-performance of contracts relating to the supply of digital content to consumers, including non-conformity of the digital content product. However, certain rules regarding specific types of contracts may to some extent provide the consumer with additional protection. For example, the Directive on Distance Selling stipulates that delivery of the service or goods should take place within 30 days after the conclusion of the contract.[599] It allows the consumer to terminate the contract if the good or service is not available and obliges the supplier of the digital content product to return any amount already paid by the consumer. This refund must happen automatically; if it is not effectuated within 30 days, the consumer is entitled to claim payment of the double amount, without having to give up the rights to compensation for damages that exceed the amount.[600]

[595] Europe Economics 2011, Report 3, p. 158. See also the INDICARE survey on digital music and DRM, in particular p. 30-31, available on www.indicare.org (last visited April 28, 2011).
[596] Europe Economics 2011, Report 3, p. 160, 189.
[597] Ibid., p. 114-115.
[598] Ibid., p. 120-121.
[599] Art. 7 of Directive 97/7/EC on the protection of consumers in respect of distance contracts (Distance Selling Directive). This rule does not deprive the consumer from other remedies in general contract law; compare Report I (Spain), p. 335-336.
[600] Ibid.

In the absence of tailored legal remedies, in case of non-performance of a contract concerning the supply of digital content the consumer will have to seek recourse to the remedies that are available under consumer contract law or general contract law.[601]

If the contract is qualified as a contract for the **sale or supply of goods**,[602] the consumer may invoke the following remedies under consumer contract law:
- repair or replacement;
- price reduction or termination.[603]

Moreover, besides these remedies the consumer can normally claim compensation for any damage suffered as a consequence of the non-performance of the contract.[604]

If the contract does not qualify as one for the sale or supply of goods, but is seen as a one for **services**, or of a ***sui generis*** nature, a consumer may in principle rely on the remedies available in general contract law in all countries included in the analysis.[605] These remedies include:
- specific performance;
- damages;
- termination.

Surveying these lists, it seems that a consumer has quite similar remedies available for contracts regarding goods and contracts regarding services. The main difference between the two types of contracts seems to be the restriction of the consumer's choice of remedies in sales law, which will be further elaborated in the next section.

Irrespective of the classification of the contract, and although this is not a 'remedy' in the strict sense of the term, a consumer may also withhold performance of her own obligations in order to induce the provider of the digital product to perform her part of the contract.[606] In the digital environment, however, withholding performance often is not possible, as many transactions will not proceed unless the consumer pays directly (using online banking or a debit or credit card).

Furthermore, a claim for non-performance may coincide with one for avoidance of a contract on the basis of mistake, fraud or misrepresentation. A consumer may, for instance, base a claim either on the fact that the digital content did not conform to her expectations (and invoke one of the remedies mentioned above) or on the basis that she was mistaken as to the exact characteristics of the product (and therefore avoid the contract). It will depend

[601] Cf. Report I, in particular section 9 of the country reports.
[602] On the classification of digital products, see section 2.1 above. Note that, for instance, the Polish legal system applies a strict definition of (tangible) 'goods' and does therefore not apply consumer sales law to digital content products; Report I (Poland), p. 281.
[603] Compare Bradgate 2010, p. 29. On the hierarchy of these remedies, see section 2.8.2.1 below.
[604] Report I, section 9.2 of the national reports.
[605] Refer to section 8.4 of the national reports included in Report I.
[606] As mentioned, for example, in Report I (Italy), p. 188. The same rule would apply in Dutch law, according to Art. 6:262 Dutch c.c.

on the circumstances (e.g. type of digital content, access method) which action will have a higher chance of success.

It should be pointed out that damages in practice are not limited to compensation in money. Although financial compensation is a common type of compensation for damage, empirical data make clear that the digital environment offers traders other means to redress for damage, such as:[607]
- free downloads;
- free extensions of contracts;
- discounts on future purchases.
These types of non-financial compensation appear to be more prevalent for problems related to anti-virus software, social networking sites and e-learning than for other types of digital content.[608]

In case of termination of the contract, a difficulty arises in regard to the consequences that are normally attached to the ending of the contract. In most EU legal systems, in principle, the parties to the contract will have to return the benefits from the performance of an obligation that has already taken place.[609] In case of the sale of a bicycle, for instance, after termination of the contract for non-performance, the seller will have to pay back the price that has been paid, whereas the buyer will have to return the bicycle to the seller. Following these rules, digital content would have to be returned to the supplier. In many cases, this will be difficult to arrange, because of the nature of digital content. The consumer could be requested to delete the files from her system, but it will hardly be possible to check whether she has actually done so.

Certain other remedies have been developed for cases of **privacy breaches**. Although mostly unrelated to specific contractual terms, data subjects have been granted remedies to stop data processing in a number of cases. The Data Protection Directive holds that Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed to her by the national law applicable to the processing in question.[610] Moreover, any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to the Data Protection Directive is entitled to receive compensation from the controller of the data for the damage suffered.[611] Member States should adopt suitable measures to ensure the full implementation of the provisions of this Directive and shall in particular lay down the sanctions to be imposed in case of infringement of the provisions adopted pursuant to the Data Protection Directive.[612] Even though data subjects may have given their free consent to personal data being processed, they retain the right to withdraw their consent. Also, data subjects have the right to access the information about them being

[607] Europe Economics 2011, Report 3, p. 134 ff.
[608] Europe Economics 2011, Report 3, p. 142.
[609] H. Beale et al., *Cases, Materials and Text on Contract Law*, Oxford: Hart publishing 2010, p. 980-990. Note that especially in the UK there are restrictions to the possibility for the breaching party to obtain restitution; cf. Beale et al. 2010, p. 985-988.
[610] Art. 22 Data Protection Directive.
[611] Art. 23 Data Protection Directive.
[612] Art. 24 Data Protection Directive.

processed and have the right to rectify, erase or block this data. If the data processor has transmitted personal data to a third party, he must forward any request to rectification, erasure or blocking.[613] The Spanish report confirms that these provisions, with regard to the right of access, rectification, cancellation, opposition and to compensation, have been implemented in national legislation.[614]

Recently, the e-Privacy Directive has been changed by the Citizens Rights Directive.[615] Once the latter Directive is implemented, not only users but also Internet providers may sue persons or businesses in case of spam-related behaviour. This ensures that spammers can be sued on grounds of abuse of the provider's network. This possibility did not appear explicitly in the original wording of the e-Privacy Directive. Since clients often lack either the money, the knowledge or the time to engage in a legal procedure to stop unsolicited communications, it was felt convenient if providers could represent the interest of their clients in court.[616] *A contrario*, this paragraph seems to suggest that a provider may only start a procedure in case of spam related conduct. Both the European Data Protection Supervisor[617] and the Article 29 Working Party[618] have unsuccessfully recommended broadening the scope of this provision. Nevertheless, it should be noted that States are free to provide in their national legislation that providers may require a judicial injunction with regard to breaches in other circumstances than mentioned in the Directive.[619] Finally, the Citizens Rights Directive has implemented a new article in the e-Privacy Directive[620] which holds that member states shall grant a national authority the competence to order the cessation of the infringements related to the e-Privacy Directive. This article is especially relevant with regard to unsolicited communications, because judicial intervention may respond too slowly.[621]

2.8.2.2 Hierarchy of remedies

If the digital content product qualifies as a **good** in the sense of the Consumer Sales Directive, the hierarchy of remedies established in that Directive applies, insofar as this

[613] Art. 12 Data Protection Directive.
[614] Report I (Spain), p. 321.
[615] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.
[616] Citizens Rights Directive, recital 68.
[617] European data protection supervisor, Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council amending, among others, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)(2008/C 181/01).
[618] Art. 29 Data Protection Working Party, Opinion 2/2008 on the review of the Directive 2002/58/EC on privacy and electronic communications (e-Privacy Directive), adopted on May 15, 2008.
[619] Y. Hofhuis, *Minimumharmonisatie in het Europees recht: vormen, begrip en gevolgen*, Deventer: Kluwer 2006.
[620] Art. 15a amended e-Privacy Directive.
[621] 2008/C 181/01.

hierarchy has been implemented in the law of the Member State concerned.[622] This means that a consumer will have to allow the supplier of the digital product to repair or replace the product before being able to ask for price reduction or to terminate the contract. Of the countries included in this analysis, the following have adopted this hierarchy of remedies:[623] Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Spain and the UK. Norway and the US, not being Member States of the EU, are not bound by the Consumer Sales Directive.

If the digital content product does not qualify as a good, but as a **service or *sui generis*** category, general contract law applies. Most legal systems included in the analysis do not apply a hierarchy of remedies in general contract law, but leave it up to the consumer to choose which remedies to invoke. In case performance is not impossible, the consumer may, for instance, choose whether to ask for specific performance or damages *in lieu* of performance (depending on the circumstances of the case, in combination with other remedies, such as damages for loss caused by the non-performance).

Although most national systems of general contract law do not apply a strict hierarchy of remedies, there are some national rules that have a somewhat similar effect. In Poland, for example, consumer sales law, including the hierarchy of remedies for consumer sales contracts, does not apply to the supply of digital content to consumers. Nevertheless, the seller may, once only (unless the default is irrelevant; Article 560(1) of the Polish Civil Code), block the creditor's right to terminate the contract. This approach recalls the debtor's right to cure the non-performance that is recognised in some form in many of the systems included in the analysis.[624] The debtor's possibility, or right,[625] to cure a non-conforming performance to some extent prevents the creditor from immediately invoking remedies for non-performance. Furthermore, in English law there is a certain hierarchy of remedies in the sense that termination is only available as a remedy in case the breach of contract is shown to be sufficiently serious.[626] The same is true, in essence, for Dutch law, which establishes that the non-performance has to justify termination of the contract;[627] this implies that in principle a minor breach does not allow the creditor to terminate, unless there are other factors that justify termination (e.g. if the non-performance was intentional). This means that, according to the laws of these countries, a consumer cannot terminate a contract for the supply of digital content if the non-conformity of the digital content is deemed to be of a not sufficiently serious nature. It will have to be established on a case-by-case basis what is considered to be a 'sufficiently serious' breach; probably, the type of digital content involved as well as the access medium will affect the assessment. In any

[622] See also Report I1 (Finland), p. 22, Report I (the Netherlands), p. 234, Report I (Norway), p. 266 and Report I1 (UK), p. 373.
[623] See Schulte-Nölke/Börger 2010, p. 675; available online at http://www.eu-consumer-law.org/study2_en.pdf#tm00117 (last visited April 28, 2011).
[624] For a concise overview of the availability of a possibility for the debtor to cure non-performance, see Von Bar et al. 2009a, Notes to Article III.–3:201 DCFR (Cure by debtor of non-conforming performance), p. 814-817.
[625] Beale et al 2010, p. 972.
[626] Report I1 (UK), p. 373. See also Bradgate 2010, p. 28-29.
[627] Art. 6:265 Dutch c.c

case, this limitation to the availability of the remedy of termination results in a factual hierarchy, in the sense that a consumer's choice of remedies is restricted.

2.8.2.3 Formal requirements; notice

In most legal systems included in the analysis, a notice to the debtor is required before the debtor is considered to be in default and the creditor may terminate the contract.[628] Once again, it depends on the classification of the contracts as one for the sale of goods, provision of services or *sui generis* which rules apply. In general, it seems that the rules on notification leave room for interpretation when they are applied to the digital context; many consumers do not know whom to notify and how. National laws do not yet offer much guidance on this point.

If the contract qualifies as one for the **sale of goods**, the rules of the Consumer Sales Directive, as implemented in national law, apply in EU Member States. Although the Directive does not give any formal requirements for invoking remedies for non-conformity, it does give Member States the option to provide that a consumer must notify the seller of the non-conformity within a period of two months from the day the consumer detected the lack of conformity.[629] The following countries selected in the research have implemented this option in their national laws:[630] Finland, Hungary, Italy, the Netherlands, Poland and Spain. France, Germany and the UK have chosen not to implement this option. It might be contended that a period of two months seems quite long in a rapidly developing technological environment.

If the contract is seen as one for the provision of **services** or as a contract of a ***sui generis*** nature, the rules of general contract law establish whether notice has to be given. In most systems included in this analysis, notification is a requirement for termination of these types of contracts.

In French law, however, it has been established that the summons to court to terminate a contract are considered to have a similar effect as a formal notice requiring the debtor to perform her obligations. Therefore, if the judge considers the breach of contract to be of a sufficiently serious nature, termination of the contract is warranted even if no formal notice has been sent before the court proceedings were started.[631]

According to German law, the buyer/consumer may in principle only terminate the contract after having set a reasonable additional period for performance.[632] The same is true for Dutch law.[633] However, important exceptions to this rule are the situation where the parties had agreed on performance on or before a specified day and the case where the debtor has

[628] On this topic, see Beale et al. 2010, p. 973.
[629] Art. 5 (2) of the Consumer Sales Directive.
[630] Schulte-Nölke & Börger 2010, p. 680.
[631] Note that under French law termination of the contract can only be achieved through judicial proceedings; Beale et al 2010, p. 920-924.
[632] Art. 323(1) German c.c.
[633] Art. 6:81 jo. 6:82(1) Dutch c.c.

stated that he will not perform,[634] and the case where awarding the debtor with the possibility to remedy the non-performance cannot reasonably be expected from the creditor, e.g. because immediate action is required.[635] In English law, more time for performance only needs to be given if the time for performance has not actually arrived, e.g. if the defective performance has been provided early.[636] When applying these rules to digital content, the question arises what would be a 'reasonable' additional period for performance. The answer to this question seems to depend on the type of digital content and; national case law does not yet give much guidance on this.

There are considerable differences in respect to the **formal requirements** that the legal systems set for notification in case of non-performance of a contract for the supply of digital content. On the one hand, some legal systems, such as Germany, Italy, Spain, Poland and the UK do not apply any formal requirements to the notification.[637] On the other hand, there are systems that require a notice to be in writing or that differentiate according to the type of contract involved. For example, in Hungary and Finland, notice in principle has to be given in writing.[638] Finnish law, however, also allows notice in electronic format.[639] Dutch law also requires notification to be in writing or in electronic format, depending on the manner in which the contract was concluded.[640] It thus seems that the present, not harmonised situation adds to the already existing confusion and uncertainty of digital consumers about where and how to notify.

2.8.3 Termination of a long-term contract

2.8.3.1 Relevance for digital content

Many contracts for the supply of digital content are not spot contracts (in which performance of the obligations takes place right after the conclusion of the contract, after which the contractual relationship ends), but cover a longer period of time. In this context, one may think of contracts for the supply of anti-virus software, subscriptions to newsletters and databases. Given the special nature of these contracts, certain rules applying to them may deviate from those of general contract law. In particular, it may be possible for a consumer to terminate a long-term contract for an indefinite period of time, even if the supplier of the digital content product has not breached any of her obligations.[641]

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[634] Cf. Art. 6:83(a) and (c) Dutch c.c.

[635] Compare the Dutch Supreme Court's judgments in *Verzicht/Rowi*, NJ 2000, 691, and *Hotel Atlantic (Endlich/Bouwmachines)*, NJ 2006, 597. In the latter case, if possible the creditor was required to inform the debtor by other means before taking action to obtain cure elsewhere herself.

[636] Report I (UK), p. 374.

[637] Report I (Germany), p. 103; Report I (Italy), p. 188-189; Report I (Poland), p. 296-297; Report I (Spain),p. 337; Report I (UK), p. 374.

[638] Report I (Hungary), p. 141 and Report I (Finland), p. 22 respectively.

[639] Report I (Finland), p. 22.

[640] Art. 6:81 Dutch c.c.

[641] The comments and notes to the provisions governing certain long-term contracts (viz. commercial agency, franchise and distributorship) in the DCFR are very informative; cf. Von Bar et al 2009a. Comments and Notes to Article IV.E.–2:302 DCFR (Contract for an indefinite period), p. 2303 ff.

2.8.3.2 Termination outside of cases of non-performance

Does a consumer have the possibility to terminate a long-term digital content contract even if the supplier correctly fulfilled her obligations? Three situations may be distinguished:

a. The contract (either for a determined or undetermined period of time) arranges for the possibility to terminate outside of situations of non-performance.
b. The contract runs for a determined period of time and does not include any specific clauses on termination.
c. The contract runs for an undetermined period of time and does not include any specific clauses on termination.

Ad a:
Most legal systems included in the analysis allow contracting parties to make contractual arrangements for the termination of a long-term contract.

According to Polish law, the contract clause regulating the termination of the contract does not have to stipulate a reasonable notice period.[642]

Ad b:
In Finland, Norway, Germany, Spain, Hungary and France, in principle it is not possible to terminate a contract that has been concluded for a fixed period of time, if there is no case of non-performance.[643] The contracting parties will have to wait for the contract period to elapse to be liberated from their obligations. It is assumed that this rule is applicable to digital content contracts that have been entered into for a fixed period of time.

In Poland, some scholars recognise the possibility to terminate a fixed-time contract outside of cases of non-performance, but only if the terminating party gives a valid, important reason for termination.[644] In the Netherlands, if the contract qualifies as one for the supply of services, termination also is possible, but the consumer will be required to pay a reasonable part of the contract price if payment was based on the passing of time.[645] Similarly, in the UK termination is possible, but if the contract so stipulates, the consumer may be required to pay the full value of any products transferred, such as satellite TV receiving equipment; and the remaining periodic fees.[646]

Ad c:
The rules regarding this type of contract differ from one legal system to another. In Finland, Spain, Poland, Italy, UK, Norway, Hungary and France it is possible to terminate a long-term contract for an undetermined period of time by giving reasonable notice.[647] As indicated in the French report, this rule 'stems from the idea – of public policy and constitutional force – that nobody may be kept in a contract perpetually'.[648] Most national

[642] Art. 395 Polish c.c., Report I (Poland), p. 297.
[643] Report I, section 9.4 of the national reports.
[644] Report I (Poland), p. 297.
[645] Art. 7:411 Dutch c.c.; Report I (the Netherlands), p. 236.
[646] Report I (UK), p. 374-375.
[647] Report I, sections 9.4 of the national reports.
[648] Report I (France), p. 65-66.

reporters consider it likely that it will in principle also apply to contracts for the supply of digital content.[649]

In German law, a contracting party may terminate a contractual relationship with continuous obligations (*Dauerschuldverhältnis*) if it has an important reason to do so. In that case, the party terminating the contract does not have to take into account a notice period.[650] Under Dutch law, if a contract for the supply of digital content qualifies as a services contract a similar and even more lenient rule applies: the consumer may terminate the contract at any time, without having to take into account a reasonable notice period.[651]

Within as well as among the aforementioned countries, however, there are different opinions as to what constitutes a **'reasonable notice period'**. The Hungarian report indicates that a minimum period of 15 days would have to be respected. The Finnish, French and Spanish reports indicate that what is to be understood as a 'reasonable period' should be determined on a case-by-case basis. For electronic communication services, nevertheless, Spanish law provides that it is mandatory to '[notify] the provider at least two working days prior to the moment the service is deemed to be effective'.[652] According to Polish law, the length of the period to be taken into account should be deduced from contract clauses (see category *a* above), laws or customs; if no period of time has been specified in any of these, the contract ends immediately after the declaration of termination has been given.[653]

If the consumer terminates the contract without being allowed to do so or with respecting a notice period of sufficient length, this may have various **consequences**. These include the possibility for the supplier of the digital content to claim:

- specific performance, i.e. payment of (part of) the contract price;[654]
- damages.[655]

In Spanish law, the supplier of the digital content may only ask for specific performance if the consumer terminates the contract without a fair reason. If the consumer merely exercises her right to recede from the contract in an untimely manner, only damages are available as a remedy.[656]

2.8.4 Linked contracts

The topic of 'linked' or 'ancillary' contracts and obligations is still very much in development in the laws of the countries selected for the analysis.[657] Therefore, there are no clear-cut answers as to what will happen to contracts regarding a product that forms part of

[649] In French law, the rule has even been explicitly recognised as applying to all contracts; Cass. 1re civ. 5 February 1985, no. 83-15.895, *Bulletin civil* I, no. 54. Compare also Report I (Spain), p. 337-338.
[650] Art. 314 German c.c.
[651] Art. 7:408(1) Dutch c.c.
[652] Art. 7 of the Spanish bill of rights of the users of electronic communications services.
[653] Art. 365 Polish c.c.
[654] Report I (Germany), p. 103; Report I (Hungary), p. 142; and Report I (Spain), p. 338.
[655] Report I (Finland), p. 23; Report I (Spain), p. 338; and Report I (Italy), p. 189.
[656] Report I (Spain), p. 338.
[657] Cf. Von Bar et al. 2009a, Comments and Notes to Article II.-5:106 DCFR (Linked contracts), p. 384-386.

a package in case one of the contracts is terminated. The question nevertheless is of importance in the digital environment, in which types of digital content are regularly linked to each other, e.g. music files to a software program; the acquisition of software or sms-services in combination with a mobile phone or mobile phone subscription; or a credit contract for financing the acquisition of digital content.

In some countries, termination will only affect the contract to which it applies and not have consequences for contracts that are to a certain extent linked to it. Consequently, if a good or service forms part of a separate contract, termination of a contract regulating another product in the package will not affect it. On the other hand, if the package as a whole is governed by one contract, its termination will of course have an impact on all products included. This seems to be the situation under English law.[658]

In other countries, contracts that are linked may have an impact on each other. In French law, for example, it has been recognised that the termination of a contract that is part of a set of contracts 'to the point that their mutual existence is indivisible' (*ensemble contractuel indivisible*) will affect the remaining in existence of other contracts being part of that 'ensemble'.[659] The same applies to contracts that under Italian law form part of a so-called *collegamento negoziale*, referring to the economic connection between independent contracts that share a common purpose.[660] Also in German law, if services are inseparable and only part of the contractual obligations relating to them are fulfilled, a contracting partner may terminate the whole package if he or she has the right to terminate one part of it.[661] The same rule seems to apply in Hungarian law.[662]

In Polish and Spanish law, a similar rule seems to apply, but only to credit agreements.[663]

In other legal systems, partial termination of a contract governing several digital content products may be possible. This is the case in, for instance, Dutch law.[664]

For still other legal systems, such as Finland and Norway, it is suggested that the rules governing delivery of goods in instalments may apply by analogy to packages of digital content products.[665] According to these rules, it would be possible to cancel the contract in respect to deliveries made or future deliveries, if, by reason of their interdependence, those deliveries could no longer be used for the original purpose of the contract because of the cancellation of a single delivery.[666]

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[658] Report I (UK), p. 375.
[659] French Supreme Court 1re civil Chamber 4 April 2006, no. 02-18.277, *Dalloz* (2006) 1186.
[660] Report I (Italy), p. 281: 'the validity of each contract affects the others according to the general rule *simul stabunt simul cadent*.'
[661] Art. 323(5) German c.c.
[662] Section 317(2) Hungarian c.c.
[663] Report I (Spain), p. 328-329; Report I (Poland), p. 298.
[664] If the product forms part of a bigger package and is governed by the rules on sales law, Art. 17(1) Dutch c.c. applies, according to which the entire package should be in conformity with the contract.
[665] Report I (Finland), p. 23; Report I (Norway), p. 268.
[666] Ibid.

2.9 Minors and other vulnerable consumers

2.9.1 Introduction

For many reasons the subgroup of underage digital consumers deserves special attention. Surveys show that their participation in the commercial process typically starts at a fairly young age and can also be quite intense in nature. An active consumer, however, is not necessarily a knowledgeable consumer. Credulity, susceptibility to certain advertising strategies and a lack of experience with managing personal finances (to name a few aspects) all contribute to the vulnerability of the underage consumer. When we add to this the relative ease of digital purchasing and the difficulty of reliable age verification, a (potentially) problematic image appears.

But that's only half the story. Minors are not solely associated with vulnerabilities, but also with the opposite characteristics like digital savvy and a choosy attitude. In the online environment young consumers may sometimes be more skilled in transacting, trading or gathering information than adults. Due to these contradictory features and the heterogeneity of the group, it is hard to draw a clear profile and subsequently to strike the right balance between protection and 'emancipation'. Also within other subgroups of vulnerable consumers, such as seniors or those with a mental handicap, similar peculiarities make it difficult to adopt a one-size-fits-all approach.

Complicated and versatile problems are often not responded to in a similar way by different nations. In the absence of harmonisation, this is not only an inevitable, but also a rather disruptive reality given the international character of digital commerce. National borders are easily crossed, which means that traders enter a whole range of different legal regimes simultaneously. The uncertainty flowing from this situation may have considerable costs and adverse effects on online trade. A company offering downloadable music, for example, may face a combination of potential risks: not only the possible contractual incapacity of its counterparty, but also unfamiliarity with the law that appears to be applicable. And even if she has knowledge of the jurisdiction in question, the legal approach in case of intangible, digital content may still be unsettled. To complicate things further: if no transaction, but only advertisement for digital content is involved, a whole new field of scattered, settled and unsettled (case) law emerges.

Be it with an eye to future harmonisation, be it to make some order out of these national, legal intricacies, this comparative analysis will discuss the main points on the topic of underage (and other vulnerable) consumers in the digital environment.
The comparative analysis will be structured as follows: the first two sections will discuss content-related issues, the distribution of harmful material and the marketing of digital services. The next part will briefly touch upon the topic of privacy. Subsequently, the analysis focuses on contract law, first on minors and then on other vulnerable consumers, each time with special attention for contractual capacities. Also the peculiarities of applying current law to intangible services will be considered. Finally, the last section goes more deeply into age verification tools. The comparative analysis shall eventually be evaluated in a section with concluding remarks and policy options.

2.9.2 Distribution of harmful material

In contrast with *illegal* content, there is not much consensus among nations about what constitutes *harmful* content. Even within the European Union there is no commonly shared definition. This situation continues to exist, even after the implementation in national laws of the Audiovisual Media Services Directive 2007/65/EC, which only requires that media services providers comply with the applicable law in the country of origin.[667] Therefore, the closest to a definition that can be found on a Community level is the rather abstract formulation of 'content causing physical or moral detriment to minors.' In concrete terms, one can think of some examples mentioned in the Directive, such as sexual, racial and religious discrimination, material prejudicing human dignity or incitements to unsafe or unhealthy behaviour. Again, the precise interpretation of these qualifications is left to the member states. A video game, for example, that is labelled as 'harmless' under PEGI, (acronym for 'Pan-European Game Information', a European age rating system) may still be considered harmful in countries as the United Kingdom or Germany, that have (also) put in place their own classification rules.

In addition to the harmful content mentioned above, the Directive also proscribes aggressive advertisements especially geared towards minors.[668] Protection of minors from aggressive or misleading advertisements is also dealt with in the Unfair Commercial Practices Directive.[669] The next paragraph is dedicated to the subject of marketing to minors. It will elaborate on this more extensively.

Still with regard to the admissibility of content itself, it be repeated that differences among nations remain to exist notwithstanding the partial harmonisation brought about by the Audiovisual Media Services Directive. Moreover, also the process of transposing relevant provisions into national law diminishes uniformity; while it is at the Member States' discretion how to fit the provisions of the Directive into their own legal frameworks, enforcement methods may diverge. In addition, the national regulations already in force provide a broad legislative spectrum, often including laws on media, alcohol and tobacco, advertising, broadcasting and even copyright. But also considerable sanctions under criminal law exist, as may be illustrated by the French € 75,000 fine or three years imprisonment[670] for distribution of pornographic or violent messages to minors.

To conclude a few words about harmful content and media literacy. As pointed out in the Audiovisual Media Services Directive legal measures will not suffice. Even when time slots, age verification tools or filtering techniques for the protection of minors are encouraged or imposed by law, knowledge about the safe use of (new) media will remain

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[667] Art. 2(1) Audiovisual Media Services Directive.

[668] Cf. Art. 3e (1)(g) Audiovisual Media Services Directive: audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

[669] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, *OJ* 2005, L 149/22 (hereinafterm 'Unfair Commercial Practices Directive').

[670] Art. 227-24 French Penal code.

indispensable. Taking into account the large number of local, national and supranational programs to this end, such as the recently extended Safer Internet Program, extralegal measures deserve to be mentioned as well. Discussing the effectiveness of these initiatives would fall outside the scope of this analysis. However, the importance of informed and responsible consumption of media services (beside, or maybe before, recurring to legal instruments), can hardly be contested.

2.9.3 Marketing digital content to minors

As announced in the previous section, with regard to the marketing of digital content to minors the Unfair Commercial Practices Directive 2005/29/EC is of particular significance. The Directive outlaws aggressive or misleading advertisements, taking the average consumer of the targeted group as a point of reference. This means that minors are likely to enjoy a higher degree of protection, since their specific vulnerabilities (and not those of an average adult consumer) should be taken into account. In annex I (28) of the Directive all advertisements are labelled unfair which contain direct exhortations to children to buy advertised products or to persuade their parents or other adults to buy advertised products for them.

Another question that arose in the context of this study concerned the marketing of harmful content. Here one should make a distinction between the content of the digital content itself and the content of the advertisement. If the latter is *per se* not harmful, aggressive or misleading one could hypothesize that no infringement takes place. This would be the case, for example, if an acceptable commercial promotes an online video game that appears to be particularly violent and therefore not suitable to minors. However, such a practice would very likely conflict with the requirement of professional diligence, codified in Article 5(2)(a) of the Directive.

Again, it must be underlined that the process of transposing these provisions in national laws usually compromises its harmonising objective. Depending on which field of law is chosen to harbour the new rules, the deterrent effects may differ markedly. This will be illustrated by the next paragraph about enforcement and, with a more evaluative character, in the section with concluding remarks and policy option. For the moment it is important to note that transpositions *have* been carried out in different ways. Implementations have occurred, for example, in media / marketing law (*Germany, Hungary, The Netherlands, Norway, Poland*) consumer / contract law (*Italy, The Netherlands, Spain*), competition law (*Germany, Poland*) or combinations thereof.

With regard to enforcement, roughly three approaches can be discerned. The first one is that sanctions or damages can be imposed and collected by the state, while general private law remedies are available to the aggrieved party or its legal representatives. This is the situation in *Hungary,*[671] *Norway,*[672] *Spain,*[673] *The Netherlands*[674] and *Poland.*[675] In the

[671] Report I (Hungary), p. 148.
[672] Report I (Norway), p. 272.
[673] For punitive damages, cf. Art. 44.3.c Spanish Data Protection Law (LOPD) and 44.4.c LOPD in relation to Art. 45 LOPD.

second approach, adopted by *Italy* and possibly by *France*, no damages can be imposed on offenders, but consumers can still recur to private law remedies. The third approach can better be called a mix of alternative legal instruments. Most notable are the skimming-off procedure under the law of unfair competition (*Germany*),[676] in which profits resulting from unlawful behaviour can be taken away; the possibility to estimate the consumer's damage under tort or contract law as equalling the unjustly obtained profit (*The Netherlands*);[677] the order to discontinue the practice under criminal law (*UK*)[678]; and a combination of injunctions under marketing law, sanctions under criminal law and contractual remedies with the exclusion of damages (*Finland*).[679]

2.9.4 Privacy

While consent is an important ground[680] for legitimate data processing in the Data Protection Directive, in most countries youngsters are qualified as incompetent to give their consent.[681] Consent is defined in the Directive as any freely given specific and informed indication of one's wishes by which the data subject signifies her agreement to personal data relating to her being processed.[682] Presumably, all countries would have a provision in their Data Protection Act to restrict the legal value of a minor's consent. Generally, a minor would need her parents' consent or that of her legal guardian instead (see also the next section, 'minors in contract law'). The respondents of *Spain,*[683] *Italy*[684] and the *United States*[685] have confirmed this explicitly.[686] The Spanish report elaborates on the special status of minor's consent and states that the law holds that "when the processing [of personal data] relates to data from minors, the information addressed to them must be expressed in a *language that is easily understandable by them* (...)".[687]

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[674] The Dutch Consumer Authority can impose an administrative fine up to € 450,000. Since the Unfair Commercial Practices Directive is implemented in tort law, aggrieved consumers (or the parents/legal guardians) can also bring a tort claim for damages or can seek an injunction or rectification, cf. Report I (The Netherlands), p. 244.

[675] Report I (Poland), p. 303.

[676] Consumer organisations can bring a claim against a trader who has intentionally breached the Unfair Competition Act. The action does not aim at damages but at skimming off the unlawful profits. Thus, the trader shall be put into the position in which it would be if she had not engaged in unlawful commercial practices. In other words, she shall be put on a par with her honest competitors. The skimmed-off profits are not transferred to the consumer organisation but to the state budget. Cf. Report I (Germany), p. 108.

[677] Cf. Art. 6:104 Dutch c.c.

[678] A breach of the regime implementing the Unfair Commercial Practices Directive is a criminal offence. Private law claims cannot be based on such a breach, but only on general provisions. No damages can be awarded.

[679] Report I (Finland), p. 29.

[680] Art. 7 and 8 Data Protection Directive (Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ* 1995, L 281/31).

[681] Cf. also Art. 29 Data Protection Working Party. Working Document 1/2008 on the protection of children's personal data (General guidelines and the special case of schools) Adopted on 18 February 2008. (WP 147).

[682] Cf. Art. 2(h) Data Protection Directive.

[683] Report I (Spain), p. 344.

[684] Report I (Italy), p. 194.

[685] Cf. the Children's Online Privacy Protection Act (COPPA), Report I (United States), p. 420.

[686] Cf. in addition Art. 5 Dutch Data Protection Act (WBP).

[687] Art. . 13.3 Spanish Personal Data Protection Act (RLOPD).

The use of soft law instruments is very much encouraged by the Data Protection Directive.[688] It holds that both the Member States and the Commission shall encourage the drawing up of codes of conduct intended to contribute to the proper implementation of the national provisions adopted by the Member States pursuant to the Data Protection Directive, taking account of the specific features of the various sectors. Since in the digital sector, minors are one of the most important user groups, in various countries there have been adopted specific codes of conducts relating to the processing of data pertaining to a minor, which are gathered and obtained via the Internet. In the *United Kingdom*[689] and *Italy*[690] 'soft law' instruments, in the form of 'codes of conduct', are relevant as well. While the Italian codes of conduct deal with pre-contractual information and the processing of personal data, the British counterpart focuses (as far as the particular issues about minors are concerned) on unfair pressure and exploitation of credulity.

2.9.5 Minors in contract law

In all the examined countries age plays a role when interpreting contract or consumer law. The precise rules and doctrines, however, differ one from another.

2.9.5.1 Legal capacities

Of primary importance are the age-related limitations of legal capacities. Generally, the age of maturity is set at 18. (Exceptions may apply, e.g. for persons who marry at the age of sixteen or seventeen.)
Usually minors are not completely deprived of the possibility to enter into contracts. Often the concept of limited (instead of absent) contractual capacities is applied. This means that some transactions may remain unaffected, as long as certain requirements are fulfilled. They typically regard the presence of parental consent, the 'normality' of the purchase (often in connection with the age of the minor) and the origin of the money (e.g. pocket money, own earnings). In some countries the doctrine of limited capacities only finds application as from a certain age, thus making anyone below that age absolutely incapable of concluding valid contracts.
In the details, the national rules differ considerably, as the following overview demonstrates:

Finland: contracts are not binding on the minor if the consumer is under the age of 18, unless the purchase was usual, of little significance or confirmed by the minor's parents or legal guardians.[691] There is no clear-cut distinction between usual/unusual or significant/insignificant purchases, so this has to be established on a case by case basis.[692]

[688] Art. 27 Data Protection Directive.
[689] Cf. Report I (United Kingdom), p. 381; The UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the so-called CAP Code) contains self-regulatory rules to ban the use unfair pressure, direct exhortations to buy, the dissemination of harmful content and the exploitation of children's credulity.
[690] Report I (Italy), p. 194.
[691] Cf. art. 24-26 of the Finnish Guardianship Services Act (442/1999).
[692] Cf. case 2715/39/07, given 21.1.2009; 3291/36/09, given 13.7.2010; 1840/30/09, given 21.7.2010 – unfortunately the cases are only referred to by file codes.

France: contracts are voidable if the consumer is under the age of 18, unless the transaction was an 'act of daily life.'

Germany: contracts are suspended if the consumer is under the age of 18 years[693] and the parents/legal guardians did not give their consent.[694] Upon parental confirmation the contract will have legal effect. If no consent is given, certainty can be obtained by asking for the required consent. If parents do not approve the transaction within two weeks, the contract is void. No consent is needed when pocket money or own earnings are concerned.[695] Minors under the age of 7 years have no contractual capacities whatsoever.

Hungary: minors between 14 and 18 have limited contractual capacities. This means that contracts concluded by them without parental consent are void, unless they (i) relate to everyday needs, (ii) are paid for by pocket money or own earnings or (iii) are purely advantageous to the minor. Minors under the age of 14 are deemed incompetent and contracts concluded by them are therefore void, unless the transaction is of minor importance and has already been performed.

Italy: contracts are voidable if the consumer is under the age of 18 (without any need to prove harm)[696] unless the minor has deceptively induced the other party to believe that he/she was not minor.[697] In the latter case parents will be liable, unless they could not have prevented the act.[698]

The Netherlands: Persons under the age of 18 are not competent of performing legally binding acts without parental consent.[699] However, if it is common practice that a minor (of his/her age) independently concludes a certain transaction then parental consent is legally assumed, without the possibility of contesting.[700]

Norway: Persons under the age of 18 cannot conclude valid contracts without parental consent, unless they have reached the age of 15 and the purchase is paid for with pocket money or own earnings.

Poland: Persons under the age of 18 have limited contractual capacities[701] or, when also younger than 13, are deemed to have no contractual capacities at all[702]. Minors with limited legal capacities may nonetheless enter into contracts when they have parental consent[703], when the contract relates to everyday matters[704] or when it has been paid out of own

[693] Art. 2 and 108 German c.c.
[694] Art. 107 German c.c.
[695] Art. 110 German c.c.
[696] Art. 1425 Italian c.c.
[697] Art. 1426 Italian c.c.
[698] Art. 2048 Italian c.c.
[699] Art. 1:234 Dutch c.c.
[700] Art. 1:234(3) Dutch c.c.
[701] Art. 10 Polish c.c.
[702] Art. 12 Polish c.c.
[703] Art. 17 Polish c.c.
[704] Art. 20 Polish c.c.

earnings.[705] In the case of minors without any contractual capacities, a contract can only escape voidance when it is commonly concluded in petty, everyday matters. However, it only becomes valid from the moment of performance, unless it seriously harms the minor.[706]

Spain: People under the age of 18 can void contracts they concluded at their request.

United Kingdom: A contract with a minor, i.e. a person who has not attained the age of 18, is voidable, unless the contract is for necessaries[707]: goods or services which are deemed necessary or beneficial to them.

Somewhat simplified,[708] this translates as follows in table format:

[705] Art. 21 Polish c.c.
[706] Art. 14(2) Polish c.c.
[707] Art. 3 (2/3) SOGA/The Minors' Contracts Act 1987.
[708] It should be noted that this table is based on applicable law as mentioned in the country reports; no conclusions *a contrario* may be drawn from this overview. In particular one should not interpret the fact that criteria that are not marked for a given legal system that these criteria don't play any role in that legal system as the criteria listed in the country reports were not exhaustive. Moreover, they may play a role when interpreting and applying a criterion, which is recognised in that legal system.

Exceptions in Europe to the default rule of minors' absent legal capacities.
(If a minimum age exists for these exceptions to be applicable, this is mentioned in the far right column.)

	Common transactions	Pocket money	Own earnings	Purely advantageous	Minimum age
Finland	x				
France	x				
Germany		x	x		7
Hungary	x	x	x	x	14
Italy					
The Netherlands	x				
Norway		x	x		15
Poland	x		x		13
Spain					
UK	x				

As this simplified table illustrates, the European digital environment is characterized (and hindered) by considerable legal diversity.

2.9.5.2 Protection outside the realm of legal capacities

As discussed earlier with regard to rules on unfair commercial practices, a person's age can also play a role when applying general provisions of contract (and/or consumer) law. As the reports from France and The Netherlands point out, defining the relevant consumer is often

not a static process, but takes into account the individual circumstances. In France this means that the way in which providers of digital content are obliged to inform may depend on the mental state or experience of the consumer.[709]
The same principle can be found in Dutch law, where the misleading character of commercial practices must be assessed with the average consumer *of the targeted group*, not simply the average consumer, in mind.[710] This reflects the Unfair Commercial Practices Directive, which states that if 'characteristics such as age, physical or mental infirmity or credulity make consumers particularly susceptible to a commercial practice or to the underlying product and the economic behaviour only of such consumers is likely to be distorted by the practice in a way that the trader can reasonably foresee, it is appropriate to ensure that they are adequately protected by assessing the practice from the perspective of the average member of that group.'[711]

2.9.6 Other vulnerable consumers

Apart from minors, there are other categories of consumers who also enjoy enhanced protection under contract or consumer law. Among them are e.g. those who are senile, mentally disturbed or under guardianship. Again, differences exist between applicable provisions and doctrines. In most jurisdictions, however, the validity of contracts can be contested by claiming the absence of consensus.
In addition to that, vulnerable consumers can often also recur to general doctrines such as good faith, undue influence, duress or unconscionability.

Nearly all jurisdictions have similar provisions to protect the patrimony of other vulnerable consumers. It is important to note, however, that the provisions discussed below are not applied 'flexibly' in order to cover all kinds of vulnerabilities, such as prodigality or lacking/modest expertise. That kind of features may play a role when construing the average consumer of a group or when interpreting good faith (see Q.12.3).
This section, instead, discusses rules that protect narrowly defined groups, such as those under guardianship or suffering from a mental disorder.
Since this is not the place to discuss all possible limitations of legal capacities that exist in the various jurisdictions, this overview will concentrate on provisions with enhanced practical relevance.

In *France* protection is available to those who can medically prove a mental disturbance[712] or have come (in order of intensity) under judicial supervision, curatorship or tutorship.
In *Germany* the mentally disturbed are protected as well, unless the contested contract relates to an everyday transaction which has already been performed.[713]
In *Hungary* persons who are incompetent because of a mental disorder or whose legal capacities are limited by court fall under the same regime as minors.
In *Italy* those incapable due to natural or legal causes would both enjoy enhanced protection.

[709] Art. 1135 French c.c.
[710] Report I (The Netherlands), p. 244.
[711] Cf. recital 19 and Art. . 5(3) Unfair Commercial Practices Directive.
[712] Art. 414 (1) French c.c.
[713] Art. 105a German c.c.

In *The Netherlands* other categories – persons with a mental disorder, under guardianship, or with a defective will[714] – could equally be eligible for protection. However, protection granted to those suffering from a mental disturbance can easily be overtaken by a third party's good faith.
In *Norway* the protection described in the previous section is only shared by those who are put under guardianship.
In *Poland* protection of the patrimony is extended to a broad range of persons whose legal capacity has been limited, such as the mentally disturbed and drug / alcohol addicts.[715] When someone's legal capacity has not yet been confined officially, he/she would nevertheless fall under the same regime if the mental or dependency problems are combined with an inability to take care of oneself.[716]
In *Spain* the protection is only extended to people legally incapacitated by a court's order. Cause of such an order must be found in 'one's illness or persistent shortcomings either physical or psychological in nature that prevent the person from governing itself.'[717]
In the *UK*, protection is also available to those "unable to make a decision for herself in relation to the matter" at the time the contract is made; whether or not the mental impairment is permanent or temporary.[718] Such impairment is defined in terms of the ability to understand, retain and weigh the relevant information and to communicate one's decision.

2.9.7 Issues related to the intangibility of digital services

Even though some reserves have been expressed,[719] all reporters confirmed that the aforementioned rules also apply to contracts for digital content. Obviously, this doesn't mean that all questions have therefore been answered; on the contrary. The intangible nature of digital content often urges to reinterpret existing rules. In the case of voidance, for example, the purchased good should usually be returned to the trader. But if the minor downloaded a song or listened to streaming music, restitution is hardly imaginable. The next paragraph will discuss how the various jurisdictions deal with interpretation issue.

In case of voidance and a subsequent obligation on the minor to restitute a good or service that, by its nature, can simply not be restituted, one may adopt three different approaches: (i) the minor has to pay anyhow; (ii) the minor has no obligation to pay for the service; (iii) only a partial restitution is due, or the obligation to repay depends on the specific circumstances.

In the various jurisdictions no example of the first approach – an absolute obligation to pay for the service – has been found. Instead, the reported solutions range from a complete exemption to a 'mitigated' obligation, i.e. a reduction of the claimable amount or a restitution made contingent on specific circumstances.

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[714] Art. 1:378, 3:34 and 3:44 Dutch c.c. respectively.
[715] Art. 13 Polish c.c.
[716] Art. 16 Polish c.c.
[717] Art. 200 Spanish c.c.
[718] Art. 3 (1) Mental Capacity Act 2005.
[719] Cf. for example Report I (Italy), p. 193.

In the category of complete exemptions of the minor's duty to pay only *Finland* appears; after voidance of the contract there is no longer the obligation to pay for the digital content that was provided.

All other countries leave open the possibility of a (partial) restitution under certain circumstances. In *Germany* the protection of minors is extended into the law of unjustified enrichment in order to prevent them to have to pay as restitution what they do not need to pay as contractual obligation.[720] If fraud is involved, however, the minor may face a tort claim anyway. For such a claim to be successful the accused minor must be at least 7 years old and should have had insight in the tortuous character of her activity.
Somewhat similar is the *Hungarian* approach, where a judge can deviate from the general rule that no compensation is due when the minor knowingly misled the other party.

In *Norway, Italy, Spain* and *The Netherlands* compensation only has to be paid for as far the content service has been to the minor's real advantage/benefit.[721] In Spain the supplier bears the burden of proof as to the real benefit of the minor.[722]

Slightly different is the situation in *Poland* where not only a real advantage for the minor is required, but also a disadvantage for the seller. Since the latter is questionable in the case of (almost) freely reproducible goods, such as digital content, this condition is unlikely to be fulfilled.[723]

In the *UK* the trader may have an action in restitution if the contract with a minor is set aside. The outcome of such a suit is uncertain. In *France* the question is unsettled as well.

2.9.8 Age verification

As discussed in the introduction, the scarce possibilities of reliable age verification are an important concern in the digital environment. Since no face-to-face-contact between the transacting parties takes place, it becomes harder to assess whether a contract may be subject to voidance. Age verification tools, that is to say any technical means to ascertain a customer's age, could then bring relief. However, unsophisticated tools, such as the requirement of filling out one's birth date, can easily be by-passed, while more intelligent systems have not yet been widely adopted.

This might be an important reason why today in none of the jurisdictions age verification tools are compulsory. Another explanation may lie in the fact that they are not solely considered as positive: they can indeed be used to avoid non-binding contracts or to prevent harmful content from reaching unintended viewers, but less noble goals are not hard to imagine. Depending on the amount of (personal) information stored on or collected by such tools, they can also compromise the minor's privacy rights. Because of the different views

[720] Art. 812 German c.c.
[721] Cf. the Norwegian Guardianship Act, Art. 1443 Italian c.c., Art. 1263 Spanish c.c. and Art. 6:209 Dutch c.c.
[722] Cf. for more details Report I (Spain), p. 346.
[723] Cf. Art. 405 Polish c.c.; this article has general application, i.e. not specifically for minors.

legislators may have with regard to this piece of technology, it is unlikely to be prescribed quickly and generally. Below, the most important observations are listed per country:

In *Germany* the trader bears the risk of concluding a non-binding contract with a minor. Age verification technology may therefore improve the provider's legal position, especially if she wants to sue a fraudulent minor under tort law.[724] However, since only damages can be covered in such a procedure, the provider of digital content (the delivery of which involves negligible costs) is not likely to profit significantly from the enhanced legal position brought about by age verification tools. Of course, this doesn't alter the fact that it may have a preventive function.
Hungary reports that no such verification tools are compulsory, neither to avoid liability in case of communicating harmful content to minors; the standard contractual conditions the minor will sign in order to access the content, exclude such liability. The report does not indicate, however, whether such standard contract may be relied upon if the contract is voided for lack of legal capacity.
In *Italy* a code of conduct about minors and Internet prescribes the use of age verification tools in order to protect the minor from accessing certain content.[725] This tool may only be used in a way that does not prejudice the minor's right to privacy. Again, it must be underlined that this code of conduct is only enforceable against providers who voluntarily adhere to it.
In *the Netherlands* age verification is only prescribed with regard to sales of tobacco and alcohol, not with regard to digital content.
In *Norway* no obligation to use age verification tools exists. However, its usage would not necessarily exempt the service provider from possible liability.
In *Spain* age verification tools are far from obligatory: in July 23, 2010 a draft law on civil registers was approved that *allows* verifying one's legal capacity by consulting said registers.

In the *UK* there appear to be some complaints about the lack of an obligation to use age verification tools.[726] A study, conducted by the children's charity NCH showed that a 16 year old girl succeeded to create a gambling account using her debit card on 30 out of 37 UK based gambling websites.

2.10 Unfair commercial practices

Unfair commercial practices regulation in the Member States is based on the implementation of the Unfair Commercial Practices Directive.[727] The structure of the Directive is threefold: on the first level a main (large) general clause prohibits the use of

[724] Cf. Art. 823 (2) German c.c. and art. 263 Criminal code.
[725] Art. 3 Self-regulatory code on Internet and Minors (Codice di autoregolamentazione Internet e Minori) signed by the following service providers: AIIP, ANFoV, Assoprovider, Federcomin.
[726] Cf. also http://www.gamcare.org.uk/news.php/29/underage_internet_gambling_study_report.(last visited April 28, 2011).
[727] Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ* 2005, L 149/22 (hereinafter referred to as: Unfair Commercial Practices Directive.

unfair commercial practices in general, on the second level smaller general clauses prohibit the use of misleading and aggressive commercial practices, and on the third level the Annex to the Directive contains a list of commercial practices that are deemed to be unfair *per se* (black list).[728]

While the Unfair Commercial Practices Directive has largely contributed to the enhancement of the protection of consumers through its enforcement by national authorities (in particular as regards the black list), it has so far played a relatively modest role in national case law. An important reason for this appears to be that neither national lawyers nor judges seem to fully understand how the system introduced by the Directive works, in particular in its interaction with existing national (consumer) contract laws. The ECJ has as yet not been able to give much guidance, since it has mostly been confronted with questions regarding the possibility for national legislatures to expand the black list. The Court has, thus, not (yet) had an opportunity to clarify other questions concerning the implementation of the Directive, for example with regard to the general clauses.

Questions relating to the scope of the black list result from the method of harmonisation that has been chosen for the Unfair Commercial Practices Directive. Whereas most consumer law directives start from the principle of minimum harmonisation, the Unfair Commercial Practices Directive was enacted on the basis of full harmonisation.[729] This implies that unfair commercial practices legislation, in so far as harmonised, is the same in all legal systems of the European Union. One of the drawbacks of this approach, however, is that additions to the European black list of forbidden commercial practices can only be made by way of a revision of the Directive.[730] The European Court of Justice has decided on several occasions that commercial practices may not be prohibited *per se* if they are not listed on this European black list.[731] Rather, it must be decided on a case-by-case basis whether or not a particular commercial practice by a particular trader is to be considered unfair in the circumstances of the case. This is problematic since even a small adjustment of the commercial practice would imply that a new assessment is to be made. Similarly, if the circumstances of another consumer are different, or if the commercial practice is offered by another trader, an earlier decision by a court does not apply anymore. It is questionable whether this approach meets the needs of a dynamic law required to deal with ever changing commercial practices.[732]

This would be different if it would be possible to apply Article 114, paragraphs (4), (6) and (7) TFEU[733] to perceived needs to intervene by prohibiting newly developed unfair commercial practices. These paragraphs provide that when a Member State deems it

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[728] Cf. H.-W. Micklitz, 'The general clause of unfair practices', in: G. Howells, H.-W. Micklitz, Th. Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, Hampshire UK/Burlington USA: Ashgate, 2006, p. 84-85 (hereinafter referred to as: Micklitz 2006a).

[729] See the internal market clause in art. 4 of the Directive and the absence of a minimum harmonisation clause. Cf. also recital (14) of the preamble to the Unfair Commercial Practices Directive.

[730] See explicitly art. 5(5) Unfair Commercial Practices Directive. See critical G. Howells, 'Introduction', in: G. Howells, H.-W. Micklitz, Th. Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, Hampshire UK/Burlington USA: Ashgate, 2006, p. 25.

[731] Cf. ECJ 23 April 2009, joint cases C-261/07 and 299/07, *ECR* 2009, p. I-2949 (VTB-VAB et al./Total Belgium et al.), and ECJ 14 January 2010, case C-304/08, n.y.r. (Plus Warenhandelsgesellschaft).

[732] Cf. H.-W. Micklitz, 'A general framework directive on fair trading', in: H. Collins (ed.), *The forthcoming EC Directive on Unfair Commercial Practices. Contract, consumer and competition law implications*, The Hague/London/New York: Kluwer Law International, 2004, p. 76.

[733] Treaty on the Functioning of the European Union.

necessary to maintain or introduce national provisions on grounds of major needs relating to, in particular, public morality, public policy or public security and the protection of health and life of humans, animals or plants, the Member State is required to notify the Commission of the provisions it intends to introduce or maintain, as well as the grounds for introducing or maintaining them. The Commission is then required to approve or reject the national provisions within six months after having been notified thereof by the Member State. A failure by the Commission to meet this deadline, which may be extended by six months only, implies a tacit approval of the maintenance of the national provisions. When a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission is required to examine whether to propose an adaptation to that measure. These paragraphs thus allow the Member States some room for manoeuvring.[734] The question is whether these provisions may be invoked in the case of consumer protection. Consumer protection is, unlike environmental protection and the protection of the working environment, not listed as a specific category allowing for such additional measures to be taken at the national level. This implies that consumer protection would have to qualify as rules of equal standing to national rules of public policy. It is unlikely that this, as a general rule, is the case, although the ECJ-rulings in *Mostaza Claro*[735] and *Asturcom*[736] indicate that in some cases consumer protection rules may be qualified as such. It should be mentioned in this respect that the ECJ explicitly took into account that the relevant consumer protection rules are not only mandatory, but as such belong to a directive that as a whole constitutes a measure which is essential to the accomplishment of the tasks entrusted to the European Community.[737] It seems difficult, if not impossible;[738] to argue that national consumer protection rules that derogate from a full harmonisation directive meet that criterion.[739] And even if this were possible, the procedure does not seem to allow a Member State to introduce or maintain legislation *pending* the Commission's response, which implies that this mechanism in any case cannot be used in order to react to *immediate* threats and needs.[740] This would be different only if an explicit provision in the directive would allow Member States to respond to specific national needs and to new developments by taking ad hoc measures temporarily prohibiting newly emerged unfair commercial practices. The Unfair Commercial Practices Directive does not

[734] P. Rott, 'Minimum harmonization for the completion of the internal market? The example of consumer sales law', *Common Market Law Review* 2003-40, p. 1132, mentions that in a number of cases where Member States wanted to provide better environmental protection than was allowed under the relevant directive, which was based on full harmonisation, such submission was successful.

[735] Cf. ECJ 26 October 2006, case C-168/05, *ECR* 2006, p. I-10421 (Mostaza Claro/Centro Móvil Milenium), nos. 35-37.

[736] Cf. ECJ 6 October 2009, case C-40/08, *ECR* 2009, p. I-9579 (Asturcom Telecomunicaciones/Rodríguez Nogueira), nos. 51-52.

[737] Cf. ECJ 26 October 2006, case C-168/05, *ECR* 2006, p. I-10421 (Mostaza Claro/Centro Móvil Milenium), no. 37; ECJ 6 October 2009, case C-40/08, *ECR* 2009, p. I-9579 (Asturcom Telecomunicaciones/Rodríguez Nogueira), no. 51.

[738] Rott 2003, p. 1132-1133, therefore argued that (now) Article 114 TFEU should be amended to explicitly include consumer protection measures.

[739] This would be different if the protective measure were intended to protect the health and life of humans, which, however, constitutes an independent ground for the maintenance or introduction of specific measures at the national level under Article 36 TFEU.

[740] On this, M. Ebers, 'De la armonización mínima a la armonización plena. La propuesta de Directiva sobre derechos de los consumidores', *InDret* 2010-2, p. 12.

contain a provision to this extent.[741] As a consequence, Member States are not able to swiftly react to newly developed and unfair commercial practices by simply prohibiting these practices until the European Commission has had a chance to determine whether such prohibition is justified.

The fact that the Directive is enacted on the basis of full harmonisation and Member States are not awarded the possibility to even take intermediate measures implies that the effectiveness of the Directive depends on the usefulness of the blacklist and of the general clause of Article 5(2) of the Directive. It is problematic that the general clause is newly developed and therefore does not come with an already tried and tested formulation. The general notions introduced by this general clause have not yet been the subject of case-law by the European Court of Justice and may therefore still be interpreted and applied differently in the Member States.[742] This is problematic also given the almost unlimited scope of the Directive, as it applies to unfair commercial practices 'before, during and after a commercial transaction in relation to a product'.[743] Whether or not true harmonisation has been achieved is therefore impossible to say.[744] Given the vagueness of the meaning of the general notions embodied in the unfairness test, not much legal certainty for businesses and consumers has been achieved so far.[745]

Among the most problematic elements of the Directive is the fact that it is unclear whether the unfairness test is measured exclusively against values relating to the internal market, or also against other values.[746] Arguably, the latter is the case, as the Directive on several occasions refers to broader values such as 'taste and decency' and 'social, cultural and linguistic factors'.[747]

Another source of uncertainty is the question which remedies are available if a consumer has concluded a contract with a trader after the use by the latter of an unfair commercial practice. First of all, it should be noted that the Directive does not list which remedies are available in such a case. Article 11(1) of the Directive merely requires the Member States to ensure *that* adequate and effective means exist to combat unfair commercial practices, and that collective action is possible by consumer organisations, competitors or, if there is one, the relevant public authority. Moreover, under Article 13 Member States are to provide for 'effective, proportionate and dissuasive' penalties for infringement of the provisions of the Directive and to ensure that these penalties are enforced. From this it follows that the Directive aims at *collective* protection of the consumers against unfair

[741] See also Howells 2006, p. 22.
[742] Howells 2006, p. 22.
[743] Art. 3 (1) Unfair Commercial Practices Directive. See critical Th. Wilhemsson, 'Scope of the Directive', in: G. Howells, H.-W. Micklitz, Th. Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, Hampshire UK/Burlington USA: Ashgate, 2006, p. 49, 53-54 (hereinafter referred to as: Wilhelmsson 2006a).
[744] Compare also Howells 2006, p. 22.
[745] In this sense also H. Collins, 'EC Regulation of Unfair Commercial Practices', in: H. Collins (ed.), *The forthcoming EC Directive on Unfair Commercial Practices. Contract, consumer and competition law implications*, The Hague/London/New York: Kluwer Law International, 2004, p. 26.
[746] Cf. Micklitz 2006a, p. 87.
[747] See recitals (7) and (18) of the preamble to the Directive. See also Wilhelmsson 2006a, p. 58-63; Micklitz 2006a, p. 89, 95-97.

commercial practices.[748] The Directive is not concerned with the interests of *individual* consumers.[749] Whether or not individual consumers may invoke a remedy for the use of an unfair commercial practice by a trader, is left to the Member States to decide.[750] Moreover, it is unclear what the relation is with general contract law: Article 3(2) of the Directive merely provides that the Directive 'is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.' This means that national legislation must determine whether a contract concluded with a trader after the use by the latter of an unfair commercial practice is void, voidable or simply valid, and whether a consumer is awarded a remedy, e.g. the right to terminate the contract or to claim damages for breach of a pre-contractual information obligation. From the perspective of the consumer who was the victim of an unfair commercial practice, this is highly unsatisfactory. And indeed, Member States laws differ as regards the availability of contract law remedies. In fact, several potential contractual remedies may be applied: the consumer could be allowed to apply general contract law remedies such as voidance or adaptation of the contract for mistake, fraud or abuse of circumstances, to terminate the contract without having to compensate the trader for the loss of profit, to claim damages or to claim price reduction. In Finland, contractual effects have to be decided on case-by-case basis taking all the circumstances into consideration. However, in principle all suitable contractual remedies would potentially be available to the consumer.[751] The same is true in Germany, The Netherlands, Norway, Spain, and the United Kingdom.[752] In France, a misleading commercial practice would be seen as a criminal offense (*délit pénal*). If the public prosecutor would take criminal action against the trader, the consumer may claim damages during the criminal proceedings. Alternatively, she may seek termination of the contract from the civil courts, as well as voidance of the contract for mistake or fraud.[753] In Poland, the consumer may claim damages and, separately, declaration of the voidance of the contract and the return of all payments made and compensation of the costs she has made.[754] In the US, state consumer protection statutes typically provide both for public enforcement by a state official, usually the state attorney general, often with penalties, and for private rights of action. In the latter instance, state consumer protection statutes often provide for actual damages and multiple or statutory damages, along with attorneys' fees, for prevailing consumers.[755]

Despite the explicit provision to the contrary (Article 3(2) of the Directive); it is unrealistic to assume that the Directive will not have any effect on contract law. As *Wilhelmsson* argues, the fact that certain behaviour on the part of the trader leading to the conclusion of a contract is considered to be illegal according to the Unfair Commercial Practices Directive,

[748] Cf. Wilhelmsson 2006a, p. 51.
[749] Wilhelmsson 2006a, p. 52.
[750] Cf. H.-W. Micklitz, 'Legal redress', in: G. Howells, H.-W. Micklitz, Th. Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, Hampshire UK/Burlington USA: Ashgate, 2006, p. 221-222.
[751] See Report I (Finland), p. 28.
[752] Cf. Report I (Germany), p. 107; Report I (The Netherlands), p. 241-242; Report I (Norway), p. 271; Report I (Spain), p. 341; Report I (UK), p. 380.
[753] Report I (France), p. 49-50, 70.
[754] Report I (Poland), p. 301-302.
[755] See Report I (US), p. 418-419.

this may – one could even say: should – be relevant also in a contract law dispute, as it may trigger the use of national rules pertaining to the invalidity of contracts for reasons of illegality, undue influence, fundamental mistake, or even fraud and deceit.[756] Moreover, it is likely that when a trader has neglected to inform the consumer of the main characteristics of the product – to an extent appropriate to the medium and the product – this will influence the reasonable expectations the consumer may have of the goods or services. Failure to inform the consumer about such essential characteristics then does not only constitute a misleading omission and therefore an unfair commercial practice under Article 7(4)(a) Unfair Commercial Practices Directive, but may also give rise to a claim of non-conformity.[757] For instance, if the consumer was not informed thereof before the conclusion of the contract, the use of incompatible standards to prevent users from switching to other services or hardware is considered to constitute an unfair commercial practice in Finland, Italy, The Netherlands, Norway, and the United Kingdom.[758] However, when the consumer has not been informed of matters of interoperability and system requirements, the consumer may expect that the digital content may be used with the ordinary hardware and software, which at the time of the purchase is commonly available on the market. Where these expectations are not met, this constitutes non-conformity, as the digital content would not be fit for its normal purpose.[759] In short, in situations like these, the fact that the trader omits to provide the consumer with information about essential characteristics of the digital content ultimately translates into non-conformity of that digital content. In this respect, it is important to note that the notion of 'main characteristics' is to be interpreted in a rather broad sense: it does not only cover information such as fitness for purpose, usage and composition and accessories, but also the method and date of manufacture or provision, and the geographical and commercial origin, the availability of the digital content and its delivery.[760]

Similarly, though the use of Digital Rights Management to prevent unauthorized use of the digital content or to restrict the use of the digital content to a certain region or country would not be seen as an unfair commercial practice if the consumer was properly informed thereof before the contract was concluded,[761] this is different if the consumer was not properly informed.[762] In this case the use of such Digital Rights Management would constitute non-conformity.[763] In Spain it is argued that even though there is no explicit obligation to this extent, the fact that the use of Digital Rights Management limits the consumer's use of the product, it alters (and simultaneously defines) the essential features

[756] Wilhelmsson 2006a, p. 72-73.
[757] See also sections 2.3.2.1, 2.3.5.1, and 2.7.5.1.
[758] Report I (Finland), p. 25; Report I (Italy), p. 191; Report I (The Netherlands), p. 238-239; Report I (Norway), p. 269; Report I (UK), p. 376.
[759] Cf. OLG Cologne, *NJW* 1996, 1683, as referred to in Report I (Germany), p. 100. See also Report I (The Netherlands), p. 229, and in essence also Report I (Italy), p. 185. See further section 2.7.5.1.
[760] Cf. Th. Wilhelmsson, 'Misleading practices', in: G. Howells, H.-W. Micklitz, Th. Wilhelmsson (eds.), *European Fair Trading Law. The Unfair Commercial Practices Directive*, Hampshire UK/Burlington USA: Ashgate, 2006, p. 140-141 (hereinafter referred to as: Wilhemsson 2006b).
[761] See Report I (Finland), p. 25; Report I (Germany), p. 106; Report I (Italy), p. 192; Report I (The Netherlands), p. 239; Report I (Norway), p. 270; Report I (Poland), p. 299-300; Report I (UK), p. 378.
[762] See explicitly Report I (The Netherlands), p. 239; Report I (Norway), p. 270; Report I (UK), p. 378.
[763] See Report I (Germany), p. 89, 91; Report I (UK), p. 371, 378.

of the contract. As a result, the trader is required to inform the consumer thereof. Nevertheless, it is unclear which remedies apply if such an obligation is breached.[764] There are, however, a few legal systems, which are clearly more lenient towards the use of Digital Rights Management. This is in particular true for Hungary, where there is no need for the trader to inform the consumer of it being used.[765]

As the above shows, unfair commercial practice legislation and contract law legislation can't be separated. However, the 'translation' from unfair commercial practices regulation into contract law remedies is not without problems. This is largely due to the fact that unfair commercial practices legislation makes use of the concept of the average consumer as a person, who is reasonably well-informed and reasonably observant and circumspect'.[766] This notion was developed by the European Court of Justice under, in particular, labelling legislation.[767] General contract law and national consumer law, and arguably also substantive European consumer law rather consider the consumer as a vulnerable party who is in need of legal protection. Such a consumer typically is *not* very observant and circumspect, and in particular does not read advertisements and other commercial communications carefully. Rather, she looks at the headings and pictures.[768] As *Wilhelmsson* indicates, 'the average consumer' may in fact rather act as a casual observer. It is uncertain whether the notion now included in Article 5(2) of the Unfair Commercial Practices Directive in fact allows for taking such factual behaviour into account.[769]

Article 5(2)(b) and (3) of the Unfair Commercial Practices Directive provide for additional protection in the case the commercial practice is targeted not at the public at large, but rather at a particular group of consumers or particularly vulnerable consumers. In these cases, not the 'average consumer', but the average person in the targeted group is the yardstick to determine whether or not the commercial practice is unfair. Arguably these specific 'average consumers' are also the yardstick to be used when interpreting the small general clause on misleading practices,[770] implying that whether or not a commercial practice is unfair is to be determined on the basis of the average member of the targeted group of consumers.[771] In this respect, also the particular market and marketing method will be relevant. For instance, whereas a sweepstake may be misleading towards the public at large,[772] or towards a group of particularly gullible consumers, this may be different where other groups of consumers are targeted. In this sense, it is argued that in case of online consumer transactions, consumers should be experienced in using and sorting the information provided,[773] implying that a *higher* level of awareness could be expected from

[764] Cf. art. 22.1.e of the Law concerning the free access to service activities and their practice (LAASE) and art. 60 General Law for the Protection of Users (TR-LGDCU); see Report I (Spain), p. 326-327, 331.
[765] See Report I (Hungary), p. 123. See also Report I (US), p. 405.
[766] See Article 5(2) Unfair Commercial Practices Directive.
[767] Cf. ECJ 16 July 1998, case C-210/96, *ECR* 1998, p. I-4657 (Gut Springenheide).
[768] Cf. Wilhemsson 2006b, p. 132.
[769] See cautiously affirmative Wilhelmsson 2006b, p. 132; Micklitz 2006a, p. 112, is rather inclined to think that such is not the case.
[770] Wilhelmsson 2006b, p. 133.
[771] Wilhelmsson 2006b, p. 133.
[772] See for instance *Office of Fair Trading* v *Purely Creative Ltd and others* [2011] EWHC 106.
[773] See C. Coteanu, *Cyber consumer law and unfaiur trading practices*, Aldershot: Ashgate, 2005, p. 183

consumers contracting online. It seems doubtful, however, whether as a general statement this (still) is true given the rapid development of the consumer e-market and the fact that also less experienced or educated consumers frequently conclude contracts online.

This argument is substantiated by recital (18) to the Directive, which reads that '[w]here a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that group.' This sounds as a robust strengthening of the position of minors, for practices are likely to qualify more easily as unfair if its addressees are not of age. Such adjustments for vulnerable parties, however, are often already common practice under national laws and it may therefore be questioned whether this will significantly alter the yardstick(s) in use. In addition to that, the flexibility of the standard makes its practical functioning uncertain and probably nationally coloured. The terms used in article 5(3) are often open to national interpretations, which may notably differ among each other.[774] The 'children', for example, referred to in recital 18 are not defined (by age or otherwise) and neither are qualifications as 'credulity' or 'commercial inexperience.' This means that 'Member States will retain a margin of appreciation in determining the need for protection of weaker parts of the population as the Community is far from agreeing and wanting to agree on such subtle, and at the same time fundamental, social policy questions.'[775]

According to Article 6 of the Unfair Commercial Practices Directive, a commercial practice shall be regarded as misleading if it contains false information or in any way deceives or is likely to deceive the average consumer, even if the information is factually correct. Such information may, for example, regard the price at which a product or service is offered. Most Internet services are advertised as gratuitous; while true in monetary terms, it is agreed by most specialists that the new currency on the Internet is personal data.[776] In return for services, companies gather, either explicitly through registration forms or secretly via cookies, personal data of their consumers. Through the use of personal data they offer personal advertisements with which they make profit. Given the formulation in the directive that the information even if factually correct may mislead and given the fact that the average Internet user will not be aware of the fact that he is paying Internet services with her personal data, this may qualify as a misleading practice. The black list holds that describing a product as gratuitous is misleading if the consumer has to pay anything other than the unavoidable cost.[777] Another black list rule holds that it is considered misleading when a trader falsely claims or creates the impression that she is not acting for purposes relating to her trade, business, craft or profession. It is not unlikely that the average consumer will not be aware of the business models behind the 'free Internet' and the fact

[774] See Micklitz 2006a, p. 113-115.
[775] Micklitz 2006a, p. 113-115.
[776] As acknowledged by (then Commissioner for Consumer Protection) M. Kuneva, keynote speech at the Roundtable on Online Data collection, targeting and profiling, Brussels, 31 March 2009, Speech/09/156, p. 2, available online at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/156 (last visited on April 28, 2011).
[777] Annex I - Nr. 20 Unfair Commercial Practices Directive.

that her personal data is gathered on large scale.[778] The question is however if her conduct would be different if she would be aware if these facts. According to Wilhemsson, 'Only if the practice that contains false information or is deceptive causes or is likely to cause the consumer to take a transactional decision that she would not have taken otherwise, shall it be regarded as misleading.'[779] Although certainly some users would show some hesitance to consume certain digital content, confronted with the choice between free digital content and giving away personal data, the question is whether the average consumer would not rather sacrifice the latter in favour of the former. Still, what might be misleading is that the 'privacy policy' of some businesses inform the user how they will gather, analyse and distribute the biggest amount of personal data as possible, while the average consumer will be under the impression that if a company contains such a policy on its website, it will protect her privacy.[780] However, again it has to be determined whether the average consumer would alter her behaviour upon receiving such information, and although children are considered vulnerable consumers with the need of special protection[781] and they are the prime consumer of most free Internet services, it is unsure whether they would stop using Facebook, MySpace and the likes if they would be aware of these facts. In such cases, misleading commercial practices are banned by Article 6(1) of the Directive only to the extent where the consumer is actually deceived or is likely to be deceived and the practice causes or is likely to cause her to take a transactional decision that she would not have taken otherwise. The wording of the Directive is unclear, however, with regard to the situation where the provided information is false, but consumer is actually not deceived or the information provided by the business does not cause her to take a different transactional decision than she would have taken otherwise: the text of the Directive opens the possibility to consider the provision of false information to be a misleading commercial practice even in those cases.

When the information provided about the main characteristics of the digital content is false or deceptive information this may constitute both an unfair commercial practice and non-conformity of the digital content. This may occasionally also be the case where the trader has indicated that updates or after sales services are available (if need be: against the payment of a separate price) and such updates are in fact not made available.[782] This is probably different, however, with regard to false or deceptive information pertaining to the need for additional services, parts, replacement or repair. Where the consumer is led to believe, for instance, that he needs to contract for updates or additional services and subsequently concludes a contract to that extent, where in fact the updates or services are not needed in order to properly benefit from the earlier purchased digital content, this constitutes a misleading and thus unfair commercial practice under Article 6(1)(e) of the Unfair Commercial Practices Directive.[783]

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[778] It might be questioned whether such business model would be in conflict with recital 25 of the Unfair Commercial Practices Directive, red in conjunction with the Data Protection Directive and article 8 of Charter of Fundamental Rights of the European Union, since these companies root in personal data.
[779] Wilhemsson 2006b, p. 136.
[780] Kool et al. 2011
[781] Micklitz 2006a, p. 112.
[782] Wilhelmsson 2006b, p. 141.
[783] Wilhelmsson 2006b, p. 143.

As indicated in section 2.9, digital content offered over the Internet in practice is often targeted towards minors. As minors lack legal capacity to conclude contracts, commercial practices aiming at the conclusion of contracts by minors are problematic, in particular where these practices are likely to impair the minor's freedom of choice or conduct with regard to the digital content. This implies that such practices may easily be qualified as an aggressive commercial practice within the meaning of Article 8 of the Directive, which would in turn mean that such practice would be considered to be unfair. Moreover, it could even be argued that where the business does not provide sufficient means of age verification and as a result it allows minors to conclude contracts without the consent of their parents or legal guardians, the business commits an unfair commercial practice under the open clause of Article 5 of the Directive. Until recently, some companies provided consumers access to an account from where they could make in-app purchases by using a single password and without requiring the consumer to provide the password – let alone a different password – a second time. As a result, children could make purchases through such an account for thousands of dollars. Whether a European court would find there to be an unfair commercial practice is uncertain. However, it is interesting to note that recently in the United States the Federal Trade Commission has been asked to investigate potentially deceptive practices on smart phones that allow makers of free children's games to charge users,[784] and an American father has filed a law suit against an electronics company for what he considers to be the 'unlawful exploitation' of children (and their parents' wallets) via in-app purchasing policies, where purchases apparently were paid for by merely providing the number of their parents' credit card.[785] It does not seem farfetched that similar claims could be made in Europe under the Unfair Commercial Practices Directive.

[784] See C. Kang, 'Lawmakers urge FTC to investigate free kids games on iPhone;, *Washington Post*,8 2011, available online at http://www.washingtonpost.com/wp-dyn/content/article/2011/02/08/AR2011020805721.html?sid=ST2011020706437 (last visited April 28, 2011).
[785] See C. Albanesius, 'Apple Sued Over iPhone In-App Game Purchases', *PCMag.Com* 15 April 2011, available online at http://www.pcmag.com/article2/0,2817,2383641,00.asp (last visited on 28 April, 2011).

3. Assessment

3.1 Classification

The classification of digital content as goods or services is uncertain in European consumer contract law.[786] There is no consistent approach to the definition of 'goods' or the treatment of digital content, either in domestic or European legislation. Moreover, as the Bradgate report points out, there is a tendency to treat the two categories of contracts for goods and contracts for services, as mutually exclusive, so that all contracts must be capable of fitting into either one or other of the categories.[787] Moreover, analysing the contract to supply standard software as one for the supply of services can, in some Member States, undermine consumer protection. If the consumer contracts directly with the software copyright holder to purchase a copy of the software, classifying the contract as one for services, means that the consumer might be given a lower level of protection than she would enjoy if the contract were classified as one for the sale or supply of goods. The approach which categorizes standard software or digital content, in intangible form as a service seems to confuse the object supplied with the manner of its supply.[788]

A recent BEUC position paper[789] states that 'the downloading of digital goods (software, music, games, ringtones,…) where the consumer obtains the possibility of use on a permanent basis or in a way similar to the physical possession of a good with the possibility to store it, should be treated as goods for the application of the provisions applying to sales contracts (…) The format in which a product is presented or purchased should not matter in terms of consumer protection: consumers should be equally protected on line and off-line'. This statement does not per se explain what digital goods are, but rather explains when they could be treated as goods by giving a series of criteria. However, these criteria are highly relevant and could be used to understand what digital goods are.

Mainly the criterion of permanency in access presents merits. Digital content can be accessed as it as if it were the consumer's own, with a certain degree of permanency. As for the possibility to store it, we would add, the possibility to store it on a personal device. Digital content is not necessarily stored on a device that belongs to the consumer. For example, the consumer could pay for a song which is stored (a unique copy of the same song being accessed by multiple users) on a distant access server for the sake of portability, which the consumer may download if needed or simply access at a distance. The possibility to store the data on a personal device is nonetheless an important feature. It allows inter alia for archiving, interoperability (pick up and leave) and access to content when disconnected. In other words, that the good may function relatively autonomously (from the constant connectivity with the Internet, from constant upkeep from the trader, etc.) if so desired.

In this context, the parallel with copyright law is particularly interesting, especially in relation to the application of the exhaustion doctrine. Several cases have been decided in

[786] Schmidt-Kessel 2011, p. 5.
[787] Bradgate 2010, p. 47.
[788] Ibid., p. 50.
[789] BEUC 2010, p. 5; Bradgate 2010, p. 14 ff.

Germany[790] and elsewhere, examining the circumstances under which a piece of software is deemed tangible enough to give rise to the application of the exhaustion doctrine. The Court of Appeal of Dusseldorf refused to apply the exhaustion principle to software pre-installed in a personal computer, recalling that exhaustion occurs only in relation to the physical embodiment of a work.[791] The Court stressed that the concept of a copy of the work cannot be interpreted extensively by 'taking into account the purposes of the exhaustion principle'. In another case involving the re-distribution of the music file downloaded on a computer, the District Court of Berlin also refused to apply the exhaustion rule.[792] German courts have proved reluctant to apply the doctrine of exhaustion by analogy to software or other digital content that is not embodied in a tangible medium, leaving it to the legislator to decide on the issue. It is clear, however, that the application of the exhaustion doctrine and the criterion of tangibility give rise to uncertainty among consumers of digital content.

It seems that the distinction between (digital) goods and (digital) services does not help to solve the current legal problems and that the focus on this distinction in fact obscures the real issues with digital content contracts. As follows from parts 2 and 4 of this study, the provisions applicable to sales contracts lend themselves well for application to digital content contracts, with some obvious amendments as to gratuitous digital content. In particular the provisions on conformity and the remedies for non-conformity may be applied with only minor changes. Moreover, it is clear that the possible application of a right of withdrawal deserves specific attention. However, even for the right of withdrawal the distinction between (digital) goods and (digital) services does not seem to draw attention to the real issues at stake. It is therefore submitted that the distinction between (digital) goods and (digital) services lacks practical relevance and should, therefore, be ignored in a future legislative instrument.

3.2 Prosumers

Being often a borderline case, the legal status of the prosumer can be quite hard to define. As the analysis has illustrated, no golden formula exists to draw a sharp line between amateurs and professionals. Admittedly, some countries have a more limited set of criteria than others, but a completely unproblematic method of classification has not been found. Even the approach of Poland, where the apparently straightforward criterion of profit making is decisive, has to overcome some interpretative hurdles. Are indirect revenues, e.g. coming from advertising or from selling collected personal data, to be considered as profit? Or should this necessarily take the form of direct payment?

Similar problems can be signalled with respect to the requirement of an organisational structure. In the first place the 'organisation' test may turn out just as elusive as the

[790] Court of Appeal Munich, MMR 2006, 748; Court of Appeal of Frankfurt, judgment of 12 May 2009, 11 W 15/09.

[791] Court of Appeal Dusseldorf, Decision of 29.06.2009 I-20 U 247/08, available online at http://www.jurpc.de/rechtspr/20090170.htm; see also German Supreme Court, (OEM case), decision of 06.07.2000 I ZR 244/97, available online at http://www.jurpc.de/rechtspr/20000220.htm.

[792] District Court Berlin, decision of 14.07.2009, 6 O 67/08, available online at http://www.jurpc.de/rechtspr/20090240.htm (last visited April 28,, 2011).

overarching 'professionalism' concept which it seeks to concretize. Moreover, while many activities can be developed from behind the desk (or better, on the computer) physical traces of an organised structure may become less appropriate indicators.

Of a different nature are the objections that can be raised against the frequency criterion. Although it is uncontested that a professional is likely to trade more actively than an amateur, it is doubtful whether incidental but significant transactions should fall under a milder regime. All this doesn't alter the fact, of course, that an examination based on the abovementioned trio may give some important clues about the (professional or household) nature of a business. As suggested in literature, objective, quantitative criteria can also be helpful to distinguish between players.[793] Practically speaking, one could think of tying the qualification 'professional' to a threshold value with regard to turnover, number of sales etc. This would give an important weight to factors as 'frequency' or 'activity'.
A somewhat related approach can be found in the law & economics part of this report.[794] Building on one of the traditional objectives of consumer law, reducing information asymmetry, it discusses the possibility of judging transactions by the parties' actual experience instead of their 'labels'. The central question to determine entitlement to consumer protection is whether legal or natural persons operate 'in a field external to their professional competences, skills and knowledge'. A highly experienced private party selling items in online auctions may thus no longer qualify as a consumer, while a green grocer buying a company car does. By applying such a yardstick in the earlier stage of classification significant flexibility and differentiation of the consumer concept could be reached.[795]

Less mentioned, but perhaps not less relevant are the factors relating to appearance, presentation and consumer perception. In Germany and The Netherlands the impression that a certain trade is likely to make on the public is an important aspect of the assessment. Because such arguments lie at the heart of consumer law one could argue that they should be given more weight than a set of hard-to-obtain data about profit, organisation and trade frequency.

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[793] P. Swire suggested, by means of example, that consumer privacy legislation could be applied on commercial databases containing more than 5,000 names.
[794] See chapter 5.5 of this Report III.
[795] This approach has already been adopted, be it in a less absolute form, in France and the United Kingdom. In France, for example, an estate agency ordering an alarm system was considered to act as a consumer, not as a professional, since it would lack technical competence in this specific field. See Cass. Civ. of 28 April 1987, Juris-classeur periodique (JCP) 1987. II. 20893). In later case law, however, the emphasis was mainly put on whether the contract was directly related to the business activity or not. See Cass. Civ. 24 January 1995, Recueil Dalloz Sirey 1995, 327-329; Cass. Civ. 23 November 1999, Jurisclasseur, Contrats-Concurrence-Consommation 2000, commentaires 25; and Cass. Civ. 23 February 1999, Recueil Dalloz 1999, Informations Rapides, 82. In the past the same argument could successsfully be made in the United Kingdom. Under section 12(1) of the Unfair Contract Terms Act (UCTA) 1977 companies could claim to 'deal as a consumer' when a transaction outside their normal business purposes was involved, see R & B Customs Brokers Ltd v United Dominions Trust Ltd. [1988] 1 WLR 321. In more recent jurisprudence, however, this line has not been pursued with regard to businesses selling items that fall outside their normal activities, such as a used computer by a legal office. See Stevenson v Rogers [1999] 1 All ER 613. These examples are adapted from the EU Consumer Law Compendium, Comparative analysis 671: the notion of 'consumer', University of Bielefeld, 2007, available online at http://www.eu-consumer-law.org/ (last visited April 28, 2011).

Also the question of differentiation within the group of professionals and prosumers caused some struggle. A few countries denied the possibility straightaway, but others gave a more hesitating answer. While statutory provisions often do not or barely deal with this issue, some respondents noticed (certain degrees of) differentiation by judges. Especially professional diligence and the duty to care were mentioned as obligations eligible for alleviation under circumstances. Obviously, not much legal certainty can be expected from a similar approach. However, the fact-specific nature of such cases may justify some legislative reticence, leaving room for a necessary degree of flexibility. Here the British open-ended test may prove more adequate to deal with the subtlety and versatility of the subject than extensive codification.

3.3 Information obligations

Providers of digital content contracts must provide digital consumers with a host of information under general and sector-specific law. With regard to the information obligations in general contract law, consumer sales law, distance selling law and service law, none of the countries examined has adopted more detailed or specific information duties specifically for digital content contracts. Insofar, the general information obligations apply. There is not yet much case law or a common standard regarding the information that consumers of digital content are entitled to receive. There is certainly a tendency that when interpreting the general obligations to also consider the specific characteristics of digital content contracts. A majority of the country reports, for example, indicated that the technical format and its influence on the interoperability and compatibility of a digital content service with consumer hard- software is an essential characteristic consumers need to be informed about. More controversial is the question if consumers need to be informed about potential usage restrictions as the result of the application of Digital Rights Management or technical protection measures. Remarkably, it appears that a duty to inform about technical protection measures (but also matters of interoperability, activities relating to the processing of personal data, etc.) will flow more readily and indirectly from unfair commercial practices regulation than from contract, distance selling, services and consumer sales law.

In addition to the information obligations in general consumer and contract law, sector-specific information obligations may apply that originate from media law, communication law, e-commerce law, data protection and copyright law. The national provisions in this area are largely inspired by the European acquis communautaire. Unlike the information obligations in general consumer and contract law, sector-specific law requires traders to provide very specific information about very specific aspects of digital content.[796] Only few have a more horizontal character, such as the information obligations in data protection law. Common to all is that they are not triggered by the conclusion of a particular contract,

[796] Examples include the presence of different forms of advertisement, the trader (notably in case of audiovisual media services or publishers), the presence of DRM and other technical protection measures, transmission quality, and the way personal data are processed. Most of these information obligations apply to specific digital content services only (e.g. audiovisual media services, editorial services or services whose content is subject to copyright).

but rather by the performance of a particular activity, such as providing audio-visual media services to consumers or processing personal data.

One question that has so far received no or little attention is how the information obligations in general and in sector-specific law interact. For example, if data protection law requires traders to inform consumers about the way their personal data is being processed, would this information also need to be included as part of the contract, according to the rules of general contract law? Or could an editorial text, which is in reality written to promote a certain product (advertorial), be considered "flawed" according to the rules of consumer sales law? These are yet open questions.

In general, it is striking to notice that existing information obligations pay little attention to the particular form, language and means consumer information is administered. Most national rules take little into account the cognitive limitations of consumers in general, and certain, particularly vulnerable groups, such as minors, in specific. This gives rise to the question to what extent issues such as "information overload" or aspects of information quality, noise reduction and user friendliness must play a more prominent role for the existing information obligations to be effective.

3.4 Formation of contract

Provisions relating to the transparency and comprehensibility of standard terms essentially derive from the provisions on unfair contract terms and distance selling. Three elements contribute to the transparency and comprehensibility of contract terms: 1) the language used to write the terms; 2) the possibility to take notice of the terms before the conclusion of the contract; and 3) where terms are specially onerous or unusual, a high degree of prominence may be required for incorporation. With respect to digital content, the question arises as to whether the current set of rules is sufficient to ensure that traders use transparent and comprehensible contract terms, taking account of the means of communication used. Nevertheless, it seems there is a need to give traders an extra incentive to comply with the rules on transparency and comprehensibility.

The general rule in force in the law of all examined Member States is that all contract terms should be made available to the consumer before the conclusion of the contract. The main difficulty in relation to the making available of contract terms using means of distance communication is to determine the proper timing for the communication of the pre-contractual information and the contract terms.

With regard to the validity of the standard terms concluded via electronic means and manifestation of assent, there remains uncertainty regarding the validity of contract terms known as 'click-wrap' and 'browse-wrap' licenses.

3.5 Right of withdrawal

In most of the current European directives, as well as the DCFR, the proposal for a Consumer Rights Directive and the texts suggested by the Council and the European Parliament, in so far as the consumer is entitled a right of withdrawal, this right may be exercised during a period of fourteen calendar days. Different from the other European

directives, the cooling-off period starts to run even if the consumer is not informed of the existence of the right of withdrawal, but is extended. Whereas under the Distance Selling and the proposal for a Consumer Rights Directive, the extension is limited to three months after its initial starting point, the texts suggested by the Council and the European Parliament would lead to a longer extension period of six months or even a year. Under the DCFR, the cooling-off period would be extended to one year after the conclusion of the contract – in this sense (and different from the other provisions) not distinguishing between goods and services.

The question of whether a right of withdrawal should be applied also to digital content contracts is not answered unequivocally in the current directives that award such a right in principle. All legal systems included in the study exclude the right of withdrawal in the case of audio and video recordings and computer software which was provided on a tangible medium with a seal, where the seal has been broken by the consumer. The reason for the industry to insist on the exclusion of the right of withdrawal in the case of audio or video recordings or computer software in the case a seal was broken, would seem to equally apply to digital content. In this sense, it is not surprising that in Spain and in a French law proposal the exclusion is applied also to digital content, which is downloaded or reproduced immediately for permanent use.[797] However, it seems doubtful whether the application of the exemption pertaining to unsealed audio or video recordings or computer software to downloaded digital content is in conformity with the Distance Selling Directive, in particular when the digital content itself was not protected by an electronic seal. Moreover, the exemption in the Distance Selling Directive only applies to audio or video recordings or computer software and not to the many other types of digital content.

Similarly, it is unclear whether the trader could rely on the exemption for goods 'which, by reason of their nature, cannot be returned'. Arguably this exemption does not apply either to digital content, as the digital content could in theory be uploaded and deleted from the consumer's hardware. However, it is clear that the risk remains that the consumer retains a copy of the digital content.

A third approach to exclude the right of withdrawal seems to be more successful. In so far as the contract is classified as a contract for services, the exemption of Article 6(3), first incident, of the Distance Selling Directive applies. Under this provision the consumer loses her right of withdrawal when performance of the contract has begun with the consumer's agreement before the end of the cooling-off period. This implies, for instance, that when a contract for the live streaming of, for instance, football matches has commenced with the consumer's consent during the cooling-off period, the consumer loses her right of withdrawal.

What the approaches indicated above – both the application of the rules applicable to services and the application of the exemption of the right of withdrawal for certain sales contracts – have in common is that in essence the right of withdrawal is excluded in particular when the digital content has been obtained by the consumer. The 'services'

[797] See Report I (France), p. 74; Report I (Spain), p. 327.

approach, however, does leave intact the possibility for the consumer to withdraw from the contract as long as the digital content has not been delivered to the consumer, whereas the right of withdrawal is excluded altogether if the digital content is classified as a good and the two mentioned exemptions would apply. However, even if the three exemptions could be relied on, it seems that not all digital content contracts would be covered under an exemption of the right of withdrawal. In particular in the case of e-books it seems that neither the services-exemption nor the sales-exemptions would apply.

In essence, this is not different under the DCFR or the proposal for a Consumer Rights Directive. However, Article 19)1)(j) of the text suggested by the Council indicates that the right of withdrawal is excluded for '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'. Even though the text suggested by the Council itself is silent on the matter, recital (10d), which is also introduced by the Council, clearly indicates that digital content, which is not stored on a tangible medium, is not considered as a tangible good. This implies that in the view of the Council the right of withdrawal is excluded once the consumer has expressly agreed with performance during the cooling-off period and performance has begun.

Yet, the text suggested by the European Parliament introduces a different exclusion, by indicating in its Article 19(1)(ha) that the right of withdrawal is excluded in the case of 'the supply of digital content once the consumer has started to download this digital content'. In both cases, when the consumer downloads music, video content or an e-book on the basis of a spot contract – i.e. not on the basis of a subscription – both the text suggested by the Council and that suggested by the European Parliament leads to the exclusion of the right of withdrawal once the download has commenced. However, whereas the exclusion suggested by the Council seems to apply also to streaming contracts and online gaming contracts that are immediately and fully performed, this does not seem to be the case with regard with the exemption suggested by the European Parliament. On the other hand, the text suggested by the Council seems not to apply to subscriptions to, for instance, streamed digital content, as such contracts are not performed *fully* when the consumer first accesses the digital content.[798] The text suggested by the European Parliament would seem to exclude also these subscriptions once the initial download has commenced.

The text suggested by the Council, and even more so the text of the DCFR, also solve a matter which is not regulated clearly in the Distance Selling Directive and which has led to differing approaches in the Member States: under the suggested text and the DCFR it is made clear that the consumer does not lose her right of withdrawal if she agrees to performance of the digital services contract during the cooling-off period and performance has begun, but the consumer was not informed of her right of withdrawal. Moreover, if the consumer invokes her right of withdrawal, she need not pay for any services rendered. Similarly, the consumer would also not lose her right of withdrawal in so far as services are

[798] It may be argued that in so far as the subscription pertains to the supply of e-newspapers or e-magazines, the exclusion of Art. 19(1)(f) of the text adopted by the Council may be applied. However, this provision cannot be applied in the case of other subscriptions to digital content.

rendered during the cooling-off period without her informed consent under the text suggested by the European Parliament.[799] Unfortunately, a similar provision is missing in Article 19(1)(ha) of this text pertaining to the supply of digital content. Moreover, the text suggested by the European Parliament does not indicate whether the consumer needs to pay for the services rendered during the cooling-off period, which threatens to import the existing uncertainty as to this matter under the Distance Selling Directive into the future.

3.6 Unfair terms

The widespread use of restrictive standard form contracts for the distribution of digital content poses a threat to some of the basic objectives of both copyright policy and consumer protection. If technological measures are prone to undermine essential user freedoms, the same is true *a fortiori* for standard form licenses. In fact, the use of DRM systems in combination with on-line standard form contracts may accentuate information asymmetries, indirect network effects, high switching costs and lock-ins, leading to market failures and thereby preventing well-functioning competition.

As copyrighted works are increasingly being distributed on the mass market subject to the terms of standard form contracts, consumers of protected material are likely to be confronted more and more with contract clauses that attempt to restrict the privileges normally recognised to them under copyright law. The consumer's only choice is often to refuse to transact under the conditions set out in the standard form contract. In view of the consumer's inferior bargaining power and information asymmetry, the question is whether and to what extent the introduction of a rule in consumer protection law could improve the user's position with respect to such restrictive contract clauses. Consumer protection rules typically purport to operate on two levels: first, to increase the consumer's pre-contractual information and, second, to offer protection against unreasonable one-sided contract terms. A Community legislative intervention could be envisaged on both levels, namely imposing an obligation to inform consumers of the licensing conditions before they proceed to a purchase, and regulate the content of the licenses.

Imposing a duty on rightholders to disclose particular information or to observe specific formalities at the time of the conclusion of the standard form contract does contribute to reducing inequalities between parties, insofar as it increases transparency and compensates for the lack of information or experience on the part of the end-user. While they were absolutely unknown to the area of copyright just a few years ago, consumer protection measures related to copyright matters have recently become more frequent.

What is apparent from the national reports is that although most of them signal that a contractual terms restricting or breaching privacy rights are to be considered unfair, the ground for this conclusion is often absent or vague. Given the importance of privacy protection in the digital environment, where consumers often are not aware of the use made of their personal data,[800] it seems desirable to create more legal certainty on this topic.

[799] See Art. 19(1)(a) of the text approved by the European Parliament.
[800] Compare the Introduction to this Report.

Making the purchase of digital content conditional upon the purchase of additional contents or a particular hardware restricts the ability of consumers to exercise free choice between different contents and traders. Consumers do attach considerable value to the ability of transfer digital content between different devices,[801] including devices from competing traders. As such, tying arrangements can conflict with important interests of consumers, even if the tying is the result of a viable and perfectly legitimate business strategy. The interest of consumers in being able to exercise choice between different digital contents, devices and traders is also protection worthy, as it is an important element of functioning competition, effective consumer protection and, last but not least, the ability to fully benefit from a diverse media offer.

3.7 Non-performance and non-conformity

Parties are free to determine both the time and place of performance. In case the parties have not agreed upon the time for performance, national law in the Member States provides that performance must take place either immediately or within a reasonable period after conclusion of the contract. Extraordinarily, the default rules in the Distance Selling Directive, the DCFR and the proposal for a Consumer Rights Directive all provide that in such a case performance must be rendered within 30 days after the conclusion of the contract. This provision seems ill-drafted with regard to the question whether the consumer may require earlier performance in the situation where such is feasible for the trader. It should be noted that this is almost always the case for digital content, where performance normally can take place immediately or shortly after the conclusion of the contract. It is submitted that the current provisions of the Distance Selling Directive, the DCFR and the proposal for a Consumer Rights Directive are not fit to be used with regard to digital content contracts. With regard to the place of performance, there is a similar problem, albeit that the provision of the DCFR here is in line with the situation in most Member States. Article III.–2:201(1) DCFR (Place of performance) determines that delivery takes place at the trader's place of business. This default rule has been clearly written for the tangible world, with traditional goods and services in mind, but seems to be incompatible with the digital environment, where in most cases no tangible goods need to be delivered or services rendered in nature. In practice, however, in most cases the parties will either explicitly or implicitly have determined where and when performance is due. This implies that even though the default rules are not suitable to be used in a digital environment, in practice they don't cause too many problems either.

In the case of a digital content contract, the trader may be required to transfer the ownership of the tangible medium on which the digital content is provided. However, a transfer of the digital content or the intellectual property rights associated with it typically does not take place. In contrast, the consumer is (merely) provided with a license to use the digital content. Nevertheless, the consumer may reasonably expect that she will be able to peacefully enjoy the use of the digital content in accordance with its ordinary use. Where the consumer is not informed of restrictions as to the normal use of the digital content and rights of third parties have not been cleared or stand in the way of the consumer's peaceful

[801] Dufft 2005, p. 24; Dufft 2006, p. 26.

enjoyment of the digital content, this constitutes a non-conformity for which the trader is liable.

The conformity test as such seems fit to be used also with regard to digital content and in practice is applied in the legal systems included in this study, whether the contract is classified as a (consumer) sales contract or not. This does not mean that applying the conformity test to digital content is without problems. In fact, the most problematic aspect is that it is often uncertain what the consumer may reasonably expect from the digital content and that an objective yardstick to determine whether these expectations have been met often does not (yet) exist because of the relatively new character of digital content, the many different types of digital content, the high level of product differentiation, licensing practices and licensing conditions and the rapid market and technological developments.

An important factor in practice is the fact that the legitimate expectations of the consumer are to a large extent influenced by statements from the side of the industry. It is submitted, however, that such statements cannot undermine the legal expectations consumers may have of the digital content, in particular in so far as these are based on previous experiences with digital content or similar experiences with traditional, tangible goods, which may resemble the digital content now purchased. Moreover, more abstract notions such as public order and the protection of privacy or fundamental rights, in particular also the possibility to express oneself and to access opinions expressed by others, are to be taken into account when assessing whether the digital content is in conformity with the contract.

Different types of conformity problems may be identified. Most pertain to problems regarding accessibility, functionality and compatibility, to the quality of the digital content, and to security and safety matters. Most of these in fact are hidden defects, i.e. defects that the consumer cannot discover before the digital content is in fact used. The trader is required to communicate these defects before the conclusion of the contract. It is undisputable that when the trader knows or should recognise a hidden defect, and does not disclose this before the contract is concluded, the trader is liable for non-conformity.

A recent study shows that access problems are among the most prominent types of problems consumers experience with digital content. Some of these problems in fact are caused by technical protection measures, which may seek to prevent the transfer of the digital content from one device to another or to prevent the number of times or the period during which the consumer may access the digital content. The question arises whether such problems amount to non-conformities. This is the case where the consumer may otherwise reasonably expect to be able to use the product freely, unrestricted in time, in number of times of access to the product, or in the number of times she wishes to transfer the file to another device or to make a private copy, and he was not properly informed of such restrictions before the conclusion of the contract. Such restrictions cannot be said to constitute an unfair contract term, an unfair commercial practice or an unlawful restriction of fundamental rights such as the right to information or the right to privacy.

One of the battlegrounds with regard to digital content is whether or not consumers are allowed to make one or more copies of the digital content for private use. Empirical

research shows that consumers generally tend to expect to be able to make such private copies. It should be noted that under European copyright law a generally recognised *right* to make private copies does not (yet) exist. However, the fact that consumers generally expect to be able to make private copies, the fact that such a right is even recognised by statute in several Member States and, thirdly, the fact that the use of Digital Rights Management already has been abandoned by several major players on the side of the industry all point in the direction that such expectations are indeed legitimate, in particular when consumers are not explicitly informed otherwise.

Another problem relates to matters of interoperability and system requirements. A particular trait of digital content is that it cannot be used without making use of a technical device and, in most cases, without making use of (other) software. Obviously, where the trader (whether or not performing an obligation to that extent) has indicated in advance in a clear and intelligible manner that the digital content can only be played on or accessed through that device or operating system and the consumer (nevertheless) concludes the contract, the digital content is in conformity with the contract if it indeed only can be played on or accessed through that device or operating system. However, when such information is not given, it is submitted that by not properly informing the consumer, the trader has indeed supplied non-conforming digital content if that digital content cannot be used on other commonly available devices, as the digital content would not be fit for its normal purpose.

An important element causing the absence of generally accepted quality standards is the rapid development of new types of digital content and of devices on which they have to operate. The mere fact that newer digital content of a higher quality – e.g. because of the use of a higher resolution – has appeared on the market does not imply that digital content that was put on the market is henceforward to be considered as substandard because of that mere fact. However, it may well be that the newer version of the same digital content, e.g. standard software, remedies existing problems in older versions of that digital content. In that case, the older digital content may very well be considered to be substandard if that older digital content is sold to the consumer and at that time the trader does not mention that these known defects have been remedied in a newer version of the digital content.

A related question is how long the digital content must be 'fit for use'. In practice, often consumers will be enabled to frequently update the digital content in order to cope with such developments, ensuring that the consumer may continue to make use of the purchased digital content. It is argued that even where the parties have not agreed upon such updates – either for free or against remuneration – the consumer would have to be able to make use of the digital content for a reasonable period of time. Where the normal purpose of the digital content is for it to be used for a certain period of time, and due to technological development such use is no longer possible during that period of time, this may be classified as non-conformity as well. On the other hand, the consumer may not reasonably expect that such updates will be available for an unlimited amount of time, even against remuneration, as at a certain point it may be commercially unviable to provide such updates if the product itself has become obsolete. The reasonable expectations of the consumer

would then have to decide when her right to be able to continue to use the digital content subsides.

Clearly, the consumer may expect that software delivered to the consumer (including technical protection measures) does not open security holes that subsequently allow viruses to break in and damage the consumer's hardware or software. Similarly, when products have been on the market for a certain period, the consumer may reasonably expect that most bugs and defects have been remedied, as the industry indicates it does, implying that when a bug or defect preventing the consumer from using the digital content for its ordinary purpose or limiting her from doing so, the digital content is not in conformity with the contract.

3.8 Remedies

Do the existing remedies in consumer law and contract law provide adequate solutions to problems that consumers encounter with digital content, such as difficulties related to access and information?

In the BEUC position paper on digital products, it is indicated that repair could provide a remedy for flawed software that can be fixed by an update or a new release.[802] Replacement could be an option in case a copied file was corrupted during transmission, for instance if the digital product is delivered on a defective CD.[803] In such cases, replacement could take place by providing the consumer with a new copy of the original file or, in case the non-performance is a consequence of the application of technical measures (DRM), by providing the consumer with an unprotected version of the file.[804] It should, however, be pointed out that this latter solution, though valid from a consumer law perspective, could be problematic from the information law point of view, since it would circumvent DRM rules in copyright law.

In light of the empirical data on consumers' experiences with digital content, however, one may wonder whether repair and replacement actually provide an adequate remedy to all problems that consumers encounter. Most reported consumer problems are related to access.[805] It is doubtful whether repair or replacement of digital content can fully resolve these particular problems. Rather, remedies would have to address the manners in which to make sure digital content is compatible to the medium through which it is accessed. Furthermore, it might be investigated how to incorporate possibilities to 'repair' unclear information, or a lack of information, in the legal framework for digital content, for instance by requiring traders to provide clearer instructions.[806]

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[802] BEUC 2010, p. 8.
[803] *Ibid*
[804] *Ibid.*
[805] See again Europe Economics 2011, Report 3, p. 158.
[806] In this context, it is of importance that some legal systems include information about system requirements in the concept of 'essential characteristics' of the digital content, which means that a lack of information or unclear information may imply non-conformity of the digital content. See further section 2.7.4.

According to the BEUC report, moreover, price reduction could be an option where 'software runs in principle, but has some flaws that reduce its functionality or where a digital product can be used on one particular device of the consumer but cannot be copied to another device'.[807] Still, it is important to notice that this remedy will only be available in case it is established that the reduction in functionality, or the limited possibilities for making a copy, add up to non-conformity of the digital product.[808]

Most legal systems included in the analysis have adopted the hierarchy of remedies of the Consumer Sales Directive: the consumer should first give the trader a chance to repair or replace defective goods, before being able to ask for price reduction or termination of the contract. In this context, it may be noted that the original proposal for a Consumer Rights Directive[809] followed the Consumer Sales Directive on this point, including a hierarchy of the remedies available in case of non-performance (Article 26). In the text suggested by the Council in its General Approach, this provision has, however, been deleted. Moreover, it is not yet clear to what extent the CRD will have an impact on digital content contracts as the text suggested by the Council excludes digital content from the definition of 'goods'.[810] Nevertheless, it does include contracts for downloaded digital content within its scope, although without a right of withdrawal.[811]

One may also note that the Draft Common Frame of Reference has not adopted a hierarchy of remedies. However, the rules on cure of the non-performance by the debtor (Book III, Chapter 3, Section 2 of the DCFR) to some extent have a similar effect as a hierarchy of remedies would have: they give the debtor the right to cure a non-conforming performance, before allowing the creditor to rely on the remedies provided for in the DCFR. It is not clear, however, to which extent this type of right would affect digital content contracts if it became binding: on the one hand, it might be assumed that sometimes it will be easier for a trader to replace digital content than to replace a tangible good (e.g. a digital file in principle can be reproduced infinitely); on the other hand, flawed digital content may be much more difficult to repair than tangible goods or services (e.g. bugs in software). The success of a right to cure thus depends on the type of digital content that is the subject of the contract.

In sum, although national consumer laws and contract laws offer a considerable range of remedies for non-performance of contractual obligations, certain characteristics of digital content seem to make their application to this category difficult on some points. For these particular issues, special rules may be indicated.

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[807] *Ibid.*
[808] See section 2.7.5.
[809] Proposal for a Consumer Rights Directive of 8 October 2008.
[810] See in particular recital (10d) in the Council's General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010. Consumer organisations argue in favour of including digital content in the scope of the Directive; see http://www.europeanvoice.com/article/imported/cover-for-downloads-fuels-consumer-rights-debate/69916.aspx (last visited April 28, 2011).
[811] *Ibid.*

3.9 Minors

The comparative analysis has shown that legislation with regard to vulnerable consumers in the digital environment is far from uniform. Admittedly, some interesting similarities can be found and differences are not always 'fundamental' in nature, but taken as a whole the sets of rules are rather varied. Since the digital environment is not divided along national borders, one might signal some friction at this point. As mentioned earlier this inconvenience, to put it mildly, is even exacerbated by the fact that two complications come together in this field: there is not only the tension between an *international* market regulated by *national* legislations, but also the concern about a *new* environment where *traditional* rules apply. At the time various legislators codified the contractual capacities of minors, they could not reckon with 'invisible' consumers shopping in a digital environment. While age assessment has become harder, existing rules (primarily based on face-to-face transactions) continue to be in vigour. Given the adverse effects this may have on legal certainty and (cross border) trade, legislative revisions or even harmonisation initiatives may be welcome. This section will briefly resume and evaluate some of the points that deserve special attention, be it for an academic or legislative debate.

With regard to the admissibility of certain digital content and its marketing to minors there are both important analogies and divergences. As a result of the Audiovisual Media Services Directive 2007/65/EC and the Unfair Commercial Practices Directive 2005/29/EC similar substantive provisions have been implemented into national laws. However, since it is left to the discretion of Member States how to allocate the rules within their national legal frameworks, they are enforced and sanctioned differently. This means that a trader with customers throughout the EU is subject to a broad range of legal regimes, with it all the consequences mentioned before. Even though discretion with regard to implementation is not new or peculiar to these Directives (it's simply inherent in this category of legal instruments), one brief observation about its practical implications might be of interest. With an eye on effectiveness it matters, for example, whether the provisions of the Unfair Commercial Practices Directive have become part of tort law, contract law or competition law. If a disappointed minor has to find out that she was lured into a shop by a misleading advertisement, a private tort claim is probably of little help, while a state action under competition law could be a real deterrent. This is just one example to show that similar provisions may yet have different outcomes, depending on how they are adopted in national law.

This 'transposition issue' does not play a role with regard to contractual capacities of minors. All countries deal with the subject within the same field of law (i.e. contract law), but now the differences are simply due to intrinsic disagreement. Even though some common contours can be discerned, such as the coming of age set at 18 years, a closer look reveals many disparities. As the table *supra* shows there is no consensus as to the relevant criteria to determine the validity of a transaction executed by a minor. Moreover, the minimum age (if existent) to conclude *any* contract is not constant. In this 'mix' of concepts, however, some elements seem to recur more frequently than others. Worth mentioning are, above all, parental consent and the normality of a purchase. Less common are provisions referring to the source used to finance a transaction (pocket money, own earnings, other), the (un)advantageous character of the contract or the involvement of

deceit. Neither the *Lando* Commission when formulating the Principles of European Contract Law (PECL) nor the drafters of the Draft Common Frame of Reference (DCFR) have touched upon this subject. The reason not to deal with this matter in the DCFR is, as the Comments to the DCFR indicate, 'it is more a matter of the law of persons than of contract proper'.[812] That the differences between the legal systems on the matter of legal capacity lead to difficulties for traders to conclude cross border contracts apparently was less of an issue. As a consequence, however, a (fictive) Community stance on contractual capacities has thus far not been authoritatively proposed. Even though speculations about the precise form of such a European nucleus may take many different shapes, the concepts of parental consent and normality are likely parts of it. However, as cases in various jurisdictions have already made clear, especially the requirement of 'normality' or 'common practice' is hardly ever an undisputed qualification. When such a standard is adopted it inevitably comes with the task of further – and probably on-going – concretization.
When we look once again beyond the core criteria, we see three concepts concerning the financing, the character and the circumstances of the transaction. Contrary to what one might expect, these less frequent provisions are all but local curiosities. Some of them may even be of particular interest when considering the challenges of the digital environment. Italian law, for example, alleviates some of the risks weighing on traders once face-to-face contact has been increasingly replaced by anonymous ways of consuming. When the minor has deceptively hidden her age the remedy of voidance may be forfeited. Another interesting rule (reported in the Norwegian, German and Hungarian report) regards the use of pocket money or earned income to pay for a purchase. When such sources are involved, their nature and purpose justifies a more emancipated treatment of the underage consumer. Since these may be considered the first steps towards contractual autonomy, some of the protective rules, such as the possibility of voidance, understandably recede. The fact that these regulations are not generally adopted, is not necessarily the result of other nations' dissent. It may well be the case that they have just not been considered so far or that evidentiary problems associated with them have deterred legislators. At the end of this section, when the implementation of digital tools will be discussed, we will go down to some of these provisions' practicalities.

Finally, a few words should be spent on the minimum age (ranging from 7 to 15 years) established by some jurisdictions to protect some minors unconditionally from contractual obligations. Even though it seems sensible to exclude the youngest entirely from commercial activities, the practical relevance may be limited. Children below the age of 7 (the lower limit in Germany) are unlikely to enter into the kind of agreements the law protects them from. When the minimum age is set significantly higher (i.e. at 15 years) its relevance is likely to increase, but so is its potentially hindering effect. At the age of 14 minors can already be fairly active consumers, while they enjoy the same legal protection as infants or toddlers. It is very dubious whether such provisions (still) reflect reality. Moreover, the requirement of 'normality' will likely obviate most of the drawbacks that the minimum age provision seeks to combat. If a very young child enters into an unwanted agreement this will probably not qualify as 'common practice' or one of its equivalents.

[812] Cf. Von Bar et al 2009a, Comments to Article II. – 7:101 DCFR (Scope), p. 451.

This rule therefore risks to add a superfluous (if not an arbitrary and hindering) stipulation to the national legal systems that already possesses the resilience to overcome this kind of problems.

In this section other vulnerable consumers, such as seniors or those with a mental handicap, have been examined as well. Here, conclusions can be drawn that remind of the previous paragraph about minors in contract law: there are some common features, but the precise functioning differs – in varying degrees of importance – among the jurisdictions. As results from the summary the most distinctive characteristic is the division between persons falling into clearly defined and protected categories (e.g. the mentally disturbed or the legally restrained) and those who don't. While the former enjoy enhanced protection of their patrimony, the latter have to base their remedies on more general doctrines, like good faith, duress, unconscionability or lack of professional diligence. The reason for this dichotomy is quite straightforward: given the basic assumption of freedom of contract, a limitation of one's legal capacities should be justified by compelling motives. It is not the task of contract law to prevent or undo every ill-considered or disadvantageous decision a consumer may possibly take. Protecting vulnerable consumers is therefore a complicated issue of striking the right balance between the rights of consumers and traders; an assessment, it has been said, that is not carried out uniformly among the examined countries.

The question of whether relevant legislation can also be applied to digital content contracts has not caused too much hesitation among respondents. Nearly all jurisdictions continue to use existing rules to solve problems arising in the digital environment. However, when confronted with the difficulties that may arise from such provisions, ill-suited to new technologies, divergences appear. The problem of downloaded or steaming content, not capable of being restituted, shows that interpretation issues inevitably surface when using a traditional set of legal instruments for modern problems. Yet the outcomes of these exegeses are not necessarily ungainly or distorted, as an example reported by Poland may illustrate. The case is about a minor's obligation to restitute product after voidance of contract, which by its nature can't be returned. In such circumstances compensation is due if (delivery of) the product was both to the minor's real advantage and to the trader's disadvantage. Based on this traditional concept only a negligible compensation can be claimed. Although newly designed, technology-neutral legislation may bring additional clarification, existing rules are not always unworkable. For further details and observations, the reader is referred to the comparative analysis.

The final part of the inquiry dealt with age verification tools. Thus far, no concrete obligations to implement such tools have been imposed in the examined states. However, a British survey suggests that the absence of effective age checks on certain web pages leads to undesirable situations, in which minors can even participate in online gambling. One might therefore jump to the conclusion that quick steps towards the development of these tools should be made. But when measures are taken rashly other risks, often related to privacy, may lurk. Given the technical and political complexities of this topic a separate study would be needed to treat the subject properly.

Anyhow, a more general remark can be made within the scope of this section. As far as contracting by minors is concerned, age verification tools would typically come into play fairly late in the contracting process. When a transaction is eventually to be concluded, the mechanism (hopefully) blocks its completion when the consumer's majority cannot be established. A more direct approach to the problem would focus on the payment systems involved. One can think of bank / debit cards that tell the intended buyer's age or solely whether she has reached majority or not. In this way traders can assess for themselves which transactions may be executed and which should be refused on legal or moral grounds. This situation comes close to the traditional setting in which the seller can make a personal judgment whether it is 'common practice' for a certain customer to buy a certain product. Of course, such an integrated age verification tool would not be a panacea. Discussions about what qualifies as common practice will continue to exist. Moreover, information about one's age is still of little use when it comes to other criteria, such as the permitted use of pocket-money or own earnings. At this point, the situation in the digital environment wouldn't be much different from offline commerce. However, some additional opportunities could be created if these tools become more sophisticated, allowing for example parts of one's patrimony to be flagged as pocket money or as wages.
It remains to be seen whether (integrated) age verification tools will actually take up this role.

4. Recommendations for digital content contracts

4.1 Classification and Scope

4.1.1 Distinction between goods and services

Short description of the problem
The classification of digital content as goods or services is uncertain in European consumer contract law.[813] As this classification often determines the level of protection granted to the consumer, it would seem that the matter of classification would have to be dealt with before any other policy choice can be made.

Suggested approach
It is suggested that there is no need to distinguish between digital goods and digital services with regard to the development of specific rules for digital content contracts.

Explanation of the suggested approach
Based on the discussions of classification in European consumer law as well as national experiences, the following policy options could be considered at EU level:

1. Applying the traditional distinction between goods and services to digital content contracts;

2. Classifying digital content as services;

3. Classifying digital content as sui generis.

The first option would mean that the traditional rules for goods and services would be applied, in as far as possible, to digital content contracts, classifying some digital content as (digital) goods and other as (digital) services. This option has the advantage that the classification leads to the application of otherwise familiar legal concepts, which are essentially technology-neutral, to new types of goods and services. To that extent, the definition of goods could be amended to include digital products. This would require addition of a clause to the definition of "goods" confirming that "goods" includes software and other digital products, whether stored on a physical medium or not and that a contract for the supply of software or other digital products is a contract for the sale of goods.[814] This is in fact the approach taken by the European Parliament.[815] The European Parliament suggested a new definition of 'goods', which reads as follows:

> Article 2 – point 2 a (new)
> *(2a) 'goods' means any tangible movable item, and any intangible item usable in a manner which can be equated with physical possession, with the exception of goods sold by way of execution or otherwise by authority of law. Water, gas and electricity*

[813] Schmidt-Kessel 2011, p. 5.
[814] Bradgate 2010, p. 68.
[815] European Parliament, Plenary endorsement of the IMCO committee's opinion of 24 March 2011.

shall also be considered as 'goods' within the meaning of this Directive where they are put up for sale in a limited volume or set quantity;

Recital 11e (new)(11e)

Digital content transmitted to the consumer in a digital format, where the consumer obtains the possibility of use on a permanent basis or in a way similar to the physical possession of a good, should be treated as goods for the application of the provisions of this Directive which apply to sales contracts. However, a withdrawal right should only apply until the moment the consumer starts to download the digital content.

The second option would simply state that all digital content is classified as a service, thus leading to the application of the law of services to digital content contracts. This approach would mean that only the rules applicable to service contracts would be applied to the digital economy. This is in fact the approach taken by the Council in its General Approach to the proposal for a Consumer Rights Directive:[816]

Recital 10d (new)
(10d) Digital content, such as computer programs, games or music that is not burned on a tangible medium is not considered as tangible items. It is thus not considered as a good within the meaning of this Directive. On the contrary, media containing digital content such as CD/DVD are tangible items and are thus considered as goods within the meaning of this Directive. The downloading of digital content by a consumer from Internet should be regarded, for the purpose of this Directive, as a contract which falls within the scope of this Directive, but without a right of withdrawal. The Commission should examine the need for harmonised detailed provisions in this respect and submit, if necessary, a proposal for addressing this matter.

This option is supported by the law of several Member States. However, as the law applicable to service contracts is rather underdeveloped in most Member States, this option suffers from the drawback that the existing uncertainty as to the applicable rules is even enlarged with regard to these legal systems, which currently classify such contracts as (consumer) sales contracts.

The third option would mean that specific rules would have to be enacted specifically tailored to the digital economy, which could be achieved through a technology specific approach, through the drafting of overarching principles, or both.

The third option has the advantage that it could lead to rules that can take into account all relevant technical and technological developments. However, it could also lead to the introduction of unfamiliar legal concepts and thus to more legal uncertainty, possible even

[816] Council's General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010.

to a larger extent than the current status quo. On the other hand, as both the comparative analysis and the Law & Economics analysis indicate, it is only very infrequently that different rules for 'digital goods' and digital services' could become relevant, as the rules developed under general contract law and under sales law may be applied also to digital content contracts with some additions and amendments without there being a practical need to distinguish between digital goods and digital services. It is therefore suggested that this is the proper approach to digital content. However, from the Law & Economic analysis it may be deduced that this approach could be problematic with regard to the costs of enforcement and compliance in so far as there is uncertainty whether and to what degree specific rules apply. Therefore, a clear legislative framework indicating which (general or specific) rules apply would be required in order to reduce such costs.

4.1.2 Scope of 'digital content contracts'

Short description of the problem
If it is decided that digital content should not be subdivided into digital goods and digital services, the question arises how digital content contracts are to be identified and classified.

Suggested approach
It is suggested that there be no explicit definition of what qualifies as a digital content contract, but rather to indicate which contracts should be considered as such contracts and which contracts should not be considered as such contracts.

It is therefore suggested that if a legislative instrument is developed, the following provision is introduced regarding the scope of the provisions on digital content contracts:

IV. A. – 1:103: Digital content contracts

(1) This Part of Book IV applies to contracts whereby a business undertakes to supply digital content to a consumer in exchange for a price.

(2) This Chapter applies in particular to

- ***(a) contracts whereby video, audio, picture or written content is provided to the consumer in electronic form;***
- ***(b) gaming contracts;***
- ***(c) contracts for the provision of digital content that enables the consumer to personalise existing hardware or software;***
- ***(d) software contracts;***
- ***(e) contracts pertaining to the provision of digital content applications that are hosted by the business and that are made available to the consumer over a network;***
- ***(f) social networking services;***
- ***(g) contracts enabling the consumer to create new digital content and to moderate and review existing digital content or to otherwise interact with the creations of other consumers.***

(3) This Chapter does not apply to contracts pertaining to

- ***(a) financial services, including online banking services;***
- ***(b) e-government and social services;***
- ***(c) legal or financial advice provided in electronic form***

(d) electronic healthcare services;
(e) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC
(f) gambling.
(4) This Chapter also applies to contracts whereby a business undertakes to supply digital content to a consumer otherwise than in exchange for a price.

Explanation of the suggested approach
Digital content is a very broad phenomenon, which refers to high value digital data. The OECD indicates that digital content is increasingly becoming the basic creative infrastructure underpinning the knowledge economy, and that it will be at the centre of health, educational, and cultural activities. As such, '(d)igital content is a rapidly growing sub-set of the output of the creative, cultural, copyright and/or content industries, defined by a combination of technology and the primary focus of industry production'.[817] For the purposes of the provisions on digital content contracts, 'digital content' may be described as data which is produced in digital form and which can be accessed or displayed by the consumer on the consumer's personal device or on a personalised part of a remote server. It should be noted that this is a temporary 'definition' at best. At this stage, it is not feasible to provide a more or less lasting definition of what constitutes 'digital content', if only because the rapid development of both technology and products would cause any such definition to be outdated very soon. The suggested 'definition' therefore merely describes the current situation.

The provisions developed for digital content contracts have been developed with consumer-purchasers and business-providers in mind. They are therefore not intended to be used in B2B-contracts.

With an eye to determining the scope of application of the provisions on digital content contracts, the definition provided by Europe Economics in their *Report 1, Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (Lot 1)* appears to be a good starting point. In this report, Europe Economics has defined 'digital services as all digital content which the consumer can access either on-line or through any other channels, such as a DVD or CD, and any other services which the consumer can receive on-line'.[818] From this working definition, it follows that is key that digital content is provided or made available to the consumer irrespective of the channel through which the consumer accesses the digital content. However, any legal description pertaining to digital content should avoid the listing of access channels as these are subject to (rapid) technological developments. There is a substantive risk that these developments will render any technology-driven description obsolete even before a possible legislative instrument is

[817] OECD, Directorate for Science, Technology and Industry , Committee for Information, Computer and Communications Policy, Working Party on the Information Economy , *Digital Broadband Content. Digital Content Strategies and Policies*, DSTI/ICCP/IE(2005)3/FINAL, published on 19 May 2006, available online at: http://www.oecd.org/dataoecd/54/36/36854975.pdf (last visited April 28, 2011), p. 6.
[818] Europe Economics 2010, Report 1, p. 36.

enacted.[819] This implies that a clear definition cannot and should not be provided, but rather an indication of which contracts are covered and which are not.

In paragraph (2) a number of digital content contracts are enumerated which, in any case, are covered by the scope of application of the rules on digital content. These types of contracts – at least at this moment – constitute the core of digital content contracts. The provisions applicable to these contracts were developed with these types of contracts in mind. The first of these types refers, for instance, to downloads and to e-books, but also to streaming of TV, film or music and access to e-magazines, e-newspapers and online information databases, such as Eurostat. Contracts pertaining to such digital content typically do not call for overt interaction by the consumer.[820]

The second category of gaming contracts refers to contract where the consumer actively interacts with the digital content and where the leisure component clearly outweighs other interests. These contracts include classic board and card games offered online by web portals or on traditional DVDs, but also multiplayer games such as World of Warcraft and virtual worlds such as Second Life.[821]

The category of personalisation contracts refers in particular to contracts that enable consumers to personalise their hardware or software. These include ringtones and screensavers.[822]

Software covers a broad range of digital content and may be divided in system software, programming software and application software. System software helps to run the computer hardware and system and operates as a platform for other software.[823] This category also includes anti-virus programs, which is often pre-installed on the computer on a trial basis only. Further use is then dependent on the purchase of the program on a CD or DVD or online.[824] Programming software provides tools to assist a programmer in writing computer programs. In order to use such software, the user usually is required to have undergone extensive training. For this reason, in practice, programming software will not be purchased by consumers.[825] Application software probably consists of the largest type of digital content. It includes office suite programs, including word processors and spread sheets. In practice, such office suite programs are often sold to consumers in a package.[826]

Application software also consists of so-called software-as-a-service (SaaS), here identified as the fifth category of contracts covered. This type of software concerns applications that are hosted by the business of a third party and made available to the consumer over the Internet or another network. SaaS may either operate on the basis of a generic installed program, such as a browser, or on a program installed specifically for that purpose, which is the case for apps on a mobile phone. Typical for such software is that the consumer usually only has a limited amount of data on her own device and in fact operates 'in the cloud' (hence the alternative name: cloud computing), which is hosted on the service provider's server. SaaS include location services, such as satellite navigation software used

[819] See also Europe Economics 2010, Report 1, p. 36.
[820] *Ibid*.,37.
[821] *Ibid*., p. 38.
[822] *Ibid*., p. 40.
[823] *Ibid*., Report 1, p. 41.
[824] *Ibid*., p. 42.
[825] *Ibid*., p. 44.
[826] *Ibid*., p. 42.

for route maps and online translation services.[827] More and more office suite programs are also operated on the basis of cloud computing. Given their increasing importance for the consumer market,[828] such contracts are explicitly mentioned as a separate category.

The sixth category consists of social networking services, such as Facebook and LinkedIn. Finally, the seventh category relates to so-called user-created content (UCC). UCC refers to services such as blogs, YouTube, Flickr, Wikipedia, citizen journalism sites and talent search sites.[829]

Whereas paragraph (2) indicates the digital content contracts which in any case are covered by these provisions, paragraph (3) enumerates contracts which in any case are outside their regulatory scope. Each of these contract types are subject to sector-specific legislation and have little in common with sales contracts, which regulation is at the basis of the specific provisions applicable to digital content contracts. This is true in particular for financial services (including online banking),[830] e-government and social services, and electronic communication services and networks. With regard to social services and gambling, it should be added that the existing regulation depends on political decisions and social policies, which go far beyond the scope of ordinary (consumer) contract law. In many respect the same applies to e-healthcare and e-advice contracts. Legal advice and healthcare are covered by the specific provisions of Book IV.C DCFR and also by deontological rules applicable to their particular services.

A particular question is whether these rules should also deal with contracts or unilateral promises whereby the consumer is not required to pay a price in exchange for receiving the digital content. It is suggested that these contracts and unilateral promises (hereinafter: contracts) should indeed be included in the scope of this Chapter. One reason for this is that in particular in the digital environment performance by a consumer need to take the form of a payment in money. In the digital environment it seems rather artificial to include contracts where micropayments are being made – e.g. contracts with a monetary value of € 0.99 per downloaded music file – and not to include contract where payments are made in other forms. First of all, virtual currencies – e.g. those used in games played online – represent a monetary value in themselves. Secondly, consumers often 'pay' by providing their personal data. That data also represents a monetary value as it may be collected, used for marketing purposes and even sold to other businesses – in so far as allowed under data protection law.

Moreover, there are also substantive reasons to deal with such contracts. Firstly, these provisions in principle are fit to be applied to such contracts. In this respect it should be noted that the fact that the digital content was provided for free will influence the application of the conformity test as this fact will influence the expectations the consumer may have of the digital content: clearly such expectations will be lower than in the case where the consumer has paid the market price for the digital content now provided for free. Secondly, applying these rules to 'gratuitous' digital content contracts provides for a legal

[827] Europe Economics 2010, Report 1, p. 42.
[828] *Ibid*., p. 42-43.
[829] *Ibid*., p. 39.
[830] *Ibid*, p. 44.

framework against which possibly unfair clauses – e.g. clauses limiting the business' liability, clauses infringing privacy rights etc. – can be evaluated. This may equally appeal to businesses as such an approach fosters legal certainty for both businesses and consumers. Finally, providers of digital content often make use of different business models by offering their standard products for free but offering additional features against a price. By applying the same rules to both types of contracts it can be ensured that no legal diversity occurs apart from the fact that the application of, for instance, the conformity test will be influenced as a result of the 'gratuitous' or remunerated character of the contract.

4.1.3 Approach to drafting of rules for digital content contracts

Short description of the problem
If it is decided that digital content contracts should not be subdivided into contracts for the supply of digital goods and contracts for the supply of digital services, the question arises which rules are applied to digital content contracts. One approach could be to develop a completely self-standing legal regime. Alternatively, one could in principle apply an existing set of rules and adopt these in so far as necessary to accommodate for the specific needs of digital content contracts.

Suggested approach
In order to prevent the development of new legal concepts for the digital content contract, it is suggested to apply the rules developed for sales contracts, to amend these rules where necessary and to introduce additional rules where this is deemed to be appropriate. To this extent, necessary amendments will be introduced in the relevant articles. However, one generic amendment is necessary: in the provisions applicable to sales contracts, the delivery of *goods* is central. With regard to digital content, such reference could be misunderstood as implying to refer only to 'digital goods'. In order to prevent such misunderstanding, it is suggested that the following specific provision is introduced in a new Section 3: Digital content contracts:

IV. A. – 1:301: Amendments for digital content contracts

(1) For the purposes of the application of the provisions applicable to sales contracts to digital content contract, any reference to 'goods' in these provisions is to be read as 'digital content'.

Explanation of the suggested approach
In theory, two very different approaches may be considered:
1. Developing a specific set of rules for digital content contracts.
2. Applying the rules which govern the sale of tangible goods to digital content contracts insofar as is compatible with the specific nature of digital content contracts.

The first option is to develop specific rules for digital content contracts, which would lead to the classification of digital content contracts as a separate specific contract subject to its own legal regime. This approach has the advantage that rules can be developed tailored to the specific needs of digital content contracts. However, the development of a self-standing regime for digital content contracts also brings the difficulty of developing new legal concepts and thus entails the risk of legal uncertainty as to the meaning of these concepts.

Moreover, it would make the distinction between tangible goods and 'digital goods' – and subsequently possibly also the distinction between 'digital goods' and 'digital services' more important. Such an approach would seem to be attractive only if and to the extent that the rules applicable to sales contracts in general could not reasonably be applied to digital content contracts.

The second option would enable the application of the rules which govern the sale of goods to digital content without forcing the traditional concept of goods as tangible objects, while enabling adaptations or derogations to take into account the specific nature of digital content. Moreover, it facilitates the possibility to not apply or bend the rules on the sale of goods where application of such rules would be inappropriate given the specific situation of digital content. This approach is taken in Germany and The Netherlands. In Germany, many provisions of the Consumer Sales Directive have not only been extended to non-consumer sales contracts, it is also indicated that these provisions may also apply with the necessary modifications to the purchase of rights and other objects, including software.[831] Similarly, in The Netherlands, in the legal doctrine the view is defended that standard software, be it supplied on a tangible medium or not, should be construed as 'rights', to which sales law is applied 'to the extent that this conforms to the nature of the right' by virtue of Article 7:47 Dutch Civil code).[832] This approach has the advantage that the concept of goods is not stretched as is the case under the first approach and is therefore better suited to take into account the specific needs resulting from the intangible nature of digital content. A possible drawback could be that it is not always certain whether and to what degree specific rules apply, given the fact that the intangible nature of digital content may lead courts to reject or amend a rule, which was primarily intended to deal with tangible objects. It should be noted, however, that in particular the conformity test seems fit to deal also with digital content contracts.[833] Moreover, it seems that careful scrutiny of the rules applicable to sales contracts would reveal whether any specific rule on sales contracts would be contrary to the nature of digital content contracts and, as such, its application would have to be excluded for the purpose of digital content contracts or that its text would have to be amended for that purpose.

It is submitted that both the first and second approaches have their advantages and disadvantages. While the first approach appears to provide more flexibility, it will lead to the developments of new legal concepts and as a result to some extent lacks legal certainty. The second approach makes use of familiar legal concepts and adapts them where necessary for digital content contracts. Given this it is suggested that the second approach is the preferred approach.

4.1.4 Approach to gratuitous digital content contracts

Short description of the problem

If it is accepted that the rules applicable to digital content contracts should also apply to 'gratuitous' digital content contracts, and that in principle the rules applicable to sales

[832] Cf. Report I (France), p. 41; Report I (Germany), p. 85-87; Report I (The Netherlands), p. 210.
[833] See the comparative analysis in section 2.7.4 and the assessment in section 3.7.

contracts should apply to digital content contracts (with adaptations where appropriate), the question arises whether the sales provisions are actually fit to be applied to digital content contracts where the consumer is not required to pay a price.

Suggested approach
It is suggested that the following specific provision is introduced:

IV. A. – 1:301: Amendments for digital content contracts

(1) (…)
(2) The provisions applicable to sales contracts apply to gratuitous digital content contracts with the following adaptations:

- ***(a) In determining what the consumer may reasonably expect of the digital content in accordance with Article IV.A.–2:302(F) DCFR (Fitness for purpose, qualities, packaging, regard shall be had to the gratuitous nature of the contract.***
- ***(b) Articles IV. A. – 3:101(a)(Main obligations of the buyer), IV.A.–3:103 (Price fixed by weight), and IV.A.–3:105 (Early delivery and delivery of excess quantity) do not apply.***
- ***(c) In case of termination of a gratuitous digital content contract for non-conformity, Article III. – 3:512 (Payment of value of benefit) does not apply.***

Explanation of the suggested approach
Even though gratuitous digital content contracts may be governed, in principle, by the same rules as digital content contracts, which are concluded for a price, it will be clear that not all rules developed for sales contracts are fit to be used also with regard to 'gratuitous' contracts. This is the case in particular with regard to provisions regarding the payment of the price. For this reason, paragraph 2 limb (b) is introduced.

Moreover, the fact that the digital content is not provided for a price obviously has an influence on what the consumer may reasonably expect of the digital content, e.g. with regard to functionality, quality and other performance capabilities. Paragraph 2 limb (a) explicitly reflects this reality. It could be argued that it is not necessary to spell this out in the Article. On a general note, the price the consumer is required to pay for the digital content will influence the reasonable expectations the consumer may have of the digital content. In particular when the business's business model provides for different versions of the same product – with more or less performance capabilities depending on the price to be paid – it will be clear that additional performance capabilities come at an additional price. In this sense it is not an absolute necessity to spell this out in the text of the Article. However, it is thought that adding an explicit reference to the gratuitous character of the contract would provide more legal certainty to the business offering the digital content that its performance will not be measured against the same yardstick as would be the case when the consumer would be required to pay a price. In this sense it is thought that by applying the same set of rules to both gratuitous and remunerated digital content contracts and by enumerating the rules that are not applicable to gratuitous contracts or have to be interpreted differently, legal certainty is provided to both the consumer and the business. It may even be attractive for businesses to have a uniform, but flexible set of rules applicable to all digital content contracts – in particular when the business model offers gratuitous

contracts with limited performance capabilities and remunerated contracts with additional performance capabilities.

Finally, limb (2)(c) is introduced to prevent the situation that when a gratuitous digital content contract is terminated for non-conformity but cannot be returned, the consumer would in fact have to compensate the value that the digital content has had for her – as would be the normal outcome of the provision. In that case, termination would produce unexpected and undesired outcomes. The same is true if the digital content could in theory be returned but it couldn't be determined by the business whether the digital content had actually been copied by the consumer for further use, as Article III –3:510(4) (Restitution of benefits received by performance) (as amended below) in conjunction with Article III. – 3:512 (Payment of value of benefit) would also require payment of the monetary value in such situation. By excluding the latter Article in case of the termination of a gratuitous digital content this problem is solved.

4.2 Information obligations

4.2.1 Introduction

The comparative analysis concluded that there is not yet a (European-wide) standard of information that consumers of digital content contracts are entitled to receive, nor has there been much attention for the aspect of "effective consumer information" with regard to digital content. The result can be legal uncertainty, information asymmetries and an excess of unhelpful information. The analysis also pointed to the complex relationship between consumer information and the level of legal protection that digital consumers can expect. Not only are consumer information obligations a prominent feature in general and sector-specific consumer protection rules. When interpreting the fairness of contractual conditions, of commercial practices, the conformity of digital content with the reasonable expectations of consumers as well as the availability of rights, such as the right to withdrawal, the fact of whether the consumer has been properly informed will play a central role in the judgment.

4.2.2 Choosing the right instrument

Short description of the problem

Before exploring the need for additional information obligations with respect to digital content, a more fundamental consideration is in place. Information obligations can never replace mandatory rules that explicitly protect and thereby "standardise" certain consumer expectations, rights and legitimate interests. Substantive rules are typically the result of a purposeful balancing process, determining the features and characteristics digital content contracts should have. To the contrary, information obligations stress party autonomy. Empowered by information, it is essentially up to private actors to 'discover' which features and characteristics are (still) acceptable, through the market mechanism.

In situations in which the main goal of disclosure requirements is to protect specific expectations or interests of users and/or society as a whole, a decision will have to be made whether such interests are not better protected through alternative means. Such means can span from voluntary standards and default settings to mandatory quality and safety

requirements or even bans. For example, instead of simply requiring information about the presence of technical protection measures (like in the German copyright act) and leaving it to the consumer to decide whether she is willing to buy a service even if it is not interoperable, the French law banned incompatible digital content services as the result of the application of DRM technologies. Along the same lines, the Dutch legislator considered it not sufficient to simply inform consumers about sponsorship of news programs and political programs. Instead, it banned such practices all together. With regard to harmful content, the Audiovisual Media Service Directive stipulates that it is not sufficient to simply inform minors or their parents that certain contents can be harmful. Harmful contents must not be made available to minors in the first place. Taking into account that apparently only a small fraction of consumers actually read consumer information,[834] consumer information as a tool to protect important consumer interests or the realization of pressing public policy goals, should be considered carefully and with restraint.[835]

Even if the prime purpose of disclosure obligation is *consumer empowerment*, however, policy makers must consider whether certain legitimate interests of consumers, such as the ability to exercise the private copying exception, protection of privacy and freedom of expression, etc. can be left to party autonomy. Public, cultural or economic considerations may require additional substantive rules of consumer protection. The need for substantive rules would appear particularly urgent in situations in which consumers typically have no choice, or their exercise of fundamental rights is at a risk (media pluralism as a component of freedom of expression), where they lack the necessary negotiation power (areas in which the use of standard term contracts is common) or where they are confronted with certain risks that cannot be removed by information obligations alone.

Suggested approach:
1. It is suggested to make the ability to make a restricted number of private copies mandatory (see section 4.6.7).
2. It is suggested to include additional items in the grey list stipulating that unilateral contractual provisions that deviate from the provisions of copyright and/or eliminate or impede the making of private copies shall be presumed null and void. (see section 4.5.1).
3. Thirdly, it is suggested to adopt the following rule in a sector-specific regulation or directive:

Article XX: Setting of standards

(1) Each Member State may designate the competent authorities to specify standards to the compatibility and functionality of certain digital content and to the content, form and manner of the information to be provided by the trader.

[834] The finding that only a limited share of people actually reads consumer information has been confirmed by other studies as well, e.g. Y. Bakos et al., *'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts',* CELS 2009 4th Annual Conference on Empirical Legal Studies Paper, 6 October 2009, *NYU Law and Economics Research Paper No. 09-40*, available online at SSRN: http://ssrn.com/abstract=1443256 (last visited April 28, 2011). In their research they estimated the fraction of retail software shoppers that accesses terms of use even significantly lower, between 0.05% and 0.22%. refer to Lot 1, Report 3 (later on that is done)
[835] Arriving at a similar conclusion, cf., Bakos et al. 2009.

(2) The competent authorities shall only make use of their powers indicated in paragraph (1) after taking account of the views of interested parties.
(3) A trader may only deviate from the requirements set in accordance with paragraph (2) after having specifically drawn the consumer's attention thereto in a clear and intelligible manner and in a comprehensive and easily accessible form.

Explanation of the suggested approach
An important argument in favour of defining a certain minimum standard of usability, safety and consumer friendliness of digital content lies in the complex interaction between consumer information and the reasonable expectations of consumers. Consumer information can shape the reasonable expectations of consumers, and thereby also the level of protection consumers can reasonably expect. Insofar, the level of protection consumers can expect e.g. according to the rules of non-conformity but also the fairness of commercial practice or contract terms depends to a considerable extent on the extent to which consumers have been informed about possible restrictions or side-effects of digital content. Once a consumer has been informed about a usage restriction, she cannot any longer claim that the use of restrictive DRM technology constitutes a case of non-conformity. This way, consumer information can result in a creeping degradation of traditional user freedoms. Traders can gradually reduce the general standard of what consumers ought to be able to expect from digital content, without much that the consumer can do due to her limited negotiation position.[836]

In line with these considerations, it is suggested elsewhere in this report to include a rule saying that consumers should be enabled to make a restricted number of private copies of digital content under certain conditions (for the concrete proposal and explanation, see section 4.6.7). For the same reason, it is suggested in section 4.5.1 to add two items to the grey list.

The consumer survey[837] found that the failure of consumers to read information seems to be more pronounced for some distribution channels (particularly mobile phones) than for others (e.g. digital content accessed via the computer). This could point to a need for more differentiation between types of digital content, respectively means of reception. In other words, consumer information is probably more effective for some digital content contracts, e.g. such that are typically accessed via a computer, than others (e.g. those typically accessed via the mobile phone, MP3 player or handhelds). Put differently, there might be a more pressing need for substantive rules to protect the interests of consumers for some kinds of digital content, and less for others.

This is why it is suggested here to include an additional rule saying that governments can entitle the Consumer Authority to specify minimum standards to the compatibility and

[836] Helberger & Hugenholtz, 2007, p. 1094; O. Ben-Shahar & C.E. Schneider, 'The Failure of Mandated Disclosure', *John M. Olin Law/Economics Research Paper No. 516,* p. 59, March 2010, available online at http://www.law.uchicago.edu/files/file/516-obs-disclosure.pdf (last visited April 28, 2011). R. Hillman, 'Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire', in O. Ben-Shadar (ed.), *Boilerplate, Foundations of Market Contracts*, 2006, p. 83-94.
[837] Cf., Europe Economics 2011, Report 3, p. 46ff.

functionality of certain digital content contracts. The rule has been inspired by a comparable rule in telecommunications law, whose goal it is to prevent the degradation of service (the rule plays an important role in the European discussion concerning net neutrality for example).[838] Similarly, the main purpose of the here suggested rule is to create a flexible framework that would allow governments, respectively a designated consumer authority to specify further quality requirements as a default for certain kinds of digital contents. Examples could be digital content delivered via mobile phones or MP3 players. The responsible authority could, for example, decide to specify the time of delivery, a minimum level of permitted uses and compatibility (e.g. compatible with common hard- and software sold at that time) consumers are entitled to expect, but also the absence of region codes that prevent cross border access or use, unauthorized tracking software, watermarks, persistent cookies, to name but some examples. Similarly, it could determine standardised procedures for filing and dealing with complaints. When so doing, the responsible authority could also take additional, public interests into account, e.g. making sure that such contents are accessible for disabled people or respect consumers' privacy and right to diversity. This way, a default can be set, and consumers are entitled to expect a certain minimum level of quality in digital content. At the same time, public interest considerations can play a role when defining the accessibility and functionality of digital content. Having said this, it is also important to realise that any initiatives to standardise aspects of the provision of digital content must remain ultima ratio, due to the costs involved with government intervention for consumers and traders.[839]

One example of an already existing government agency that is responsible for setting standards for digital content is the French *Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet* (High Authority of Diffusion of the Art Works and Protection of the (Copy)Rights on Internet - HADOPI).[840] Among the tasks of the *Hadopi* is, inter alia, to ensure an appropriate balance between the protection of copyrights, the functioning of competition and the safeguard of public and consumer interests. To this end, the *Hadopi* is also authorized to set standards for Digital Rights Management technologies. It can specify a minimum number of copies consumers must be entitled to make. It must also make sure that the use of TPM does not have as consequence a mutual incapacity to interoperate between device or restrictions on the use of the work that are not desired by the rightholder. The erection and task of the *Hadopi* may be controversial with regard to other questions, and it still needs to be seen to what extent the *Hadopi* proves effective in protecting the interests of digital consumers. The basic concept however, is potentially

[838] Art. 22 and Recital 34 of the Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Text with EEA relevance) OJ L 337, 18.12.2009, p. 11–36. See also N. Jondet &J. Winn, 'A "New Approach" to Standards and Consumer Protection', *Journal of Consumer Policy,* 2008 -31, p. 459-472.

[839] See chapter 5.9 of law & economics chapter . In this section it is also explained that standardization could potentially discourage a process of learning from earlier purchases, which is another reason to apply government intervention with care. Having said that as the law & economics chapter also demonstrates, standardization could further promote the learning process, p. 283.

[840] See http://www.hadopi.fr. Cf. also Jondet/Winn 2008, for a discussion (last visited April 28, 2011)

useful to the consumer, and it follows the example of a range of standardization organisations whose goal it is, among others, to also protect the interests of consumers.[841]

A matter for discussion is if traders should be entitled to deviate from the so determined default, providing they inform the consumer. An argument against such a possibility is that it lowers the protection for consumers and, again, allows consumer information to determine and shape their reasonable expectations. An argument in favour of such a possibility is that it leaves more room for innovation and the development of new products or business models. For this reason it is suggested here to allow deviation, but only after the trader has explicitly drawn the attention of the consumer to that fact, and only if this is done in a prominent way (i.e. not hidden away in the terms of use). Alternatively, one could consider that traders would in addition need to inform the responsible authority.

A beneficial side effect of the suggested approach is that it reduces information burdens for traders and consumers – only in exceptional cases, traders would need to inform consumers about the so prescribed characteristics.

4.2.3 Additional information requirements

Short description of the problem

The comparative analysis has demonstrated that the general and sector-specific information obligations in place cover most of the specific information needs of digital consumers (accessibility, licensing conditions, privacy, quality guidelines, professional standards and codes of conduct, legal information). The question is rather whether suppliers act in conformity with these rules, and in a way that is useful and understandable for consumers (see also section 4.2.5). From the point of view of consumers, probably the most important exception is the question to what extent consumers need to be informed about restrictions of the functionality of digital content, for example as a result of the use of Digital Rights Management or Technical Protection Measures. While there is no doubt that information about possible restrictions is relevant to the decision making practice of consumers and that, in practice, consumers are insufficiently informed about such usage restrictions, most national reports were hesitant to deduct such a disclosure requirement from the general information obligations. The question is if it is necessary to complement the general information obligations to this respect.

Suggested approach

It is suggested to integrate additional information requirements in a new provision for digital content contracts that was presented in the previous section:

II.–3:101a: Pre-contractual information duty for digital content contracts

(1) A party who is engaged in negotiations for a contract within the scope of this Part has a duty to provide the other party, a reasonable time before the contract is concluded and so far as required by good commercial practice, with such information as is sufficient to

[841] For an excellent overview and discussion see J. Winn, 'Information Technology Standards as a Form of Consumer Protection Law', in J. Winn (ed.), *Consumer Protection* in the Age of the "Information Economy", Burlington: Ashgate 2006, p. 99-117.

enable the other party to decide on a reasonably informed basis whether or not to enter into a contract of the type and on the terms under consideration.
(2) In the case of digital content, the duty under (1) includes the duty to inform about the main characteristics of any goods, other assets or services includes in particular the duty to inform the consumer on the interoperability and functionality of digital content.

Explanation of the suggested approach
It is suggested to require traders to inform consumers about the functionality, respectively the functioning of a digital content product or service. The notion of functionality refers to the ways in which digital content can be used, as well as the absence or presence of any technical restrictions. The notion of interoperability is meant to describe information regarding the hard- and software environment that digital content is compatible with.

Another option would be to inform consumers, as suggested e.g. in the BEUC report, about the "application of technical protection measures".[842] Simply informing consumers about the presence of technical protection measures, however, does not yet mean that consumers can understand the practical implications.[843] An alternative approach would be to inform consumers about the fact that certain restrictions are in place. Properly informing about restrictions to the use of digital content, however, is difficult as long as there is not some common standard of what is actually normal in digital content.

From the perspective of consumers, probably more important than being informed about the presence of technical protection measures is the effect they have on the functioning of digital content. This is the approach of the disclosure requirement in the German copyright law, which demands the provision of information about the characteristics of the technical[844] protection measures and could also apply to e.g. region coding, tracking of consumer behaviour, as well as compatibility with hard and software. The advantage of general, technology neutral norms is further that they are less likely to become outdated in a fast changing and highly innovative sector such as is the digital content service.

The here suggested amendment to the disclosure requirements, which is based on Art. IV.E.–2:101 DCFR (Precontractual information duty) does not take away the possibility to adopt more substantive rules.

4.2.4 Standardisation of selected items of consumer information

Short description of the problem
The ultimate goal of consumer information is to enable consumers to make informed choices. Being able to make informed choices is not limited to deciding in favour of or

[842] In this sense e.g. BEUC 2010, p. 9-10.
[843] In this sense also the Tribunal de Grande Instance de Nanterre, which decided that sole reference to the fact that technical anti-copying measures (as the cause of the incompatibilities) are in place is not enough to avoid liability; Tribunal de Grande Instance de Nanterre (2003b). In response, it imposed on EMI Music France the obligation to label its CDs – in 2.5 mm characters: "Attention cannot be listened on all players or car radios"; Tribunal de Grande Instance de Nanterre 6eme Chamber Judgement du 2 September 2003, (Francoise M. / EMI France, Auchan France).
[844] Art. 95d (1) of the German Copyright Act.

against one particular problem. Probably even more important for the protection and promotion of the interests of consumers is the ability to compare the information about the different digital services, the way they support compatibility, allow the making of copies, printing and other uses, protect the users' privacy, etc. Making information about prices and product characteristics comparable is a way to help users actually act upon information and be better able to choose. It would also favour the establishment of e.g. third party recommendation services that help users find the optimal choice. Finally, comparability of information can stimulate competition.

Suggested approach
It is suggested to introduce an additional provision:

Article YY: Transparency and publication of information

(1) Member States shall ensure that the competent authorities are, after taking account of the views of interested parties, able to require traders that provide digital content to publish comparable, adequate and up-to-date information for consumers on applicable prices and tariffs, on any conditions limiting access, use or compatibility of digital content, on the use of technologies that are used to collect and process personal data, and on measures taken to ensure equivalence in access for disabled end-users.
Such information shall be published in a clear, comprehensive and easily accessible form. The competent authorities may specify additional requirements regarding the form in which such information is to be published.
(2) The competent authorities shall encourage the development and provision of interactive guides, comparison tools or similar techniques. Third parties wishing to make such guides or techniques available shall have a right to use, free of charge, the information published by traders as mentioned in paragraph (1).

Explanation of the suggested approach
The goal of the here suggested provision is to enhance transparency and the comparability of digital content goods and services. It defines a number of key aspects digital consumers need to be informed about, and entitles national consumer authorities to standardise the way in which this information is provided.

The provision has been inspired by a similar provision in European telecommunications law. European telecommunications law has for long acknowledged the importance of not only providing consumers with information, but making that information comparable and transparent. As the recently amended Citizen Rights Directive[845] explains, the availability of comparable information is key not only for the promotion of the interests of consumers, but also for the competitiveness of markets:

> '(32) The availability of transparent, up-to-date and comparable information on offers and services is a key element for consumers in competitive markets where

[845] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws OJ L 337/11 (18.12.2009).

several providers offer services. End-users and consumers of electronic communications services should be able to easily compare the prices of various services offered on the market based on information published in an easily accessible form. In order to allow them to make price comparisons easily, national regulatory authorities should be able to require from undertakings providing electronic communications networks and/or services greater transparency as regards information (including tariffs, consumption patterns and other relevant statistics) and to ensure that third parties have the right to use, without charge, publicly available information published by such undertakings. … Undertakings should not be entitled to any remuneration for the use of information where it has already been published and thus belongs in the public domain.'

An important element of the here suggested transparency approach is that the required information is made available to third parties free of charge. This is to stimulate the development and viability of comparison tools and services.

4.2.5 Clarity and form of information

Short description of the problem

Simply piling ever more information on the consumer will do nothing to further her interests, nor will it improve incentives for traders to provide consumers with the best, safest and most innovative and user friendly products and services. To the contrary, badly designed consumer information can actually confuse or distract consumers, as well as be costly and cause a competitive disadvantage for traders.[846] For this reason, an aspect that should be at the core of future information obligations for digital content is the format and effectiveness of consumer information. Ideally, "effective" consumer information will not only inform users. It will also help users to use that information and act upon it. Insights from behavioural economics further demonstrate the importance of presentational aspects.[847] The consumer survey that was conducted in the course of this project confirmed the need to align consumer information with the way in which consumers actually access, process and use information.

The most frequently cited reasons for not understanding the information were the complexity of the language, the technicality of the language, layout, small font as well as the length of the information provided.[848] Remarkably, the survey also found that not being

[846]OECD, Consumer Policy Toolkit, Paris, 2010, available online at http://www.oecd.org/document/34/0,3343,en_2649_34267_44074466_1_1_1_1,00.html (last visited April 28, 2011), p. 86. Rehberg 2007, p. 36.

[847] Ben-Shahar& Schneider 2010; Bakos 2009; Rehberg 2007; E. Golan, F. Kuchler & L. Mitchell with contributions by C. Greene and A. Jessup, 'Economics of Food Labelling', *Journal of Consumer Policy*, 2001: 24, p. 117-184; H. Beales, R. Craswell & S. Salop, The Efficient Regulation of Consumer Information, *Journal of Law and Economics* 1981(24), p. 491-539; European Commission, Consumer Behaviour: The Road to Effective Policy-Making, available online at http://ec.europa.eu/consumers/docs/1dg-sanco-brochure-consumer-behaviour-final.pdf (last visited April 28, 2011).

[848] Europe Economics 2011, Report 3, p. 52-53. Earlier, the Better Regulation Executive and National Consumer Council identified similar reasons for not understanding information, Better Regulation Executive and National Consumer Council, Warning: too much information can harm. A final report by the Better Regulation Executive and National Consumer Council on maximizing the positive impact of regulated

able to understand the information is not even the most pressing issue. Apparently, a majority of users (between 60% and 80%) actually did understand the information provided to them about digital content products they had used in the last 12 months (another, yet open question is whether they were actually able to use that information). But: only a minority of users ever got so far and actually read the information. Only 13-25 % (depending on the medium in question) of all users surveyed actually read the information. The proportion of users that did not read the information was the largest for consumers that accessed digital content products through mobile phones. These findings seem to suggest that maybe an even larger problem than failure to understand the information provided is getting consumers so far to actually read the information. It is conceivable, though, that the same reasons that make it hard to actually understand the information are for many users a reason to avoid consumer information altogether. One possible conclusion from this is that *if* the legislator opts for a mandatory information approach, making that information accessible and useful should be a prime objective.

Suggested approach
It is suggested to refer to existing rules on transparency and publication of information in the following way:

Art. II.–3:106a: Clarity and form of information in digital content contracts
(1) A duty to provide information imposed on a business under this Chapter is not fulfilled unless the requirements of this Article are satisfied.
(2) The information must be understandable, well-organised and concise, expressed in plain and intelligible language and in an instructive way. When a business is under a duty to provide information to a consumer, the information must be sufficiently prominent and clearly distinguished from any other information that the business chooses to provide that an average consumer can readily identify the information which is required.
(3) Key information, including information regarding prices, main characteristic, functionality, the identity of the trader must be brought to the attention of consumers in a clear and prominent way.
(4) In so far as information is to be provided through a device that is incapable of displaying all information in a legible manner, the trader must at least provide the key information as indicated in paragraph (3) together with a digital or geographical address where this and the complete information is available in a permanent, easy, direct, and exact way. If so requested by the consumer, the trader must provide the complete information to an email address as indicated by the consumer.

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information for consumers and markets, November 2007, available online at http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/bre/reviewing-regulation/protecting-consumers/consumer-information/page44095.html . See also Vanilla Research, Consumer Information and Regulation, Report prepared for the Better Regulation Executive and the National Consumer Council (NCC), July 2007.

Explanation of the suggested approach
The importance of using a clear, not too technical and user-friendly language when informing consumers is obvious. Goal of consumer information must be to inform the user and help her to actually understand the information provided. As the survey demonstrated, this is an aspect of consumer information that is commonly ignored in practice. It is therefore suggested here to replace "clear" with "understandable" consumer information. It should remain in essence up to traders to experiment and decide what "understandable" information is (outcome based model). Some of the following factors, however, might play a role:

Consumer information can be presented in form of facts and a neutral frame that leaves it up to consumers to put that information into a context and fill it with meaning for their personal situation. Alternatively, traders could frame information in a way that points consumers towards possible real-life implications. For example, information about software requirements and compatibility can be given in form of a very specific list of software requirements. Alternatively, traders can inform consumers that a particular digital content is compatible with the hardware and software that is commonly in use at the time of the purchase. While the first approach may be more specific, the second one is probably more useful for the user. This is because in the second example very technical information is framed in a way that the consumer can actually understand and relate to her own situation: "Will the digital content work on my computer"? Similarly, instead of informing consumers that "copy protection is in place" or simply showing a label indicating that this content is copy protected, the information that "this e-book cannot be copied, printed and transferred to other devices" (which could eventually also be conveyed in form of labels) is far more instructive. In order to emphasize the importance of framing,[849] it is suggested here to add the requirement that information should be provided "in an instructive way".

A question to consider is whether traders should be explicitly obliged to take into account the specific cognitive and mental capacities of their intended customers. Arguably pre-contractual information for digital content that is specifically intended for underage consumers or other vulnerable groups should be presented in a different way than information that accompanies software for law professors. Also, in order to promote social inclusion, consumer information should be made available in a format so that also physically impaired consumers can take notice. Beyond that the obligation to target more specifically the different intended recipients of consumer information is afflicted with a number of practical problems. "Personalised" disclosure in an essentially anonymous digital environment is probably not impossible, but most likely a costly and potentially ineffective solution.

One aspect of "understandable consumer information" could be the language in which it is conveyed. The language question takes on an added importance in the case of cross border services, and the realization of an Internal Market for digital content. Devising an appropriate policy for the language question however is complicated by a number of

[849] See also the law & economics chapter, p. 278, stressing the importance of framing effects, and pointing out remedies aimed at framing effects and steering consumer behaviour to certain beneficial options could assist consumers in making personal and socially beneficial decisions.

factors. On the one hand, particularly consumers from countries with in Europe less commonly used languages indicated that the fact that the information was written in a foreign language constituted an impediment to understanding.[850] Insofar, it might be an option to demand, as some member states (including France, Finland, Hungary and Italy) did, to require traders to provide consumer information in the language of the Member State for which the digital content is intended or where it can be purchased. On the other hand, requiring that trader provide information in less widely known languages such Hungarian, Polish, Finnish, etc. creates further obstacles for inter-Community commerce. Also, in case digital content is available to consumers in more than one member states, translating consumer information into the different national languages can be a costly exercise for traders. The obligation could further discourage especially smaller traders from the provision of cross border services. Finally, consumers, too, should take some responsibility in guarding their own interests, in particular when deciding to contract with traders in a language they do not understand (sufficiently enough). These could be arguments not to include a provision in a possible legislative instrument, at least not at this stage. Arguably, it is in the interest of traders who intend to provide cross border services to do so in a language (or languages) that consumers from other countries are able to understand.

The next suggestion in the Article on transparency and publication of information is the requirement that information needs to be well-organised. Well-organised information is not only easier to understand. It is also more inviting to read in the first place. Accessibility and comprehension of particularly longer texts can be improved e.g. in form of headings, highlighted key words, summaries, table of contents, FAQs, most essential information first[851], etc. When prioritizing information, it should be the interest of the user in being optimally informed that counts, not the perspective of the trader in indemnifying herself from any claims that might arise from incomplete information.

This also involves that traders must ensure that key information that consumers need to make informed decisions, such as information about prices, additional charges or usage restrictions are not be hidden away in the terms of use but must be presented prominently (the above suggested paragraph ((3)).

Finally, it is submitted that in situation in which consumer information is being accessed via devices with small screens that make it difficult to actually display all information, only the key information should be made available online at first, while providing a link and/or address where consumers can find the remainder of the information. The here suggested paragraph (4) is inspired by one of the few existing provisions in national laws that already do take into account the problem of reduced screen space. According to Spanish law, if the service is designed for being accessed through a device with reduced format screens, the information obligation is understood to be fulfilled when the Internet address where that information is available is provided in a permanent, easy, direct, and exact way.[852]

[850] Europe Economics 2011, Report 3, p. 52.
[851] E.g. information about price, (restricted) functionality, software requirements first and most prominently, then licensing conditions and terms of access, privacy, followed by disclaimers, indemnity, etc.
[852] Report I (Spain), p. 320.

Similarly, according to Finnish law, in case of m-commerce, consumers must be provided with a web address where they can find complete information. Demanding an additional action from the consumer (visiting the website) could, however, further increase the threshold for actually accessing that information. Also, there may be situations in which it is preferable for the consumer to be provided with the information in another format (e.g. by mail or in written text). This is why it has been suggested here to provide already at the mobile screen with key information, as well as to handle a more flexible approach with regard to the format in which additional information has to be provided.

As a final, more general remark: it would be beneficial to further examine the options for additional requirements regarding form and timing, in particular the aspect of contextualization of information as well as non-textual forms of providing information. Part of that exploration should also be a consumer analysis as well as a cost-benefit analysis. So far, when drafting mandatory disclosure rules, legislators were primarily concerned with the content of the information, and maybe that it is written in clear language, etc. Still underrepresented is the aspect of the correct timing and contextualization of information.[853] Ideally, consumers are presented with the information (and only the information) that they need at the moment when it is relevant. So far, the law stipulates rather globally that information must be provided before the conclusion of a contract, during the performance of a contract, at the time of delivery, before the collection and processing of personal data, etc. One interesting, more differentiated example is the information obligations in the Service Directive, some of which have to be provided without and others only upon request of the consumer.[854]

Traders should explore the possibilities to further differentiate and offer more "contextual" information: providing information in the right portions and the right context, and not all information at the same time (e.g. in the terms of use). It is well acknowledged that this incurs additional organisation efforts and costs at the side of traders. It might be even annoy users at times. More research needs to be done therefore to assess whether the costs of such an approach were outweighed by a clear advantage, namely that better timing would increase the chances that consumers will actually read and use that information. For example, information on the reporting of problems, cancellation policies and dispute settlement could be organised as a separate button ("report a problem") at the bottom of the first page of the trader's website, and also only provided once the user clicks that button. Information about the price, usage restrictions and software requirements would be displayed prominently at the first visit of a product or service description. Information about the trader, contact details are part of the "About" section, etc.

While in mandatory consumer information obligations, there is still a strong prominence of textual and non-linear information, some areas, such as food law or environmental law, experiment with none (or: not only)-textual forms of information users, such as labels as a means to reduce the obligatory information to what is really essential. Labels, if well designed, not only facilitate purchasing decisions, but also help particularly valuable, safe,

[853] OECD, Rehberg 2007, p. 43. Better Regulation Executive and National Consumer Council, *Guide to Policy-Makers*, November 2007, p. 9.
[854] Art. 22 (1), (2) and (3) Services Directive.

user friendly, healthy, etc. services to distinguish themselves from less favourable ones.[855] Digital technologies, moreover, make other non-textual ways of presenting information increasingly feasible and attractive, e.g. in form of instruction videos, pictures, banners, call-outs, interactive buttons, etc. [856]

4.2.6 Responsibility for informing consumers effectively

Short description of the problem
An additional question for future consumer law and policy is whether, in addition to providing consumers with certain information, traders should be required to abstain from miss-information, e.g. by providing too much and not strictly necessary information (noise), non-legible information (extreme small print) or incomprehensive information, difficult to find information (especially in situation where information is provided via a website or deep linking), badly drafted information, etc.

It is important to guarantee that consumer information is presented in a way that is actually useful to the consumer. As long as consumer information is primarily or also used as a "safety net" for traders or, in the worst case, to obscure information[857] the incentives for making the consumer actually understand the information are limited.

Suggested approach
It is suggested to provide the following rule for digital content contracts:

II.–3:101a: Pre-contractual information duties for digital content contracts

(…)

(3) The business bears the burden of proof that the consumer has received the information required under this article and that such information has been provided to the consumer in a manner that the average consumer can reasonably be expected to access and understand the information.

Explanation of the suggested approach
It has been suggested in Article II.–3:104 DCFR (Information duties in direct and immediate communications) to change the burden of proof that the information required has been provided indeed. In addition, it is suggested here to stipulate that traders not only bear the burden of proof that information has been provided. They also must show that they have done so in an effective way. In other words, traders must show that they informed consumers in a way that the average consumer can be expected to easily access and understand that information. This requirement increases pressure on traders to make sure that consumer information is communicated effectively. This way, excess information or

[855] OECD 2010; C. Macmaoláin, 'Ethical Food Labelling: The role of European Union Freetrade in Facilitating International Fairtrade', *Common Market Law Review*, 2002-39, p. 295-314; Golan, Kuchler& Mitchell 2001, p. 117-184.
[856] About possible beneficial insights from 'readability' research', see Rehberg (2007), p. 42. Better Regulation Executive and National Consumer Council 2007, p. 13.
[857] About the concrete danger that complex and unintelligible language is used to abuse or circumvent disclosure requirements, see G. Hadfield, R. Howse & M. Trebliock, Information-Based Principles for Rethinking Consumer Protection Policy, *Journal of Consumer Policy*, 1998 -21, p. 131, 143.

badly drafted and organisation can be a further reason for judges to argue that the information obligations have not been complied with. The approach suggested here leave the possibility intact that courts might also examine excess or badly drafted information under the national rules about unfair commercial practices.

It is worth considering, in addition, how governments can create additional incentives for traders to inform consumers effectively, for example by providing government support for experimenting with innovative ways of informing consumers, by commissioning research how consumers can be effectively informed and making such research available to stakeholders, by reporting best practice examples or by promoting joint industry initiatives to standardise and optimize information disclosure, to name but some examples.

4.3 Formation of contract, inclusion and transparency of standard terms

4.3.1 Transparency and comprehensibility of contract terms

Short description of the problem

Provisions relating to the transparency and comprehensibility of standard terms essentially derive from the provisions on unfair contract terms and distance selling. Three elements contribute to the transparency and comprehensibility of contract terms: 1) the language used to write the terms; 2) the possibility to take notice of the terms before the conclusion of the contract; and 3) where terms are specially onerous or unusual, a high degree of prominence may be required for incorporation. With respect to digital content, the question arises as to whether the current set of rules is sufficient to ensure that businesses use transparent and comprehensible contract terms, taking account of the means of communication used.

Suggested approach

It is suggested to give businesses an extra incentive to comply with the rules on transparency and comprehensibility, by introducing a provision along the following lines:

II. – 9:402: Duty of transparency in terms not individually negotiated
(3) In a digital content contract, a term which falls within the scope of paragraph (2) is presumed to be unfair.

Explanation of the suggested approach

Most of the current legal requirements for transparency and comprehensibility of contract terms are already couched in the DCFR, including proper remedies for failure to supply the contract terms in a transparent and comprehensible way. The rules contained in the DFCR[858] could be regarded as sufficient to ensure that contracts terms are transparent and comprehensible for the consumer. A flexible, open-ended and technology neutral formulation of these provisions is to be preferred to a rigid, technology-determined rule that would specify what is deemed transparent and comprehensible according to the means of communication used. Failure for a business to comply with the information duties

[858] Article II.–3:105 DCFR (Formation by electronic means); Article II.–3:106 DCFR (Clarity and form of information); Article II.–3:109 DCFR (Remedies for breach of information duties).

mentioned in these provisions would give rise to the remedy mentioned in Article II.–3:105(3) DCFR (Formation by electronic means) read in conjunction with Article II.–5:103 (3) DCFR (Withdrawal period). These provisions indicate that the consumer may withdraw from the contract, and the cooling-off period may extend to one year after the conclusion of the contract. Moreover, Article II.–3:105(4) DCFR (Formation by electronic means) indicates that the business must compensate the consumer for any loss caused by a breach of the information duties. These remedies give the consumer an effective recourse against the business without necessarily entailing the start of a court proceeding.
Finally, Article II.–9:402(1) DCFR (Duty of transparency in terms not individually negotiated) indicates that a party using not-individually negotiated terms is required to ensure that they are drafted and communicated in plain and intelligible language, and paragraph (2) adds that in a B2C-contract, a provision supplied by the business in breach of the duty of transparency may on that ground alone be considered unfair. This second paragraph clearly indicates that the remedy for the failure of a business to provide transparent and comprehensible terms could be to declare that term unfair on that sole basis. On the other hand, this provision is open to discretion by the court, as it merely indicates that the court *may* find the term unfair on that sole basis. From this, it could be argued that the court may also decide otherwise on the basis of the facts of the case. It is thought that in particular with regard digital content contracts, which are typically concluded online, i.e. not on business premises, this provides the consumer too little certainty as to the validity of such unclear terms. It is therefore suggested that for digital contents, Article II.–9:402 DCFR (Duty of transparency in terms not individually negotiated) be supplemented with an additional provision indicating that in digital content contracts, an unclear or incomprehensible terms is presumed to be unfair.
This would ensure that in cases where it is either not possible or practical for the consumer to make use of a right of withdrawal, the consumer still may be protected from vague and incomprehensible terms.

4.3.2 Availability of contract terms

Short description of the problem
The general rule in force in the law of all examined Member States is that all contract terms should be made available to the consumer before the conclusion of the contract. The main difficulty in relation to the making available of contract terms using means of distance communication is to determine the proper timing for the communication of the pre-contractual information and the contract terms. Pursuant to the Services Directive, all required (pre-contractual) information and contract terms must be supplied "*in good time before conclusion of the contract* or, where there is no written contract, before the service is provided*"*. The rules on distance marketing of financial services specify that the obligation of information is fulfilled "*immediately after the conclusion of the contract*, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the contractual terms and conditions and the information in conformity with paragraph 1".

Suggested approach and explanation
The inconsistency that appeared in the Dutch legislation following the implementation of the Services Directive[859] is the direct result of apparently contradictory requirements regarding the timing for making the contract terms available to the consumer. The general rule must stay unchanged and before, e.g. all contract terms should be made available to the consumer before the conclusion of the contract, as specified in Article II.–3:103 DCFR (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage).[860] It is therefore suggested that the Services Directive be amended in this respect.

4.3.3 Validity of the standard terms concluded via electronic means and manifestation of assent

Short description of the problem
The general rule is that a contract is concluded, without any further requirement, if the parties intend to enter into a binding legal relationship or bring about some other legal effect; and reach a sufficient agreement. While the implementation of the e-Commerce Directive has ensured that contracts concluded using electronic means of communication are generally recognised as valid in the Member States examined, there remains uncertainty regarding the validity of contract terms known as 'click-wrap' and 'browse-wrap' licenses.

Essentially, the consumer must be aware that through her express or implicit conduct, she is entering in a legal obligation towards the business. This may pose problem in some countries, like Italy, Poland and Spain, that do not regard contracts concluded through click-wrap or browse-wrap as binding, as well as in France in the case of browse-wrap licenses where the law has established a double-click system for acceptance of electronic terms, which excludes 'browse-wrap' licenses.

Suggested approach
A specific rule should be adopted to clarify the validity of the standard terms included in click-wrap and browse-wrap licenses. Such a provision could be drafted along the following lines:

II. – 3:105: Formation by electronic means

(…)
(3) In the case of a digital content contract, not individually negotiated terms may be included by means of click-wrap or browse-wrap or other electronic means. Articles II. – 3:103(1)(d)(Duty to provide information when concluding a distance or off-premises contract with a consumer) and II-9:103 (Terms not individually negotiated) apply accordingly.
(4) For the purposes of paragraph (3):
(a) 'click-wrap' refers to the situation where the terms are presented to the consumer in textual form before the consumer is enabled to conclude the contract

[859] See Report I (The Netherlands), p. 217.
[860] Article II.–3:103 DCFR (Duty to provide information when concluding a distance or off-premises contract with a consumer) currently specifies that the moment when the terms of the contract and other information must be made available to the consumer is 'a reasonable time before the conclusion of the contract'.

and the consumer gives her express consent to the applicability of the terms and subsequently has concluded the contract; and
(b) 'browse-wrap' refers to the situation where the consumer is made aware of the existence of the terms and is given a clearly identifiable possibility to access the terms before the consumer is enabled to conclude the contract, and the consumer subsequently has concluded the contract.

Explanation of the suggested approach
In the case of click-wrap, the consumer is asked to express her consent to the use of standard contract terms by clicking on a button or ticking a box labelled 'I agree' or by some other electronic action. In the case of browse-wrap, the terms of the agreement are simply made accessible via a hyperlink on the website of the business. Contrary to the click-wrap method, the consumer does not get the possibility to 'agree' to the terms by actively clicking on a button or ticking a box. Instead, the user is presumed to assent to the terms by merely using the website. Both forms of licensing are increasingly being used in online transactions for digital content, for they significantly lower transaction costs between businesses and consumers. Click-wrap licenses offer a greater assurance than browse-wrap licenses that the consumer has been made aware of the terms before giving express assent by clicking in the appropriate box. However, not every use of digital content demands the set up of a click-wrap system. Moreover, and more importantly, even though consumers are offered the opportunity to read the standard terms both in the case of click-wrap and in the case of browse-wrap, consumers tend not to read these terms and, in the case of click-wrap, often are rather annoyed they have to scroll through pages of standard terms before they are able to 'accept' the terms. In this sense, the aim of transparency is met already when the consumer is offered a chance to access the terms and to download or print them, whereas the idea that the consumer is in theory offered a better possibility to become acquainted access the standard terms in the case of click-wrap licenses is in fact illusory. Therefore, the validity of the terms included in a browse-wrap licence should not be dismissed too hastily as a valid form of accepting contract terms.

It should be remarked that this Article adds to the provision of Article 2/10 (Formation by electronic means). The latter Article merely requires the business to *inform* the consumer before the conclusion of the contract on certain matters, but does not indicate in which way information must be presented to the consumer. Similarly, Article 7/15 (Terms not individually negotiated) does indicate that standard terms may be invoked against the consumer only if the consumer was aware of them or if the business took reasonable steps to draw the other party's attention to them. This does not solve the matter, however, whether this requirement has been met in the case of click-wrap or browse-wrap.

Provided that they meet the requirements of Articles 2/2(1)(d)(Duty to provide information when concluding a distance or off-premises contract with a consumer), 2/9(4)(Formal requirements for distance contracts), and 7/15 (Terms not individually negotiated), such clauses should be considered valid. Given the fact that in many legal systems the validity of the standard terms included in the case of click-wrap and, in particular, browse-wrap licenses is debated, an explicit provision accepting this manner to include standard terms in digital content contracts is thought to be necessary.

4.3.4 Confirmation by the business of the existence of the contract

Short description of the problem

The rules pertaining to the obligation to confirm the existence of the contract as well as certain information relating to the contract derive from the Distance Selling Directive and the E-Commerce Directive. These rules have been implemented in all jurisdictions considered and their application to digital content contracts does not appear to create particular difficulty.

Suggested approach and explanation

No adaptation or modification is needed to deal with the obligation of the business to confirm the existence of the contract as well as certain information relating to the contract in addition to the rules already in place, in particular those included in Article 2/9 (Formal requirements for distance contracts).

4.4 Unfair terms

4.4.1 Restriction of private copying

Short description of the problem

The widespread use of restrictive standard form contracts for the distribution of digital content poses a threat to some of the basic objectives of both copyright policy and consumer protection. If technological measures are prone to undermine essential user freedoms, the same is true *a fortiori* for standard form licenses. In fact, the use of DRM systems in combination with on-line standard form contracts may accentuate information asymmetries, indirect network effects, high switching costs and lock-ins, leading to market failures and thereby preventing well-functioning competition.[861] Absent certain limits to freedom of contract, law-abiding consumers may be forced to forego some of the privileges recognised by law, in order to be able to use protected material. This practice in effect tilts the balance of interests far in favour of rightholders to the detriment of consumers.[862]

As copyrighted works are increasingly being distributed on the mass market subject to the terms of standard form contracts, consumers of protected material are likely to be confronted more and more with contract clauses that attempt to restrict the privileges normally recognised to them under copyright law. The consumer's only choice is often to refuse to transact under the conditions set out in the standard form contract. In view of the consumer's inferior bargaining power and information asymmetry, the question is whether and to what extent the introduction of a rule in consumer protection law could improve the user's position with respect to such restrictive contract clauses. Consumer protection rules typically purport to operate on two levels: first, to increase the consumer's pre-contractual information and, second, to offer protection against unreasonable one-sided contract terms. A Community legislative intervention could be envisaged on both levels, namely imposing an obligation to inform consumers of the licensing conditions before they proceed to a purchase, and regulate the content of the licenses.

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[861] S. Bechtold, 'Digital rights management in the United States and Europe', *American Journal of Comparative Law*, 2004/52, p. 362.

[862] Guibault, 2008, p. 409.

Imposing a duty on rightholders to disclose particular information or to observe specific formalities at the time of the conclusion of the standard form contract does contribute to reducing inequalities between parties, insofar as it increases transparency and compensates for the lack of information or experience on the part of the end-user. While they were absolutely unknown to the area of copyright just a few years ago, consumer protection measures related to copyright matters have recently become more frequent. This is the case for example with the German Copyright Act, which as a result of the implementation of the Information Society Directive, now requires that all goods protected by technological measures be marked with clearly visible information about the properties of the technological measures.[863]

However, the obligation to supply information imposed by German law or by the French courts has so far addressed only the restrictions put by technology and not the restrictions imposed inside contractual agreements. These rules do not eliminate the risk that rightholders abuse their economic and bargaining position by making systematic use of licence terms that are unfavourable to consumers.[864] Since, in practice, pre-contractual information regarding restrictive terms of use of copyrighted material would only have limited effect on the consumers' situation, another type of intervention may be called for.

Suggested approach
It is suggested to introduce in the grey list of contract terms of a possible legislative instrument clauses that are presumed to be unfair because they depart from the copyright exceptions and limitations or they eliminate or impede the exercise of the exception or limitation on copyright allowing for the making of a private copy of a work. To that extent, it is suggested that Article II.–9:410(1) DCFR (Terms which are presumed to be unfair in contracts between a business and a consumer) is supplemented by two additional terms, with replacing the '.' at the end of the existing limb (q) by a ';':

II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

***(1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it:*(…)**

(r) is not individually negotiated and]eliminates or impedes the exercise of the exceptions or limitations on copyright;

(s) is not individually negotiated and eliminates or impedes the exercise of the exception or limitation on copyright allowing for the making of a private copy of a work;

Explanation of the suggested approach
A presumption of unfairness would have the advantage of having a broad application, relating to all limitations and exceptions on copyright. Such a rebuttable presumption of unfairness would have the advantage of not undermining the emergence of new, potentially attractive business models since a trader would be able to provide counter-evidence for the

[863] Art. 95d of the German Copyright Act.
[864] See Guibault 2002, p. 251; Kretschmer, Derclaye et al 2010.

need to include such a restrictive clause in his standard terms. As *Helberger and Hugenholtz* points out that 'an absolute ban on contractual clauses that prohibits private copying would result in less choice for consumers'.[865] The European Parliament's Committee on the Internal Market and Consumer Protection proposed an amendment to the proposal for a Consumer Rights Directive in this sense. Amendment 1584 provided: 'Annex 3 – paragraph 1 – point 1 d (new)(*ld) restricting the use of digital products permitted under copyright law;*' which should be given consideration. This approach is not unprecedented since Member States of the European Union have declared the rules of copyright mandatory, namely Belgium[866], Portugal[867], and Ireland.[868] However, the European Parliament did not take over this amendment.

Similarly, an explicit provision on the grey list regarding the impediment to the exercise of the exception or limitation on copyright allowing for the making of a private copy of a work would have the advantage of being more specifically directed to the safeguard of the private copying exception. This is important for not all Member States of the European Union currently recognise such an exception in favour of the consumer. This clause could be introduced, in place of or in addition to the clause previously mentioned.

4.4.2 Restriction on the right to respect privacy

Short description of the problem
What is apparent from the national reports is that although most of them signal that a contractual terms restricting or breaching privacy rights are to be considered unfair, the ground for this conclusion is often absent or vague. Given the importance of privacy protection in the digital environment, where consumers often are not aware of the use made of their personal data,[869] it seems desirable to create more legal certainty on this topic.

Suggested approach
It is suggested to introduce a rule in a possible future legislative instrument that clauses are deemed to be unfair if they infringe certain privacy rights.

II. – 9:409a: Terms which are deemed to be unfair in contracts between a business and a consumer

A term in a contract between a business and a consumer is deemed to be unfair for the purposes of this Section if it is supplied by the business and if it is not individually negotiated and its object or effect is to exclude or limit the consumer's rights governing the protection of his or her personal data or privacy.

Explanation of the suggested approach

[865] Cf. Helberger & Hugenholtz 2007, p. 1095; Guibault 2008, p. 409.
[866] Art. 23*bis* Belgian Copyright Act of 1994.
[867] Cf. Art. 75(5) Portuguese Copyright Act.
[868] See: Art. 2(10) Irish Copyright Act, which reads: 'Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act'.
[869] Compare the Introduction to this Report.

One way to deal with privacy protection in contract law is through mandatory rules that regulate the validity of contractual clauses restricting fundamental rights,[870] such as the right to respect for privacy. If one follows Article II.-7:301 DCFR (Contracts infringing fundamental principles) it would determine that '[a] contract is void to the extent that: (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle.'[871] According to the Comments to this provision, it has deliberately been formulated in a neutral, descriptive way, so as to avoid confusion with 'varying national concepts of immorality, illegality at common law, public policy, *ordre public* and *bonos mores*'.[872] Therefore, it should be understood as referring to a 'necessarily broad idea of fundamental principles found across the European Union, including EU law'.[873] The drafters of the DCFR indicate that 'guidance as to these fundamental principles' may be found in, for instance, the EC Treaty (now TFEU), the ECHR and the EU Charter of Fundamental Rights. Although national constitutions may also provide inspiration, the drafters take care to emphasize that 'merely national concepts as such have no effect under the Article'.[874] Given the apparent consensus among legal systems on the nature of privacy rights, it seems that contracts, terms of use or privacy statements which encroach on principles regarding to the right to respect for privacy could be declared null and void under this provision.[875] A disadvantage of this approach is that it would still leave considerable discretion to the courts to establish whether a 'fundamental principle' has been infringed and would thus not greatly enhance legal certainty.

Another approach would be to deal with contractual restrictions on privacy rights under unfair terms legislation. It is suggested to follow this approach for digital content, by indicating which types of contractual restrictions of privacy rights are deemed or presumed to be unfair and therefore non-binding on consumers.[876] The European legislator could introduce clauses on a black list, attached to a future legislative instrument, with regard to contractual terms restricting or infringing the privacy rights of consumers.[877]

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[870] On the question to which extent contract parties have to take into account fundamental rights, which originally were developed to protect citizens against the State rather than against each other, see further the Introduction to this Report.

[871] See Von Bar et al. 2009 a, Art. II.-7:301 (Contracts infringing fundamental principles).

[872] Von Bar et al. 2009a, Comments A and B to Art. II.-7:301 (Contracts infringing fundamental principles), p. 536-537. See also the Notes to this provision, which give an overview of the different national concepts, p. 537-538.

[873] Von Bar et al. 2009a, Comment B to Art. II.-7:301 (Contracts infringing fundamental principles), p. 536-537.

[874] Ibid.

[875] See further C. Mak, 'The Constitutional Momentum of European Contract Law. On the Interpretation of the DCFR in Light of Fundamental Rights', *European Review of Private Law* 2009, 513-529; C. Mak, 'Constitutional Aspects of a European Civil Code' in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak and C.E. du Perron (eds), *Towards a European Civil Code*, 4th revised and expanded edition (The Netherlands: Kluwer Law International 2011,p. 333–352.

[876] Cf. Art. 3 Unfair Terms Directive.

[877] In line with Art. 6(3) of the Treaty on European Union, which stipulates that 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

What should be the core of such clauses is that certain restrictions are considered to be null and void (black list). For example, this could be determined for clauses concerning a change of the purpose of data collection without informing the consumer.

4.4.3 Bundling clauses

Short description of the problem

Making the purchase of digital content conditional upon the purchase of additional contents or a particular hardware restricts the ability of consumers to exercise free choice between different contents and businesses. Consumers do attach considerable value to the ability of transfer digital content between different devices,[878] including devices from competing businesses. As such, tying arrangements can conflict with important interests of consumers, even if the tying is the result of a viable and perfectly legitimate business strategy. The interest of consumers in being able to exercise choice between different digital contents, devices and businesses is also protection worthy, as it is an important element of functioning competition, effective consumer protection and, last but not least, the ability to fully benefit from a diverse media offer.

Suggested approach

It is suggested to introduce a rule in the grey list indicating that clauses are presumed to be unfair if they tie the purchase of digital content to the accompanying purchase of another product or another service.

II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

***(1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it:*(…)**

(t) is not individually negotiated and requires the consumer to conclude an additional digital content contract or a contract pertaining to hardware with the business or a third party .

Explanation of the suggested approach

Bundling clauses are clauses that force the consumer who has purchased digital content to conclude another contract. Such clauses are not infrequent and may be entirely justified, in particular when the consumer was properly informed thereof before purchasing the digital content in the first place. For instance, it need not be unfair if the business imposes such an obligation on the consumer if has informed the consumer of the need to conclude an additional contract in order to make use of the digital content. For instance, the business may sell a videogame on a DVD which can only be played online if the consumer also concludes an access contract with the producer of the game. However, in particular when the consumer is not informed of the obligation before the conclusion of the contract, such a provision may have the effect that a consumer engages more (financial) obligations than she may have expected upon the conclusion of the original digital content contract. Such clauses may lead to anti-competitive tying arrangements, which traditionally have been a matter for antitrust law and the responsible competition authorities. It is, however,

[878] Dufft 2005, p. 24; Dufft 2006, p. 26.

uncertain whether antitrust law and, more generally, competition law offer appropriate remedies in the case of bundling clauses. On the one hand there is still uncertainty to what extent consumers can be active parties in competition law procedures.[879] On the other hand, even though the end-goal of competition law may be the protection of end-users (including consumers) and of competitors, in the first instance competition law concerns the (functioning of) competition. And while competition authorities may decide to ban practices that they find anti-competitive, this still does not say anything about the effect of such ban on an individual consumer's contract. Similarly, while imposing such clauses on a consumer may under certain circumstances constitute an unfair commercial practice, this also does not give an indication as to the validity of the contract term.

This is why it is suggested here to include a rule into the grey list clarifying that any not-individually negotiated clause requiring the consumer to conclude an additional contract and thus taking on additional (financial) burdens is presumed to be unfair. The business may then prove that in the circumstances of the case such a clause is not unfair. An example where such attempt may be successful has already been provided above. As this provision focuses on the *contractual* consequences of the term which is presumed to be unfair, it is not affected by the legislation on unfair commercial practices, as Article 3(2) of the Unfair Commercial Practices Directives indicates that the Directive is without prejudice to the rules of contract law, and in particular to those on the validity and legal consequences of contracts. On the same basis, the Rome II-Regulation is not applicable to such contractual remedies either.

4.4.4 Other unfair terms

Short description of the problem

In view of the fact that new business models are constantly emerging for the online or off-line distribution of digital content, it is fair to say that the market is still evolving rapidly. For this reason, it may not yet be possible to foresee all possible clauses which may be experienced as unfair by the consumer. The case law originating from the Member States provides interesting leads for consideration of other types of unfair clauses that are not yet covered by the proposed Consumer Rights Directive or by the DCFR.

Suggested approach: more study needed

More study would be needed to assess what types of unfair clauses are recurrent inside standard form contracts attached to digital products and whether they should be incorporated in the grey or black list of unfair terms. Since such information is currently lacking, it is suggested at this time that no further provisions should be put on the lists of provisions which are deemed or presumed to be unfair.

[879] For a discussion, see Helberger 2005, p. 188 seq.

4.5 Right of withdrawal

4.5.1 The applicability of a right of withdrawal

Short description of the problem

A first question is whether a right of withdrawal should apply at all to digital content contracts. It should be noted that several Member States have tried to extend existing exclusions of the right of withdrawal for goods to digital content contracts pertaining to digital content which may be downloaded. One could argue that in the case of digital content contracts a right of withdrawal is particularly problematic as the performances rendered are in practices difficult to undo, and there is a substantive risk that the consumer who has withdrawn, nevertheless is able to make use of the digital content after withdrawal. On the other hand one may doubt whether digital content contracts are so different from other contracts that a generic exclusion of such a right could be justified.

Suggested approach

There does not seem to be a convincing reason why the consumer should not be allowed to withdraw from a digital content contract, where she would be able to withdraw from another type of contract in the same situation. It is therefore suggested that in principle, the consumer should be entitled to withdraw from a digital content contract concluded at a distance or away from business premises under the same conditions as any other contract concluded in that way. This implies that it is suggested to take over Book II, Chapter 5 DCFR (Right of withdrawal) in a possible legislative instrument, with amendments to be discussed below.

It should be stated right from the outset, however, that this does not mean that there may not be specific reasons why to limit or even to exclude the right of withdrawal in certain cases. These limitations or exclusions will be addressed in the following policy recommendations.

Explanation of the suggested approach

Whether or not a right of withdrawal should exist in the case of distance contracting cannot be answered unequivocally as the primary reason for introducing such a right in the 1990s – the desire to remove barriers to cross border trade – seems insufficient to justify the intrusion to the fundamental principle of *pacta sunt servanda*. This is true all the more in the 2010s, where distance selling has come of age and is seen more like (just) another distribution channel. Moreover, the Law & Economics analysis in Part 5, below, indicates that the right of withdrawal could undermine the individual responsibility of the consumer, and might have the adverse effect of businesses exiting the market because of the costs of compliance, which in turn could lead to a reduction of supply and higher prices. On the other hand, the availability of the right of withdrawal does allow the consumer some time for reflection, to process all the relevant information, search for additional information or advice and establish whether the agreement indeed reflects their individual preferences. The Law & Economics analysis in Part 5 therefore also indicates that cooling-off periods

can serve as an effective remedy in case of asymmetric information related to credence or experience goods such as digital content. The right of withdrawal can then provide an easy way out of a contract that after having received all information no longer appeals to the consumer and may prevent difficult discussions whether or not the consumer was entitled to void the contract for lack of consent, e.g. on the basis of fundamental mistake, whether the consumer could invoke the right to terminate the contract for a performance which is not rendered or not rendered in conformity with the contract, or whether the conclusion of the contract was the result of the use of unfair commercial practices by the trader. The well-established provisions on the right of withdrawal arguably facilitate a smooth functioning of the distance contracting market and, from a practical point of view, as such fulfil a useful purpose.

Given the fact that the right of withdrawal is generally accepted in European private law, the question arises whether there are substantive reasons to make a fundamentally different policy choice when it comes to digital content contracts by excluding such contracts from the scope of the right of withdrawal. It is submitted that no such case can be made. While it is true that it may difficult, if not impossible, to return digital content that has already been provided to the consumer, this is not different for most service contracts or for contracts pertaining to the supply of energy and water. This fact has led the European legislator to provide already in the Distance Selling Directive that for services the cooling-off period should not start when the service has been rendered, but already when the contract is concluded, and that when the contract is performed during the cooling-off period with the consent of the consumer the right of withdrawal should end.[880] Such a provision could equally be applied to digital content contracts, as is the case with regard to the proposal for a Consumer Rights Directive as suggested by the European Parliament.[881]

4.5.2 Starting point of the cooling-off period

Short description of the problem

If it is accepted that, in principle, the consumer is to be awarded a right of withdrawal, it must be determined when the cooling off-period should start running. The regulation of the right of withdrawal in distance contracts draws a fundamental distinction between the sale of goods and the supply of services. Whereas the cooling-off period only starts at delivery of the goods, this is different for services, where delivery rather would mean the end of the cooling-off period, provided that the consumer was properly informed and consented to performance during the cooling-off period. The question arises which is the better approach in the case of a withdrawal from a digital content contract.

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[880] See art. 6 paragraph (1) and (3) Distance Selling Directive.

[881] See recital (11e) and art. 19 paragraph (1)(ha) in the text suggested by the European Parliament in its Plenary endorsement of the IMCO committee's opinion of 24 March 2011. The position of the Council is less clear, as in its General Approach, recital (10d) suggests that a right of withdrawal is rejected in the case of digital content contracts, but article 19(1)(j) mentions the exclusion of the right of withdrawal in the case of a service contract concluded by electronic means and perforemd 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'. It is clear that in the case of downloading from the Internet, the contract is a digital content contract. This would seem to suggest that when the circumstances of the exclusion in art. 19(1)(j) are not met, a right of withdrawal would exist.

Suggested approach
It is suggested that not to differentiate between the supply of 'digital goods' and 'digital services', but to provide that for digital content contracts the cooling-off period should start to run when the contract is concluded. To this extent, it is suggested that the following provision be introduced in a possible legislative instrument:

II. – 5:103: Withdrawal period

(…)
(2a) Paragraph (2)(c) does not apply to digital content (…).
(…)

Explanation of the suggested approach
There are several options for the moment on which the cooling-off period could start to run.[882] In the proposal for a Consumer Rights Directive and in the current text of Article II.–5:103 DCFR (Withdrawal period) the distinction between services and goods as developed under the Distance Selling Directive is upheld. This is the case also for the text suggested by the Council of the European Union, and the text suggested by the European Parliament's Committee on the Internal Market and Consumer Protection. Both the Council and the Parliamentary Committee appear to be tempted to apply this distinction also to digital content contracts, thus distinguishing between contracts for the purchase of digital goods and contracts for the supply of digital services. The problem with this approach is that it reinforces the relevancy of the distinction between goods and services in the digital domain, as the starting point for the cooling-off period differs fundamentally in case the contract is classified as a sales contract or a services contract, even though this distinction is problematic in the area of digital content. Moreover, it creates the need to develop specific limitations or exceptions with regard to the exercise of the right of withdrawal to digital goods in order to prevent the consumer from abusing her right of withdrawal. It is suggested here again that a distinction between digital goods and digital services is not to be preferred.[883]

Interestingly, in the text suggested by the Council a specific provision is introduced in the case of contracts for the supply of water, gas, electricity and district heating.[884] In these cases, the cooling-off periods ends fourteen days after the day on which the contract was concluded. With this specific rule, the Council ensured that the classification of such contracts as sales contracts or services contracts is irrelevant with regard to the starting point for the cooling-off period. For that reason, it seems that this approach is to be preferred as well in the case of digital content contracts. In practice, this means that the rule currently applicable to service contracts would apply to all digital content contracts, irrespective whether the digital content is classified as a digital good or a digital service. It also prevents the odd situation under the text suggested by the European Parliament, where

[882] Loos 2009, p. 253-254, distinguishes between 4 different starting points, which have been chosen in the various European directives that have so far introduced a right of withdrawal.
[883] See also above, section 4.1.1.
[884] See Art. 12 (2)(f), as adopted by the Council on 10 December 2010.

the cooling-off period in the case of services commences when both the contract is concluded and the consumer has received a copy of the signed contract document on a durable medium.[885] It is submitted that such a formal requirement of a signed document is unsuitable for distance contracts concluded through electronic communication in general and for digital content contracts in particular.

A substantive argument to prefer the conclusion of the contract as the starting point for the calculation of the cooling-off period rather than the moment of delivery of the digital content is that the nature of digital content makes it difficult, if not impossible, to return the digital content after it has been delivered to the consumer, in much the same manner as is the case with the provision of services. Whereas this may be different, for instance, with regard to downloads, there another problem surfaces: even though such a digital content file may as such be returned to the business, it will be difficult, if not impossible, for the business to determine whether or not the consumer has in fact retained a copy of the digital content for further use. For both types of contract, the Law & Economics analysis suggests that choosing the moment of conclusion of the contract as the decisive moment leaves the consumer the least opportunity for abusing the right of withdrawal while at the same time remedying the problems caused by the existing information asymmetries.

The suggested new Article IV.A.–1:301(1)(Amendments for digital content contracts)[886] indicates that for the purposes of the application of rules applicable to digital content contracts, a reference to 'goods' is to be read as a reference to 'digital content'. If this provision is applied without modification with regard to the right of withdrawal, this would imply that the cooling-off period would only commence after delivery, as Article II.–5:103(2)(c) DCFR (Withdrawal period) determines for the right of withdrawal in the case of the delivery of goods. As explained above, this would not be the proper solution for digital content contracts. In order to ensure that the preferred solution for digital content contracts is achieved, the here suggested paragraph (2a) misapplies this provision for digital content contracts. The misapplication of paragraph (2)(c) implies that the cooling-off period starts when the contract is concluded and the information as to the right of withdrawal is provided.

4.5.3 The right of withdrawal with regard to digital content on tangible media

Short description of the problem

The regulation of the right of withdrawal in distance contracts makes a fundamental distinction between the sale of goods and the supply of services. Whereas the cooling-off period only starts at delivery of the goods, as indicated above this is different for services, where delivery rather would mean the end of the cooling-off period, provided that the consumer was properly informed and consented to performance during the cooling-off period. Above, it is argued that it is the latter approach, which should apply to all digital content contracts, ensuring that no distinction has to be made between digital goods and digital services. However, this may lead to a conflict in so far as the digital content is contained on a tangible medium. With regard to the tangible medium, the cooling-off

[885] See Art. 12 (1a), as adopted by the European Parliament.
[886] See above, section 4.1.3.

period would only start at delivery, whereas for the digital content contained on it, the cooling-off period may already have elapsed. The conflict between the two rules must be resolved by ensuring that either the one or the other rule is not applied in case digital content is provided on a tangible medium

Suggested approach
It is suggested that the conflict between the specific rule for digital content and the general rule for goods should be reconciled by excluding the application of the provision on digital content contracts in the case of digital content supplied on a tangible medium. To this extent, the specific provision introduced above should be slightly amended:

II. – 5:103: Withdrawal period

(…)
***(2a) Paragraph (2)(c) does not apply to digital content*, which is not supplied on a tangible medium.**
(…)

Explanation of the suggested approach
In the case of digital content which is supplied on a tangible medium (e.g. a CD or DVD), two conflicting rules as regards the right of withdrawal could be applicable: whereas under the provision applicable to digital content contracts the cooling-off period would start to run at the moment when the contract is concluded, under the provision applicable to goods the cooling-off period only starts at the moment of delivery of the goods. If paragraph (2)(c) would be misapplied altogether for digital content contracts (as paragraph (2a) stands after the discussion mentioned in section 4.4.2), all digital content contracts would be subject to the same rules as to the start of the cooling-off period. However, such a rule would at the same time introduce a distinction between contracts pertaining to goods on which digital content is stored, and contracts pertaining to other goods.

This conflict can only be resolved by giving priority to one or the other rule. In case the digital content provision would be applicable, a distinction would have to be made between 'ordinary' goods and goods which contain digital content. This would mean that the cooling-off period would start to run at the moment when the contract is concluded in case the CD or DVD contains music or video content, but only at delivery if the contract concerns blank CDs or DVDs. This seems to be inconsistent and in any case is difficult to explain to consumers and traders alike. If, on the other hand, the provision on goods would apply to such contracts, differences emerge between the situation where music or video content is downloaded and music or video content that is stored on a CD or DVD. From a policy point of view, this solution has the advantage that it prevents a further differentiation between goods which with regard to the application of the right of withdrawal effectively are treated as if they were services and other goods. Moreover, this solution will clearly be easier to explain to consumers and traders, as the method of delivery is distinctively different. It seems that this solution therefore is to be preferred over the alternative. For this reason, it is suggested that the newly introduced paragraph (2a) is supplemented as indicated above.

4.5.4 Exclusion or termination of the right of withdrawal in case of performance

Short description of the problem

If it is accepted that, in principle, a right of withdrawal exists, and the cooling-off period starts at the moment is concluded, the question arises whether that right should be excluded in the case the contract, with the consent of the consumer is performed by the trader. A specific question arises if the contract includes continuous or repetitive performance by the trader, e.g. in the case of a subscription to a database, an e-journal or to the streaming of movies or football matches.

Suggested approach

It is suggested that the right of withdrawal should end when the consumer has given her consent to performance during the cooling-off period and that in the case of a contract pertaining to continuous or repetitive performance by the trader the right of withdrawal should end when the consumer has first made use of the digital content, e.g. by accessing the trader's database or online streaming service.

To this extent, it is suggested that Article II.–5:201 (3)(b) DCFR (Contracts negotiated away from business premises) be amended as follows:

II. – 5:201: Contracts negotiated away from business premises

(…)

(3) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for:

> ***(a)(…);***
>
> ***(b)* the delivery of digital content that is not supplied on a tangible medium, or for *the supply of services other than financial services if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in II. – 5:103 (Withdrawal period) paragraph (1)(…);***

(…).

Explanation of the suggested approach

As indicated above, the consumer in principle has the right to withdrawal from a distance contract. However, as follows from the country reports, Member States have gone to some length to try to apply the exemptions to the right of withdrawal, as enumerated in Article 6 of the Distance Selling Directive to digital content contracts. This signals that there is considerable concern that in the case of digital content contracts the consumer would be able or even tempted to abuse her right of withdrawal in order to withdraw from the contract while keeping a 100% copy of the digital content. It is submitted that this is a serious concern, which should be addressed.

Article 19(1)(a) of the proposal for a Consumer Rights Directive contains the established exemption for services contracts where performance has begun during the cooling-off period with the consumer's prior express consent. Whereas this provision is only slightly modified in the text suggested by the European Parliament, it is deleted in the text

suggested by the Council of the European Union.[887] However, Article 19(1)(j) of that text introduces a similar exemption for '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'. This implies that in the Council's General Approach the right of withdrawal for digital services is excluded when the consumer has explicitly agreed with early performance. Given the fact that according to recital (10d) of the text suggested by the Council, all digital content which is not burned on a tangible medium is classified as a service, this provision applies to almost all digital content contracts. The exemption seems to apply to downloads, streaming contracts and contracts for online gaming alike. This would be different, however, in the case the digital content contracts would not be performed *fully,* i.e. completely, which is the case where the contract pertains to a subscription to, for instance, an online database or to an e-journal or e-magazine. Whereas it may be argued that in so far as the subscription pertains to the supply of e-newspapers or e-magazines, the exclusion of Article 19(1)(f) of the text suggested by the Council can be applied, this is not the case for other subscriptions to digital content.

In the text suggested by the European Parliament, however, a different exclusion is introduced. It indicates in its Article 19(1)(ha) that the right of withdrawal is excluded in the case of 'the supply of digital content once the consumer has started to download this digital content'. Whereas the provision suggested by the Council seems to be applicable also to streaming contracts which are immediately and fully performed (i.e. not with regard to subscriptions to streamed digital content), this does not seem to be the case with regard with the exemption suggested by the European Parliament.

From the above it becomes clear that neither the provision suggested by the Council nor that suggested by the European Parliament seem to give proper consideration to the specificities of digital content contracts. It seems better to try to avoid the details currently included in the drafting of the exclusions and to exclude the right of withdrawal altogether once the consumer has given her express consent to performance during the cooling-off period and performance has begun. Such a provision could then also be applied in the case of subscriptions where the consumer has first made use of the digital content, e.g. by accessing the trader's database or online streaming service.

It should be noted, finally, that the specific exception for the supply of newspapers, periodicals and magazines in Article II. – 5:201(3)(e) DCFR (Contracts negotiated away from business premises) applies to digital content contracts only if the digital content is provided on a tangible medium. For all other digital content contracts, (only) the amended provision of paragraph (3)(b) applies.

[887] Council's General Approach of 24 January 2011 on the basis of Council Doc 16933/10 of 10 December 2010.

4.5.5 Consequences of uninformed consent to performance

Short description of the problem

If it is accepted that the right of withdrawal expires when the consumer agrees to performance, the question arises whether this should also be the case if the consumer is not made aware of the existence or the modalities or consequences of the right of withdrawal. If the consumer may still withdraw from the contract, a further question is then whether in case of a successful subsequent withdrawal from the contract, the consumer should have to pay for the digital content that has already been rendered.

Suggested approach

It is suggested that if the consumer was not informed of the existence, the modalities, the consequences of the right of withdrawal before consenting to early performance, or of the consequences of consenting to that early performance, her consent to performance during the cooling-off period should not lead to the demise of that right. The present text of Article II.–5:201 DCFR (Contracts negotiated away from business premises) does not sufficiently capture this, as it only indicates that the exclusion of the right of withdrawal listed in paragraph (3)(b) applies only at the consumer's express *and informed* consent. It does not, however, indicate when the information as to the right of withdrawal is to be provided in order for the exclusion to apply. For that reason it is suggested that Article II.–5:201 DCFR (Contracts negotiated away from business premises) be further amended as follows:

II. – 5:201: Contracts negotiated away from business premises

(…)

(3) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for:

> ***(a)(…);***
>
> ***(b) the delivery of digital content that is not supplied on a tangible medium, or for the supply of services other than financial services, if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in II. – 5:103 (Withdrawal period) paragraph (1)*** **and the business has provided adequate information about the right of withdrawal in accordance with Article II. – 5:104 (Adequate information on the right to withdraw) and on the consequences of such a request with regard to the right of withdrawal before the request is made*;***

(…).

Moreover, the question whether or not the consumer should pay for performances rendered in case the consumer was not adequately informed of her right of withdrawal is not yet resolved in the DCFR at all. For that reason, it is suggested that in such case, the consumer should not be required to pay for the services rendered during the cooling-off period if she subsequently withdraws from the contract. To this extent it is suggested to add the following limb to a possible legislative instrument, with replacing the '.' at the end of the existing limb (b) by a ';':

II. – 5:105: Effects of withdrawal

(…)

(4) The withdrawing party is not liable to pay:

(a) - (b)(…);

(c) for any digital content already rendered before the consumer had received adequate information on the right to withdraw in accordance with Article II.–5:104 DCFR.

(…)

Explanation of the suggested approach

The Distance Selling Directive does not regulate in a clear manner whether the consumer who consents to performance of a service contract during the cooling-off loses the right of withdrawal even if she was not properly informed about the existence or the modalities thereof or the consequences of exercising that right. This has led to differing approaches in the Member States. Whereas the consumer retains her right of withdrawal in such case in Finland, Norway, and Spain,[888] she would lose her right of withdrawal in Italy, The Netherlands, and Poland.[889] The same is true in Germany in case both parties have fully performed their obligations under the contract, but otherwise the consumer retains her right of withdrawal.[890] Moreover, it is unclear whether if the consumer retains her right of withdrawal, she would be required to pay for performances rendered before the withdrawal if she subsequently makes use of her right to do so. This would most likely be the case in Finland and Norway, but not in Spain. [891]

This matter is not explicitly resolved under the proposal for a Consumer Rights Directive: the proposal merely requires the consumer's consent to be given prior to the start of the performance, and express. Whether or not the consumer loses her right of withdrawal if she was not informed of its existence, is not clarified. This is different under the text suggested by the Council: Article 17(4) of this text indicates that in the case of withdrawal, the consumer does not have to pay for the services rendered in so far as the trader had not informed the consumer of the fact that in the case of withdrawal she would have to pay for the services already rendered or where services were rendered without the consumer's prior consent. The result is the same under the DCFR, but that text is even more explicit in this sense. Article II-5:201(3)(b) DCFR (Contracts negotiated away from business premises) indicates that in order for the right of withdrawal to be excluded, the consumer's consent must be 'express *and informed*' (emphasis added). The latter addition indicates that the consumer would not lose her right of withdrawal if she had not been informed of its existence in accordance with Article II.–5:104 DCFR (Adequate information on the right to withdraw). Moreover, Article II. – 5:105(5) DCFR (Effects of withdrawal) clarifies that in this case the consumer would not have to pay for the services rendered before the withdrawal.

[888] Report I (Finland), p. 16; Report I (Norway), p. 262; Report I (Spain), p. 328.
[889] Report I (Italy), p. 180; Report I (The Netherlands), p. 224; Report I (Poland), p. 290-291.
[890] Report I (Germany), p. 96.
[891] Report I (Finland), p. 16; Report I (Norway), p. 262; Report I (Spain), p. 328.

The text suggested by the European Parliament is more ambiguous. Whereas Article 19(1)(a) of this text indicates that the consumer would not lose her right of withdrawal in so far as services are rendered during the cooling-off period without her informed consent, a similar provision is missing in Article 19(1)(ha) of this text pertaining to the supply of digital content. Given the fact that Article 17(1) of the text is restricted to the supply of goods and does not provide for an express obligation to return the digital content, an a contrario reasoning would seem to be possible. Moreover, Article 17(2) of this text does not indicate whether the consumer needs to pay for services or digital content rendered during the cooling-off period. This threatens to import the existing uncertainty as to this matter under the Distance Selling Directive into the future.

It is submitted here that the approaches of the DCFR and the Council should be combined. Whereas the text of the DCFR clearly sets out that the consumer does not lose her right of withdrawal by consenting to performance during the cooling-off period if she was not adequately informed, the text suggested by the Council more clearly indicates that the consumer need not pay for any digital content provided during the cooling-off period without the consumer having been properly informed. It is suggested that combining these provisions prevents rogue traders from trying to undermine the right of withdrawal by inviting the consumer to agree to early performance without disclosing to the consumer that she loses her right of withdrawal if she agrees to the performance. The consumer should not have to suffer the detrimental effects of the trader's lack of vigilance or scheming. It is therefore suggested that, in accordance with the amended text of Article II.–5:201(3)(b) DCFR (Contracts negotiated away from business premises) the consumer should maintain her right of withdrawal if she was not informed of its existence and the consequence of anticipated performance. Similarly, in accordance with Article 17(4) of the text suggested by the Council in its General Approach, it is suggested that the consumer should not have to pay for services rendered on the basis of her defective consent to early performance. If another rule would be adopted the trader would still reap the benefits of inciting the consumer to early performance without complying with the information obligations. It is submitted that the trader should not be given this undeserved advantage.

4.6 Non-performance and non-conformity

4.6.1 Time for performance

Short description of the problem

Where the parties have not made arrangements as to the time of performance, the question arises when performance is due. At present, Article 7(2) of the Distance Selling Directive, Article III.–2:102(3) DCFR (Time of performance) and Article 22(1) of the proposal for a Consumer Rights Directive all provide that in such a case performance must be rendered within 30 days after the conclusion of the contract. This provision may make sense in the case where tangible goods are being shipped, but is clearly aimed at the analogue world and incompatible with the digital environment, where performance can take place immediately or shortly after the conclusion of the contract. Therefore, in the case of digital content contracts, there does not seem to be any justification to allow the business a period of 30 days to perform.

The question therefore is whether for digital content contracts a specific default rule as to the time for performance is needed.

Suggested approach
It is suggested that no specific default rule is introduced for the time of performance for digital content contracts.

Explanation of the suggested approach
In theory, a specific rule for digital content contracts could be justified on the basis of the fact that the 30 days-rule is incompatible with the digital environment. The default rule could therefore be that performance is due within a reasonable period after conclusion of the contract, or even immediately. Such a rule would, moreover, be in line with the current law in most Member States.[892]

However, even though the 30 days-rule does not reflect the normal situation for digital content contracts, the same is true with most contracts concluded in a retail shop, in particular where the contract pertains to the sale of tangible, movable goods. As indicated, Member States law normally determines that unless the parties have determined otherwise, (also) these contracts should be performed either within a reasonable period after conclusion of the contract, or even immediately. It is therefore doubtful whether the provision of the Distance Selling Directive and the DCFR should be included in any legislative instrument. In this sense, the text suggested by the European Parliament in its plenary endorsement of the IMCO committee's opinion of 24 March would seem to go in the right direction, as Article 22(1) of that text indicates that performance must take place 'as soon as possible but no later than thirty days from the day of the conclusion of the contract', save other contractual arrangements.

However, it is submitted that if the European legislator nevertheless decided to adopt the 30 days-rule as the default rule, there would seem to be no convincing reason why a different rule should apply to contracts pertaining to digital content than to other consumer contracts: although the then chosen rule does not fit with either type of contract, in practice it will hardly have an impact on consumers and businesses. In this sense, it should be noted that in most cases the parties will have agreed upon a moment for performance – either explicitly or implicitly. This implies that in any case the default rule will hardly have any consequences for the legal position of the parties. For these reasons, it is suggested *not* to include a specific rule as to the time for performance of digital content contracts.

4.6.2 Place of performance

Short description of the problem
When the contract neither explicitly nor implicitly determines the place of performance, it needs to be established where the contract must be performed. Digital content contracts often are concluded and performed over the Internet. In such cases, performance is completed only when the digital content is received at or accessible from the consumer's private email- or IP-address. However, Article III.–2:201(1) DCFR (Place of performance)

[892] See C. von Bar et al. 2009a, Notes 2 and 3 to Article III.–2:102 DCFR (Time of performance), p. 728.

as a default rule provides that performance is due at the business's place of business. One could argue that for digital content contracts this default rule is incompatible with the reality of the digital world and therefore should be replaced by a default rule that performance is due at the consumer's place of residence.

Suggested approach
It is suggested that no specific default rule is introduced for the place of performance for digital content contracts.

Explanation of the suggested approach
In theory, a specific rule for digital content contracts could be justified on the basis of the fact that the normal default rule that performance is due at the business's place of business is not proper in the case of digital content contracts and therefore argue in favour of the opposite policy choice, i.e. take place at the consumer's place of residence. However, it is doubtful whether this argument bears much weight. In practice, the contract will almost always determine where performance must take place, if not explicitly then implicitly. This implies that in practice, the default rule will hardly have any consequences for the legal position of the parties. Where the consumer has concluded the contract in a retail shop and the parties have not made explicit arrangements, there is no reason to distinguish between digital content contracts and other contracts: performance can at least just as easily take place at that retail shop. Where the business is to provide digital content or access thereto over the Internet, the parties may be considered as having implicitly determined that the digital content is to be delivered to or made accessible from the consumer's private email- or IP-address. Therefore, there seems to be insufficient reason to justify a specific rule derogating from the general rules on place of performance. In addition, it should be noted that the alternative default rule – performance should take place at the consumer's place of residence – makes use of an equally static notion as the place of the business's place of business and does not seem to take into account the fact that the place where the consumer in fact downloads or receives the digital content very often is not her place of residence, but the place where she actually is at the moment of delivery, as the digital content often is received on a mobile phone or a laptop computer the consumer has taken with him.

4.6.3 Delivery of digital content

Short description of the problem
Article IV.A.–2:201(1) DCFR (Delivery) indicates that the 'seller fulfils the obligation to deliver by *making the goods* (…) *available* to the buyer' (emphasis added). The description in the DCFR indicates that the notion of 'making the goods available' to the consumer indicates that the business need not necessarily hand over the physical control over the goods, but (insofar as this conforms to the contract) may also provide the consumer with the possibility to access the goods herself and to make use of them. However, the text may be problematic with contracts where the business merely undertakes to provide access to digital content on the business's server. The question therefore arises whether the notion of 'delivery' is sufficiently broad to encompass all types of delivery of digital content or whether specific rules as to the delivery of digital content are required.

Suggested approach
It is suggested that no specific default rule is introduced for the delivery of digital content as long as the provision applicable to the delivery of goods does not refer to the transfer of the physical control over the goods.

Explanation of the suggested approach
With regard to the delivery of digital content, a distinction can be made between digital content which is delivered on a durable medium, digital content which is delivered over the Internet and digital content which is made available to the consumer, but remains within the business's domain. The latter category includes contracts where the business merely undertakes to provide access to, for instance, an online game, a database, or other programs on the business's server (i.e. software-as-a-service or cloud computing) without actually downloading the information. The formula in Article IV.A.–2:201(1) DCFR (Delivery), which states that the seller must make the goods available to the buyer, covers the first two categories. It is questionable, however, whether the wording of this Article also fits with regard to contracts where no digital content is transferred, but the consumer is merely provided access to digital content which remains within the business's domain could a different rule be necessary. However, even with these types of contracts the wording of the DCFR could suffice, as delivery could then be seen as taking the form of communication of the necessary identification data to the consumer, e.g. by providing the consumer with a user identification number or a password that enables access to the digital content, or – when such identification data is not required – but providing the consumer with access to the digital content from the hardware indicated by the consumer. In the suggested draft it is left open how the business makes the digital content available to the consumer. As a result, the suggested rule is technology-neutral and may be used also with regard to future developments.

4.6.4 Passing of risk

Short description of the problem
Similar to the matter of delivery, the question may arise whether the ordinary provisions on the passing of risk are suited to deal with digital content that is provided on a one-time permanent basis, but is not provided on a tangible medium, e.g. in the case of downloading.

Suggested approach
It is suggested that the following provision is needed for digital content contracts:

IV. A. – 5:103: Passing of risk in a consumer contract for sale

(…)

(1a) In so far as the digital content is not provided on a tangible medium but is provided on a one-time permanent basis, the risk does not pass until the consumer or a third person designated by the consumer for this purpose has obtained the control of the digital content.

(…)

Explanation of the suggested approach
This new paragraph (1a) deals with the matter of risk in digital content contracts. It provides that when the digital content is provided on a one-time permanent basis and not on a tangible medium, risk passes when the consumer obtains the control over the digital content. This implies, for instance, that in case of downloads, risk does not already pass when the download takes place, but only when the download is completed and the digital content is within the consumer's control, e.g. because it is stored on the consumer's hardware. Any deterioration of the quality or damage to the digital content during the download is therefore for the risk of the business. This is different when the business proves that the damage is caused by circumstances for which the consumer is responsible, e.g. because her system has damaged the files during the download of the digital content.

It should be noted, however, that when the consumer fails to download the digital content within a reasonable time and as such breaches her obligations under Article IV.A.–3:101(b)(Main obligations of the buyer), and the non-performance is not excused, risk passes already at the time the consumer would have acquired the control over the digital content had she performed her obligation to take delivery, Article IV.A.–5:103(2) DCFR (Passing of risk in a consumer contract of sale) provides.

The scope of application of this provision is restricted to digital content which is provided both on a one-time basis and on a permanent basis. In the situation where the digital content is only temporarily transferred (e.g. in the case of streaming), the digital content remains within the control of the business and the business simply remains liable if no or only corrupted digital content is transferred at the moment of performance of the obligation. Similarly, in the case of continued provision of the digital content (instead of the provision of that digital content on a one-time basis), the conformity test applies throughout the contract period.

4.6.5 Transfer of usage rights instead of ownership

Short description of the problem
Where the digital content is provided on a physical medium, such as a DVD, a CD or a USB stick, the business is required to transfer the ownership of the medium. However, a transfer of ownership of the digital content itself, or more specifically, of the intellectual property rights associated with the digital content, typically does *not* take place in the case of contracts pertaining to digital content. This seems at odds with the normal rules on sales contracts, where the transfer of ownership is one of the main obligations of the business. This begs the question whether a specific rule excluding the obligation to transfer ownership of the digital content is necessary.

Suggested approach
It is suggested that the absence of an obligation to transfer the ownership of the digital content or the intellectual property rights associated with it need should be spelled out in the Black letter rules. Moreover, it is suggested that it should be spelled out as well that the consumer is entitled to make use of the digital content and that the business is thus required to transfer usage rights. To that extent, it is suggested to add the following paragraph to

Article IV.A.–2:101 DCFR (Overview of obligations of the seller), with renumbering the existing provision into paragraph (1):

IV. A. – 2:101: Overview of obligations of the seller

(1)(…)

(2) In derogation of paragraph (1)(a), in the case of a digital content contract the seller must transfer the right to use the digital content and, in so far as relevant, transfer the ownership of the tangible medium on which the digital content is stored. The business is not required to transfer ownership of the intellectual property rights in the digital content, unless such is expressly agreed otherwise by the parties.

Explanation of the suggested approach

That the business – save contractual arrangements to the contrary – is not required to transfer the ownership of the digital content, or more in particular the intellectual property rights associated with it, is not controversial. In practice, the business hardly ever intends such transfer when concluding the contract and merely grants the consumer usage rights. In this sense, consumers could not reasonably expect that the transfer of the ownership of the digital content or the intellectual property rights associated with it is included in the digital content contract. The question is therefore merely whether or not this should be expressed explicitly in the black letter rule, or should be considered self-evident and therefore not subject to explicit regulation.

It is suggested that an explicit rule is indeed required to avoid legal uncertainty and, in particular, to prevent any reasoning on the basis of analogous application of the main obligation under sales law pertaining to the transfer of ownership. In this sense, it should be noted that without an explicit provision to the contrary, it could be argued that the ordinary rules of sales law would at least suggest that in the case where the digital content is contained on a physical medium, such transfer should also include a transfer of the intellectual property rights associated with the digital content. This in itself could create uncertainty as to the legal obligations of the business. Moreover, if the analogy would be taken even further, one could argue that where the digital content is only contained in an intangible medium, the transfer of ownership – which is quintessential for sales contracts – must then pertain to the ownership of the intellectual property rights themselves. Even though it seems unlikely that a court would accept such analogy, it would take considerable time and effort for providers of digital content to obtain legal certainty in this respect. Therefore, it is submitted that the importance of intellectual property rights for digital content contracts and the fact that the *normal* situation for digital content contracts explicitly departs from the normal rule for sales contracts – where a transfer of ownership is at the heart of the sales contract – require an explicit provision indicating that the obligation to transfer the ownership of the physical or intangible medium embodying the digital content does not entail an obligation to also transfer intellectual property rights in that digital content. In order to prevent any a contrario reasoning, the first words of this Article ('Without prejudice to the application of the exhaustion doctrine,') are meant to indicate that this provision is not to be interpreted as a restriction of consumer rights under the Information Society Directive with regard to digital content that is included on a tangible medium.

It is recommended, however, that in so far as Article IV.A –2:306 DCFR (Third party rights or claims based on industrial property or other intellectual property) would be included in a possible legislative instrument, it is amended. Currently, it reads as follows:

Article IV.A –2:306 DCFR (Third party rights or claims based on industrial property or other intellectual property)

(1) The goods must be free from any right or claim of a third party which is based on industrial property or other intellectual property and of which at the time of the conclusion of the contract the seller knew or could reasonably be expected to have known.
(2) However, paragraph (1) does not apply where the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer

This provision intends to reflect the existing provisions of the Vienna Sales Convention. However, it fails to recognise the fact that goods may be subjected to third party rights with which the buyer actually *should* reckon. This is the case in particular with regard to intellectual property rights. Some of these rights may be transferred by the author to the seller; these may subsequently be transferred from the seller to the buyer. However, there are also intellectual property rights which cannot be transferred by the author. Such 'personality rights' therefore by definition stay with the author. Where the buyer of the goods infringes such personality rights, the seller cannot be considered to breach an obligation under the contract, unless the infringement is the consequence of normal use of the goods or a specific use in accordance with the contract, and the seller has not warned of the fact that such use could infringe intellectual property rights. It is suggested that the text of Article IV.A –2:306 DCFR (Third party rights or claims based on industrial property or other intellectual property) should be amended to reflect this, e.g. by adding an additional paragraph:

(3) Paragraph (1) does not apply with regard to rights or claims of a third party which the consumer may reasonably expect.

4.6.6 Application of the conformity test in general and long-term digital content contracts

Short description of the problem
In practice, the question of whether the digital content provided is in conformity with the contract is answered on the basis of the same criteria as those applied to determine the conformity of 'ordinary' consumer goods. Member States have broad experience in applying the different implied terms embodied in the conformity test of the Consumer Sales Directive and the general rules on defective goods in sales law to contracts whereby digital content is permanently transferred[893] – e.g. cases where the digital content is stored on a

[893] As indicated, the notion of 'transfer' of digital content is not completely in accordance with reality, as the digital content itself is not transferred but remains under the business's control), but only a copy of that original data is transmitted. The expression 'transfer of the digital content' is nevertheless used as this does not cause any misunderstandings and is in accordance with common parlance.

tangible carrier, or sent by the business or downloaded by the consumer for permanent use by the latter. Less certain, however, is whether the conformity test is equally fit to deal with digital content that is not permanently transferred but only on a temporary basis (e.g. by allowing access for only a limited number of times or a limited period) or merely made accessible to the consumer – either by way of streaming or by way of access to a database. In particular, one may wonder whether the ordinary conformity test sufficiently takes into account that in the case of long-term contracts (concluded either for a determined or an undetermined period of time) the digital content should not only conform to the contract at the start of the contract period but also throughout the contract period – which may include regular updates of the digital content if such could reasonably be expected.

Suggested approach
It is suggested that the conformity test may be applied to all digital content contracts. However, a specific provision is needed for digital content contracts whereby the digital content is not transferred on a permanent basis. For these contracts, a rule is needed that requires the business to keep the digital content in accordance with the contract throughout the contract period. Moreover, it is suggested that a clarifying provision is added to the provision on the relevant time to assess conformity with regard to the absence of influence of the fact that after the conclusion of the contract better products are put on the market. To that extent, it is suggested to include the following paragraphs are added to Article IV. A. – 2:308 DCFR (Relevant time for establishing conformity)

IV. A. – 2:308: Relevant time for establishing conformity

(…)
(4) In the case of a digital content contract where the digital content is not provided on a one-time permanent basis, the business must ensure that the digital content remains in conformity with the contract throughout the contract period.
(5) Digital content shall not be considered as not conforming to the contract for the sole reason that better digital content has subsequently been put into circulation.

Explanation of the suggested approach
One could argue that the conformity test is developed for traditional sales contracts whereby the purchased goods are transferred on a permanent basis to the buyer. In this sense, the question may arise whether such a rule could also be applied to digital content contracts whereby digital content is not provided on a one-time basis for permanent use. This includes contracts whereby the consumer is entitled to make use of the digital content for a limited number of times or during a limited period of time, but also contracts whereby the consumer is merely provided access to the digital content, and the digital content remains within the latter's control at all times. These types of contracts do not particularly resemble sales contracts, but rather look like lease contracts or services contracts. It should be noted, however, that the conformity test in practice is used also with regard to lease contracts[894] and services contracts,[895] as is demonstrated by the fact that the wording of the

[894] Cf. Article IV.B.–3:102 DCFR (Conformity with the contract at the start of the lease period) and Article IV.B.–3:103 DCFR (Fitness for purpose, qualities, packaging etc.).

respective provisions in the DCFR largely mirror the provision of the conformity test for sales contracts. In this sense, a specific conformity rule is not necessary.

The conformity test appears to be flexible enough to take into account the differences between the different contracts pertaining to digital content – in much the same way as the conformity test is flexible enough to be applied to such differing goods as cars, furniture, toys and foodstuffs. In this respect, the conformity test is to be seen as a dynamic concept.[896] What constitutes a 'normal use' of the digital content will have to be defined on a case-by-case basis. Most problems identified in Chapter 2.7 of this Report – e.g. problems of access to digital content, the delivery of digital content of substandard quality and the existence of flaws, bugs, viruses and Trojan horses, and other security and safety matters – can, however, be solved satisfactorily on the basis of this general test, in particular when the information provided by the business is taken into account when determining which expectations the consumer may reasonably have of the digital content.[897]

However, where the obligation of the business is of a continuous or recurring nature, the consumer may reasonably expect the business to keep the digital content in conformity with the contract. In this sense, a similarity occurs with the situation under a lease contract, where the lessor is also required to keep the leased goods in conformity with the contract throughout the contract period.[898] With regard to a digital content contract allowing the consumer access to an online database, this implies for instance that new entries in the database take place when this may reasonably be expected. This will for example be the case with an online subscription to an e-newspaper. As the provisions on sales contracts only require the goods to be in conformity at the moment of delivery,[899] an explicit provision requiring the business to keep the digital content in conformity with the contract is necessary.

It should, however, be noted that the mere fact that newer or better products have been put into circulation after the conclusion of the contract does not imply that the digital content is no longer in conformity with the contract as of that moment. Suppose, for instance, that Norton has offered the consumer with an anti-virus program including updates. The mere fact that Norton (or another provider) has put a newer version of its program on the market does not imply that the earlier program no longer is conforming to the contract, provided that the updates are provided throughout the period for which the contract is concluded. Paragraph (6) is meant to reflect this. It is inspired by a similar provision in the Directive

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[895] Cf. Article IV.C.–2:106 DCFR (Obligation to achieve result), and more specifically for construction, storage, design and information contracts, Article IV.C.–3:104 DCFR (Conformity), Article IV.C.–5:105 DCFR (Conformity), Article IV.C.–6:104 DCFR (Conformity), and Article IV.C.–7:105 DCFR (Conformity).

[896] See in this respect explicitly Report I (Norway), p. 264, and Report I (Spain), p. 331. The latter report indicates that the concept of normal use will be defined in each case, clarified (and broadened) with the set of rights and obligations established by the applicable corresponding rules.

[897] See however the next chapter as regards the question whether and to what extent the legitimate expectations of the consumer may be restricted by information provided by the business.

[898] Cf. Article IV.B.–3:104 DCFR (Conformity of the goods during the lease period).

[899] Cf. Article IV.A.–2:308 DCFR (Relevant time for establishing conformity), which refers to the moment when risk passes, which in turn is determined by the moment when the buyer takes over the goods or should have done so, see Article IV.A.–5:102 DCFR (Time when risk passes).

on Product Liability.[900] This implies even when the business does not provide any updates of the digital content if the consumer may not reasonably expect that such updates will be provided (either for free or against separate payment). As this matter may apply to all sales contracts, but may be more poignant for digital content contracts, where markets and products are subject to rapid developments, a legislator could choose to include such a rule in a generic manner for all sales contracts, or as a specific provision for digital content contracts only.

4.6.7 Restricting the legitimate expectations of the consumer by statements of the business

Short description of the problem

A particular problem with digital content contracts is that often no common standards have yet been developed. As a result, the conformity test's sub-rule that the digital content must be fit for its ordinary (or: normal) purpose is often of little use and the legitimate expectations the consumer may have of the digital content to a large degree is determined by the information the business has provided to the consumer. *Schmidt-Kessel*[901] rightly remarks that this may incite businesses to describe the expectations the consumer may have of the digital content in an abusive way by indicating only limited performance capabilities, thus in practice restricting her liability. It should be noted that even if consumers indeed believed these statements, this still need not necessarily mean that digital content would be in conformity with the contract merely because they were so informed, as long as they could (nevertheless) reasonably expect to be able to do so, for instance because of the existing legislative framework.[902] However, the fact remains that whether or not a consumer can benefit from the rules on non-conformity to a large extent depends on the fact whether she has been properly informed.[903] The question thus arises whether a specific provision should be introduced in the conformity test indicating that statements by the seller or persons for whom she bears responsibility may only limit the expectations the consumer may have of the digital content if this is reasonable in the circumstances of the case.

Suggested approach

It is suggested that leaving the matter entirely to the discretion of the courts would not provide sufficient guidance to practice. It is important to realize that statements made by the business can and do influence the legitimate expectation the consumer may have of the digital content. However, it is equally important that such statements cannot set aside legitimate expectations the consumer could otherwise have of the digital content if this is unreasonable in the circumstances of the case. Given the insecurity that exists in legal practice, this should be expressed by way of an explicit provision, which could be included as a second paragraph to Article IV.A.–2:302 DCFR (Fitness for purpose, qualities, packaging), with renumbering of the original text into paragraph (1):

[900] See Art. 6 (2) of the Product Liability Directive (Council Directive 85/374/EEC, *OJ* 1985, L 210/29).
[901] Schmidt-Kessel 2011, p. 13.
[902] Which may differ from one country to the next, as Rott 2008, p. 450 remarks.
[903] Cf. Helberger & Hugenholtz 2007, p. 1093-1094.

IV. A. – 2:302: Fitness for purpose, qualities, packaging

(1)(…)

(2) With regard to digital content contracts, statements made by the business or by a party for whom she is responsible pertaining to the digital content restrict the expectations the consumer may have of the digital content only insofar as this is reasonable in the circumstances of the case.

Explanation of the suggested approach

The conformity test takes into account that the legitimate expectations the consumer may have of the digital content are influenced by the business's statements as to the digital content. However, these statements cannot take away legitimate expectations based on more objective notions. These include public order, the protection of privacy or fundamental rights, but also shared social values, the state of the market, the state of technology and the nature and characteristics of comparable goods and digital content. For instance, even though the business may indicate that the digital content is of substandard quality, the consumer may still expect that the digital content is fit for use in accordance with its ordinary purpose. The digital content may, therefore, not be of such bad quality that it can no longer be used in accordance with its ordinary purpose. Yet, the business's statement does have consequences, as the consumer must realize that the performance capabilities will not be as good as those of other products that may be available on the market. The business's statements therefore have an impact on the expectations the consumer may have of the digital content, but only to a limited extent.

4.6.8 Private copies

Short description of the problem

One of the battlegrounds with regard to digital content is whether or not consumers are allowed to make one or more copies of the digital content for private use. Article 5(2)(b) Information Society Directive does not provide consumers with such a right, but merely allows (but by no means requires) Member States to allow consumers to make a copy for private use, provided that the rightholders receive a fair compensation. As a consequence, the rules on private copying have remained largely not harmonised in the European Union.[904] One exception is the right of the lawful purchaser of a computer program to make a back-up copy of the program if this is necessary for its use and in accordance with its purpose, as recognised by Article 5(2) and 8 of the Computer Programs Directive. This right may not be set aside by contract. Arguably, the impossibility to make a back-up copy of a computer program due to *technical protection measures* would constitute a non-conformity of the software, since the consumer does enjoy an explicit right awarded to her under the Consumer Programs Directive and will therefore have a reasonable expectation to be able to make such a copy as part of the normal use of the software. It is important to note, however, that the right to make a back-up copy currently relates only to computer programs and not to other categories of works like music, video, pictures or texts, the private copying of which is governed by the Information Society Directive. The question whether and to what extent the consumer may reasonably expect to make private copies of

[904] Cf. Helberger & Hugenholtz 2007, p. 1064; L. Guibault et al., 2007, p. 125, available online at http://www.ivir.nl/publications/guibault/Infosoc_report_2007.pdf (last visited April 28, 2011).

the digital content therefore largely remains uncertain and will differ from one country to the next.

Suggested approach
It is suggested that the consumer should be enabled to make a restricted number of private copies (e.g. 3 to 5 copies) of the digital content under certain conditions. Moreover, it is suggested that the backup-copy rule included in the Computer Programs Directive should be extended to other digital content contracts. It is therefore suggested to include the following provisions in a Chapter on digital content contracts:

IV. A. – 2:308a: Back-up copy

Where digital content is transferred to the consumer permanently, the consumer is entitled to make a copy insofar as it is necessary to make use of the digital content in accordance with its ordinary purpose.

IV. A. – 2:308b: Private copies

(1) Where digital content is transferred to the consumer permanently, the consumer must be able to make a limited number of copies provided such copies are for purely private use and for ends that are neither directly nor indirectly commercial, and provided the rightholder receives fair compensation.
(2) For the purposes of paragraph (1), if and to the extent that an agreement has been reached between rightholders and businesses offering digital content to consumers regarding the making of private copies by consumers, the rightholder is deemed to have received fair compensation.
(3) Paragraph (1) does not apply in so far as the parties have included a term in their contract regulating the number of private copies the consumer may make of the digital content, unless this term is to be considered unfair. Paragraph (2) applies accordingly to private copies made by the consumer on the basis of such a term in the contract.
(4) A restriction on the possibility to make private copies as provided in paragraph (3) above is permitted only if, before the conclusion of the contract, the trader has specifically drawn the consumer's attention to the absence of such a possibility.
(5) This article does not apply insofar as the consumer is entitled to withdraw from the contract and the original withdrawal period has not elapsed.

Explanation of the suggested approach
Empirical research shows that consumers generally tend to expect to be able to make private copies.[905] The fact that businesses have, for several years, made use of technical protection measures preventing private copies and have informed their customers thereof, has not affected the expectations that consumers generally have of digital content. However, consumers certainly will not always expect to be able to make a private copy, for instance not in the case of streaming or online gaming. A general provision entitling consumers to expect to be able to make private copies, therefore, seems hard to defend.

[905] Cf. also Dufft et al. 2005; Dufft et al. 2006.

On the other hand, with regard to computer programs, on the basis of the back-up copy exception in the Computer Programs Directive, consumers may indeed expect to be able to make private copies. Furthermore, the empirical evidence as regards the actual expectations of consumers shows that in the case of music files consumers in fact do expect to be able to make private copies of digital content, which is transferred permanently. Moreover, such a right is recognised explicitly in some legal systems and cannot be waived by contract or excluded by way of technical protection measures.

Alternatively, one could imagine a default rule under which for such contracts the consumer is entitled to expect to make a private copy, unless the business has specifically drawn the consumer's attention to the absence of such a possibility. The advantage of such a rule would be that it could better balance the mutual interests of the parties, as it allows the parties to differentiate prices in case the consumer waives her right to make a private copy and in case she does not, and so better respects the parties' freedom to shape their contractual relations. Such a rule would put the burden on the industry to ensure that the consumer is properly informed of the absence of such a possibility, leaving the consumer to make an informed decision whether or not to purchase the digital content under these conditions.

A third approach would be to allow the consumer to make private copies insofar as rightholders receive fair compensation for private copying. It could be argued that in such cases the copyright-holder is already compensated for private copying, which would imply that there is no justification to exclude such a possibility anymore.

Finally, one could also imagine that this matter is completely left to the decision of the parties. This seems to best reflect the parties' freedom of contract, but has the drawback that it in fact leaves it to the discretion of the business whether or not to allow private copies and whether or not to inform the consumer thereof. Moreover, as no general rule is provided, this approach does not lead to any clarity as to the question of whether or not the consumer may reasonably expect to make a private copy.

It is submitted that even though some Member States have introduced such a rule, it seems difficult to defend a general right to make private copies even though consumers might expect to be able to make such a private copy in the case of digital content that are transferred permanently. On the other hand, leaving the matter entirely to the parties, or allowing the consumer to make a private copy unless the business has specifically drawn the consumer's attention to the exclusion of such a provision in fact implies that it is the business who effectively decides whether or not the consumer is enabled to make a private copy. This in particular does not take into account that in certain cases private copies are necessary to make proper use of the digital content, and that in some Member States consumers actually pay for the right to make such private copies by paying levies on blank carriers and/or on recording equipment. The suggested rules therefore set out that in the first case, the consumer is entitled to make the necessary back-up copy and in the latter case a limited number of private copies – leaving the number of private copies that may be made to the courts – and to allow for the exclusion of such a right in other cases, provided that the consumer is explicitly informed thereof before the contract is concluded. This implies

that Digital Rights Management in these cases is allowed, provided that the consumer is made aware of such use.

However, the consumer and business may make their own arrangements as to the right to make a private copy by agreeing to a more limited right to make private copies. Such a term would be binding on the consumer, provided that it does not constitute an unfair term.

The matter of fair compensation for rightholders deserves specific attention. In practice, (organisations of) businesses and rightholders negotiate specific agreements regarding the making of private copies by consumers. If such an agreement is made, then the compensation agreed upon by such parties should be seen as a sufficient compensation for the rightholders.

Finally, in order to protect the legitimate interests of the industry, consumers should not be entitled to make a private copy insofar as they may (still) withdraw from the contract. In such cases, the right to withdraw could be abused by the consumer by making a private copy and subsequently withdrawing from the contract. Insofar as with regard to digital content contracts a right of withdrawal would be accepted and that right is not excluded when the digital content is delivered, a provision such as paragraph (3) is necessary to prevent the possibility of abuse. The scope of paragraph (3) is, however, limited to the original cooling-off period, i.e. to fourteen calendar days after the conclusion of the contract, as the failure of the business to provide the required information would lead to an extension of the cooling-off period, but there is no need to also extend the period during which the consumer is entitled to make private copies. If the consumer subsequently withdrew from the contract, the specific provision on restitution (which will be discussed below) would be applicable in such cases.

4.6.9 Interoperability

Short description of the problem

Next to private copies, the matter of interoperability – the possibility to make use of the digital content on other devices – has attracted much attention. Lack of interoperability is often caused by the use of technical protection measures and by the use of different standards and formats. It leads to consumers being locked-in the choices they once made with regard to the particular devices and digital content once purchased, because the investments made are lost when the consumer purchased new, incompatible hardware. The question arises whether such interoperability constitutes a non-conformity.

Suggested approach

Even though lack of interoperability constitutes problems for consumer, it is suggested not to introduce a specific rule on this matter.

Explanation of the suggested approach

A lack of interoperability is problematic in particular when the consumer is not made aware thereof before the conclusion of the contract. This is relevant with regard to both the purchase of the digital content itself as that of the hardware on which it is intended to be used. One could imagine introducing a specific obligation on the provider of the digital

content to inform the consumer of limited functionality as a result of a lack of interoperability. A breach of such an obligation would then translate into a non-conformity of the digital content as the consumer could reasonably have expected to be able to freely make use of the digital content. However, such an obligation should then at least also be imposed on the provider of the hardware. Moreover, it is doubtful whether an explicit provision on this subject is necessary. The comparative analysis has demonstrated that even though an explicit obligation to inform the consumer about a lack of interoperability is normally missing, in most Member States, interoperability is considered an essential characteristic of the digital content, or as an element of normal functioning of the digital content. This implies that even without an explicit obligation to inform the consumer about such a lack of interoperability the matter is dealt with sufficiently under the general conformity test. It seems therefore better to leave this matter to the general conformity test and to general contract law. In this respect it should be noted that Member States may impose obligations to inform under general contract law or derive such an obligation from the law on unfair commercial practices or labelling legislation, but need not do so.

4.6.10 Liability for providers of online platforms

Short description of the problem

Some digital content products – in particular provided by operators of online platforms – are intended to provide the consumer with the possibility to make use of third party offers. A first question is who in such cases the contractual counterpart of the consumer is. Insofar as the contract is concluded with the third party, in principle only that third party is liable for non-conformity of the digital content. The question arises whether this should be different when the defect was caused by the provider of the platform, or when the operator has negligently provided the third party with a possibility to make use of the platform, or when the third party cannot be identified or found or is insolvent.

Suggested approach

General contract law should determine with whom the contract is concluded in the case a consumer purchases digital content through an online platform. It is further suggested there is no need to introduce a specific rule on the liability of providers of platforms for the non-conformity of digital content provided by third parties through its platform.

Explanation of the suggested approach

Whether the operator of the platform or the third party offering the application is the consumer's counterpart should be determined on the basis of general contract law. This implies that digital music platforms, such as the Apple iTunes Store and the Nokia Ovi Store are the consumer's counterpart if they have given the consumer the impression that they were concluding the contract in their own name. This is the case where the platform looks like a web shop or when payment is made to the provider of the platform instead of directly to the third party. In these cases, the consumer may reasonably understand the operator of the platform to be the contracting party, in much the same manner as when the consumer concludes an offline contract in a retail shop which makes use of the shop-in-shop concept.

Where the operator is not the contracting party, it should be liable for the non-conformity of the digital content provided by the third party only insofar as it has contributed to the non-conformity of that digital content. This is the case when the defect was caused by the provider of the platform, e.g. because its platform is unstable and has corrupted the data. However, it is doubtful whether this should be regulated explicitly: one could argue that the normal rules on liability for non-performance or tort law suffice to protect the consumer's interest in these cases. Similarly, one could argue that when the provider of the platform has negligently provided the third party with a possibility to make use of the platform, the same rules on non-performance or tort law may determine whether or not the business should be liable for the resulting damage of the consumer. This may also apply in the case of insolvency of the third party if the operator of the platform knows or reasonably should be aware of the insolvency of the third party. It could be argued that in that case, the operator of the platform has acted negligently by nevertheless allowing the third party to continue to make use of the platform to conclude contracts. It should be noted, however, that in all these cases liability of the provider of the platform seems exceptional.

In essence, the same holds true for the situation where the third party cannot be identified or found could be en as a different matter. The third party is required to provide information as to its contact details before the contract with the consumer is concluded. Obviously, the third party is liable for damages if this information is fraudulent. If the provider of the platform knows or reasonable should be aware of the fraudulent actions by the third party, it can be held liable again for non-performance or under tort law. However, a general duty for providers of platforms to provide consumers with the contact details of the third parties trading through its platform, or a duty to obtain such information from these third parties would be practically impossible to enforce. Given the absence of any case-law substantiating the introduction of specific rules for this situation, it is submitted that no specific rule should be created for this situation.

4.7 Remedies

4.7.1 Available remedies

Short description of the problem

The Consumer Sales Directive (for consumer sales of goods) and the DCFR (for all types of contracts[906]) both give the following remedies for non-performance of contracts falling within their scope:

- repair or replacement / specific performance;
- price reduction;
- termination.

Moreover, the DCFR provides the consumer with the remedy of damages.[907] All of these remedies also form part of the laws of the countries analysed in this study. The majority of

[906] Some rules on remedies that only regard sales contracts can be found in Chapter IV.A, Chapter 4 DCFR (Remedies). These do, however, not fundamentally change the range of remedies available in case of non-performance.

[907] The Consumer Sales Directive does not deal with damages, leaving this matter to the national laws of the Member States. All Member States allow consumers (and other creditors) to claim damages under general contract law. Art. 27(2) of the proposal for a Consumer Rights Directive indicates that the consumer may

the legal systems do not give specific remedies for non-performance of digital content contracts.

The question is whether these remedies suffice in the context of digital content contracts and therefore whether it would be desirable to introduce more specific remedies for digital content contracts or to adapt these general remedies to digital content.

Suggested approach
It is suggested that no specific default rule is introduced regarding the available remedies for non-performance of digital content contracts.

Explanation of the suggested approach
Under existing law, the question of available remedies relates to the question of classification of digital content as goods or services; under the DCFR, classification is of less importance for this topic, since the rules on remedies are included in the more general part of the document. It has been suggested that, to the extent that contracts for the supply of digital content are similar to consumer sales contracts, there seems to be no reason why consumers of digital content should not be able to rely on the same remedies as consumers of tangible goods.[908] As indicated in section 2.8.2.1, most of the remedies available in consumer sales law and general contract law could be applied in the digital context as well.

Although it may be contended that repair and replacement do not always offer a solution in case of non-conformity of digital content (e.g. in case of access problems), the same rings true for cases of non-conformity of certain tangible goods (e.g. neither repair or replacement is of any use to the buyer of a wedding dress if that remedy can be provided only after the wedding; moreover, repairs of a new car may not satisfy the buyer of a new car where the defects are of a serious nature, and replacement of unique tangible goods, such as antiques and art, is impossible exactly because of their unique nature). In some situations, it may simply not be possible to give the buyer exactly what he contracted for.[909] In these situations, however, other remedies, such as damages, price reduction or eventually termination of the contract may provide a solution. Furthermore, it seems that a possible legislative instrument cannot be expected to spell out solutions for all cases of non-conformity; the adequacy of a remedy will have to be assessed on a case-by-case basis.

If digital content contracts are included in future legislative acts, it would therefore not seem necessary to further tailor the existing remedies. Rather, such acts should specify which types of digital content fall within their scope and guarantee a sufficiently high level of consumer protection for all contracts, including those concerning digital content.

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claim damages for any loss not remedied by the other remedies, further leaving the matter of damages to the Member States.
[908] Cf. Bradgate 2010, p. 87-88; BEUC 2010, p. 2 and 8.
[909] Compare V. Mak, *Performance-Oriented Remedies in European Sale of Goods Law*, Oxford: Hart Publishing 2009, p. 118.

4.7.2 Restitutionary effects of termination

Short description of the problem

One matter that might require further elaboration is the legal consequences of termination of a contract for the supply of digital content. In particular, it is not always clear how an obligation to undo the performance of an obligation can be applied to digital content: Should the consumer return digital data to the supplier and, if so, how?[910]

Suggested approach

Clarification of the restitutionary effects of termination of digital content contracts would be desirable. In particular, it is suggested to provide that, in analogy with the DCFR provisions on restitution, insofar as it is not possible to monitor restitution (e.g. in the form of deletion of files by the consumer), payment of the value of the benefit may be required.

To that extent, it is suggested to amend Articles III.-3:510 and III.-3:512 DCFR in the following way:

III. – 3:510: Restitution of benefits received by performance

(…)

(4) To the extent that the benefit is not transferable* or where, in the case of digital content, its nature makes it impossible for the business to determine whether the consumer has retained the possibility to use it, *it is to be returned by paying its value in accordance with III. – 3:512 (Payment of value of benefit).

(…)

III. – 3:512: Payment of value of benefit

(1) The recipient is obliged to:

(a)(…)

(aa) in the case of digital content, pay the value (at the time of performance) of the digital content if its nature makes it impossible for the business to determine whether the consumer has retained the possibility to use it; and

(…)

(2) ***Where there was an agreed price the value of the benefit is that proportion of the price which the value of the actual performance bears to the value of the promised performance. Where no price was agreed the value of the benefit is the sum of money which a willing and capable provider and a willing and capable recipient, knowing of any non-conformity, would lawfully have agreed. The previous sentence does not apply to digital content, which was provided gratuitously.***

Explanation of the suggested approach

In line with Article III.-3:510(3) DCFR (Restitution of benefits received by performance), a possible legislative instrument regarding digital content might set the rule that 'to the extent that the benefit (not being money) is transferable, it is to be returned by transferring it'.

[910] BEUC 2010, p. 8.

Although this rule could be applied to digital content (e.g. the consumer would have to delete downloaded files), it is difficult to police the compliance with the rule (has the consumer actually deleted the file, or is she still able to use it?). Technical measures may to some extent make it possible to disable the use of the digital content (for instance, if access to an online medium or software is needed to play the digital content). However, it may not be possible for all types of digital content to make sure they are returned or deleted after termination of the contract.

Article III.-3:510(4) DCFR (Restitution of benefits received by performance) and III.-3:512 DCFR (Payment of value of benefit) provide rules to the effect that if a benefit is not transferable, its value must be paid. This rule, if included in a possible legislative instrument, may be applied to types of digital content for which it is not possible to monitor their restitution. Regarding the calculation of the value of the received benefit, Article III.-3:512(2) DCFR (Payment of value of benefit) stipulates: 'Where there was an agreed price the value of the benefit is that proportion of the price which the value of the actual performance bears to the value of the promised performance. Where no price was agreed the value of the benefit is the sum of money which a willing and capable provider and a willing and capable recipient, knowing of any non-conformity, would lawfully have agreed.' For digital content, one could think, for example, of payment of part of the subscription price for access to a database that does not function properly. The added sentence to this provision is meant to prevent that in the case of a gratuitous digital content contract that was terminated by the consumer for non-conformity, the consumer would be required to pay for the defective digital content. If the sentence was not added, the argument could be made that even though originally the parties had agreed to a delivery free of charge, the consumer would now all of a sudden be required to pay the monetary value of the digital content that had been rendered. The added sentence is intended to prevent such an – absurd – argument.

Moreover, Article III.-3:512(3) DCFR (Payment of value of benefit) reduces the recipient's liability to pay the value of the benefit to the extent that as a result of the other party's non-performance of an obligation towards the recipient the latter is not able to return the benefit in essentially the same condition as when it was received, or is compelled to dispose of the benefit or sustain a disadvantage in order to preserve it.

4.7.3 Hierarchy of remedies

Short description of the problem

For consumer sales contracts, the Consumer Sales Directive has introduced a hierarchy of remedies that has been implemented in all EU Member States included in this study: A consumer should allow a seller to repair or replace a non-conform good before being able to ask for price reduction or terminate the contract. The Commission's proposal for a Consumer Rights Directive also includes this hierarchy. The text approved by the European Parliament on the basis of the amendments suggested by its Committee on the Internal Market and Consumer Protection, on the other hand, does not.[911] The DCFR also does not

[911] See Art. 26 of the proposal for a Consumer Rights Directive of 8 October 2008.
The text adopted by the Committee on Legal Affairs for the Committee on the Internal Market and Consumer Protection of 24 January 2011 largely goes in the same direction, albeit that the maximum cooling-off period

stipulate a hierarchy of remedies. Moreover, the general contract laws of the countries included in this study do not apply a hierarchy either; a creditor in principle can freely choose which remedy to invoke.[912]

The question is whether the available remedies should be ranked in a different manner for digital content contracts than for consumer contracts in general.

Suggested approach
It is suggested that no specific default rule is introduced regarding the consumer's free choice of remedies for non-performance of digital content contracts.

Explanation of the suggested approach
It is suggested to follow the approach adopted in the DCFR, i.e. not to establish a hierarchy of remedies for digital content contracts for consumers. A free choice of remedies is the starting point in the systems of general contract law in the countries analysed in this study and in the DCFR.

The choice whether or not to adopt a hierarchy of remedies is not so much related to the nature of the good, service or product that is the object of the contract, but rather to the level of protection that is given to the consumer.

A free choice of remedies is usually considered to correspond to a higher level of consumer protection.[913] A limitation of the consumer's choice, in the form of a hierarchy of remedies, would be beneficial to businesses, which would have a chance to still perform the contract (similar to a right of cure) before the consumer would be allowed to terminate the contract.

A substantive argument against the hierarchy in general, however, is that in particular for cross border contracts it is very impractical to return the goods and to have them repaired or replaced, given the time this will take in an international context.[914] This may not apply

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is extended to one year after the conclusion of the contract but applies only to information as to the right of withdrawal (Art. 13(1), and the specific provision pertaining to energy and water contracts is not included. See the Opinion of the Committee on Legal Affairs of 24 January 2011, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-445.885+03+DOC+PDF+V0//EN&language=EN (last visited April 28, 2011). The text adopted by the European Parliament on 24 March 2011 stipulates that '[t]he consumer *may* first require the trader to repair the goods or to replace them if such a remedy is not impossible or disproportionate' (Article 26(2), emphasis added). This implies that the consumer may already choose another remedy (i.e. price reduction or rescission of the contract), without having to allow the trader to repair or replace the non-conform goods first. See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0116+0+DOC+XML+V0//EN&language=EN (last visited April 28, 2011)
Note, furthermore, that the amended proposal adopted by the Council does not include provisions on sales law anymore.

[912] It should be emphasised in this context that the primary remedy in English law is damages, whereas continental systems tend to allow specific performance. In English law, specific performance is only awarded in cases in which damages do not offer adequate compensation.

[913] Schulte-Nölke & Börger 2010, p. 675.

[914] See M.B.M. Loos, 'Consumer sales law in the proposal for a Consumer rights directive', *European Review of Private Law* 2010-1, p. 37.

exactly in the case of digital content, but the problems of returning the digital content do exist, as indicated in regard to the previous policy issue regarding the effects of termination.

It seems somewhat artificial to make a distinction between digital content contracts and other consumer contracts in regard to the free choice of remedies. The approach to be adopted in a possible legislative instrument could therefore be the same for all consumer contracts falling within the scope of that instrument.

4.7.4 Formal requirements; notice

Short description of the problem

The Consumer Sales Directive does not give any formal requirements the consumer should fulfil before being able to invoke a remedy. The Directive does give Member States the option to require the consumer to give notice of a lack of conformity to the seller, which a majority of the Member States of the European Union have made use of.[915] The DCFR has excluded consumers from the scope of the provisions concerning notification of non-conformity.[916] It does, however, determine that termination of a contract is exercised by notice to the debtor.[917] Furthermore, as explained in section 2.8.2.3 *supra*, general contract laws in national systems do usually require a creditor to give notice to the debtor in order to establish the latter's default and to apply a remedy.

Some legal systems require the notice to be in writing; some allow a notice also in electronic format. Article I.-1:109 DCFR (Notice) stipulates that 'notice may be given by any means appropriate to the circumstances'. The Comments specify that this means that notice may be made in any form, but that, for instance, for notices of major importance written form may be appropriate.[918]

The question to be answered here is whether specific formal requirements should be established for a consumer to rely on remedies for non-performance of a contract concerning digital content. Moreover, it should be decided whether notification of the lack of conformity is required. In general, finally, the question is whether the existing lack of harmonisation further increases the uncertainty of consumers where and how to complain about non-conformity of digital content.

Suggested approach

It is suggested that no specific default rule is introduced regarding the formal requirements for invoking remedies for non-performance of digital content contracts. It is suggested that no formal requirements such as an official e-signature are set, i.e. a normal email suffices (just as no registered letter or a deed by a notary public is needed).

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[915] See Loos 2010, p. 33.

[916] Article III.-3:107(4) DCFR (Failure to notify non-conformity); Art. IV.A.-4:302 DCFR (Notification of lack of conformity).

[917] Article III.-3:507 DCFR (Notice of termination).

[918] Von Bar et al. 2009a, Comment B to Article I.-1:109 DCFR (Notice), p. 112.

Explanation of the suggested approach
Seeing that the DCFR gives no formal requirements for consumer contracts in general, there seems to be no reason to give different rules for contracts on digital content. If a legislative instrument follows the DCFR, in particular Articles III.-3:507 (notice of termination) and I.-1:109(2), therefore no formal requirements will apply to notification. Moreover, a notice in electronic format would in most cases be permitted.

It must be emphasized that this approach would deviate from many national laws, which do usually require the consumer to give notice in order to be able to invoke remedies for non-performance.

4.7.5 Termination outside of cases of non-performance

Short description of the problem
The Consumer Sales Directive does not give specific rules on the question whether a (long-term) sales contract may be terminated in case there is no situation of non-performance. This may be explained by the fact that most consumer sales contracts are spot contracts and therefore the question does not arise. For long-term contracts, such as those regarding the provision of services, but also in cases where the consumer subscribes to a newspaper or magazine (whether or not an e-newspaper or e-magazine) this is of more relevance. Most legal systems included in this study do not allow the termination of a contract for a fixed period, but do allow the termination of a contract for an undetermined period of time outside of cases of non-performance, as long as the creditor takes into account a reasonable notice period. The DCFR contains similar provisions for certain specific long-term contracts (commercial agency, franchise and distributorship; Articles IV.E.-2:301 to IV.E.-2:306 DCFR). Moreover, it provides a general rule in Article III.-1:109(2) DCFR (Variation or termination by notice), which stipulates: 'Where, in a case involving continuous or periodic performance of a contractual obligation, the terms of the contract do not say that it will never end, it may be terminated by either party by giving a reasonable period of notice. In assessing whether a period of notice is reasonable, regard may be had to the interval between performances or counter-performances.'

Since digital content is often supplied over a longer period of time under the same contract (e.g. software that is regularly updated, newsletters, access to databases), it is of importance to establish whether a consumer can terminate the contract even if the debtor is correctly performing the contract. In particular, it has to be considered which rules will apply if the parties have not provided for this type of termination in their contract. Another relevant question is whether certain public interest considerations (e.g. media diversity, promoting access to information, competition arguments, innovation, etc.) would mandate maximum limits on contract.

Suggested approach
It is suggested that no specific default rule is introduced regarding the termination of long-term contracts for the supply of digital content.

Explanation of the suggested approach
Given the nature of certain contracts for the supply of digital content, which may continue over a long period of time, it seems desirable to have a rule on the possibilities for termination of digital content contracts concluded for an undetermined period of time. Such a rule would at least give a consumer the possibility to get out of the contract; it could also stipulate a 'reasonable notice period' that the consumer would have to take into account.

If a possible legislative instrument follows Article III.-1:109(2) DCFR (Variation or termination by notice), it seems that an adequate possibility will be included for the consumer to get out of a long-term contract.

4.7.6 Linked contracts

Short description of the problem
As explained in section 2.8.4 the regulation of linked contracts is still the topic of debate. The main question is whether the termination of one contract has or should have an effect on other contracts that are closely related to it, such as a credit agreement related to the purchase of a good or supply of a service. For digital content, one could think of related digital content, such as downloaded software needed to play music and the acquisition of music files that can only be played by using this software.

Suggested approach
In the case of the exercise of a right of withdrawal, Article II.–5:106 DCFR (Linked contracts), provides that the effects of the withdrawal extend to any linked contract. The restitutionary effects of the withdrawal are then governed by the rules on restitution in Book III, Chapter 3, Section 5, Sub-section 4 (Restitution), as modified by the specific rules of Article II.–5:105 DCFR (Effects of withdrawal). The Article also indicates when a contract is to be seen as a linked contract. It is suggested that with regard to termination, this provision should be applied accordingly. To that extent, it is suggested to introduce a new Article III.-5:109a DCFR, which could be drafted along the following lines:

III. – 5:109a: Effects on obligations under linked digital content contracts

(1) In the case of the termination of a contract for digital content, the consumer may terminate any linked contract in so far as this is reasonable in the circumstances of the case.

(2) A contract forms a linked contract with a digital content contract, in particular:

> ***(a) if the business provides both the digital content and other goods or services under the other contract and the other goods or services are necessary for the use of the digital content, whereas the digital content is purchased, in accordance with its ordinary purpose or for a particular purpose made known to the business at the time of the conclusion of the contract, to be used together with those other goods or services;***
>
> ***(b) if the other contract is a credit contract and the business finances the consumer's performance;***
>
> ***(c) if the other contract is a credit contract and a third party which finances the consumer's performance uses the services of the business for preparing or concluding the other contract;***

(d) if the credit contract refers to specific digital content to be financed with this credit, and if this link between both contracts was suggested by the provider of the digital content or the business supplying the credit; or
(e) if there is a similar economic link.

Explanation of the suggested approach
It could be argued that the principle of freedom of contract not only implies that a contract, as a rule, does not produce effects for third parties,[919] but also not for other contracts concluded between the same parties. On the basis of that it would seem logical to argue that the termination of a digital content contract should not have any effect on another contract, as the parties themselves have decided not to conclude one, but two distinct contracts.

It is submitted, however, that this approach denies the reality of modern contracting. Parties may, for all kinds of reasons, decide to conclude not one, but several contracts, either in the form of a framework contract and subsequent contracts, or in the form of two or more interrelated contracts. The European Union has acknowledged this fact by providing in Article 6(4) of the Distance Selling Directive that the withdrawal from a distance contract may lead to the termination of a credit contract which was concluded with the trader or with a third party on the basis of an agreement between the trader and the third party, in order to finance the purchase. Similarly, Article 6(7) of the Distance Marketing of Financial Services indicates that the withdrawal from a financial service concluded at a distance leads to the termination of the linked other distance contract. And Article 15(1) of the Consumer Credit Directive determines that the withdrawal from a contract for the supply of goods or services leads to the termination of the linked credit contract. From this it follows that the concept of 'linked contracts' and the fact that the demise of one contract may lead to the termination of another contract, is well-established in European private law, albeit that the application of the concept so far has been limited to cases where one of the contracts is a financial contract.

The DCFR has taken a further step by recognizing that contracts may be linked also outside the situation of financial contracts. Article II.–5:106 DCFR (Linked contracts) provides guidance. This Article indicates when the withdrawal from one contract leads to the withdrawal from a second contract. The Comments set out that two contracts are linked if the connection between them is close enough to justify that the withdrawal from one contract has legal consequences for the other contract. This is the case, the Comments continue, if the two contracts form an economic unit from an objective point of view. 'It is the close economic link from the commercial point of view, and not the exact legal constellation, that determines whether the contracts can be considered to form a unit.'[920] On the basis of this concept, the court will have to determine on the basis of objective factors and the specific circumstances of the case whether or not the contracts are so interdependent that the demise of one contract should have such effects on the future of the other contract. The Comments continue to explain that by referring to objective factors,

[919] See Von Bar et al. 2009a, Principles, no. 4, p. 39.
[920] V.on Bar et al. 2009a, Comment B to Article II.-5:106 DCFR (Linked contracts), p. 382-383.

traders are prevented from avoiding the effects of the withdrawal from the one contract on the other by pointing out to consumers that they cannot expect the contracts to be linked.[921]

Article II.–5:106(2) DCFR (Linked contracts) gives an indication when a credit contract is linked to the contract from which the consumer has withdrawn. It provides:

> (2) Where a contract is partially or exclusively financed by a credit contract, they form linked contracts, in particular:
> (a) if the business supplying goods, other assets or services finances the consumer's performance;
> (b) if a third party which finances the consumer's performance uses the services of the business for preparing or concluding the credit contract;
> (c) if the credit contract refers to specific goods, assets or services to be financed with this credit, and if this link between both contracts was suggested by the supplier of the goods, other assets or services, or by the supplier of credit; or
> (d) if there is a similar economic link."

However, the Comments explain that these criteria should also be taken into account in the application of the general rule.[922] While acknowledging that linked contracts will most often be credit contracts financing sales (or service) contracts, it is indicated that also other contracts may be linked. The Comments provide the example of a consumer purchasing burglary alarm from trader B, who also represents trader C in the conclusion of a separate maintenance contract for that alarm system.[923] Moreover, the Comments indicate that it is possible that the contracts are concluded between the same parties as well as between the consumer and two other parties.[924] The decisive factor appears to be the economic link between the two contracts.

It seems there is no reason to restrict the application of the rule that the termination of the one contract leads or may lead to the termination of the linked contract to cases of withdrawal. Rather it seems that the same approach should apply where one contract is terminated for non-performance or, more in particular, non-conformity.

In the area of digital content contracts, linked contracts may appear in different forms. Firstly, the trader may offer digital content as well as the means to enable the consumer to use that digital content, e.g. a device. A common example would be for a trader to provide a consumer with both digital content and a phone or a computer to use the digital content. When the digital content is non-conforming, the consumer is not able to use the phone or computer for the purpose it was purchased. It would therefore stand to reason that when the digital content contract is terminated, the linked contract may be terminated as well. On the other hand, there may also be cases where the consumer would have an interest in terminating the digital content contract, but leaving the other contract intact. This would be the case, for instance, when the consumer has also purchased other digital content and is

[921] Von Bar et al. 2009a, Comment B to Article II.-5:106 DCFR (Linked contracts), p. 383.
[922] Von Bar et al. 2009a, Comment B to Article II.-5:106 DCFR (Linked contracts), p. 383.
[923] Von Bar et al. 2009a, Illustration 1 to Article II.-5:106 DCFR (Linked contracts), p. 382.
[924] Von Bar et al. 2009a, Comment B to Article II.-5:106 DCFR (Linked contracts), p. 383.

able to make use of that digital content on the phone or computer. For this reason, it is suggested that the termination of one contract should not automatically lead to the termination of the other contract, but (just) to award the terminating party the possibility to do so.

4.8 Minors

4.8.1 Legal capacity of minors partly covered by the DCFR

Short description of the problem

Rules on legal capacity are excluded from the current scope of the DCFR: Article I.–1:101(2)(a) DCFR (Intended field of application) expressly excludes the regulation of legal capacity from the scope of application of the DCFR. This implies that the validity of contracts concluded by minors (but also of other persons lacking legal capacity under national law) is not to be determined on the basis of the DCFR. This poses problems in particular with regard to digital content contracts, where contracts concluded with minors are an important part of the number of concluded contracts, in particular with regard to downloads, online gaming and ringtones (see the contracts mentioned in the suggested Article IV.A.–1:103(2)(a), (b) and (c) DCFR (Digital content contracts). The question therefore arises whether the DCFR should not, after all, contain rules on legal capacity.

Suggested approach

It is suggested that the DCFR should provide rules on legal capacity, at least with regard to digital content contracts offered to consumers online.

To this extent, it is suggested that Article I.–1:101(2)(a) DCFR (Intended field of application) be amended as follows:

I. – 1:101: Intended field of application

(…)

(2a) In derogation of paragraph (2)(a) of this Article, these rules may be used in relation to the legal capacity of minors to conclude contracts for the purchase of digital content in accordance with Article IV. A. – 1:301 and in relation to the obligations arising from such contracts.

(…)

Explanation of the suggested approach

By excluding rules on legal capacity altogether from the scope of the DCFR, the use that can be made of the DCFR in B2C-contracts is in fact severely compromised. Digital content contracts form an important category of the type of contracts where an internal market of goods and services can in fact be achieved, as in these types of contracts – apart from the situation where digital content is delivered on a tangible medium – no physical delivery of the goods or services is needed: performance by the business can in fact take place from a computer or server situated within the premises of the business through an online connection. Many of these contracts are in fact concluded by minors, but given the fact that parties are not in the same room, it is difficult to ascertain for the business whether the consumer is a minor or an adult. Age verification is in practice difficult. Moreover, the

laws in the Member States differ rather fundamentally as to when a person may be considered to possess full legal capacity. As a result, businesses cannot rely on the same or even similar rules applying as to whether a minor is or is not competent to validly conclude the contract. This in itself may impede the development of the internal market. Whereas this may not be problematic with regard to most types of contracts, as these contracts normally are hardly concluded by minors, this is very different with digital content contracts, where such contracts actually occupy large percentages of the market. With regard to legal certainty as well as the use consumers and businesses may make of the internal market for B2C-contracts for the supply of digital content, it seems important to provide rules on legal capacity. This is true in particular with regard to the validity of such contracts and the consequences of contracts concluded with incompetent minors. Obviously, one could argue the same should apply for other contracts concluded by minors, but – as indicated earlier – such contracts are far less frequent than is the case with regard to this type of contract.

4.8.2 The demarcation of a minor's legal capacities

Short description of the problem

It is commonly held that minors should not enjoy full legal capacities. However, judging by current legislation in Member States it is neither considered desirable to deprive underage consumers of *any* capacity to conclude contracts. This raises the question as to where a line should be drawn: which transactions should fall within the scope of a minor's limited legal capacities and which should not? It should be emphasized that a (uniform) answer to this question is important not only for the minors concerned (and their parents), but also for businesses, as they need to be able to ascertain the risk of the digital content contract not being valid. This is important also as it is difficult to ascertain for the business whether it deals with an adult or with a minor. The difficulty for businesses to establish the age of their counterpart and the resulting uncertainty as to the validity of cross border B2C-contracts for the supply of digital content may hamper the development of the internal market for digital content not only with regard to minors, but also with regard to adults.

Suggested approach

Minors, i.e. persons under the age of 18, should enjoy the legal capacity to conclude so-called everyday contracts, in any case with regard to digital content contracts. The specific circumstances of the transaction must play an important role in substantiating and concretizing the criterion in a particular case. For this reason, it is suggested to include the following provisions in a possible legislative instrument:

II. – 7:101: Scope

(…)

(2a) In derogation of paragraph (2)of this Article, this Chapter deals with lack of capacity of a minor capacity to conclude a digital content contract.

(…)

II. – 7:208a: Legal capacity of minors to conclude digital content contracts

(1) This Article applies with regard to the legal capacity of minors to conclude a digital content contract. It does not apply to the legal capacity of minors to conclude other contracts.

(2) A minor is capable of concluding a digital content contract only

(a) with the permission of her legal representative;

(b) if the contract is an everyday contract within the meaning of paragraph (3).

(3) In determining whether a contract is to be considered an everyday contract, regard is to be given to all circumstances of the contract, in particular:

(a) the price to be paid by the minor, if any;

(b) whether the contract is of a kind that is frequently concluded by minors of the same age;

(c) whether the contract relates to a single or a continuing performance;

(d) whether the minor had a reasonable interest in concluding the contract; and

(e) whether the value of the digital content grossly deviates from the price to be paid by the minor.

(…)

As the scope of this study is restricted to digital content contracts, the scope of the suggested provision is restricted to such contracts. There is no convincing reason, however, why such a provision could not also be introduced for other everyday contracts.

Explanation of the suggested approach

In Europe the criterion of 'normality' plays an important role to determine whether a contract involving a party with limited legal capacities is valid. This concept goes by several names, such as 'everyday transactions', 'juridical acts that are common practice' and the somewhat related exception for 'necessaries' used in the United Kingdom. Every standard is interpreted according to national rules and has produced its own corpus of case law. Even though differences between these approaches exist, there seems to be a shared rationale behind them: minors should be protected against the effects of ill-considered contracts. In determining the acceptability of disputed contracts the minor tends to be the point of reference, while the business's intentions or financial gain are much less relevant.

Departing from this common starting point, the minor's best interest, it should be determined how far her or her legal capacity should stretch. As national laws illustrate, it is not possible to set out these boundaries in an unambiguous way. Since a subjective yardstick is used, be it the qualification 'everyday', 'usual', 'common' or 'normal', a margin of appreciation will inevitably exist. This doesn't mean, however, that a term can be chosen randomly, for its meaning is open to various interpretations anyway. For good understanding, the criterion should ideally be as concrete as possible. Although 'normal', 'usual' and 'common' are useful common denominators, they suffer somewhat from vagueness – which makes them suitable as common denominators, but less as new standards. The term 'everyday contracts' on the other hand is more precise, while leaving intact a necessary margin of appreciation. Although its meaning cannot be captured in a single formula, some of its possible constituent parts may be derived from national (case) law. These include, *inter alia*, the amount of money involved in the transaction, whether

the kind of contract is frequently concluded by peers, whether the minor had a reasonable interest in it and the relation between the price and the product or service delivered.

Another development that should be mentioned in this discussion is the relation of legal capacities with new commercial channels, such as Internet and mobile phones. Existing legislation is based on face-to-face contact between the contracting parties. While transactions in the online environment are often executed in a highly anonymous way, it has become much harder for businesses to assess the legal capacities of the counterparty. This means that maintaining traditional legislation online works in favour of the vulnerable party, who continues to enjoy the same protection, while businesses can hardly prevent voidable contracts from being concluded. To counterbalance this disadvantage somewhat additional measures are welcome. This will be discussed in greater detail in the next policy matter. For the moment, however, it is important to add one more observation. While new technologies have complicated the traditional functioning of the legal capacities doctrine, they may also add to its reliability. If the age of a minor cannot always be determined with certainty in the offline environment, on the Internet this problem may be solved by sophisticated age verification tools. This means that this initial hurdle can turn out to be an opportunity for improvement. Of course, this can only be reached if efforts are made to implement reliable, technical tools.

4.8.3 Voidance of a contract; duty to return the digital content

Short description of the problem

If a contract relating to digital content is voided for lack of capacity, a legal complication occurs. Where the restitution of physical objects does usually not give rise to any problems, an intangible good or service can by its nature hardly be returned. It must therefore be decided under which circumstances a minor or her legal representatives are due to compensate.

Suggested approach

After voidance of a digital content contract, the performances already rendered should in principle be returned by the parties. Where it is not possible or reasonable for the business to demand the return of the digital content intangible, compensation is only due if the good or service has really been beneficial to the minor and, in addition to that, detrimental to the business.

For this reason, it is suggested to include the following provision in a possible legislative instrument:

II. – 7:208a: Legal capacity of minors to conclude digital content contracts

(…)

(4) A digital content contract concluded by a minor who was not legally capable of concluding such a contract may be avoided by the minor's legal representative.

(5) In so far as performances have already been rendered,

> ***(a) Article III.–3:510 DCFR (Restitution of benefits received by performance) applies;***
>
> ***(b) Article III.–3:512 DCFR (Payment of value of benefit) applies only if***

(i) the digital content has been to the true benefit of the minor and the business is disadvantaged as a result of her performance, or
(ii) when the minor has fraudulently led to believe that she was legally capable of concluding the contract and the business has acted upon that belief in concluding the digital content contract.

As the scope of this study is restricted to digital content contracts, the scope of the suggested provision is restricted to such contracts. There is no convincing reason, however, why such a provision could not also be introduced for other everyday contracts.

Explanation of the suggested approach
If full (or a substantial) compensation must be paid after undoing transactions involving digital content that cannot be returned, the effect of voidance would be significantly undermined. If, for example, a minor downloads a ringtone, which can obviously not be rendered after the contract has been voided, the obligation to partially repay would make the injured party fall back in her initial position. Therefore, legislation in this field may need revision in order to prevent voidance from becoming illusory in this kind of situations. An effective way to this end would be to adopt the approach taken by Poland. This means that compensation is only due if the service has really been beneficial to the minor and, in addition to that, detrimental to the business. In the case of services that can be reproduced at negligible costs, the latter requirement is very unlikely to be fulfilled, thus restoring the practical significance of voiding a contract.

However, if the minor executed the transaction by means of fraud or deceit it can hardly be justified that a business would still have to bear the costs. Therefore, a judge should in such cases be able to deviate from the standard rule. The gravity of the deceit could be taken into account when apportioning the costs among the parties concerned. Declaring to be of age by checking a box, for example, could then be appraised differently from the falsification of documents or the unauthorized use of someone else's credit card.

4.8.4 Age verification tools and/or smart payment systems

Short description of the problem
The development of the internal market for digital content contracts is to a large extent frustrated by the fact that such contracts are very often concluded by minors and the contracts they may conclude are subject to voidance because of diverging national rules on legal capacity of minors. By introducing a uniform rule for 'everyday digital content contracts' the uncertainty resulting from such diverging rules may be limited, but not excluded. It should be noted that this problem is also more pressing in the digital world, as the business cannot ascertain the consumer's age by merely looking at the consumer. Moreover, there are no real safeguards either in asking the consumer for identification, as the minor may (fraudulently) make us of a passport or credit card of her parents in order to pose as an adult.

This would be different if the contract would not be subject to voidance in case the contract was concluded by using sophisticated age verification tools or smart payment systems.

The advent of new technologies has been a challenge to the proper functioning of the legal capacities doctrine. With contacts between businesses and consumers becoming ever more anonymous, undesirable transactions have become harder to avoid. Without appropriate tools someone's age (and therefore her or her legal capacity) cannot reliably be assessed.

Suggested approach
The same technological advance that threatened the workability of the traditional approach may also come to its help. If the development of reliable age verification tools is encouraged, the assessment of the counterparty's legal capacity may even become an easier task than it was before. Therefore, efforts must be made to stimulate the creation of these tools. In this respect it is remarked that similar problems with regard to the authenticity of digital signatures have led to the development of techniques to certify such digital signatures.[925] It is suggested that it is worthwhile to consider whether a framework for age verification tools could be developed. Use of a recognised age verification tool should then lead to the validity of the contract concluded with the minor. However, at this stage it seems too early to suggest a – possibly highly controversial – rule to this extent.

Explanation of the suggested approach
A high hurdle in this process may be the 'critical mass' that is needed for a tool to become widely employed. As the history of micro-payments shows, some systems (even if there is a long felt need for them) just keep struggling to come about.

Although technical expertise and research is needed to devise such an age verification tool, a preliminary observation should be made. For reasons of efficiency the incorporation of such a tool in an existing system may be advisable. If e.g. payment instruments, such as debit cards or mobile phones, would automatically communicate the age of the costumer, unwanted transactions could possibly be prevented in a very direct manner. Moreover, smarter payment systems could also create other opportunities to the benefit and the empowerment of the underage consumer. In quite a few jurisdictions, for example, minors are not only allowed to enter into everyday agreements, but also into those that they paid for with pocket money or own earnings. If parts of one's money can be electronically flagged as such, these justifiable exceptions to the default rule of absent legal capacity may gain practical significance and eligibility for implementation.
If worked out effectively, age verification and/or payment tools could turn some legal problems connected to the advancing technology into their very opposites.

If and when such age verification tools are developed, it could be seen as politically opportune to introduce a provision stating that contracts concluded with the use of such

[925] See Directive 1999/93/EC on a Community framework for electronic signatures, *OJ* 2000 L13/12 and Commission Decision of 14 July 2003 on the publication of reference numbers of generally recognised standards for electronic signature products, *OJ* 2003, L 175/45.

tools are to be considered valid. This would effectively have the result of a lowering of the protection of the minor in cases where the minor fraudulently have led the business to believe that the minor was actually an adult and therefore legally capable to conclude the contract. However, at this time, in the absence of reliable age verification tools, it seems to be too politically controversial to suggest a rule to this extent.

5. LAW & ECONOMICS ANALYSIS

5.1 Introduction

This part provides selected aspects of the law and economics literature that form a balancing commentary to the preceding chapters and that include economic insights that could be relevant for the future legal protection of consumers in the market of digital content contracts.

Consumer protection is generally understood as the protection of weaker market parties by means of mandatory rules in order to adjust the environment where consumers bargain and conclude transactions. When social norms do not work and consumers are unable to discipline firm behaviour on the market by simple mechanisms of reputation and repeat sales and they are unable to effectively enforce their rights markets might need an institutional framework composed of mandatory rules to intervene. The market for digital content contracts represents a complex contracting environment where incomplete consumer contracts can arise due to various market failures. The legal, economic and technical complexity of digital content contracts is intertwined with the fact that digital content is mainly built on information. Information is a scarce resource, which can be analysed as an independent economic good and which may involve legal and economic problems that are different from regular tangible goods or services. Moreover, digital content contracts involve intellectual property rights such as copyrights and as such have a partially public good character. In other words, they are largely inexhaustible and non-excludable. It has been argued that excludability depends upon the availability and cost of means of exclusion and digitalization has increased the public goods aspect of copyright works because once works have been released digitally on the Internet, they are non-excludable. Accordingly, commodities like music files and software on the Internet in the absence of effective technological means of exclusion are public goods. The absence of excludability gives free riders a free hand and thus the rationale for copyright law is that it closes off this possibility by making it illegal.[926]

Accordingly, this contribution focuses on information failures and failures of the institutional framework as the most valid economic reasons to intervene and alter contractual conditions in order to protect consumers of digital content services. Law and economics is a scientific approach to describe and predict the effects of legal rules on the behaviour of people. It analyses incentives, risks and effects of legal rules, i.e. the transaction costs of legal rules. It uses efficiency as its central benchmark of assessing legal rules and policies. While it acknowledges that law can increase the efficient use of resources by creating rules of conduct that correct market failures, it emphasizes that

[926] R. Towse, C. Handke, P. Stepan, The economics of copyright law: a stocktake of the literature, Review of Economic Research on Copyright Issues, 2008, vol. 5(1), p. 5. On the law and economics of copyright law see: R. Towse & R. Holzhauer (eds.)(2002), *Economics of Intellectual Property,* Edward Elgar International Library of Critical Writings in Economics, Cheltenham, UK and Northampton, MA, USA: Edward Elgar Publishing; Volume 1; K. Koelman, Copyright Law and Economics in the Copyright Directive: is the Droit d'Auteur Passé?', Amsterdam: Mimeo, Computer Law Institute, Free University, Amsterdam, The Netherlands, 2003; W. Landes & R. Posner, "An Economic analysis of Copyright Law", Journal of Legal Studies 1989 (18), p. 325-366.

increasing consumer rights does not necessarily increase consumers' welfare by setting off the costs of the additional rights against their benefits. [927]

5.2 The economics of consumer protection rules for digital content contracts

"The economics of consumer protection is the economics of information".[928]

This section expends on the previous sections on information. Whereas these sections have looked upon information from a multitude of angles, including Law & Economic, this section delves deeper into the matter from an exclusively Law & Economic point of view. This implies that the focus will be on the most important economic justification for regulating consumer contracts: the presence of information failures.

From the point of view of (law and) economics, information shortages carry the most important theoretical justification for consumer protection rules. Beyond this general approach the law and economics literature of consumer protection relies on three mainstream economic theories: informational economics, behavioural economics and institutional economics.[929] Informational economics provides insights on how information affects the dynamics of markets, the determinants of bargaining and drives regulatory approaches of consumer protection to a cost-benefit based analysis.

The contribution of information economics to consumer policy is to be found in discussing the special features of information as an economic good and information asymmetries as the main source of market failures. Its investigation is focused on the behavioural patterns of market players under the condition of imperfect information. In contrast to the neoclassic model, information is analysed as an independent good, whose production and acquisition can be costly and which can be unequally distributed among the market participants [930]Asymmetric information in markets leads to adverse selection and

[927] F. Chirico, The function of European contract law – an economic analysis, *European Review of Contract Law* 2009-4, p. 399-426.

[928] C. Shapiro, Consumer Protection Policies in the United States, *Journal of Institutional and Theoretical Economics* 1983-139, p. 527-544.

[929] In neoclassical economics the consumer is regarded as a sovereign, rationally performing market player who is aware of her needs as well as how he can satisfy these needs. In other words, consumers have rational preferences, consumers maximize their utility and act on the basis of complete information. In accordance with rational choice theory consumer behaviour is thus determined by individual income, apparent and transitive individual preference orders, as well as the goods available along with their prices. The behavioural and policy assumptions of neoclassical economics are based on the reference model of perfect competition and they argue that it is sufficient to maintain the consumers' interest without governmental intervention as protecting consumer interests have negative effects on welfare as a whole. However, the economic considerations of information have shifted the perspective of consumer protection from the theory of exploitation, (Priest, 1981) which focused on power imbalances between suppliers and consumers and identified competition problems as the main source of market failures to information failures that are also present in competitive markets, Cf. F. Rischkowsky, & T. Döring, Consumer Policy in a Market Economy : Considerations from the Perspective of the Economics of Information, the New Institutional Economics as well as Behavioural Economics, *Journal of Consumer Policy* 2008- 31, p. 285-313.

[930] J.E. Stiglitz, The Contributions of the Economics of Information to the Twentieth Century Economics. *The quarterly journal of Economics,* 2000-115, p. 1441-1478.

moral hazard and form the basic tenets of consumer regulations.[931] When asymmetric information prevents the provision of efficient quantity and quality of information rational consumers will strive for an optimal degree of information under the rational of cost-benefit calculations [932]

Asymmetrical information structures will not necessarily lead to governmental intervention. Rather, a multitude of market based and governmental mechanisms are possible to remedy the problems of adverse selection and moral hazard. Market solutions such as signalling and screening, long term relationships, learning, market provision of information through comparison instruments and the unravelling of information can also correct information asymmetries.

When these market mechanisms fail to work and market players behave opportunistically, government regulation is necessary when suppliers do not have an incentive to pass on their knowledge in a complete and trustworthy manner.

The assumptions of informational economics, however, treat key aspects of consumer decision making as exogenous and address only particular problems of consumer decisions connected to imperfect information. A wider analytical scope is needed in order to rethink the behavioural assumptions of the rational choice theory as the basis of neoclassical and information economics as well as to adequately analyse the institutional framework on which both producers and consumers base their decision-making.[933]. This latter seems to be of special interest for digital content contracts, which represent a complex contracting environment where not only the peculiarities of information as an economic good and the influence of information asymmetries seem essential but other influencing factors, such as the presence of intellectual property rights, which further enhance the relevance of information as a public good.

Informational economics addresses information costs, but it neglects transaction costs beyond those. Institutional economics takes other positive transaction costs such as further market and government regulations into account that can influence the use of market mechanism. Institutional economics extends the discussion to the formal and informal institutions which control social interaction and shape individual behaviour so that negotiation and coordination costs are reduced.[934] New institutional economics analyse institutional arrangements that are to remedy market failures that are the result of imperfect information. In other words, it is not imperfect information only that influences the efficiency of the market mechanism. This stream of economics also deals with the problem of opportunistic behaviour of contract parties[935] and draws the attention to solving information asymmetries through designing efficient contracts or institutions. It points to the economic consequences of existing transaction costs such as costs of initiating and

[931] Cf. G.J. Stigler, The economics of information, *Journal of Political Economy,* 1961; P. Nelson, Information and Consumer Behavior, 78 *Journal of Political Economy*, 1970-2, p. 311-329; G. Akerlof, The market for 'lemons': quality uncertainty and the market mechanism, 84,*The Quarterly. Journal of Economics*1970, p. 487-500.
[932] Beales et al. 1981, p. 491-539.
[933] Rischkowsky & Döring 2008, p. 285-313.
[934] Cf. Rischkowsky & Döring 2008. Cf. also D.C. North, *Institutions, institutional change and economic performance,* Cambridge: University Press 1990.
[935] O.E. Williamson, *Markets and hierarchies - Analysis and Antitrust Implications: A Study in the Economics of Internal Organizations*. New York: Free Press 1975.

bargaining over transactions and as such it provides a more composed concept of transaction costs.[936]

Further, the empirical observations of behavioural economics emphasize the institutional constraints on individual choice. Behavioural economics is occupied with the cognitive constraints of economic agents in perceiving and assessing decision options as well as in being able to reach rational choices.[937] It deals with endogenous aspects of consumer decision-making. Consumers exhibit imperfect information processing skills and prove to be poor negotiators. Empirical research shows that consumers either do not use or only limitedly use the information at their disposal. Behavioural economics pointed to relevant determinants of search, acceptance and the processing of information. An increase of rationality of purchase decisions over additional information itself seems, therefore, to be subjected to specific constraints. The individual capacity for accepting and processing information can be viewed as emotionally controlled and as multiply influenced by environmental stimulants.[938]

The relevance of behavioural economics for consumer protection lies not only in the fact that consumers are inhibited from rational decision making by biases and heuristics but also that sellers are able to take advantage of consumers' reduced capabilities. Behavioural insights imply that government interventions might be justified even in competitive markets in order to help consumers in their decision making, for example, by decreasing available options. Information disclosure, one of the most preferred government interventions in consumer protection policy needs to be reassessed in the light of behavioural biases.

As mentioned above the economic literature is critical to state interventions, as individuals are argued to be the most able to know their own preferences and act accordingly. As a result, regulatory approaches implementing behavioural economics have been developed that leave free choice uninhibited: soft paternalism.[939] Soft paternalism

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[936] Rischkowsky & Döring 2008.

[937] D. Kahneman & A. Tversky, 'Prospect Theory: An Analysis of Decision under Risk', *Econometrica* 1979, 47(2), p. 263–292. Kahneman and Tversky present a critique of expected utility theory as a descriptive model of decision making under risk and develop an alternative model, which they call *prospect theory*. Kahneman and Tversky found empirically that people underweight outcomes that are merely probable in comparison with outcomes that are obtained with certainty; also that people generally discard components that are shared by all prospects under consideration. Under prospect theory, value is assigned to gains and losses rather than to final assets; also probabilities are replaced by decision weights. The value function is defined on deviations from a reference point and is normally concave for gains (implying risk aversion), commonly convex for losses (risk seeking) and is generally steeper for losses than for gains (loss aversion). Decision weights are generally lower than the corresponding probabilities, except in the range of low probabilities.

[938] D. Kahneman, Maps of Bounded Rationality: Psychology for Behavioral Economics', *The American Economic Review* 2003 (5) 93, p. 1449-1475; G.F. Loewenstein, 'Emotions in Economic Theory and Economic Behavior',*The American Economic Review, Papers and Proceedings* 2000, (2) 90, p. 426-432; F. Ölander & J.S Thøgersen, 'Understanding consumer behaviour as a prerequisite for environmental protection', *Journal of Consumer Policy* 1995 (18), p. 345-385.

[939] There are several names devoted to this regulatory approach:
- lighter hand intervention, in: OECD Roundtable discussion on private remedies: class action/collective action; interface between private and public enforcement, United States of America, DAF/COMP/WP3/WD(2006) p. 34;
- asymmetric paternalism, in C. Camerer, S. Issacharoff, G.F. Loewenstein, T. O'Donoghue & M. Rabin, 'Regulation for Conservatives: Behavioral Economics and the Case for «Asymmetric Paternalism»', *University of Pennsylvania Law Review* 2003, 151, p. 1211–1254, Columbia Law and Economics Working Paper No. 225, available at SSRN: http://ssrn.com/abstract=399501;

nudges[940] individuals into welfare enhancing decisions without imposing a particular choice on individual consumers.

One solution would be to implement a regulation, which corresponds to what Camerer et al. call asymmetrically paternalistic: "A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational. Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices."[941] Behavioural economics suggests that intervention should be imposed with a "lighter hand".[942] It suggests remedies aimed at framing effects and thus steer consumers' choices towards welfare enhancing options.[943]

Beyond the research results and policy implications of behavioural economics, one should consider that additional information only finds consideration when consumers are motivated to receive and to process this information. Apart from the assumption that consumers are capable of practicing an optimal search and processing behaviour, the implicit assumption within the economics of information states that they are also intrinsically motivated to exercise an information search or to receive offered information. Empirical studies, however, show that the engagement in an active information search depends decisively on the degree of personal involvement.[944]

The followings sections will provide specific comments on consumers' protection with regard to digital content services against the above described broad and composed concept of law and economics.

5.3 Information as an independent good – classification of digital content as goods or services

If "[T]he economics of consumer protection is the economics of information" then the economics of digital content contracts is even more focused on the economics of information. Therefore, in this area information as an independent economic good merits separate analysis. Understanding how information is generated and used, and what kind of market failures can arise due to imperfections in the information flow is essential to design consumer law remedies.

The question whether digital content is to be classified as goods or services is closely related to the economic nature of information. Services typically concern information, for example giving advice or consulting. Intellectual property rights and more

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- or libertarian paternalism, in: C.R. Sunstein & and R.H. Thaler, 'Libertarian Paternalism is Not an Oxymoron', *The University of Chicago Law Review* 2003, 70(4), p. 1159-1202.

[940] 'Nudges' is an acronym which stands for six subtle methods for improving choice, devising a good choice architecture: iNcentives, Understanding mappings, Defaults, Giving feedback, Expecting errors, and Structuring complex choices R.H. Thaler & C.R. Sunstein, *Nudge Improving Decisions about Health, Wealth and Happiness,* 2008, Yale University Press.

[941] Camerer et al. 2003.

[942] OECD Roundtable discussion on private remedies, p. 18.

[943] Sunstein & Thaler 2003.

[944] W. Kroeber-Riel & P. Weinberg Konsumentenverhalten. München: Vahlen 2003. Cf. P.Weinberg, *Das Entscheidungsverhalten der Konsumenten*, Paderborn: Schoeningh; T. Roßmanith, *Informationsverhalten und involvement im Internet* (Doctoral dissertation, Universität Fridericiana), Karlsruhe, 2001 available at http://www.ubka.uni-karlsruhe.de/cgibin/psview?document=2001/wiwi/l&format=0&search=%2fwiwi%2fl (last visited April 28, 2011).

in particular copyright also involve information problems that are different from regular tangible goods as information can be copied and transferred without costs, which makes the enforcement quite different.

Information has a number of distinct features. Information has a private character that promotes an asymmetric information structure on the market. When information dissemination is costly, as sellers do not have an economic incentive to fully disclose information to consumers, information will be suboptimally provided. Furthermore, information possesses properties of a public good, which have a negative effect on the availability of information as well as on the information search of a consumer. Copyright, which is an essential element in digital content contracts also has a partially public good character.[945]

Public goods contrast with private goods as they have the unique characteristics of non-excludability in supply and non-rivalry in consumption while private goods are sold to those who can afford to pay the market price. Non-rivalry of public goods ensures that a provision of the good for consumer A entails a provision for consumer B and thus consumption of the public good by one citizen will not exclude the consumption of the same good by another citizen. Non-excludability ensures that one cannot exclude consumer B from securing the benefits of the public good, consequently there is no incentive for consumer B to pay the costs of providing the public good. Therefore a consumer may 'free ride'[946] on the provision of the public good, securing the benefits but not paying the costs of provision.[947] The main reason why market failure persists is to be found in the inability of citizens to act cooperatively and it is this lack of cooperation which mandates an allocative role for government in the economy.[948] These characteristics of information reemphasize the need to extend the analytical framework of digital content contracts to the analysis of the effects of formal and informal institutions as well as to the fact that it is impossible for economic agents to confront themselves with the complex reality relevant to contracts. Moreover, Williamson's seminal work on the opportunistic behaviour of contract partners, which is also important for the problem of asymmetrical spreading of information, points to the necessity for specific institutional rules, which can beneficially balance the interests between suppliers and consumers.[949]

Section 4.1.1, for example, states that the classification of digital content as goods or services is uncertain in European consumer contract law. As this classification often determines the level of protection granted to the consumer, it would seem that the matter of classification would have to be dealt with before other policy choices can be made.

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[945] Cf. W.J Gordon & R.G.Bone, 'Copyright' in: B. Bouckaert, G. de Geer(eds), *Encyclopaedia of Law and Economic,* Cheltenham 2000.

[946] K. Oliver & M. Walker, The free rider problem: Experimental evidence, *Public Choice* 1984-43.

[947] J.G. McNutt, Coming Perspectives in the Development of Electronic Advocacy for Social Policy Practice, *Critical Social Work* 2000/1.If the possibility to exclude consumers unwilling to pay for the use of information falls away, then from an informational economic point of view a suboptimal information offer sets in which leads to the situation that even consumers willing to pay do not find an appropriate offer. Additionally, it can lead to a suboptimal information demand when informed consumers generate positive external effects by means of the resulting pressure of their purchase decisions on the market suppliers, while uninformed consumers profit from these effects. The informed consumers exert a positive externality on the uninformed ones. If consumers anticipate this free-rider effect, then their demand for information decreases.

[948] P.A. McNutt, *The economics of public choice*, UK: Brookfield1996.

[949] Cf. O.E. Williamson, *Markets and hierarchies - Analysis and Antitrust Implications: A Study in the Economics of Internal Organizations*, New York: Free Press 1975.

However, it argues that there is no need to distinguish between digital goods and digital services with regard to the development of specific rules for digital content contracts.

Rethinking this argument could be based on the following insight. While the categorization of good types in informational economics is restricted to search, experience and credence goods and to the corresponding market remedies to cure related informational failures, new institutional economics brings a different typing of goods. The differentiation between so-called exchange and contract goods, transactions are distinguished according to whether or not the purchase of goods and services has after-effects for the future.[950]

This distinction finds its novelty in pointing to the effects that take place after the transactions. Exchange goods are the objects of such transactions that find their closure in the present, which means that goods and services in return do not stretch over a long period of time. Within the group of exchange goods information problems can occur for the consumer concerning experience or credence goods. By contrast, contract goods are the type of service promises of which the corresponding modalities cannot be conclusively regulated.[951] After completing the contract, the consumer cannot know when and with what quality the service will be carried out. In addition to the information uncertainty that is attached to experience and credence goods, in the case of contract goods special importance is attached to the uncertainty concerning the behaviour of the service provider (his service capabilities as well as his service willingness).[952] The analysis and the possibility of institutional coping with such chronologically stretched contract relationships are inherent part of the so-called principal-agent theory, which examines the ratio of asymmetrical information between contract partners, risk costs, and the incentive intensity attached to it.[953]

The principal-agent framework has found application in a broad range of applied fields in economics, but the problem itself is actually only a special case of "mechanism design",[954] which combines insights of economic game theory such as strategic interaction of economic actors, with those of institutional economics, for example that "rules matter" in designing economic interaction processes. Rischkowsky and Döring[955] argue that applying the principal-agent problem to consumer protection, the relationship between suppliers and consumers of services can be characterized in the following way.[956] As asymmetric information is distributed at the expense of the consumer (principal) and because of the absence of possibilities to observe the supplier (as agent), important attributes of the agent (hidden characteristics) remain concealed from the consumer before the contract is concluded. Action is taken at a disadvantage for consumer interests, which remains hidden after the conclusion of a contract. As a result the problem of adverse

[950] A. Alchian & S.L. Woodward, 'The firm is dead; Long live the firm: A Review The Economic Institutions of Capitalism', *Journal of Economic Literature* 1988-26, p. 65-79.
[951] R. Kaas, A.E. Heerwaarden & M.J. Goovaerts, *Ordering of actual risks*, Brussels: Caire 1994.
[952] Rischkowsky & Döring 2008.
[953] M.C .Jensen,W. H. Meckling, 'Theory of the Film: Managerial behavior. Agency costs and ownership structure', *Journal of Financial Economics* 1976/3, p.305-36; K. Arrow, 'The economics of agency', in: J.W. Pratt, R.J. Zeckhauser (Eds.), *Principals and agents: The structure of business ,* Boston, MA: Harvard Business, 1985, p. 37-51; D.E Sappington, 'Incentives in principal-agents relationships', *Journal of Economic Perspective* 1991/5, p. 45-66.
[954] A. Mas-Colell, M.D. Whinston & J.R. Green, *Microeconomic theory*, Oxford: University Press, 1995.
[955] Rischkowsky & Doring 2008.
[956] Rischkowsky & Döring, 2008.

selection arises. In these cases remedies of informational economics are critically assessed. The effectiveness of the reputation mechanism can be realistic only if the gains on the part of the agent from the build-up of reputation capital being assessed are higher than the short-term gains attached to opportunistic behaviour or false promises. Governmental intervention is needed in order to ensure the implementation of contracts along with sanctions of opportunistic behaviour by setting up appropriate rules.[957]

Arrow found that beyond the different types of transactions, the existence of transaction costs as "costs of running the economic system," are significant in explaining the impact as well as the design of market institutions, which in themselves also can lead to consumer problems.[958] These are the costs of transaction initiation and transaction bargaining including the cost of acquisition, processing and storing information along with the arrangement, conclusion, and implementation of contracts. Moreover, costs accumulate concerning the avoidance and reduction of contractual risks, which take place due to remaining uncertainties and cannot be solved by contractual regulation alone. Consequently, besides coordination problems of market transactions, an additional "motivation problem" is present for the consumer. This problem consists of formulating contracts so that it is rational for the partners individually to fulfil the contracts.[959] This transaction cost concept is undoubtedly more composed than that of the informational economics, which simply contains the costs of the search for and obtaining of information. At the same time, this explains that consumer policy should not only address the decline of costs for the acquisition of information. The goal setting of consumer policy extends to the decline of transaction costs that can arise from the arrangement, conclusion, and implementation of contracts.[960]

5.4 Extending the scope of sales law to digital content contracts

Section 4.1.2 suggested on the one hand, that digital content should neither be subdivided into digital goods and digital services nor a definition of digital content contract should be given, but merely indicate which contracts in any case are to be considered as such contracts and which contracts in any case are not to be considered as such contracts. On the other hand, in order to prevent that new legal concepts would have to be developed for digital content contract, to apply the rules developed for sales contracts, but to amend these rules where necessary and to introduce additional rules where this is deemed to be appropriate.

This suggested approach finds support in the economic analysis of consumer law. A valuable message from economic analysis is that consumer protection comes at a cost.[961] Mandatory allocation of risk, mandatory disclosure duties and other obligations will create

[957] Rischkowsky & Döring, 2008, p.297

[958] K. Arrow, 'The Organisation of economic activity: Issues pertinent to choice of market versus non-market allocation', in: Proceedings of the 91st Congress of the joint Economic Committee, The Analyses of and Evaluation of Public Expenditure: The PBB-System, 1st session Washington DC, 1969-1, p. 48.

[959] J. Martiensen, *Institutionenökonomik: Die Analyse der Bedeutung von Regeln und Organisationen für die Effizienz ökonomischer Tauschbeziehungen*, München: Vahlen Martiensen 2000, p. 119.

[960] Rischkowsky & Döring, 2008.

[961] T. Hartlief, Freedom and Protection in Contemporary Contract Law, *Journal of Consumer. Policy* 2004-27, p. 253-267.

additional costs to producers and sellers, who will pass these costs on to consumers where possible.

Consumer protection is not a zero-sum game; it has its price. Mandatory rules implementing consumer rights generate additional costs for business that will likely be passed on to consumers. This cost increase will have to be balanced with the increase in demand and supply of goods and services in order to prove that new rules are indeed necessary. The costs of a market failure have to be balanced with the costs of intervention and government failure and the impact of that remedy on the behaviour of affected entities should be estimated. These are costs of legislation, enforcement and compliance as well as potential indirect effects of intervention on consumer and business behaviour. For example, competition might be reduced as a result of decreasing the number of low-quality and cheap products or services on the market.

Furthermore, the distributional impact of the costs and benefits among the different groups has to be considered. Intervention has its subsequent costs for governments and the implementation of new rules create compliance costs for business but also raise prices for consumers. As far as demand elasticity allows price increases business will pass on the costs of compliance with increased protection measures to consumers. This means that consumers pay for their own protection. For example, an information disclosure imposed by the state to reduce search costs has different effect for different consumers. Such an intervention would raise firms' average costs and accordingly leads to higher consumer prices. While this would reduce search costs for consumers who actively shop around, passive consumers would have to bear the increased costs without extra gains. The intervention is optimal only in case the gain to active consumers (reduced search costs minus the increased price) outweighs the losses to passive consumers and the administration of the law.[962]

Economics is concerned about the total welfare of both businesses and consumers without distinguishing between benefits to businesses or consumers. For non-economists such an approach ignores the distributional effects of gains and losses. Efficiency and distributional concerns might coincide when all consumers value the legal rule identically, but when different consumers value the rule differently than legal rules have different distributional effects on different subgroups of consumers. Craswell shows that the extent to which businesses are able to pass on costs or benefits to consumers affects the distributional goals of legal rules. The relevant question he poses is when a mandatory rule has to be imposed on what basis such a legal rule should be selected. Craswell argues that the distributional approach will coincide with the efficiency approach. As businesses pass on the costs of a new rule to consumers, consumers will benefit when their direct benefits exceed the costs of the rule to the businesses. The crucial question is how much of their costs businesses can pass on to consumers.[963]

The pass on rate depends on the market structure, the elasticity of demand and on the fact that heterogeneous consumers value a certain legal rule differently. In markets where consumers are heterogeneous the price for a product or service including the price of

[962] R. Craswell, 'Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships', *Stanford Law Review* 1991/43, p.361-398; A.L.L Schwartz, L.L. Wilde, 'Intervening in markets on the basis of imperfect information: a legal and economic analysis', *University of Pennsylvania Law Review* 1979/127, p. 630.
[963] Craswell 1991.

consumer protection rules will be determined by the willingness to pay for higher priced product or service of those consumers who are on the margin between buying and not buying the product or service. These marginal consumers will stop buying the product when the price increases and as a result they determine how high the price of the product will be.

Those consumers who gain from a legal rule can compensate those who do not or who will even be harmed by the higher prices. Craswell concludes that when businesses can pass on much of their costs of a legal rule this indicates that consumers value the rule and benefit from the rule. When businesses cannot pass on much of their costs then consumers found the rule less attractive. When consumers are homogeneous then a comparison of the costs and benefits of the rule to businesses and consumers suffices to establish whether consumers benefit from the rule. When consumers are heterogeneous then the redistribution among consumers who benefit and who lose has to be examined. But even in this case it is the preferences of different consumer groups which are decisive and not the ability of businesses to pass on their costs.[964]

Mackaay argues that public legal rules should substitute private rules where that option leads to costs savings. He puts forward the cost minimisation formula developed by Wittman.[965] He argues that the role of contract law is to minimize costs of the parties and of the courts writing contracts and the costs of inefficient behaviour arising from poorly written or incomplete contracts.[966] In other words, law and economics asks whether regulation has a cost advantage over parties' self-protection. Regulation often aims to restrain opportunism, but pointing to this opportunism might suffice as well instead of direct regulatory measures.[967]

EU consumer law and policy knows no such effects based approach that can rationalise policy proposals and choices for regulatory measures. A cost-benefit analysis could, however, quantify principles such as proportionality, subsidiarity, necessity and feasibility of intervention. A cost minimization principle and the principle of mutual recognition which is competition among different legal systems is *via* Article 5 TEU an inherent part of European law.[968]

Any policy decisions should take account of the costs of rule formulation at EU level, of compliance, enforcement and indirect effects on other market behaviours at Member States level. One example could be the costs of directives as regulatory means. Directives induce further costs of implementation at Member States level and require national courts to interpret and enforce the rules.[969] While they might be cost-effective on EU level, they do generate substantial costs of implementation and enforcement at Member

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[964] *Ibid.*

[965] E. Mackaay, 'The economics of civil law contract and of good faith', Prepared for the Symposium in honour of Michael J. Trebilcock, 1-2 October 2009, in Toronto, p. 5-6.

[966] D.A. Wittman, *Economic foundations of law and organization*, Cambridge: University Press, 2006.

[967] F. Gomez & F. J.J. Ganuza, 'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?', *European Review of Contract Law* 2011 (7)/2, p. 275-294.

[968] H.P. Schwintowski, 'Contractual rules concerning the marketing of goods and services', in: S. Grundmann, W. Kerber & S.Weatherhill (eds.), Party autonomy and the role of information in the Internal Market, Berlin: de Gruyter, 2001, p. 331-347.

[969] H. Unberath & A. Johnston, The Double-Headed Approach of the ECJ Concerning Consumer Protection, *Common Market Law Review* 2007/44.

State level. There could substantial though diverging costs of total and minimum harmonisation, horizontal, framework rules and vertical case-by-case approaches.

In *easyCar*[970] the ECJ was asked by the UK High Court whether Article 3 (2) of the Directive on distance contracts applied to car hire services. AG Stix-Hackl argued that such services operate with reservation as a precondition and thus would be unreasonably affected by the requirements of the Directive and would generate opportunity costs.[971] The right of cancellation generates extra costs that eventually the consumer has to bear [972]

One concern with the proposed approach is, however, the costs of enforcement and compliance. As section 4.2.9 mentioned it is not always certain whether and to what degree specific rules apply, given the fact that the intangible nature of digital content may lead courts to reject or amend a rule, which was primarily intended to deal with tangible objects. A clear legislative framework indicating which (general or specific) rules apply could help reducing the costs of enforcement and compliance.

5.5 Prosumers

Section 3.3 addresses the problem of defining who falls within the category of the prosumer. The term is no longer solely a fusion of the word consumer and producer, but also of consumer and professional. The relevant question "When is a prosumer professional enough to qualify as such, implying that the prosumer may no longer invoke consumer protection herself, and must face consumer protection laws being invoked *against* him?"

Indeed the notion of the consumer is essential for the model of consumer protection with regard to digital content contracts also, as this forms the inner definition of who can rely on consumer protection rules. The notions of "consumer" and "professional" also vary among different European directives. In fact, the question is, whether these concepts should be widely or narrowly construed. The narrow notion defines consumers as natural persons acting for purposes outside their trade, business or professions, and professionals are defined as persons (legal or natural) acting for purposes related to their trade, business and profession. In the DCFR a wider concept of consumer and corresponding notion of business is opted for.[973]

In recent law and economics literature a new approach has been proposed. The notions of consumer and producer should correspond to the market failure addressed by consumer policy, namely information asymmetry. Focusing on being a natural or a legal person and on the purpose of the contract are not adequate proxies for singling out those situations where consumer protection is warranted. Of course, both elements need to be present in order for a party to be considered a consumer for the application of these regulations.[974] The personality of the parties, being natural or legal, is relevant for assessing whether a party should be considered a consumer. Only natural persons can be considered consumers. However, legal persons can also lack information with respect to the main

[970] Case C-336/03 EasyCar (UK) Ltd. V.Office of Fair Trading, [2005] ECR I -1947.
[971] See Opinion, paras 59-68 of EasyCar (UK) Ltd
[972] Unberath & Johnston 2007.
[973] Definitions are given in Annex 1, which is referred to in article I.–1:103 (1) of the DCFR.
[974] K.J. Cseres & H.A. Luth, 'The DCFR and consumer protection: an economic assessment', in: P. Larouche & F. Chirico (eds.,), *Economic Analysis of the DCFR; the work of the economic impact group within the CoPECL network of excellence*, Sellier: European Law Publishers 2010, p. 237-276.

subject matter of transactions and thus they may be eligible for the application of consumer protection legislation. Focusing on the personality of the parties as a proxy might lead to both so-called type I and type II errors, granting consumer protection where it might not be necessary to overcome information problems (type I error), and withholding consumer protection from parties that do suffer from information asymmetries in contract situations (type II errors).

It is argued that the notion of consumer should correspond to the market failure addressed by consumer policy, namely the information asymmetry between the parties to the contract and not the personality of the consumer as it is often the case now. Accordingly, the definition would focus on the issue whether a party – the seller, producer – has or is supposed to have information or knowledge with respect to the main subject matter of the contract, whereas his counterpart – the consumer – to the contract does not. Therefore, whenever a party, natural or legal, is acting outside the field of her professional competences with respect to the subject matter of the contract, whereas her counterpart is not, the first party should be protected by consumer protection rules. Lacking professional competences, skills and expertise *vis-à-vis* a contract partner implies being subject to information asymmetry. This reasoning would argue for a wide definition of consumer based on concerns related to information asymmetry. The definition of consumer and professional could thus be widened to contain all situations in which the seller has an information advantage over the consumer.

Aquaro suggests the following definition: Consumers could be defined as: *natural or legal persons operating in a field external to their professional competences, skills and knowledge with respect to the subject matter of the contracts*,[975] This definition also incorporates corporate bodies and companies who act outside their field of expertise and therefore possibly lack relevant information in comparison with their contracting partner. Information disadvantage is widely acknowledged as being one of the primary reasons for protecting consumers, next to lack of bargaining power. Such a definition can also capture situations of mixed contracts, when two professional parties conclude a contract, one of whom is acting outside the field of her profession, for example, a general practitioner buying a car to use both professionally, when visiting patients, and privately. Although the general practitioner is clearly a professional, she lacks information about the quality of the car and lacks skills to easily assess this quality, as she lacks information about other aspects of the contracts about which her counterpart, the professional car salesman, will possess information. When the general practitioner enters the car purchase contract she does not differ in her decision-making mechanism from consumers. Moreover, the information asymmetry that creates a market failure to the detriment of consumers would continue to exist even after the general practitioner would buy a car to use it *only* professionally. The same general practitioner could also buy a car with the sole purpose of using it to visit her patients. This does not alleviate the information asymmetry the doctor is subject to *vis-à-vis* a professional car salesman. Consumer protection rules as a means to overcome adverse selection should apply in this situation when taking an economic viewpoint. It should be noted that this approach departs from current EU law, but is supported in several Member States.

[975] G. Aquaro, 'Enhancing the Legal Protection of the European Consumer', *European Business Law Review* (14) 2003-3, p. 405-413.

5.6 Information obligations

5.6.1 Introduction

Section 4.2 addresses five relevant aspects of information obligations. First, choosing the right legal instrument in order to guarantee certain minimum standards related to digital contents services. Second, how general and sector-specific consumer rules on information disclosure can be centralized and which additional information requirements have to be formulated for digital content contracts. Third, the clarity and form of information provisions is addressed and fourth how to make information more accessible and effective for consumers' usage by way of regulating effective channels for consumers to compare, understand and choose relevant information (sections 4.2.5 and 4.2.6). The fifth point addresses the responsibility of business informing consumers effectively. In this section these five elements will be addressed in the following way. Issues one and two, choosing the right instrument and additional information relate to the content, issues three and four, clarity form comparison and choice relate to the form and the fifth element to the governance design of consumer information. After a general comment on the economic role of information provisions these specific issues, content form and governance design of information will be addressed.

In the assessment above, already relevant insights from both informational and behavioural economics are discussed. Therefore, only some complementary comments are made here to support the findings presented above.

It has been argued in the law and economics literature that when consumers are sufficiently informed about the possible market failures and they can protect themselves the role for government regulation decreases. Information about price, quality and other elements of a transaction allows consumers to enter efficient contracts and information disclosure encourages businesses to compete on price and quality.[976]

It has also been argued that the economic strength of information provisions is that they cure information asymmetries and assist consumers in their decision-making process, while leaving market processes and the private autonomy of market players untouched. A clear benefit of information provision as opposed to for instance mandatory quality standards is that it will not lead to a decrease in choice and it stimulates the individual responsibility of the consumer. The underlying costs and benefits should be made explicit when it is decided whether mandatory rules of substance or mere information disclosure suffice or even more interventionist substantive consumer rights should be awarded. Clearly, substantive mandatory rules restrict the variety of products and contractual conditions. Information rules even if they are mandatory, do not restrict variety and leave the substantive choice of contract contents to the parties.[977] Moreover, restricting freedom of contract is at the same time curbing a learning process, in which contracting parties discover the optimal form of contracting for their purposes on the basis of their individual preferences.

[976] Beales et al. 1981, p. 491-539.

[977] S. Grundmann, W. Kerber & S.Weatherhill (eds.), *Party autonomy and the role of information in the Internal Market*, Berlin: de Gruyter, 2001, p. 331-347.

5.6.2 The content of consumer information

Section 4.2.1 has acknowledged the regulatory flexibility and advantage of information disclosure as a regulatory tool; it has proposed to designate public authorities in each Member State who may specify a number of mandatory minimum rules defining the minimum standard of usability, safety and consumer friendliness of digital content contracts (see section 4.2.2). In the recommendations it has been put forward that the justification for choosing mandatory substantive rules lies in the complex interaction between consumer information and the reasonable expectations of consumers. It is argued that consumer information can shape the reasonable expectations of consumers, and thereby also the level of protection consumers can reasonably expect. This suggestion finds the following background in the economics literature. Traditionally economics relies on the rational choice theory. Rational choice theory is a coherent theory of human decision, which starts from the presumption that consumers have transitive preferences and seek to maximize the utility that they derive from those preferences. Choice is considered to be rational when it is deliberative and consistent and reasonably well-suited to the attainment of the goals of their choices.[978] Individuals are assumed to be the best judges of their own welfare, often referred to as consumer sovereignty. Consumers are sovereign in the sense of being able to define their needs concerning goods and services, to send a message of their needs to the market and to the producers and to satisfy those needs at a reasonable price and by choosing good quality. Consumer sovereignty is actually a "set of societal arrangements" that makes the economy respond to the messages consumers send out to other market participants about their needs.[979] Consumer sovereignty is regarded as the right and the power to decide about producers' success or failure through the exercise of consumers' freedom of choice. The market rules should guarantee that consumer preferences are the ultimate control of the process of production.[980] Consumers know their own preferences and needs the best, while regulators may not be able to protect them properly. Social norms such as reputation and repeat sales are regarded as an effective market policing tool while government protection would create substantial costs for producers and eventually for consumers.

The empirical findings of behavioural economics challenged these assumptions by explaining what people actually do, how consumers analyse, interpret and use product and service information. Behavioural economics found that consumer preferences fluctuate depending on the situation in which they have to make their decisions. Individuals lack the ability to build constant and reasoned preferences because they are influenced by the context and because they exhibit certain cognitive errors related to time or memory or simple miscalculation. Consumer behaviour is context dependent and the form, context, quantity and substance of information have an impact on the ability of individuals to assess that information. Consumers will only look for and process a certain amount of information.

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[978] R.B. Korobkin & T. S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics', *California. Law Review* (88) 2000/4, p. 1077.

[979] R. Lande, N. Averitt, 'Consumer sovereignty: a unified theory of antitrust and consumer protection law', 65 *Antitrust Law Journal*, 1997, p. 713.

[980] W. Kerber, V. Vanberg, 'Constitutional aspects of party autonomy and its limits – the perspective of constitutional economics', in: S. Grundman, W. Kerber, S. Weatherhill (eds.), *Party autonomy and the role of information in the Internal Market*, Berlin: de Gruyter, 2001, p. 54-55.

Consumers take mental shortcuts or rules of thumb to guide complex decisions about risks.[981] Consumers rely on partial information casually acquired just enough to make them comfortable with their own decision, a process called "satisficing".[982]

Consumers rely on heuristics instead of being guided by rationality and they fail to deal with information even in situations where the market does not have difficulty in producing the socially optimal amount of information or in distributing it efficiently.[983] Behavioural biases can take many forms such as misunderstanding small probabilities, pseudo-certainty, hyperbolic discounting, overconfidence, default bias, decision-conflict as a result of information overload. In case of inertia people are unable to process complex information and take irrational decisions. Or the oversupply of information may be counterproductive and may deteriorate market transparency, a situation referred to as "confusopoly".[984] Even when comparative information is available to consumers this inertia may be explained by computational difficulties, perceptions that search costs are high, or by possibly misplaced trust in consumers' present supplier.[985]

On the one hand it could be argued that consumers of digital content contracts also learn from their own purchases and align their expectations accordingly. The need for substantive regulation of information therefore might be less than public authorities of the Member States predict. It is difficult to see how such rules could shape the reasonable expectations of consumers and could in fact take the place of rather educating consumers properly about these services. Moreover, this would allow diverging levels of protection in the various Member States.

The libertarian approach has argued that consumers become aware of their biases and learn from their mistakes. Epstein argues that competition, learning by consumers and the education of sellers by consumers will drive out consumer errors.[986] People learn from their mistakes and once they are confronted with the detrimental consequences of their previous decision. People will improve their biased decision making and are then able to choose a more beneficial option when a similar situation arises. The learning effects increase the more standardised the product is (whether that product is a good, a service or digital content) and the more frequently the transactions are exercised. Kelman argues that learning effects will cause irrational behaviour to disappear over time; people should therefore be allowed to make their own mistakes. Accordingly, relying on consumer

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[981] R.A. Hillman & J.J. Rachlinski, 'Standard-form contracting in the electronic age', *New York University Law Review* 2002, 77, p. 429–495.

[982] The term "satisficing" was coined by J.G. March & H.A Simon, *Organizations*, New York: John Wiley & Sons, 1958, p. 140-141.

[983] T.S. Ulen, 'Information in the market economy – Cognitive errors and legal correctives', in: S. Grundman, W. Kerber & S. Weatherill (eds.), *Party autonomy and the role of information in the Internal Market*, Berlin: deGruyter, Berlin, 2001, p. 98-99, 105.

[984] See J.Gans, 'The Road to Confusopoly', 2005, available at http://www.accc.gov.au/content/index.phtml/itemId/658141/fromItemId/3765.Gans 2005 (last visited April 28, 2011).

[985] C. Wilson & C. Waddams, 'Irrationality in Consumers' Switching Decisions: when more firms may mean less benefit', CCP Working Paper 05/04, ESRC Centre for Competition Policy, University of East Anglia, 2005.

[986] R.A. Epstein, 'Behavioral Economics: Human Errors and Market Corrections', *University of Chicago Law Review* 2006*, 73*(1), p. 111-132*;* R.A. Epstein, 'Neoclassical Economics of Consumer Contracts, the Exchange', *Minnesota Law Review* 2008, 92(3), p. 803-835.

learning could be a very effective and efficient instrument to support consumer welfare.[987] However, whether consumers are in fact able to learn from their mistakes or can be educated to employ improved decision making strategies, depends on several factors such as feedback, spill-over effects, the cost of education and ability to improve the decision based upon the mistake. Also, the size of consequences might prevent learning and correcting mistakes.[988]

However, on the other hand, on the basis of the recent findings of behavioural economics it could be argued that public authorities could assist consumers in de-biasing their decision-making and steering them towards welfare enhancing options. Behavioural insights emphasize that in doing so, the way information is framed and presented to consumers is fundamental to make content accessible for consumers. More details will be discussed below about the form of information disclosure.

Furthermore, providing additional information about digital content services as proposed in section 4.2.3 relies on criteria such as good commercial practices and taking decisions on a reasonably informed basis. This provision correctly keeps the information obligation to what is necessary and complies with the principle of less is more.[989]

5.6.3 Comparison, choice, clarity and form of information

Comparison, choice, clarity and form of information touch upon the most important dilemma policy makers and legislators of consumer rules face today: how to provide consumers information in a meaningful way and what kind of communication channel make consumers perceive, understand and process relevant pieces of information? Furthermore, how to deal with situations where firms take advantage of consumers' welfare decreasing decisions. If consumer decision making is indeed constrained by biases and heuristics, the question is whether sellers respond strategically to these biases. Firms may intervene in various ways with the learning process of consumers by for example bundling products, creating artificial non-standardization or multidimensionality.[990]

Accordingly, the relevant question is whether and how to change regulatory tools to address the problem of the relatively limited capacity of the "consumer" mind to conceive and process complex information and the consequence that bounded rational consumers may pay higher prices, buy inappropriate products or fail to make certain purchases. They systematically fail to deal with information even in situations where the market provides the socially optimal amount of information or it distributes it efficiently.

While informational economics encouraged more and better information to remedy market failures on the demand side, such as mandatory disclosure or third-party

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[987] M. Kelman, 'Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler', *Stanford Law Review*, 1998, 50(5), p. 1577-1592.

[988] H.A. Luth, *Behavioural economics in consumer policy, The Economic Analysis of Standard Terms in Consumer Contracts Revisited* , Intersentia, 2010, p. 103-105.

[989] The concept that more information is not always better, but leads to suboptimal decision making because consumers cannot cope with information overlaod has been one of central ideas of Simon and behavioural economics. Cf. A.H. Simon, Theories of decions-making in economics and behavioural science (19590 49 *American Economic Review* 253-283.

[990] O. Bar-Gill, 'Informing Consumers about Themselves', 2007, *SSRN eLibrary; New York University Law and Economics Working Papers, Paper 111*, available at: SSRN.com/paper=1056381.

certification, the new insights from behavioural economics showed that more disclosure may not facilitate consumers making welfare enhancing choices.

However, section 4.2 also addresses the significant question what should be the contribution of the empirical findings in behavioural economics to consumer policy design. The question is whether cognitive biases impede competition and prevent market forces to perform efficiently even when consumers are sub-optimally or completely uninformed. The answer to this question significantly influences the need to introduce market correcting regulatory measures.[991] On the one hand, behavioural economics suggests remedies aimed at framing effects and thus steer consumers' choices towards welfare enhancing options.[992] Framing biases call the attention to the specific ways objective information is provided. On the other, the policy consequence of the decision-making errors identified by behavioural economics would be to expand the scope of (paternalistic) regulation.[993] However, evidence is not yet conclusive with regard its impact in real world consumer markets. The costs and benefits of such protective regulation in the long-run do not justify more government intervention but rather reaffirm the findings of neoclassical economics and rational choice theory. While to the extent that the cognitive errors identified by behavioural research lead people not to behave in their own best interests, paternalism may prove useful. But, to the extent that paternalism prevents people from behaving in their own best interests, paternalism may prove costly.[994] The dilemma is how to help bounded rational consumers to avoid making costly mistakes, while at the same time causing little or no harm in terms of minimizing costs to rational people.

Consequently, more cautious regulatory approaches had been considered.[995] New regulatory approaches have been developed that leave free choice uninhibited, and that nudges[996] individual consumers into welfare enhancing decisions without imposing a particular choice on them. When biases, heuristics and non-rational influences on behaviour render individual consumer decision making suboptimal, these light handed intervention strategies allegedly can enhance decision-making processes. Individuals can be debiased, nudged into rational decisions by for instance providing less and better information.

Choice strongly depends on the context, the alternatives that are provided and the presentation of the various options. These factors represent so-called "choice architectures" framing consumer decision making.[997]

Behavioural economics suggests remedies aimed at framing effects and thus guiding consumers towards certain options through framing the way information is provided. [998]

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[991] F. Gomez , The unfair commercial practices Directive: a law and economics perspective, *European Review of Contract Law* 2006/1.

[992] Sunstein & Thaler 2003, p. 1159.

[993] C. Jolls et al., 'A Behavioral Approach to Law and Economics', *Stanford Law Review* (50) 1998, p. 1471, 1545; T.S. Ulen, 'Rational choice theory in law and economics', in: B. Bouckaert. & G. De Geest (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics,* Cheltenham: Edward Elgar, 2000, p.790-794; R.H. Thaler, 'Toward a Positive Theory of Consumer Choice', *Journal of Economic Behavior and Organization*, 1980/1, p. 39.

[994] C. Camerer et al. 2003, p. 1211–1212.

[995] J.D. Wright, 'Behavioural law and economics, paternalism, and consumer contracts: an empirical perspective', *NYU Journal of Law &Liberty* 2007 (2) issue 3, p. 470-511.

[996] 'Nudges' is an acronym which stands for six subtle methods for improving choice, devising a good choice architecture: iNcentives, Understanding mappings, Defaults, Giving feedback, Expecting errors, and Structuring complex choices, see Thaler & Sunstein 2008.

[997] Thaler & Sunstein 2008; Luth 2010.

Remedies should intervene without restricting the choice of rational consumers and without causing cognitive hazard, i.e. denying consumers opportunities to develop market skills. State (paternalistic) regulations may lessen consumers' incentive to engage in learning and developing rational behaviour or even intensify irrational behaviour by introducing moral hazard.

The idea behind debiasing consumers' decision-making is to channel their decisions to socially beneficial options in the following way: "Altering the environment in which decision-making takes place in such a way as to induce a change in the intuition that consumers bring to bear on the situation, thereby steering/nudging them towards greater rationality."[999] For example, if policy makers are concerned about obesity certain they could make student cafeterias comply with certain choice architecture, which sets the arrangement of food in such a way that students would be steered to buy rather fruit and healthy snacks than calorie rich cream pies.[1000] Such a choice architecture leaves the full set of options available, while steering customers to health/wealth enhancing options. Debiasing thus preserves people's opportunity to make choices because consumers are not compelled to make, or desist from, particular choices. Consumers remain free to choose from the full range of options. Moreover, debiasing has little or no impact on rational consumers, who continue in exerting a discipline on firms.[1001]

Debiasing through the law could indeed take place by improving consumers' ability to compare information (section 4.2.5.). Product comparison modalities like reviews on the Internet can considerably decrease information search costs enabling increased competition and the benefits from that competition may flow to consumers.[1002]

Further, certification systems, trustmarks or codes of conduct[1003] could provide advantages over direct government regulation as well as models of standard terms that enhance welfare for the majority of consumers without protecting rational active consumers. Default rules, and as such model rules, tend to be sticky and have an expressive effect.[1004] Empirical research indicates that individuals stick to the default rule provided. The default rule could be expressive in that it is interpreted to be the fairest allocation of

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[998] OECD Roundtable discussion on private remedies, p. 18.

[999] Harker & Mehta 2011.

[1000] Sunstein's and Thaler's motivating illustration is a well-read campus cafeteria manager, a choice architect, who knows that different architectures (and not merely price) affect how people choose. If, for example, she replaces cake with fruit in the impulse basket next to the cash register, people buy more fruit and less cake. Cf. Thaler & Sunstein 2008.

[1001] C. Jolls & C.R. Sunstein, 'Debiasing through Law',University of Chicago Law & Economics, 2005, Olin Working Paper No. 225; Harvard Law and Economics Discussion Paper No. 495, available at SSRN: http://ssrn.com/abstract=590929 or doi:10.2139/ssrn.590929.

[1002] However, information comparisons may at the same time facilitate collusion among firms.Whether information exchange among firms allows welfare improvements through efficiency gains or produces welfare losses due to anti-competitive coordination is a crucial topic for both economic theory and antitrust policy. There could however be valid efficiency defences for the exchange of information under certain circumstances. Because of these, all instances of information exchange cannot unambiguously be classified as conduct facilitating collusion. Such cases therefore in international jurisdictions have typically been scrutinised through a rule of reason framework.

[1003] ACCC, 2005, Australian Government, 1998a, Australian Government, 1998b, and the UK OFT's criteria for approving consumer codes at www.oft.gov.uk/advice_and_resources/small_businesses/codes/ See further, OECD, Consumer Policy Toolkit, p.90.

[1004] For a discussion of "stickiness" in several contexts, see Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, *Yale Law Yournal* (100) 1990, p. 615.

risk simply because it is drafted in the standard term model form. A default risk allocation in the model standard form could provide the consumer with an anchor or reference point, from which she is more reluctant to deviate to the risk division she would have had in mind absent the default.

5.7 Formation of contracts

The formation of contracts touches upon the transparency, comprehensibility, the availability, the validity of standard contract terms and the confirmation of the existence of contract by business. There is vast amount of law and economics literature on standard form contracts[1005] and the debate about the optimal judicial control of contract terms is far from conclusive. The early law and economics literature first concentrated on the unequal bargaining power and the inability of consumers to bargain over the terms but has concluded that sellers with market power rarely choose this technique to exploit consumers.[1006]

It has been argued that sellers prefer to extract their bargaining advantages by increasing the price rather than reducing the value of the contract to the consumers.[1007] Therefore, even a monopoly would allocate the rights and risks in the contract efficiently. Accordingly, the emphasis has shifted to the information problem and the problem of signing without reading and without understanding the implication of each term. Goldberg argued that since contract terms are often unnoticeable, sellers are encouraged to offer low quality–low price contracts.[1008] What more, cognitive deficiencies prevent consumers from fully internalizing the costs of many terms, even if they know and understand these terms.[1009]

In the electronic contracting environment the new concern was that consumers are exploited through their cognitive failures to understand and accept shrouded contract terms

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[1005] The most cited early writings discussing form contracts are K.N. Llewellyn, 'Book Review', *Harvard Law Review* 1939, 52, p. 700; F. Kessler, 'Contracts of Adhesion – Some Thoughts about Freedom of Contract', *Columbia Law Review* 1943, 43, p. 629; V.P. Goldberg, 'Institutional change and the quasi-invisible hand', *Journal of Law and Economics* 1974, 17(2), p. 461–492; R.A. Hillman & J.J. Rachlinski, 'Standard-form contracting in the electronic age', *New York University Law Review* 2002, 77, p. 429-495; L.A. Kornhauser, 'Unconscionability in standard forms', *California Law Review* 1976, 64, p. 1151–1183; R. Korobkin, 'Bounded rationality, standard form contracts, and unconscionability', *University of Chicago Law Review* 2003, 70, p. 1203–1295, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=367172 (last visited April 28, 2011); M.J. Trebilcock & D.N. Dewees, 'Judicial control of standard form contract', in: P. Burrows & C.G. Veljanovski (Eds.), *The economic approach to law,* London: Butterworth, 1981, p. 93-119; G. De Geest, 'The signing-without-reading problem: An analysis of the European directive on unfair contract terms', in: H.-B. Schäfer & H.-J. Lwowski (Eds.), *Konsequenzen wirstschaftsrechtlicher Normen*, 2002, p. 213; R.B. Ahdieh, 'The strategy of boilerplate', Emory Law and Economics Research Paper 2005, No. 05–22; D. Gilo & A. Porat, 'The hidden roles of boilerplate and standard form contracts: Strategic imposition of transaction costs, segmentation of consumers and anticompetitive effects', *Michigan Law Review* 2006, 104, p. 983–1031; O.Gazal-Ayal, 'Economic analysis of standard form contracts: the monopoly case', *European Journal of Law and Economics* 2007, 24, p. 119–136.

[1006] R.J. Mann & T. Siebeneicher, 'Just One Click: The Reality of Internet Retail Contracting',University of Texas Law, Law and Econ Research Paper No. 104, 2007, available at SSRN: http://ssrn.com/abstract=988788.

[1007] R.A. Posner, *Economic analysis of law*, Boston: Little, Brown and Company, 1992, 4th edition.

[1008] Goldberg 1974.

[1009] Hillman & Rachlinski (2002); Korobkin (2003).

in ”browse-wrap” and “click-wrap” (or “shrink-wrap”) contracts.. It has been feared that the new ways in which electronic standard form contracts ate presented undermine the notion of assent.

Rolling contracts, where contract terms can only be viewed after payment are subject to extensive debates. Some legal academics and judges believe that rolling contracts facilitate efficient transactions and simply reflect the technological evolution of mass commerce. Most notably, in recent US court case, *ProCD v. Zeidenberg* (86 F.3d 1447) Judge Easterbrook held that a standard-form contract that was shrink-wrapped inside a software box was enforceable under the US Uniform Commercial Code. He commented on the potential efficiency losses of not enforcing software shrink-wrap licenses. He emphasized that failure to enforce the post-payment terms would subject manufacturers to broad implied warranty terms and consequential damages. Such an arrangement would harm consumers by raising prices. He concluded that “terms of use are no less part of ‘the product’ than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market” (86 F.3d 1453).

Marotta-Wurglers’s empirical research supports this view. She shows that there is no difference in content between terms in software license agreements whether they are the terms in the contracts that were available to read prior to the sale-and-payment or that are ‘shrink-wrapped’ and are not available until after the sale. Marotta-Wurgler demonstrates that when the terms come after the payment they are not any worse, and in fact they might be slightly better.[1010]

Marotta-Wurgler’s other empirical research proves that increasing contract accessibility does *not* result in a meaningful increase in readership. Increasing contract accessibility by providing it one mouse click closer to the shopper increases contract readership on the order of 0.1 per cent. In other words, it adds only one additional reader per thousand shoppers. Even *mandating* assent does not help much. When terms are presented in a click-wrap that requires consumers to click “I agree” next to the terms, readership (typically defined as those that access the end-user licence agreements page for at least one second) remains less than one in two hundred.[1011] She also found that click-wraps are read only 0.36 percent more often than browse-wraps, and the overall average rate of readership of EULAs is on the order of 0.1 percent to 1 percent.[1012]

As policy options Marotta-Wurgler suggests that regulators should focus on reducing contract length, simplifying and standardizing language, and developing ratings that would convey the essence of terms with minimal effort. Policy solutions could furthermore, increase the role of reputation and litigation as mechanisms to curb seller abuse, such as facilitating contract rating systems and eliminating class action waivers.

[1010] F. Marotta-Wurgler, ‘Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements’, 38 *Journal of Legal Studies* 2009, p. 309-343.

[1011] Marotta-Wurgler uses clickstream data on the visits of 47,399 households to a set of online software retailers over a period of one month. She examines whether potential buyers of software are more likely to voluntarily access End User License Agreements (EULAs) when they are made more accessible, as measured by the number of extra mouse clicks required to find them. Cf. F. Marotta-Wurgler, ‘Does Disclosure Matter?’, 2010, NYU Law and Economics Research Paper No. 10-54, available at SSRN: http://ssrn.com/abstract=1713860.

[1012] F. Marotta-Wurgler, ‘Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts”’, *The University of Chicago Law Review* 2011, 78, p. 165.

Marotta -Wurgler argues that these changes might induce consumers to become informed and comparison shop for products with more favourable terms.[1013]
Simplifying and standardizing the presentation format of contracts would be helpful as well as standardised label summarizing the key provisions on or near the product description page—in a manner similar to food nutrition labels. She further recommends standardised letter grades for contracts that have been approved by a credible and independent third party.[1014]

This is also in line with the basic tenet that Ben-Shahar puts forward: disclosure should be restricted to minimal information that is relevant and essential. In other words this means, information devices that aggregate basic data about contracts and place minimal burden on consumers.[1015] For example, rating of contract terms and labelling of contract terms. Rating scores could also aggregate some relevant aspects of contract terms.[1016] Similarly, a labelling regime could develop easily readable formats of the most salient contract terms summarized and uniformly presented.[1017]

The empirical results confirm that click-wrap and browse-wrap licenses are effective ways of contracting. While the availability of terms in advance or after the transaction, in browse-wrap or click-wrap does not change the behaviour of those consumers who do not read standard terms and even more importantly does not improve the content of the transaction,[1018] they in fact the new forms of electronic standard contract terms, not worse but in fact enhancing consumers' abilities to investigate the contract terms and to protect themselves from exploitation.[1019]

5.8. Right of withdrawal

Section 4.4 suggests to regulate the right of withdrawal in a uniform manner. The period of withdrawal is provided for all kinds of contracts and it is fixed in fourteen calendar days. The exceptions do not really deal with narrower or broader periods (except for the different duration of the cooling-off period for the sale of goods and the supply of services section 4.4.4) even though in certain contracts that would be justified as consumers might need longer or shorter periods to reflect on their decision.

Cooling-off periods are legislated to cure consumers' irrational decision-making, situational monopolies and information asymmetries in an environment of incomplete information and high pressure marketing. Consumers can make sub-optimal decisions when they face temporary market power. Cooling-off periods provide consumers time for reflection, to process all the relevant information, search for additional information or advice and establish whether the agreement indeed reflects their individual preferences.

Cooling-off periods can serve as an effective remedy in case of asymmetric information related to credence or experience goods such as digital content contracts.

[1013] Marotta-Wurgler 2011.
[1014] Marotta-Wurgler 2011.
[1015] This is also in line with what Grundmann proposed: making only the most material information available, information that would improve consumers decisions and have it provided by the cheapest information supplier.
[1016] Ben-Shahar 2009, p. 24-25.
[1017] Ben-Shahar 2009, p. 25-26.
[1018] Ben-Shahar 2009, p. 5-6, 19-20.
[1019] Hillman & Rachlinski 2002.

Businesses might not have an incentive to reveal relevant information about the quality of their goods either because it is costly or because it does not correspond to the price. Cooling-off periods can then ensure that businesses set their prices in correspondence with the real quality because when a consumer experiences the price of the good not to be in correspondence with the final quality, he can make use of her right to withdraw. The producer as a result will be induced to set his price in correspondence with the real quality.

Cooling-off periods may also address consumers' cognitive constraints in transactions. In this case cooling-off periods provide consumers extra time to reconsider their short term preferences and rebalance with their long-term preferences. Cooling-off periods serve thus as the costs of "regret contingency" (Goetz and Scott, 1989). Consumers can make sub-optimal decisions when they face temporary market power in the case of high pressure marketing.

Accordingly, the costs of cooling-off provisions should be considered. Consumers may engage in opportunistic behaviour by using the product during the cooling-off period and then returning it back to the seller claiming bad quality. Cooling-off periods delay transactions, create uncertainty and thus increase the transaction costs. Such a mandatory provision will raise prices of the products and services at stake and it can be realistically assumed that such costs will be passed on to consumers.

Moreover, granting withdrawal rights reduces the need for information disclosure requirements. When consumers as the cheapest information costs providers can obtain the relevant information themselves during the cooling-off period businesses should not be required to provide the same information. These extra information provisions only increase the costs of the transaction and thus the costs for consumers. This is, for example, the case in the EU Doorstep Selling Directive where businesses have to provide the information prior to and after the conclusion of the contract.

A further negative side effect of a cooling-off period may be that the contract goods can devaluate when the consumer has the possibility to directly possess them. This is a relevant issue for digital content contracts as they do not even weigh up to the standard case of using a car for a couple of days then cancelling the contract after those days, the seller is not able to sell the car again as 'brand new'. This could be an argument not to award a right of withdrawal, or to exclude the right of withdrawal once performance by the trader has taken place.

Further associated costs are the costs of proceedings, which have already been started, costs related to the re-wrapping of goods, a decrease in value after return and insurance premiums.

The law and economics literature argues that withdrawal rights should be granted when they can counteract the performance of inefficient consumer contracts.[1020] Due to irrationality or impairment of will formation consumers may enter into contracts that are more costly than their benefits. However, the cost-benefit analysis of withdrawal rights in fact has to take account of the learning effects that exist when consumer enter inefficient contracts. [1021]

Accordingly, right of withdrawal can be an example of a cost reluctant consumer protection that may undermine the individual responsibility of the consumer and may encourage moral hazard, implying that consumers take advantage of certain obligations

[1020] H. Eidenmüller, 'Why Withdrawal Rights?', *European Review of Contract Law* 2011, 7 , p. 1-24.
[1021] Eidenmüller 2011.

imposed on firms and professionals. When cooling-off periods are too long they invite moral hazard and raise transaction costs as a result of delay and uncertainty of transactions. Van den Bergh and Rekaiti argue that in certain cases the prescribed period should be longer where the economic distortion cannot be remedied within that period in case of timesharing for example. They also suggest the introduction of monetary compensation, a rental payment in order to avoid consumers abusing the right of withdrawal. This implies that during the cooling-off period the consumer will have to pay a kind of a rental payment proportional to the time he possessed and used the goods, as well as the costs incurred by the seller from that use. Passing those costs on consumers will deter them from behaving opportunistically, because they know their behaviour will not be without costs.[1022]

A compulsory cooling-off period can have further adverse effects. For example, a cooling-off period with severe sanctions on non-compliance and the high costs associated with it have the effect that businesses exit the market, which in turn lead to a reduction of supply and higher prices. Thus, the optimal period of withdrawal strikes a balance between the information asymmetry the consumer faces and the opportunity for moral hazard.

In certain cases the prescribed period should be longer where the economic distortion cannot be remedied within that period, which may be the case for timesharing. In order to avoid consumers abusing the right of withdrawal monetary compensation, i.e. a rental payment could also be introduced.[1023]

The number of contracts negotiated away from business premises is growing and thus this right might become a standard right. It is especially important to think about the question what the consumer can in fact do during the cooling-off period: collect more information? What can consumers do in let's say in an extra 7 days they could not do in the first 7 days? Moreover, consumer preferences might be distorted by exogenous and/or endogenous factor. Eidenmüller argues that in the latter case a mandatory withdrawal right with regard to timesharing, credit contracts and life insurance contracts is justified. With regard to doorstep selling endogenously distorted preferences justify mandatory withdrawal rights.[1024]

Law and economics is critical to piling up of various information remedies such as cooling-off periods and information disclosure for the same contract. If the purpose of the cooling-off period is to offer consumers some time for reflection, one may wonder why business would also be burdened by all the disclosure rules? Where the cooling-off period serves to provide the consumer with some kind of experience with the product in order to make a final decision whether to buy or not, consumers are invited to behave opportunistically. The economic analysis suggests that making consumers conscious of the price of this added protection can make the cooling-off period indeed efficient and effective to reach the aim it has been developed for. Eidenmüller argues that standardizing the instructions on the existence of withdrawal rights and lowering the costs of these rights can increase their effectiveness.[1025]

Thus, the optimal period of withdrawal strikes a balance between the information asymmetry the consumer faces and the opportunity for moral hazard.

[1022] P. Rekaiti & R.J. Van den Bergh, Cooling-off periods in the consumers laws of the EC Member States. A comparative law and economics approach, *Journal of Consumer Policy* (4) 2000/23, p. 371–407.
[1023] Rekaiti & Van den Bergh 2000.
[1024] Eidenmüller 2011.
[1025] Eidenmüller 2011.

In sum, a fourteen day cooling-off period for digital content contracts may not prove beneficial for consumers. The full or part of the costs of cooling-off periods will be passed on to consumers. Therefore, it is essential to weigh the costs and the benefits of a cooling-off period and to compare them with the costs and benefits of other remedies in order to ensure that consumers are protected by the most efficient and for them most beneficial remedy.

5.9 Unfair contract terms

Standard contract terms have been assessed above in section 5.7. In this section some additional comments are made with regard to unfair contract terms.

Standard form contracts are the most problematic in consumer markets for mass-marketed goods, where sellers who act as repeat player can construct self-serving contracts terms, but buyers who occasionally enter transactions cannot evaluate the value of such terms.[1026] Standard contract terms are typical cases of asymmetrical information between sellers and consumers, and can lead to adverse selection resulting in a decrease in the quality of contract terms. Asymmetrical information might be overcome by simple market mechanisms; however when market solutions do not work, intervention through judicial control is justified. While competition law can control standard terms in cases of market power when prices are set above competitive levels, contract and consumer law interventions tackle information deficits related to the content and meaning of pre-formulated terms and the relative costs of reducing or insuring contractual risk. Katz argued that there was insufficient evidence to support the explanation of market power as a justification for controlling standard terms. Instead he identified the presence of asymmetric information as the main ground for government intervention.[1027]

Standard contract terms have traditionally been assessed under a legal concept of fairness. However, unequal bargaining power, take-it-or-leave-it nature and standardization of contracts have given rise to scepticism regarding the fairness of standard terms. In neoclassical economics competition between companies with respect to their standard terms should ensure a "fair" (welfare-enhancing) contract for all consumers. If consumers disagree with some terms, they could shop for better terms.[1028] As profit-maximizing businesses do not want to lose consumers, they will adapt their standard terms to correspond to the preferences of the majority of their customers. Consumers are considered to be in the best position to maximize their own welfare and to make conscious choice when they enter into contracts. However, the early literature assumed that standard contracts are linked to market failure in the form of inequality of bargaining power between the seller and the buyer. Accordingly, standard contracts were regarded to fail the concept

[1026] C.P. Gillette, 'Standard Form Contracts', in: G. De Geest (ed.), *Contract Law and Economics* (Encyclopedia of Law and Economics), 2011, Edward Elgar Publishing, Second Edition.
[1027] A.W. Katz, 'Standard Form Contracts', in: P. Newman (ed), *New Palgrave Dictionary of Economics and the Law,* Houndmills, UK: Palgrave Macmillan, 1998, p. 502-505.
[1028] Standard terms allocate risks between consumers and businesses. The "best" allocations of risks are unlikely to vary between businesses, and the standard forms used by different firms allocating these risks will be comparable. Cf. Priest 1981, p. 1300.

of rational and conscious consumer choices that underlie the neoclassical basis for enforcement of contracts.[1029]

Information economics showed that standard terms form a clear case for government intervention on the basis of information asymmetry and adverse selection. Without judicial control, the probability of reaching this equilibrium price is low. In specifying the regulatory reason for judicial clause control, it is not superior market power, but rather entrenched information asymmetry which leads to detrimental deviations from the equilibrium price.[1030]

Protecting weaker parties from exploitation by market participants with market power does not explain judicial control for standard terms. If customers are thoroughly informed about the allocation of risks even a monopolist will not pass on such risk to the customer which he can bear at a lower cost. Passing on risks against the cheapest cost avoider principle will result in a decrease of demand and a reduction of the producer surplus. Judicial clause control is to avoid information asymmetries between the parties. The party who receives standard terms will typically not be willing to incur the information cost of reviewing them, in view of the limited gain expected from that operation. This is because the cost of acquiring information regarding the contents of standard terms routinely exceeds the anticipated gain. It is therefore rational to ignore the clause contents. As a consequence of this rational ignorance, competition among issuers of the best contract terms will fail. The users of standard terms will rather engage in a competition for the most unfair terms, which has the effect of a race to the bottom.[1031]

Information asymmetries can exist with regard to the possible reasons for, likelihood of and the extent and avoidance costs of a particular damage, as well as to the optimal contractual risk allocation. Contracts are concluded in spite of informational deficits due to the inability of consumers to process the information contained in the contract terms. Behavioural economics added further explanations to the theory of standard contracts. It argued that information asymmetry might be abused by traders taking an advantage of consumers being subject to certain biases and suggested that consumers of proposed contracts undervalue adverse events. Consumers will typically grasp only a limited number of contract attributes and that the majority focuses on the same attributes. This gives possibility for the users of standard terms to opportunistically introduce ancillary terms on less salient attributes.[1032] Sellers may hide or shroud onerous terms in the part of contract terms that are not approved and sellers could abuse the system of preapproval.[1033]

[1029] T. D. Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction', 96 *Harvard Law Review* 1983, p. 1174, 1187.

[1030] The legal-political starting point with regard to standard terms ought to be the equilibrium price, which reflects a distribution of contractual risks between the producer and the customer that minimizes the sum total of all costs of risk. This implies that the equilibrium price should include all contractual risks for which the producer is the cheapest cost avoider or cheapest risk taker, whereas all other risks should be borne by the costumer and consequently not be part of the equilibrium price.

[1031] H-B. Schäfer, P.C. Leyens, 'Judicial Control of Standard Terms and European Private Law', in: P. Larouche, F. Chirico (eds.), *Economic Analysis of the DCFR: The Work of the Economic Impact Group within the CoPECL Network of Excellence*, Munich: Sellier, 2009, p. 99, p.105-106, 117.

[1032] Korobkin 2003, p. 1203.

[1033] X. Gabaix & D. Laibson, 'Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets', *Quarterly Journal of Economics* 2006, 121 (2), p. 505-540.

Recent empirical research tested the effects of one-sided clauses.[1034] As mentioned above in section Marotta-Wurgler tested software license agreements and showed that licenses revealed a bias in favour of the software company that drafted the contract relative to the default terms in contract law, that larger and younger firms offer more one-sided terms, but firms offered similar terms to both business buyers and consumers.[1035] She found little evidence for the argument that firms in concentrated software markets or with market power impose one-sided terms on consumers relative to the terms offered by firms in less concentrated software markets or with low market shares.[1036]

Leff suggested that standard contract terms could be evaluated *ex ante* by administrative agencies[1037] instead of being invalidated ex post by courts. These alternative policy options could include a certificate for a "fair set" of standard terms, a grading scale for the fairness of standard terms, or stimulating the drafting of model standard forms as a result of negotiations between business and consumer interest groups.[1038] These model sets can be adjusted to the specific features of different business sectors. A welfare-enhancing model of standard terms might provide an efficient way of stimulating the inclusion of such terms into consumer contracts. The availability of options is not diminished, allowing consumers to opt for other terms if they feel confident with deviating from default and thereby increasing their welfare. Small- and medium-sized enterprises would arguably be ready to free ride on the drafting efforts by other parties and also adopt the model form, ensuring a fair set of terms throughout the business sector.[1039]

Regulating contract terms through black and grey clauses, a list of unfair terms can provide guidelines/reference points to judiciary which terms are onerous to the extent that a consumer would be harmed by agreeing to them. As this provides clarity to all parties, inclusion of such a list would provide legal and economic certainty, decrease costs and increase welfare. A black list should include terms that are to the outright detriment of consumers. However, grey listed terms could, in exceptional circumstances, be agreed upon by both parties. Hence, a grey list deserves to be treated with caution. As the professional has drafted the term, he is most likely to understand and to comment upon the admissibility of this particular term in the contract and the extraordinary situation that gave rise to this term. The burden of proof should therefore lie with the professional. A grey list does not diminish the availability of options, but it hinders the inclusion of certain terms.

However, the essentials of the contract, namely price and main subject matter, as well as individually negotiated terms are by definition salient to the consumer, and as such

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[1034] O. Ben-Shahar & J. J. White (2004), 'Boilerplate and Economic Power in Auto Manufacturing Contracts', *Michigan Law Review* 2004, 104, 953-982.; F. Marotta-Wurgler, 'What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements', *Journal of Empirical Legal Studies* 2007, 4, p. 677-713.

[1035] Marotta-Wurgler 2007.

[1036] F. Marotta-Wurgler, 'Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements', *Journal of Empirical LegalStudies* 2008, 5, p. 447-475.

[1037] A.A. Leff, 'Contract as Thing', *American University Law Review*, 1970, 19, p. 131.

[1038] See A. Becher, '"Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law', 2007, available at SSRN: http://ssrn.com/abstract=1015736, for a discussion on several options, like a certificate for fair standard terms. In the Netherlands, the Social Economic Council (SER) hosts negotiations between business and consumer interest groups to draft model standard forms for consumer contracts.

[1039] H. Luth, 'Extending the Scope of the Unfair Terms Discipline in Consumer Contracts - An Economic and Behavioural Perspective', RILE Working Paper No. 2008/01. See also Luth 2010.

part of the consumer's decision making process. With respect to these product attributes, no information asymmetry exists between the consumer and the seller. The consumer would not enter into the transaction if these terms would be disadvantageous. In the absence of misrepresentation and of market failure the consumer is able to base her choice on available information... Some contract terms could very well be knowingly and willingly accepted by the consumer in negotiations even if the terms grant a less favourable position to the consumer than default terms would when this is balanced by a decrease in price. For example, a shorter warranty period could be agreed upon in exchange for a lower price.

What behavioural economics adds to this view is that individuals suffer from several biases and heuristics when assessing risks. Consumers might willingly waive a certain right for a price premium, whereas the company with her expertise and available data knows that the waived term is likely to be more beneficial to the consumer than she expects. Black and grey lists as well as the fairness test can only bar the most onerous terms from being drafted into consumer contracts. A term that is not particularly onerous can decrease consumer welfare. Furthermore, not all standard terms that allocate risks are covered in the black and grey lists, nor are they easily assessed using the fairness test. Whether these cognitive errors in decision making warrant further mandatory provision of terms and at the same time reducing the consumers' options remains an open question until further evidence is found. Other policy options could be targeted in more efficient ways of dealing with consumer biases.

5.10 Bundling

Similarly the suggested approach with regard to qualify the bundling of contract terms (if they tie the purchase of digital content to the accompanying purchase of another product or another service section 4.5.3) as unfair forms a relevant issue with regard to the question how firms can take advantage of consumers' cognitive constraints and may exploit their information advantage. In fact this issue also forms a concern in competition law control. Tying arrangements to some extent can be assessed and controlled by the rules on abuse of a dominant position under a similar qualification of unfair trading conditions.[1040]

The potential role of bundling as a strategic response to consumers' imperfect rationality has already been recognised in two important early articles by Thaler and Craswell. Thaler's seminal article shows how mental accounting (by consumers), and specifically the framing and coding of multiple gains and losses, can lead sellers to adopt a bundling strategy.[1041] Craswell, working at the intersection of competition law and

[1040] Given that behavioural economics suggests that consumers are influenced by "defaults" to a greater extent than traditional (rational market) economics would predict, then the negative effects of the bundling on consumer welfare would be greater than that which traditional economics would suggest. Tying and bundling practices, carried out by a dominant firm, can be anticompetitive if they significantly raise the cost to competitors of competing, and thereby foreclose the market. A key piece of evidence in such a foreclosure story is whether tying creates a significant switching cost for customers in switching to rival products. Behavioural biases can clearly be relevant here. Cf. OFT, 'What does Behavioural Economics mean for Competition Policy?', 2010; N. Petit & N. Neyrinck, 'Behavioral Economics and Abuse of Dominance – A Fresh Look at the Article 102 TFEU Case-Law', 2010, available at SSRN: http://ssrn.com/abstract=1641431.

[1041] R. Thaler, 'Mental Accounting and Consumer Choice', 4 Marketing Sci 1985, p. 208–209.

consumer protection law, identifies the viability of misperception-driven bundling in competitive markets.[1042]

More recently, Bar-Gill studies firms' bundling practices, the bundling of two (or more) products as a strategic response to consumer misperception. In contrast to the bundling and tying in the competition law literature - strategies used by a seller with market power in market A trying to leverage its market power into market B - bundling in response to consumer misperception may occur in intensely competitive markets. His analysis demonstrates that such competitive bundling can be either welfare enhancing or welfare reducing. When bundling exacerbates the adverse effects of consumer misperception, regulation designed to discourage bundling may be desirable. Bar-Gill suggests several "unbundling policies" that can protect consumers and increase welfare in markets where bundling is undesirable.[1043]

As in non-competitive markets the competition law prohibition on tying serves as a direct unbundling policy, one possibility Bar-Gill considers is to extend this prohibition against bundling to competitive markets. In at least two contexts such an extension may have already occurred. A second, less blunt unbundling policy is to promote competition on each component of the bundled product. He also suggests discouraging the use of bundling tactics by reducing switching costs as well as disclosure regulation. Regulation requiring sellers to provide "total cost of ownership" information may effectively prevent bundling.[1044] Bar-Gill cautions that the difficulty in identifying the motivation for a specific bundle, coupled with the difficulty in evaluating the welfare implications of bundling even when its underlying motivation is revealed suggests regulatory caution. For this reason the most attractive unbundling policies are those that facilitate the smooth operation of markets – through reduced switching costs and the provision of information – rather than directly prohibit bundling or attempt to fix the price of the bundle or its components. He notes that this would be a regulatory tool complying with the underlying market philosophy of asymmetric paternalism.

Thaler and Sunstein propose a RECAP (Record, Evaluate and Compare Alternative Prices) system to make the necessary information more transparent. They suggest this as a measure to benefit consumers.[1045]

5.11 Minors

Section 4.10 points to the problem of protecting vulnerable consumers in the digital environment and lays the emphasis on the fact that regulation across the Member States is far from uniform. While the recommendations address the legal problem of protecting minors when they conclude digital content contracts, it in fact points to the need for harmonising the diverging national rules. The recommendations lay the emphasis on the regulations on minors but include also other groups of vulnerable consumers such as seniors and mentally handicapped. It has been argued that if the legal concept fails to differentiate between categories of consumers or to analyse the extent of their vulnerability, this may lead to both over and under protection as the law has to work with a model of the

[1042] R. Craswell, 'Tying Requirements in Competitive Markets: The Consumer Protection Issues', 62 *BU Law Review* 1982, p. 681-687 , discussing cases in which bundling is likely to be efficient.
[1043] O. Bar-Gill, 'Bundling and Consumer Misperception', *University of Chicago Law Review* 2006.
[1044] Bar-Gill 2006.
[1045] Sunstein & Thaler 2008.

average consumer and restricts protection of the vulnerable to extreme situations. However, differentiating between the average consumer and the vulnerable consumer has raised fundamental questions for both consumer policy making and consumer legislation. First, what kind of legal, economic or political arguments form the basis of justifying such a differentiation. What constitutes vulnerability? What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy? Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms?[1046] Does enforcement of this particular provision depends on the nature of the product and service at stake, the age, education, mental state or other criteria are decisive?

What should be the role of the state? Should it be active and interventionist on behalf of consumers or should the state role be restricted to regulating the marketplace for products and services? In essence this question asks how far can consumer policy be part of social policy? If vulnerability lies in the increased difficulty of obtaining and processing information then what kind of remedy can make vulnerable consumers to make an informed choice? Can the disclosure of more information be a remedy? Or is the way information is disclosed a proper tool?

Even though difficult to define precisely vulnerable and disadvantaged consumers are a particular target group for consumer policy. In this case, the trade-offs are further complicated by the typically greater weight given to protecting vulnerable and disadvantaged consumers on social justice grounds. The broader question is whether consumer policy is necessarily the best way of assisting those in the vulnerable and disadvantaged group. Thus, for example, price regulation of utility services is likely to be a more costly way for the community as a whole of meeting distributional goals than, say, targeted hardship support.[1047]

In (behavioural) economics the distinction is made between rational consumers and bounded rational consumers. This distinction can better take account of both the cost-benefit advantages of adopting a rational behaviour model, where consumers act in their best self-interest as well as of behavioural biases when consumers systematically depart from the rational model and when regulations might be ineffective. The dilemma, however, with regard to this distinction is the following. While to the extent that the cognitive errors identified by behavioural research lead people not to behave in their own best interests, paternalism may prove useful. But, to the extent that paternalism prevents people from behaving in their own best interests, paternalism may prove costly.[1048] Accordingly, the dilemma is how to help bounded rational consumers to avoid making costly mistakes, while at the same time causing little or no harm in terms of minimizing costs to rational people.

Hogg and Howells argue that a knowledge based economy among others represents potential sources of stress for inter-generational relationships as well as, important issues

[1046] Productivity Commission, *Review of Australia' Consumer Policy Framework, Inquiry Report*, 2008, Volume 2, no. 30, Chapter 12 on Vulnerable and disadvantaged consumers.
[1047] Productivity Commission 2008, p. 12.
[1048] Camerer et al. 2003.

around the teaching and learning processes within consumer socialization.[1049] Hogg and Howells refer to research, which is relevant for protecting minors in the digital environment. Are these learning processes one-way, i.e., do children learn consumer skills and attitudes from their parents (e.g., allocation of resources); or two-way, i.e., do parents learn consumer skills from their children? Ekstrom and Ward show examples of "reverse socialization" in the direct skill transfer involved in learning to search the net for information which involves direct influences (e.g., child-parent transfer of knowledge); and examples of "retroactive socialization" in the indirect skill transfer process which involves indirect influences (e.g., child-parent transfer mediated via media, peers).[1050]

These learning processes point to the direction of something else than direct regulation, they in fact illustrate the significance of consumer education for digital competences. Consumer education could target deep-level learning; beyond simple memorisation, it requires a significant degree of cognitive processing of material. This could also address the concerns raised in behavioural economics. If we accept that digital competence is now as important as reading, writing and arithmetic then consumer education can in fact be an effective complementary to regulation.. Digital competence is not only about keeping consumers safe from hackers, predators and fraud. It also has to do with understanding how consumers/citizens can use the Internet and other new communication technologies to enrich their lives and benefit society.[1051]

The comparative study acknowledged the fact that across the Member States there are important national differences which are affected by different cultural, institutional, legislative, legal, and historical frameworks and which distinguished different relationships between the individual and the state. These national differences could clearly affect any regulation at European-level to deal with consumer vulnerability and to manage consumer protection within the context of digital content services. Such future EU legislation could target refining and perhaps standardizing the understanding of vulnerability. Achieving a more nuanced understanding of consumers' vulnerability across industry, service, and national contexts by incorporating typologies such as that of Morgan, Schuler and Stoltman's "consumer-situation typology of vulnerable consumers…[that] includes four consumer groups (physical sensitivity, physical competency, mental competency, and sophistication level) and five situational alternatives (material environment, decision maker, consumption interval, usage definition and temporary conditions)…[and which] illustrates that consumer vulnerability arises from the *interaction* of a person and all of his or her personal characteristics with a consumption situation."[1052]

[1049] M.K. Hogg, G. Howells & D. Milman, 'Consumers in the Knowledge-Based Economy (KBE): What creates and/or constitutes consumer vulnerability in the KBE?', Journal of Consumer Policy 2007, 30, p. 151–158; K.M. Ekstrom, 'Consumer socialization revisited', in: R. W. Belk (Ed.), *Research in consumer Behavior,* Oxford: Elsevier, 2006, 10, p. 71–98.

[1050] K.M. Ekstrom, *Children's influence in family decision-making: A study of yielding. consumer learning and consumer socialization*. Gothenborg: BAS, 1995; S. Ward, 'Consumer socialization', *Journal of Consumer Research* 1974/1, p. 1–16.

[1051] OECD, Summary of proceedings Joint Meeting on Consumer Education OECD Headquarters, Paris, France , 24 October 2008, available at: http://www.oecd.org/dataoecd/23/11/46219117.pdf.

[1052] F.W. Morgan, D.K. Schuler & J.J. Stoltman, 'A framework for examining the legal status of vulnerable consumers', *Journal of Public Policy and Marketing* 1995, 14(2), p. 274.

6. Conclusions and future issues for Digital Consumer Law

The following section presents some of the main conclusions and issues for further discussion that this study has identified.

6.1 Access

A key word on the future consumer protection agenda is access. Access issues are the single most important area in which digital consumers experience problems, and it can be expected that access issues will become even more important. Business models in the digital "experience economy" are shifting to access regimes, based on securing the time-limited use of digital content. This has been described as a 'new approach of doing business based on access to services rather than the sale of products'.[1053] This development goes hand in hand with a shift from industrial production to cultural production in which the focus lies on the marketing of all kinds of cultural resources in the form of 'paid-for personal entertainment'. Access to digital content is thus in many situations the necessary precondition for consumers to be able to use and consume digital content. At the same time, the accessibility and availability of information is at the heart of public information policies. A pro-active approach to guarantee the broad accessibility and availability of a diversity of contents from different sources is essential to realize cultural, social and political diversity. Accessibility of digital content is critical for certain groups in society, for example the disabled. And the realization of constitutionally protected freedoms, such as the right to freedom of expression, the ability to inform oneself and to participate in the democratic debate is ultimately a matter of equal opportunities of access.

The rules in consumer sales law, contract law and unfair commercial practice law can offer potential solace to a range of access problems that digital consumers experience. Also the remedies available are in theory flexible enough to assist consumers in many situations to overcome access problems. Other situations are less well-covered, including obstacles that discourage or even prevent consumers from switching between different services. It is of utmost importance to make sure that consumers in future can also rely on consumer and contract law to address these situations. This may also be regarded in light of the wider fundamental and societal importance of access to digital content. For the very same reason, when evaluating the fairness of contractual conditions and electronic restrictions, the lawfulness of product bundling and strategic lock-ins, the adequacy of pricing conditions and the choice that is available to users, including disabled users, judges must also be aware of the social and democratic component of access, and take them into account, also when applying consumer law.

6.2 No structurally lower level of protection for consumers of intangible digital content

A frequently made argument with regard to the protection of digital consumers is the fact that at least intangible digital content is excluded from the applicability of consumer sales

[1053] Rifkin 2000, p. 90.

law. This would result in a weaker legal standing of consumers of downloaded songs or e-books, to name but two examples. This study found that the argument is only partly true. To the extent that member states have implemented the Service Directive, more elaborate pre-contractual information duties apply for services than for goods. The comparative analysis also demonstrated that in most countries examined, judges will apply consumer sales law directly or by analogy also to problems with the conformity of digital content that comes in intangible form. Much depends on whether rules (for instance on non-conformity) and remedies of consumer sales law can be regarded compatible with the nature of the digital content in question. This does not take away that at present this happens on a case-by-case basis. The application of the non-conformity rules to services is not mandatory, unlike the situation for goods. As a result there is a lack of legal certainty that needs to be addressed. Another, maybe even more pivotal and critical question is to what extent the remedies in consumer sales law are actually fit for digital content and eventual consumer concerns regarding the accessibility, safety and functionality of digital content. The study has indicated that here further research and differentiation might be needed.

Even if judges decide not to apply consumer sales law, the application of the legal framework governing services will not automatically result in a lower level of protection of digital consumers. Also in general contract law and distance selling law, the protection of the reasonable expectations of consumers, as well as the conformity of these expectations with the contract, is paramount. In case of a deviation from what consumers are reasonably entitled to expect or the standard of "normal use", information requirements comparable to those under consumer sales law are triggered, and contract (rule)s that are not in conformity with these expectation can be considered unfair. Similarly, the remedies that are available to consumers of tangible and intangible products and services offer a comparable level of protection, and can be, with some exceptions, equally well applied to intangible digital contents. For these reasons, it is here also suggested not to apply the traditional distinction between goods and services to digital content, but rather to create a *sui generis* regime for digital content. Only in very rare cases specific rules may be needed to deal with, in particular, *gratuitous* digital content. This, however, does not relate to the nature of the digital content itself but rather to the gratuitous character of the contract, which may influence the conformity test and which excludes any rules relating to price.

One area in which consumers of digital content in intangible form indeed might enjoy less protection is when exercising their right to withdrawal. The reason for this is that it might be problematic to apply such a right to digital content contracts, since the performances rendered are in practice often difficult to undo, and there is a substantive risk that the consumer who has withdrawn nevertheless is able to make use of the digital content after withdrawal. Although there seem to be no convincing reasons to exclude digital content from the application of the right of withdrawal altogether, in practice this right might offer consumers less protection in the digital context than in case of contracts for the acquisition of tangible goods.

6.3 Standardizing expectations

It is not so much the classification as services or goods that questions the merits of consumer law for the digital consumer; the real problem lies elsewhere. More than the

principal distinction between goods and services, it is the lack of experience of what consumers can normally expect in digital content that is responsible for the failure of consumer law to protect the interests of the digital consumer.

Consumer law largely operates on the basis of standardised measures of reasonable consumer expectations, standards that do not exist with respect to digital content. Digitization, however, enables innovative product diversification and a variety of ways to present, offer and charge for digital content. A film can be broadcast, streamed, watched an hour, once, twice, be downloaded permanently or for a limited time. An e-book can be offered for permanent download, be deleted from the hardware after a certain time, be copied and printed unlimited times or never, be read at all imaginable pieces of consumer hardware, or only at one particular, proprietary e-reader. The immense choice from different ways of distributing, selling and consuming digital content offers certainly exiting possibilities for traders as well as consumers. From the perspective of consumer law, however, the level of diversification also and foremost means that no clear standard exists of what characterizes digital content, what is "normal" in digital content, which level of functionality consumers should be entitled to expect, and under which conditions are restrictions of the ability to access and use digital content to be considered unfair. It is simply very unclear to what extent consumers can reasonably expect the unrestricted use of digital content. Notably, copyright law does formulate a number of possible uses or functionalities of digital content users should in principle be entitled to make. The way these entitlements are formulated, however, provides little certainty or concrete "rights" for consumers.

This is the reason why this study concluded that member states in certain areas should create more certainty and defaults of reasonable consumer expectations in digital content. This could be done, for example, in form of legislative initiatives, or, more flexibly by way of empowering a responsible authority to formulate, where necessary and after consultation with stakeholders, a certain minimum standard of quality and functionality that consumers can legitimately expect from digital content. When setting that standard, governments should look beyond merely economic and consumptive interests, but also take into account social motives and public interest considerations. Deviations from this standard would have to be brought prominently to the attention of consumers. In addition, the study suggests stipulating that contract terms that are in conflict with copyright law and data protection law are presumed to be unfair. It also suggests clarifying that the provisions on conformity and remedies for non-conformity apply also to digital content contracts which are performed in exchange for a price, and, with appropriate adaptations, to "free" digital content contracts, and to determine that consumers are entitled to a limited number of private copies.

6.4 Phasing out the information approach

The information model has for a long time been a preferred tool of consumer law and policy, and will continue to play an important role in the future. Consumers still value being well-informed. The situation of consumers of digital content may mark a turning point, however, at which it is necessary to carefully evaluate in which situation mandatory command and control rules are the preferred option over disclosure policies. Digital content

markets are characterized through an increasingly surreal abundance of information, the piling of information policies and the increasing difficulty of getting consumers attention to actually read and make sense of consumer information. In such a situation, the effectiveness of (even more) consumer information can be questioned. An important goal of future information policy must be to reduce the information burden on traders and consumers.

Alternatives such as default settings have already rightly received attention from law and policy makers in other areas, such as privacy law. They could be potentially useful in consumer law as well. Mandatory rules, although ultima ratio and only after careful considerations of their costs and benefits, as well as their usefulness for businesses and consumers, can be a means to reduce or at least not further add to the information overload digital consumers are experiencing. In situations where mandatory consumer information is still considered necessary and beneficial, however, legislators and policy makers should focus on the question of how to make the provision of information effective and useful for consumers. To this end, the report also discussed ways to ensure that traders indeed use consumer information as a means to inform consumers, rather than reducing their own liability and strategically informing consumers to lower their legitimate expectations.

In the light of these considerations, the suggestion in this study to standardise, and to protect certain consumer expectations through consumer sales and contract law, can reduce the information load for traders and consumers. Only where traders deviate from the standard, they need to inform consumers.

Having said this, the study also proposes to make certain key information about digital content (such as information regarding prices, main characteristic, functionality, the identity of the trader) publicly available, and here in particular to the responsible consumer authority and comparison services. Making information about critical key features of digital content comparable could improve the usefulness of such information for consumers and competition, and result in more transparency of the digital content sector. At the same time, a ‘contextual approach’ is suggested, providing in certain situations only key information to the consumer, whereas other information may be made available to the consumer through other means, and some even only upon request. The goal of these suggestions is to increase the likelihood that consumers will actually read the information she needs to make an informed decision.

Finally, it is pointed out that the digital environment not only challenges the ability of consumers to digest consumer information, it could also improve it. Digital technologies offer an unprecedented potential of informing consumers in an intelligent and comprehensive way. Examples are non-textual forms of information (picture, video), contextual information (banners, pop-ups, default options), meta data, interactive information and flexible ways of locating and timing information.

6.5 Interface between general and sector-specific consumer law

The study highlights the need for a comprehensive perspective on digital consumer law. Such a perspective takes into account consumer protection or “empowerment” rules in

general and in sector-specific law, such as copyright law, media, e-commerce law, data protection law and telecommunications law. Sector-specific law complements the body of rules that apply to the distribution and consumption of digital content. Sector-specific law can also be the basis for legitimate interests and expectations of consumers when purchasing digital services. For example, telecommunications law entitles digital consumers to expect a certain level of interoperability and integrity of certain services. Data protection law sets a high standard of expectations regarding the fairness of the collection and use of personal data. Audiovisual law, too, protects the interests of consumers in a safe and high quality, diverse service offer. The protection of the interests of the digital consumer was one of the central themes in a number of reviews of sector-specific laws in the past years. The comparative analysis, however, also revealed much uncertainty and lack of knowledge among (even) consumer law experts about a) sector-specific law and b) the interface with general consumer law. Consumer protection rules and standards in sector-specific law must to a greater extent be reflected in the interpretation and application of general consumer law.

The interaction between sector-specific laws and general contract and consumer law, however, also raises difficult questions. The difficulty to align copyright law and consumer sales law in particular is a result of the potential conflict between different conceptions of (the transfer of) property in digital content. It is also evidence of different legal conceptions – while in copyright law the focus is primarily on the protection of the position of rightholders, consumer law targets primarily the protection of the consumer. For informing consumers about possible privacy-sensitive actions or technologies, varying levels of intensity and detail of disclosure duties exist across general consumer and contract law, and data protection law. The conception of the user as consumer, user, creator, citizen, as active or passive, empowered or protection-needy differ strongly across the different bodies of law. The same is true for the attitude of the law towards certain groups of consumers, such as underage consumers. The relationship and consistency of the provisions about unfair commercial practices in media law and general unfair commercial practice law is far from clear. All these examples demonstrate a lack of coordination in the past, and the need for more consistency in the future.

This study was primarily concerned with the application of general and contract law to problems digital consumers experience, and how the existing provisions in media law, data protection law, copyright law, e-commerce and telecommunications law relate to general consumer and contract law. A question that was not subject to this study, but that requires further investigation is to what extent the existing sector-specific rules are suitable and appropriate to protect the interests of the digital consumer. The on-going controversies in data protection law regarding targeted advertising, social marketing and the use of tracking technologies are an example hereof. The critique of the existing catalogue of exceptions and limitations in copyright law, the way they are formulated, their relationship to technical protection measures and, generally, the weak standing of the digital consumer under copyright law are another example. The relevancy of taking the consumer perspective on board is further highlighted by a trend in many sector-specific laws (particularly media and copyright law) to see mainly, and artificially, the citizen in the consumer, and to adopt an essentially critical stance to the influence of consumerism and the consumer as a form of

'anti-citizen". Even if general consumer protection law applies to the benefit of digital consumers, this does not alleviate the need to make sector-specific laws responsive of her needs and interests, and reconcile them with the interests of the digital content industry. It is the effective interaction between general and sector-specific consumer rules that is eventually the guarantee that not only the interests of individual consumers but of society as a whole are taken into account when dealing with digital content.

6.6 Territorial restrictions

Digital content clearly has a European, if not global dimension. The accessibility of digital content is also a key issue for the realization of the interests of the European consumer, e.g. consumers within the European Internal Market. "Service users, and particular consumers, ultimately pay the price for the existence of Internal Market barriers in the services field."[1054] Consumers will have to pay the price quite literally in situations where price discrimination, in combination with access restrictions, makes it impossible for consumers to benefit from price competition. Also, consumers from some member states will miss out on the benefits of Internet to make more services available to them. This will be particularly the case where no substitute services are available to them from elsewhere. The consequences will be felt most severely by consumers from smaller countries that have less choice in their own country, respectively whose countries are not attractive enough for providers from other countries to invest in serving consumers in those countries. Exclusion of consumers from other member states also stands in the way of the free exchange of culture, knowledge and information throughout Europe.[1055] The matter of territorial restriction is another example of how closely the interests of consumers are intertwined with copyright law. One of the most influential factors that favour territorial restrictions is the concept of territorial licensing in copyright law.[1056] For these reasons, territorial restrictions already are,[1057] and should be even more so on the future consumer protection agenda.

[1054] European Commission, *Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services,* Brussels, 30 July 2002, COM(2002)441final; see also European Parliament*, Resolution of 21 June 2007 on consumer confidence in the digital environment*, Strasbourg, 21 June 2007, A6-0191/2007, European Commission, *Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*, Brussels, 26 July 2002, COM (2002) 430final.

[1055] Council of Europe, *Declaration on cultural diversity*, Strasbourg, 7 December 2000. The European Committee on Youth, Culture, Education and the Media warned that national services were beginning to vanish into the " ghettos of encryption", European Parliament, Committee on Culture, Youth, Education and the Media, Opinion for the Committee on Legal Affairs and Citizen's Rights on the legal protection of services based on, or consisting of, conditional access, Brussels, 9 February 1998, A4-0136/98, section a). . European Commission 2002, p. 7-8.

[1056] M. Van Eechoud, P.B. Hugenholtz, S.J van Gompel & N. Helberger, *The Recasting of Copyright/Related Rights for the Knowledge Economy, Report for the European Commission, DG Internal Market*, November 2006.

[1057] See only N. Kroes, *Ending fragmentation of the Digital Single Market*, Business For New Europe event, London, 7 February 2011. See also the recent Opinion of the Advocate General Kokott, expressing her view that territorial exclusivity arrangements are contrary to European Union Law, Opinion of Advocate General Kokott, delivered on 3 February 2011 (1), Cases C-403/08 and C-429/08 (Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd.), paragraph 171ff.

6.7 Empowerment of the underage consumer

A considerable part of the digital consumers are underage. Given the limited legal capacities that this group enjoys, complicated questions may arise as to the validity of contracts they conclude. For long, national legislators have erred on the protective side, allowing only very limited exceptions to the minor's incapacity. In the course of time, and more in particular with the advent of Internet, children and adolescents have become more actively involved in the consumption process. Whether existing legislation reflects this reality remains doubtful.

Possible harmonisation and modernization of this important legal field ideally goes hand in hand with the development of age verification technologies and smarter payment tools. Such instruments could significantly reduce uncertainties in the online commercial environment, thus enabling parents, minors and traders to better control their online transactions. This reduction of uncertainties is likely to smoothen the functioning of the internal market, while empowering this group of consumers to participate online in a transparent way.

6.8 Consumer protection by design

In many instances, the problems of digital consumers are not so much the result of the legal situation, but rather the lack of effective enforcement.[1058] Monitoring compliance and enforcing law in the digital environment is a problem, not only in consumer law. These problems are reasons to consider alternative or complementary concepts of protection. One of them is 'protection by design', particularly if it is coupled with initiatives to incentivise consumers and businesses to maintain and practice a high level of consumer protection. 'Protection by design' can include 'contextual' as well as technical design. Regarding contextual design, the importance of framing choices in a way that stimulates consumers to make better informed, desirable, safe or socially responsible choices is increasingly being understood. For instance, presenting critical items of consumer information more prominently and in an intuitive way can increase the likelihood that users actually do process that information, as can the style and tone in which the information is presented.[1059] Another example is the way choices are presented to the user,[1060] also here the 'context' can influence the choices consumers ultimately make. The next step is to test that knowledge in the context of making better or more effective rules that require less enforcement. Then there is technical design. We have just begun to explore the potential of technical solutions to protect consumers, and to help consumers to manage and protect their legitimate interests and rights. In the protection of personal data, technical solutions such as PETs, electronic do-not-track-me registers, default settings in the consumer's browser are intensely debated. Media law propagates technical solutions to protect (certain categories of) consumer from harmful or unwanted content, such as access controls and filters.

[1058] ECC-Network 2010.

[1059] Possible examples to illustrate this point include eco labels, age ratings, privacy polices written in lay terms in addition to the official, legal privacy policies, terms of contract presented in the form of Q&A's, etc.

[1060] Possible examples can include default privacy settings in the context of social networks, prominent presentation in the results of a search engine, narrowing down the choice through a pre-selection of a number of (e.g. socially desirable, healthy, environmental friendly, etc.) choices, inclusion of game or social elements, etc.

Telecommunications law explicitly mentions electronic price comparison tools. These are the first examples of protection by design. The study has already mentioned the possible benefits from default rules and electronic comparison tools for digital consumers. Other areas that require more investigation of electronically-assisted consumer protection is search, and the potential of search technologies to choose, compare and protect consumers from unwanted or unsafe digital content. What are the possibilities for consumers to express their preferences in form of metadata, which again would enable targeted search for digital content that lives up to her expectations. Could Digital Rights Management technologies be used in a way to manage and control legitimate rights of users, for example their right to privacy, to be able to make certain uses, or to not being exposed to any additional charges? Would it be possible to automatically block certain unfair commercial practices?

Far from science fiction, protection by design has already begun to become another aspect of digital consumer protection, and it is one that will become even more important in the future. Having said that, protection by design should not be understood as a way to place the burden of ensuring safe and fair dealings one-sidedly on businesses or consumers. The key to effective consumer protection in the digital age is the fair and realistic allocation of responsibilities among all stakeholders involved, taking into account their particular strengths and weaknesses.

Annex I - List of Recommendations for rules tailor made for digital content contracts

(Based on the existing provisions of the Draft Common Frame of Reference)

I. – 1:101: Intended field of application

(…)

(2a) In derogation of paragraph (2)(a) of this Article, these rules may be used in relation to the legal capacity of minors to conclude contracts for the purchase of digital content in accordance with Article IV. A. – 1:301 and in relation to the obligations arising from such contracts.

(…)

II.–3:101a: Pre-contractual information duties for digital content contracts

(1) A party who is engaged in negotiations for a contract within the scope of this Part has a duty to provide the other party, a reasonable time before the contract is concluded and so far as required by good commercial practice, with such information as is sufficient to enable the other party to decide on a reasonably informed basis whether or not to enter into a contract of the type and on the terms under consideration.

(2) In the case of digital content, the duty under (1) includes the duty to inform about the main characteristics of any goods, other assets or services includes in particular the duty to inform the consumer on the interoperability and functionality of digital content.

(3) The business bears the burden of proof that the consumer has received the information required under this article and that such information has been provided to the consumer in a manner that the average consumer can reasonably be expected to access and understand the information.

II. – 3:105: Formation by electronic means

(…)

(3) In the case of a digital content contract, not individually negotiated terms may be included by means of click-wrap or browse-wrap or other electronic means. Articles II. – 3:103(1)(d)(Duty to provide information when concluding a distance or off-premises contract with a consumer) and II-9:103 (Terms not individually negotiated) apply accordingly.

(4) For the purposes of paragraph (3):

> ***(a) 'click-wrap' refers to the situation where the terms are presented to the consumer in textual form before the consumer is enabled to conclude the contract and the consumer gives her express consent to the applicability of the terms and subsequently has concluded the contract; and***
>
> ***(b) 'browse-wrap' refers to the situation where the consumer is made aware of the existence of the terms and is given a clearly identifiable possibility to access the terms before the consumer is enabled to conclude the contract, and the consumer subsequently has concluded the contract.***

Art. II.–3:106a: Clarity and form of information in digital content contracts

(1) In the case of a digital content contract, a duty to provide information imposed on a business under this Chapter is not fulfilled unless the requirements of this Article are satisfied.

(2) The information must be understandable, well-organised and concise, expressed in plain and intelligible language and in an instructive way. When a business is under a duty to provide information to a consumer, the information must be sufficiently prominent and clearly distinguished from any other information that the business chooses to provide that an average consumer can readily identify the information which is required.

(3) Key information, including information regarding prices, main characteristic, functionality, the identity of the trader must be brought to the attention of consumers in a clear and prominent way.

(4) In so far as information is to be provided through a device that is incapable of displaying all information in a legible manner, the trader must at least provide the key information as indicated in paragraph (3) together with a digital or geographical address where this and the complete information is available in a permanent, easy, direct, and exact way. If so requested by the consumer, the trader must provide the complete information to an email address as indicated by the consumer.

II. – 5:103: Withdrawal period

(…)

(2a) Paragraph (2)(c) does not apply to digital content, which is not supplied on a tangible medium.

(…)

II. – 5:105: Effects of withdrawal

(…)

(4) The withdrawing party is not liable to pay:

(a) - (b)(…);

(c) for any digital content already rendered before the consumer had received adequate information on the right to withdraw in accordance with Article II.–5:104 DCFR.

(…)

II. – 5:201: Contracts negotiated away from business premises

(…)

(3) If the business has exclusively used means of distance communication for concluding the contract, paragraph (1) also does not apply if the contract is for:

(a)(…);

(b) **the delivery of digital content that is not supplied on a tangible medium, or for** ***the supply of services other than financial services, if performance has begun, at the consumer's express and informed request, before the end of the withdrawal period referred to in II. – 5:103 (Withdrawal period) paragraph (1)*** **and the**

business has provided adequate information about the right of withdrawal in accordance with Article II. – 5:104 (Adequate information on the right to withdraw) and on the consequences of such a request with regard to the right of withdrawal before the request is made*; (…).*

II. – 7:101: Scope

(…)
(2a) In derogation of paragraph (2)of this Article, this Chapter deals with lack of capacity of a minor capacity to conclude a digital content contract.
(…)

II. – 7:208a: Legal capacity of minors to conclude digital content contracts
(1) This Article applies with regard to the legal capacity of minors to conclude a digital content contract. It does not apply to the legal capacity of minors to conclude other contracts.
(2) A minor is capable of concluding a digital content contract only
(a) with the permission of her legal representative;
(b) if the contract is an everyday contract within the meaning of paragraph (3).
(3) In determining whether a contract is to be considered an everyday contract, regard is to be given to all circumstances of the contract, in particular:
(a) the price to be paid by the minor, if any;
(b) whether the contract is of a kind that is frequently concluded by minors of the same age;
(c) whether the contract relates to a single or a continuing performance;
(d) whether the minor had a reasonable interest in concluding the contract; and
(e) whether the value of the digital content grossly deviates from the price to be paid by the minor.
(4) A digital content contract concluded by a minor who was not legally capable of concluding such a contract may be avoided by the minor's legal representative.
(5) In so far as performances have already been rendered,
(a) Article III.–3:510 DCFR (Restitution of benefits received by performance) applies;
(b) Article III.–3:512 DCFR (Payment of value of benefit) applies only if
(i) the digital content has been to the true benefit of the minor and the business is disadvantaged as a result of her performance, or
(ii) when the minor has fraudulently led to believe that she was legally capable of concluding the contract and the business has acted upon that belief in concluding the digital content contract.

II. – 9:402: Duty of transparency in terms not individually negotiated
(…)
(3) In a digital content contract, a term which falls within the scope of paragraph (2) is presumed to be unfair.

II. – 9:409a: Terms which are deemed to be unfair in contracts between a business and a consumer

A term in a contract between a business and a consumer is deemed to be unfair for the purposes of this Section if it is supplied by the business and if it is not individually negotiated and its object or effect is to exclude or limit the consumer's rights governing the protection of his or her personal data or privacy.

II. – 9:410: Terms which are presumed to be unfair in contracts between a business and a consumer

***(1) A term in a contract between a business and a consumer is presumed to be unfair for the purposes of this Section if it is supplied by the business and if it:*(…)**

(r) is not individually negotiated and eliminates or impedes the exercise of the exceptions or limitations on copyright;

(s) is not individually negotiated and eliminates or impedes the exercise of the exception or limitation on copyright allowing for the making of a private copy of a work;

(t) is not individually negotiated and requires the consumer to conclude an additional digital content contract or a contract pertaining to hardware with the business or a third party.

III. – 5:109a: Effects on obligations under linked digital content contracts

(1) In the case of the termination of a contract for digital content, the consumer may terminate any linked contract in so far as this is reasonable in the circumstances of the case.

(2) A contract forms a linked contract with a digital content contract, in particular:

(a) if the business provides both the digital content and other goods or services under the other contract and the other goods or services are necessary for the use of the digital content, whereas the digital content is purchased, in accordance with its ordinary purpose or for a particular purpose made known to the business at the time of the conclusion of the contract, to be used together with those other goods or services;

(b) if the other contract is a credit contract and the business finances the consumer's performance;

(c) if the other contract is a credit contract and a third party which finances the consumer's performance uses the services of the business for preparing or concluding the other contract;

(d) if the credit contract refers to specific digital content to be financed with this credit, and if this link between both contracts was suggested by the provider of the digital content or the business supplying the credit; or

(e) if there is a similar economic link.

III. – 3:510: Restitution of benefits received by performance

(…)

***(4) To the extent that the benefit is not transferable* or where, in the case of digital content, its nature makes it impossible for the business to determine whether the**

consumer has retained the possibility to use it, ***it is to be returned by paying its value in accordance with III. – 3:512 (Payment of value of benefit).***

III. – 3:512: Payment of value of benefit

(1) The recipient is obliged to:

(a)(…)

(aa) in the case of digital content, pay the value (at the time of performance) of the digital content if its nature makes it impossible for the business to determine whether the consumer has retained the possibility to use it; and

(…)

(2) Where there was an agreed price the value of the benefit is that proportion of the price which the value of the actual performance bears to the value of the promised performance. Where no price was agreed the value of the benefit is the sum of money which a willing and capable provider and a willing and capable recipient, knowing of any non-conformity, would lawfully have agreed. The previous sentence does not apply to digital content, which was provided gratuitously.

IV. A. – 1:103: Digital content contracts

(1) This Part of Book IV applies to contracts whereby a business undertakes to supply digital content to a consumer in exchange for a price.

(2) This Chapter applies in particular to

- ***(a) contracts whereby video, audio, picture or written content is provided to the consumer in electronic form;***
- ***(b) gaming contracts;***
- ***(c) contracts for the provision of digital content that enables the consumer to personalise existing hardware or software;***
- ***(d) software contracts;***
- ***(e) contracts pertaining to the provision of digital content applications that are hosted by the business and that are made available to the consumer over a network;***
- ***(f) social networking services;***
- ***(g) contracts enabling the consumer to create new digital content and to moderate and review existing digital content or to otherwise interact with the creations of other consumers.***

(3) This Chapter does not apply to contracts pertaining to

- ***(a) financial services, including online banking services;***
- ***(b) e-government and social services;***
- ***(c) legal or financial advice provided in electronic form***
- ***(d) electronic healthcare services;***
- ***(e) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC***
- ***(f) gambling.***

(4) This Chapter also applies to contracts whereby a business undertakes to supply digital content to a consumer otherwise than in exchange for a price.

IV. A. – 1:301: Amendments for digital content contracts

(1) For the purposes of the application of the provisions applicable to sales contracts to digital content contract, any reference to 'goods' in these provisions is to be read as 'digital content'.

(2) The provisions applicable to sales contracts apply to gratuitous digital content contracts with the following adaptations:

> ***(a) In determining what the consumer may reasonably expect of the digital content in accordance with Article IV.A.–2:302(F) DCFR (Fitness for purpose, qualities, packaging, regard shall be had to the gratuitous nature of the contract.***
>
> ***(b) Articles IV. A. – 3:101(a)(Main obligations of the buyer), IV.A.–3:103 (Price fixed by weight), and IV.A.–3:105 (Early delivery and delivery of excess quantity) do not apply.***
>
> ***(c) In case of termination of a gratuitous digital content contract for non-conformity, Article III. – 3:512 (Payment of value of benefit) does not apply.***

IV. A. – 2:101: Overview of obligations of the seller

(1)(…)

(2) In derogation of paragraph (1)(a), in the case of a digital content contract the seller must transfer the right to use the digital content and, in so far as relevant, transfer the ownership of the tangible medium on which the digital content is stored. The business is not required to transfer ownership of the intellectual property rights in the digital content, unless such is expressly agreed otherwise by the parties.

IV. A. – 2:302: Fitness for purpose, qualities, packaging

(1)(…)

(2) With regard to digital content contracts, statements made by the business or by a party for whom she is responsible pertaining to the digital content restrict the expectations the consumer may have of the digital content only insofar as this is reasonable in the circumstances of the case.

IV. A. – 2:308: Relevant time for establishing conformity

(…)

(4) In the case of a digital content contract where the digital content is not provided on a one-time permanent basis, the business must ensure that the digital content remains in conformity with the contract throughout the contract period.

(5) Digital content shall not be considered as not conforming to the contract for the sole reason that better digital content has subsequently been put into circulation.

IV. A. – 2:308a: Back-up copy

Where digital content is transferred to the consumer permanently, the consumer is entitled to make a copy insofar as it is necessary to make use of the digital content in accordance with its ordinary purpose.

IV. A. – 2:308b: Private copies

(1) Where digital content is transferred to the consumer permanently, the consumer must be able to make a limited number of copies provided such copies are for purely private use and for ends that are neither directly nor indirectly commercial, and provided the rightholder receives fair compensation.

(2) For the purposes of paragraph (1), if and to the extent that an agreement has been reached between rightholders and businesses offering digital content to consumers regarding the making of private copies by consumers, the rightholder is deemed to have received fair compensation.

(3) Paragraph (1) does not apply in so far as the parties have included a term in their contract regulating the number of private copies the consumer may make of the digital content, unless this term is to be considered unfair. Paragraph (2) applies accordingly to private copies made by the consumer on the basis of such a term in the contract.

(4) A restriction on the possibility to make private copies as provided in paragraph (3) above is permitted only if, before the conclusion of the contract, the trader has specifically drawn the consumer's attention to the absence of such a possibility.

(5) This article does not apply insofar as the consumer is entitled to withdraw from the contract and the original withdrawal period has not elapsed.

IV. A. – 5:103: Passing of risk in a consumer contract for sale

(…)

(1a) In so far as the digital content is not provided on a tangible medium but is provided on a one-time permanent basis, the risk does not pass until the consumer or a third person designated by the consumer for this purpose has obtained the control of the digital content.

(…)

Article XX: Setting of standards

(1) Each Member State may designate the competent authorities to specify standards to the compatibility and functionality of certain digital content and to the content, form and manner of the information to be provided by the trader.

(2) The competent authorities shall only make use of their powers indicated in paragraph (1) after taking account of the views of interested parties.

(3) A trader may only deviate from the requirements set in accordance with paragraph (2) after having specifically drawn the consumer's attention thereto in a clear and intelligible manner and in a comprehensive and easily accessible form.

Article YY: Transparency and publication of information

(1) Member States shall ensure that the competent authorities are, after taking account of the views of interested parties, able to require traders that provide digital content to publish comparable, adequate and up-to-date information for consumers on applicable prices and tariffs, on any conditions limiting access, use or compatibility of digital content, on the use of technologies that are used to collect and process personal data, and on measures taken to ensure equivalence in access for disabled end-users.

Such information shall be published in a clear, comprehensive and easily accessible form. The competent authorities may specify additional requirements regarding the form in which such information is to be published.
(2) The competent authorities shall encourage the development and provision of interactive guides, comparison tools or similar techniques. Third parties wishing to make such guides or techniques available shall have a right to use, free of charge, the information published by traders as mentioned in paragraph (1).

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