GOODS WITH DIGITAL ELEMENTS, DIGITAL CONTENT AND DIGITAL SERVICES IN DIRECTIVES 2019/770 AND 2019/771

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ABSTRACT: Directives 2019/770 and 2019/771 are a new set of complimentary maximum harmonisation directives which will greatly modernise European Contract and Consumer Law.

Both directives focus on the matters of conformity and of the remedies for the lack of it, with different objective scopes of application. Directive 2019/770 is applicable to contracts for the supply of digital content and digital services, a previous unregulated area in EU law and in many Member States, a subject in dire need of intervention. Directive 2019/771 replaces the old Directive 1999/44/EC with an updated framework for the online and offline sale of goods, including the case of goods with incorporated or inter-connected digital services or content (referred to as goods with digital elements).

The Directives greatly improve on the old concept of conformity with the contract (including a new obligation to supply updates continuously for a reasonable period) and the effects of the remedies available to consumers. Directive 2019/770 also includes provisions on the matter of modifications beyond the scope of conformity, creating a fairer and more transparent contractual relationship between consumers and traders.

However, these directives are not without controversy. Many legal challenges are raised, with notable emphasis on the restrictive notion of consumer and the provision of personal data as a counter-performance.

1. Introduction

Under the banner of the Digital Single Market, the European Commission has endeavored great efforts to modernise and harmonise many fields of European Law to better prepare the internal market to compete in a global digital economy and face new legal challenges arising from emerging technologies and market practices. One such area in dire need of updating is consumer law.

After the controversial attempt to create a common frame of reference in contract law – the Common European Sales Law (CESL)[1]– the European Commission did not give up and decided to move forward with the proposal of directives aimed at improving the old rules on consumer contracts for the sale of goods (by tackling the new omnipresent reality of goods with digital elements), and creating and new complimentary framework for the supply of digital content and digital services, "a missing piece of the consumer law acquis"[2].

The result of those proposals were the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (DCD) and the Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive

[1] Proposal for a Regulation Of The European Parliament And Of The Council on a Common European Sales Law /* COM/2011/0635 final – 2011/0284, available in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0635.

[2] Refereed by the European Consumer Organisation in "European Commission's Public Consultation On Contract Rules For Online Purchases Of Digital Content And Tangible-goods Beuc response" Available in http://www.beuc.eu/publications/beuc-x-2015-077_contract_rules_for_online_purchases_of_digital_content_and_tangible_goods.pdf.

1999/44/EC (SGD), both published in the Official Journal of the European Union on 22 May 2019.

While they may fall short for the idealists behind the PECL and CESL projects, these two Directives are undoubtedly the main development for European Contract and Consumer Law in the last two decades[3]. Both directives are of maximum harmonisation[4], leaving little room for Member States to increase or decrease consumer rights, also with the intent of improving market integration and boosting cross-border e-commerce for consumers and PMEs[5].

2. Scope of application

These two Directives are complimentary in their action with essentially the same subjective-matter and no overlap in their objective application[6]: the conformity (of the goods, digital content or digital services) with the contract, the remedies in the event of a lack of such conformity; modalities for the exercise of those remedies. In the DCD, the topics of the supply of the digital content or digital service and of modifications performed outside of the scope of conformity in long term contracts are also addressed[7], while the SGD tackles commercial guarantees.

The SGD is applicable to contracts for the sale of goods, as in tangible items, whether the contract is concluded on or off premises.

The DCD does not attempt to regulate or create one single contract type; instead, it addresses the supply of digital content and dig-

[3] J. Morais Carvalho, "Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771" (2019) 5 EuCML 194.

[4] See Article 4 of both the DCD and SGD. On the question of the legal nature of digital content, arguing for a new category of digital goods, see J.A. Castillo Parrilla, Bienes Digitales: Una Necesidad Europea (Dykinson 2018) 259, and arguing for a new legal framework over virtual property, see Przemysław Pałka, Virtual Property, Towards a General Theory (European University Institute, EUI PhD theses 2017).

[5] See Recitals 4, 7 and 8 of the SGD and Recitals 4 to 8 of the DCD.

[6] This complimentary notion can be found in recitals 20 a 22 of the DCD and recitals 13 and 16 of the SGD.

[7] See Article 19 of the DCD.

ital services[8], creating a uniform regime which cannot be outpaced by the quick technological development and evolution of new business models in the digital market[9]. The definitions of digital content and digital services (present in both Directives) are quite broad. With an obvious intent to cast a large net to insure the longevity and effectiveness of the DCD, it names as examples for content and services "*computer programs, applications, video files, audio files, music files, digital games, e-books or other e-publications, and also digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media*"[10].

The distinction between digital services and digital content is not very clear from their definitions in Article 2-1 and 2, as there is an overlap between the two. In several contracts it could be difficult to distinguish the elements where there is only the supply of content, separated from a digital service while in others it would be obvious. A good example would be the photos stored in a USB flash drive. This is because content is "data which are produced and supplied in digital form"[11], and a service can be itself the method to distribute to the consumer said content ["service that allows the consumer to (…) access data in digital form"][12]. An example would be streaming services and the supply of virtual goods within a platform. Quite the opposite, an example of a digital service where there is no supply supply of content would be cloud storage. The fact is that the DCD does not have different provisions for services and content, treating both equally, in a undistinguishable manner, which the Member States will have to abide by in transposition (in the matters of supply, conformity, remedies and modifications), even if within their national law there are differences between the two.

[8] See Article 3 (1).
[9] See Recital 12.
[10] See Recital 19.
[11] See Article 2(1).
[12] See Article 2(2)(a).

While the DCD applies independently of the method employed for the act of supply (and gives as suggestions the transmission via tangible storage medium, download to the device, web-streaming and access to cloud storage and other online services)[13], when the content or service are included in a contract for the sale of a good with digital elements, the SGD is applicable. It is applicable even if the content or service have to be downloaded to the good after delivery, for instance, a smartwatch which is sold with certain apps already installed and one free app included in the contract that needs to be installed by the consumer. In contracts where there are several elements – the sale of goods with digital elements, digital services included in the good (independently of whether already installed or not), and also the supply of other digital content or digital services (in a tangible medium which serves exclusively as a carrier) – both the SGD and the DCD are applicable, to each appropriate element[14]. An interesting border case would be the supply of CAD files for the creation of goods by 3D printing: depending on the facts of each case, a lack of conformity of the good could be attributed to a lack of conformity of the digital content (the DCD is applicable); a defect of the 3D printer (the SGD is applicable against the trader); or could be the consumers' entire fault and negligence.

Both the DCD and the SGD employ a much restrictive concept of consumer than that which is usually found in EU substantive law, leaving out of its maximum harmonisation scope the case of dual-purpose contracts and the predominant use criteria. The extension of the concept of consumer is therefore left for the Member States to decide when transposing the directives.

This option is open to criticism. It will not only inevitably create discrepancies across the internal market and uncertainty on consumers, but it blindly ignores that a very large number of goods with digital elements (personal computers, smartphones, tablets) and digital services that are acquired by consumers for leisure and

[13] See Recital 19.

[14] See Recitals 20 to 22 and 33 and Article 3(4) DCD and Recitals 13, 15 and 16 and Articles 3(3) and 4(a) SGD.

personal use, will also have some minor use in their trade or profession. This trend is also constantly evolving, with workers finding it more difficult to disconnect from their working life when they are out of the office, a phenomenon reinforced by the quarantine resulting from COVID-19.

3. Personal data as counter-performance

If the restrictive concept of consumer can be considered a controversial step backwards, the DCD takes three very important steps forward by ensuring its applicability and effective protection of consumer's rights: (i) considering platforms as traders[15] in the cases where they act for purposes related to their own business and as a direct contractual partner of the consumer[16]; (ii) extending the notion of price, to include payments that are not necessarily performed using a currency with legal tender and the cases of e-vouchers and coupons[17]; (iii) considering the processing of personal data for purposes other than those required for the performance of the contract and or in compliance with legal requirements, as consideration[18].

The processing of personal data as consideration (or counter-performance) was a very controversial issue at the root of the DCD's legislative process. It is undeniable that a very large number of contracts for the supply of digital content or digital services are gratuitous, in the sense that consumers do not pay an actual monetary price, but instead give their consent for the processing and transfer

[15] See Recital 18 DCD, which also allows Member States to extend this concept to platforms that do not fulfill these requirements, which is line with the reasoning of CJEU in the case C-149/15 Sabrina Wathelet v Garage Bietheres & Fils SPRL, EU:C:2016:840, paragraph 33. See on that further I. Dormurath, Platforms as contract partners: Uber and beyond (2018) 25 Maastricht Journal of European and Comparative Law 578 et seq.

[16] See also Recital 22 SGD, which provides for the same rules.

[17] See Recital 23 combined with the definition of Article 2(7).

[18] Article 3(1) DCD.

of their personal data[19]. Leaving all these contracts out of the scope of the DCD would be a huge flaw. The effectiveness of the DCD would be massively compromised. Still, many were very wary about these inclusion, with three main criticisms arising: (i) the compatibility of this regime with the GDPR; (ii) the circumstance that the fundamental right nature of data protection may be affected; (iii) the legitimacy of a business model (a personal data market) hostile to data protection principles. This idea is very patent in Opinion 4/2017 of the European Data Protection Supervisor[20], which took a very critical position of equating personal data to money.

Eventually, the DCD did not neglect these arguments not neglected these arguments. The protection of personal data and the compatibility with the GDPR is continually referred to in many provisions and recitals throughout the DCD[21], even extending the obligations of the GDPR to the trader[22], which might not be necessarily the data processor or controller. The result is a balanced approach that achieves consumers' protection without infringing fundamental rights.

4. Concept of conformity

Both the DCD and the SGD address the issue of conformity with the contract in an innovative approach by expressly separating subjective and objective requirements for conformity[23]. Both are very delved into in the directives' provisions, adding three important concepts (functionality, compatibility, and interoperability) as

[19] See M. Narciso, '«Gratuitous» Digital Content Contracts in EU Consumer Law' (2017) 5 EuCML 198.

[20] <https://bit.ly/2pBrdLR>.

[21] See Recitals 37 to 40, 48 and 69, and Articles 3(8) and 16(2).

[22] See Article 16(2).

[23] See Articles 6 to 9 DCD and Articles 5 to 8 SGD. See also Christian Twigg-Flesner, Conformity of Goods and Digital Content/Digital Services (January 20, 2020). Esther Arroyo Amayuelas & Sergio Cámara Lapuente (dirs.), El Derecho privado en el nuevo paradigma digital, Barcelona-Madrid, Marcial Pons, 2020., Available at SSRN: https://ssrn.com/abstract=3526228.

requirements for digital content, digital services and goods with digital elements.

The topic of third-party rights is also handled in Articles 9 DCD and SGD, with the removal of content (for the violation of copyright that the trader does not have the license to, for instance) that affects the conformity (of the goods, digital content or digital services) triggering the remedies for conformity.

The distinction between subjective and objective requirements refers to the fact that there are elements resulting directly from the relationship between the consumer and the trader (subjective), and elements that are part of the contract only indirectly, because they are reasonably expected by the consumer (objective).

The subjective criteria, which were already present in the Directive 1999/44/EC (Article 2(2)), refers not only to the written terms of a given contract between the consumer and a trader, but also prior statements by the former, in the context of marketing, for instance, which should be considered as pre-contractual information in the assessment of Directive 2011/83/EU[24], and the characteristics of sample/trial versions of the goods, digital content or digital services.

The objective criteria as an innovation are especially commendable for mitigating the practice that certain traders incurred in, of providing lower thresholds for conformity in the terms of a contract than what is reasonably expected to consumers. Through these criteria, the widely accepted market practice for updating support is proportionally enforced and predatory "hidden" terms became ineffective. The objective criteria also protect the consumer that follows marketing information published by agents in prior phases of the chain of production, against the trader[25].

Within the requirements for conformity, a new explicit obligation is enshrined, for goods with digital elements, digital content and digital services, which effectively codifies a good market practice that is usually expected by consumers but still very much violated (even when explicitly stated in the contract): an obligation

[24] See Recital 42 DCD and Recital 26 SGD.

[25] See Article 8(1)(b) DCD and Article 7(1)(d) SGD.

to provide updates[26]. The most important aspect of this continuous support is to ensure the cybersecurity of a given service through regular security updates[27], but should not be limited to this matter. Failure to supply updates as established in the contract is regarded as a lack of conformity by not meeting the subjective criteria, and the same is considered for when the contract does not have this obligation but it should have had (objective criteria).

5. Remedies for lack of conformity

The SGD and the DCD take a similar approach to the remedies for the lack of conformity, creating a strict hierarchy between them which will need to be transposed by the Member States[28].

Both give priority to the preservation of the contractual relationship in accordance with the requirements for conformity.

The SGD stipulates that bringing the good into conformity is the primary remedy available to consumers, by either repair or replacement[29]. Only in the cases referred in Article 13(3) and (4) can the consumer pursue the other two remedies: proportionate reduction of the price[30] and the termination of the contract (reserved for the cases where the lack of conformity is not minor)[31].

[26] Article 7(d) and Article 8(2) DCD.

[27] See Article 8(2) and Recital 47 DCD and Recital 30 and Article 7(3) SGD.

[28] The transposition of this strict hierarchy will lead to a lower level of consumer protection in some Member States that do not currently foresee it. See G. Howells, C. Twigg-Flesner & T. Wilhelmsson, Rethinking EU Consumer Law (Routledge 2018) 186.

[29] See Article 13(2). The choice between either remedy to restore the conformity of goods seems to fall on the consumer, with the limits being the impossibility of the chosen remedy or the verification of its disproportionate costs.

[30] A particular useful remedy in the cases where the full price has not been payed yet by the consumer ((G. Howells, Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and other Distance Sales of Goods, in A. De Franceschi (ed), European Contract Law and the Digital Single Market – The Implications of the Digital Revolution (Intersentia 2016) 145, 153).

[31] See Article 13(4) and (5).

The differences in the DCD stem from practical reasons, as the structure is identical but adapted into a different context: the consumer must first request that the trader brings the service or content into conformity (the repair of the digital world), and only after pursuing this – and with the verification of any of the scenarios provided for in Article 14(4) – can the consumer ask for either the proportionate reduction of the price or the termination of the contract. In the case where the processing of the consumer's personal data is the counter-performance, the remedy of price reduction is unavailable.

6. Modifications in long term contracts

The DCD also creates a new framework for modifications performed outside of the scope of conformity in long term contracts for the supply of digital content or digital services in its Article 19.

This is a much-needed innovation in EU Law, as it is a very common (and necessary) practice that was not regulated and where the consumer is in a specially unprotected and precautious situation. If the modification itself does not compromise the conformity of the content (or services), the trader could carry out any modification that it wanted to implement, even to the detriment of the consumer, without having to notify him or her. There was a complete lack of transparency by the trader in the contractual relationship.

The concept of modification is never explicitly defined in the text of the DCD, neither in its recitals or articles (specially Article 2), but its meaning can be extracted from its usual use and the recitals in which it is mentioned[32]. It is clear that it refers to modifications not just in the context of Article 19, but also when they are performed to maintain the content or services within the requirements for conformity (for instance, by complying with the obligation

[32] See Recitals 74 to 78.

to supply updates); and as a remedy, to bring into conformity the service or content as requested by the consumer[33].

Because the DCD applies not only to the context of bilateral contracts between a consumer and a trader, but also to the situations where the trader can be a platform that supplies the same content or services to multiple consumers that can interact between themselves, the concept of "modification" must include not just overall changes to the service/platform that are equally applicable to all consumers of that service (for instance through an update), but also targeted changes, that only affect a given consumer's personal account in said platform.

Therefore, it should be understood as to "*modify*" (either by adding, deleting or rewriting) the data which is produced and supplied in digital form (the digital service or content, according to their definitions on Article 2 (1) and (2)), or to change in any way the characteristics (in broad sense, which must include the accessibility, quality, functionality and interoperability) of a service that allows the creation, process, storage, access, share-ability or any other possible interaction with data uploaded or created by the consumer or the other users of that service. Independently of whether the modification is performed to the source code, the software that runs the service, it is only made in the service provider's database, host website or where the modification affects the software that is downloaded and installed in the consumer's equipment.

The DCD allows the trader to implement modifications beyond the scope of conformity and even considers that they can be beneficial to consumers[34], but provides three main main reasonable and proportionate requirements: firstly, the contract needs to allow these modifications in its terms; in those terms, they must provide valid reasons to implement such modifications (for example, compliance with new legal requirements, improving the features and functionality of the service, changes to the trader's trademarks and other aesthetic aspects, changes to algorithms to increase user's

[33] See Article 14(3) DCD.

[34] See Recital 75 DCD.

engagement with content); secondly, they must not create additional costs to consumers (which should be understood in a broad sense to encompass not just monetary costs (having in mind the open definition of price in these directives) but also new hidden costs that create disadvantages (for example, increasing the minimum hardware requirements for the digital content or service); and finally, the consumer must be notified in a clear and comprehensible manner.

When the modification has a negative impact, which is not minor to the consumer (could be due to the inclusion of additional costs but not only)[35], a mere notification is not enough. The consumer needs to be notified on a durable medium[36] and has the right to terminate the contract (in a similar manner and with the same effects that this remedy has when there is a serious lack of conformity)[37], if he or she is not allowed to keep the digital content or digital services without the modification in question[38].

This framework is commendable because it puts a stop to "blank check" terms which allowed free rein to the trader and give the consumer the pre-contractual information and notifications required, so that he or she is not kept in the dark about these changes.

The DCD also includes in the termination of the contract two new consumer rights that complement the rights provided for in the GDPR (data portability and right of erasure) for the consumer: the right to the portability of user generated content, and the right that the trader abstains from using said user's content[39].

7. Conclusion

Directives 2019/770 and 2019/771 represent a major challenge for consumer law at European level, a step towards greater harmonisation which will surely benefit consumers and traders alike.

[35] See Article 19(2) DCD.
[36] See Article 19 (1)(d).
[37] Article 19(3) and Article 15 to 18 DCD.
[38] See Article 19 (4) DCD.
[39] See Article 16 (3) and (4).

The transposition of these Directives into national law – due until 1 July 2021 with the date of entry into force by 1 January 2022[40] – will be interesting, as the similarities between both texts greatly outweigh the differences which could lead to some Member States envisioning this as an opportunity to create an unified legal regime on conformity and lack of conformity for all consumer contracts.

In a conjuncture where sustainability is a priority, the SGD lays the groundwork to a more effective harmonised legal regime in the protection of consumers against the planned obsolescence of consumer goods, with special focus in goods with digital elements that could be affected by faulty or neglectful post-sale support, and thus a greater longevity of goods that represent an heavy environmental cost in their production.

Some worries persist: the restrictive notion of consumer in both texts is very discouraging, and in some Member States the level of consumer protection will lower in certain aspects. The qualification and the categorisation of the contracts for the supply of content and digital services also remain unsolved.

The notion of provision of personal data as counter-performance was successfully adapted from the earlier proposal of the DCD to the final version, appeasing most of the fundamental rights concerns, but many are still critical of some aspects, namely leaving the collection of metadata through cookies out of its scope[41].

The DCD also does not define what kind of technical security standards are to be expected by consumers in a contractual context. Since most Member States have not yet set defined standards in this matter and the new regulation for IT-security[42] also leaves this task to the national legislators, the assessment of conformity

[40] See Article 24 DCD and Article 24 SGD.

[41] Critical on excluding cookies (and being exposed to the advertisements) from the DCD's scope, see European Law Institute (ELI), Statement on the European Commission's proposed directive on the supply of digital content to consumers (ELI 2016) 15f.

[42] See Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act).

with the obligation to supply security updates is still very much uncertain[43].

The SGD and the DCD are not perfect, but they are without a doubt a much-needed push in the right direction of harmonisation and modernisation of EU Contract and Consumer Law. The coming years will be very interesting for EU law with major changes expected in the legislation of Member States.

[43] See Karin Sein and Gerald Spindler, The new Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2 (ERCL 2019) 5.