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Modifications on the digital content or digital service by the trader in the Directive (EU) 2019/770

Alterações aos conteúdos ou serviços digitais fornecidos pelo profissional na Diretiva (UE) 2019/770

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ABSTRACT: In 2019, the EU approved a package of legislation aimed at modernizing many aspects of consumer law, to face the challenges of the Digital Single Market. Among them, the Directive (EU) 2019/770 takes the task of creating a legal framework to ensure the protection of consumers in contracts on the supply of digital services and content – addressing conformity requirements, the remedies available to consumers and the subject of modifications made on those services and content by the trader. The provisions on the latter will be scrutinized and developed, with the goal of fully comprehending the legal framework on modifications and attempting to answer the questions surrounding it. What is a modification; when is the trader obliged to provide them; what are the instances and conditions required for discretionary modifications beyond the scope of maintaining conformity; how transparent should the trader be regarding these practices; and what rights and remedies do consumers possess? Finally, two real examples of T&C regarding modifications will be analyzed considering this Directive and its future transposition.

KEY WORDS: Digital Content; Digital Service; Modifications; Updates; Conformity.

RESUMO: Em 2019, a UE aprovou um pacote legislativo com o objetivo de modernizar diversas matérias em Direito do Consumo, para fazer face aos desafios do Mercado Único Digital. Neste, a Diretiva (UE) 2019/770 assume a tarefa de criar um enquadramento legal para garantir a proteção dos consumidores nos contratos para o fornecimento de serviços e conteúdos digitais – abordando as questões da conformidade com o contrato, os direitos dos consumidores e as modificações realizadas pelos profissionais a estes serviços e conteúdos no decorrer do contrato. As normas sobre esta última matéria serão escrutinadas de forma a compreender o enquadramento legal das alterações aos serviços e conteúdos e as várias questões que estes suscitam. O que é uma alteração, quando é que o profissional é obrigado a realizá-las, quais os requisitos para as alterações discricionárias, quão transparente deve ser o profissional sobre estas práticas, quais os direitos dos consumidores? No final, analisamos dois exemplos de cláusulas contratuais em Termos e Condições sobre alterações à luz da Diretiva e da sua futura transposição.

PALAVRAS-CHAVE: Conteúdo Digital; Serviço Digital; Alterações; Updates; Conformidade.

SUMMARY:

1. Introduction

The new European Union (EU) package of Directives in 2019 on consumer protection aims to update and harmonize the European legal framework for digital contracts, as part of the Digital Single Market initiative. Among them, the Directive (EU) 2019/770 (digital content directive, DCD)[1] introduces new provisions to regulate and strengthen the rights of consumers when acquiring digital content and services from suppliers, while also promoting the cross-state online e-commerce conducted by Small and Medium-sized Enterprises (SME), that would benefit from less market barriers and entry costs due to harmonisation of the applicable regulations[2] and more cemented trust from consumers.

It is important to note that before this Directive, the EU law applicable to the supply of digital content and services was quite limited[3] and there was also a lack of proper legislation in several member states[4]. The DCD was truly "a missing piece of the consumer law acquis"[5].

This Directive, while not perfect and falling short of the objectives of the original proposal for a Common European Sales Law[6], accomplishes quite a lot, by stablishing a common regime (through the maximum harmonisation[7]) on the conformity of the digital content and services,

[1] 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).
[2] Recital 11 DCD.
[3] Prior to this Directive, the contracts for the supply of digital content and digital services at EU level were only partly regulated by the Consumer Rights Directive, Unfair Terms Directive and e-Commerce Directive. See page 2, paragraph 4 of, RAFAŁ MAŃKO, EU Legislation in Progress: Contracts for Supply of Digital Content to Consumers (April 25, 2016). European Parliamentary Research Service, Briefing in series "EU Legislation in Progress". PE 581.980 (April 2016). Available https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI%282016%29581980_EN.pdf. (30/05/2021).
[4] Page 3 and 4 of RAFAŁ MAŃKO, EU Legislation in Progress: Contracts for Supply of Digital Content to Consumers (April 25, 2016). European Parliamentary Research Service, Briefing in series "EU Legislation in Progress". PE 581.980 (April 2016). Available https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI%282016%29581980_EN.pdf. (30/05/2021).
[5] 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 (30/05/2021), RAFAŁ MAŃKO, EU Legislation in Progress: Contracts for Supply of Digital Content to Consumers (April 25, 2016). European Parliamentary Research Service, Briefing in series "EU Legislation in Progress". PE 581.980 (April 2016). Available https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581980/EPRS_BRI%282016%29581980_EN.pdf (30/05/2021).
[6] 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. (30/05/2021).
[7] Article 4 of the DCD. Page 67 of JORGE MORAIS CARVALHO, Venda de Bens de Consumo e Fornecimento de Conteúdos e Serviços Digitais – As Diretivas 2019/771 e 2019/770 e o seu Impacto no Direito Português, in RED - Revista Electrónica de Direito, Outubro 2019, Vol. 20 Nº 3, pages 63-87, DOI: 10.24840/2182-9845_2019-0003_0004.

proper remedies for the lack of such conformity and lack of supply[8], and provisions for the modification of the supplied content and services performed.

This article will focus its scrutiny on a specific innovation of this Directive: its provisions concerning the modifications of digital services and digital content carried out by the trader – their substantive content, the scope of protection provided to the consumer and how they interact with other EU legal provisions in terms of contract law in practical scenarios.

While the Directive recognizes that due to ever evolving state of digital innovation related to the provision of digital content and services, updates, upgrades and other modifications carried out by the traders may be necessary and advantageous for the consumers[9], that unfortunately is not always the case. Some long-term contracts on the provision of digital services and digital content often suffer several unilateral modifications imposed by the supplier to the consumer, to its detriment – these modifications can manifest not necessarily on changes to contract clauses themselves, but to the service and or the content provided (the features and functionalities).

In order to reign in on some predatory and abusive practices, the DCD in its article 19 lays down the requirements for a lawful modification of the digital service or content, beyond the cases where performing such modifications is an actual obligation to the trader – the obligation to provide updates (including security updates) and the obligation to maintain the service or content in conformity with the contract[10].

2. The Contract to supply digital content and digital services

Firstly, in a very succinct way, we must refer which are the contracts that fall within the objective scope of application of the DCD – the approach chosen by the Commission in 2015[11], followed by both the European Parliament(EP)[12] and the Council, consisted in a deliberately avoiding differentiating between different types of contract agreements, leaving its typology to national law[13] – respecting the different national traditions on contract law and also

[8] These requirements and rules were already in place for the sale of "tangible goods" in Sale of Consumer Goods Directive (Directive 1999/44/EC), leaving out of its scope the supply of digital content and services. Through the new 2019/771 (EU) Directive on the sale of goods, many of its provisions were "updated" for the Digital Single Market.
[9] Recital 74.
[10] Article 8 and 7.
[11] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final - 2015/0287 (COD) Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0634. (30/05/2021)
[12] European Parliament, 'Report on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content', November 2017, available: https://www.europarl.europa.eu/doceo/document/A-8-2017-0375_EN.pdf. (30/05/2021).
[13] Recital 12 and article 3(10) - Besides their legal nature, other aspects of contract law, formation, validity, effects, obligations of the consumer to the trader are also still unaffected by the DCD and the national rules are applicable. See page 139 of ALEXANDRE L. DIAS PEREIRA, Os direitos do consumidor de conteúdos e serviços digitais segundo a Diretiva 2019/770, RED - Revista Electrónica De Direito, Fevereiro 2020, Nº 1 (Vol. 21) DOI: 10.24840/2182-9845_2020-0001_0007.

preventing the possibility of the fast development of technologies combined with emerging business-models outpacing any strict typology enshrined in the Directive[14].

As stipulated by article 3, any contract for the supply of digital content or digital services[15], within the meaning of article 2(1 and 2), "*irrespective of the way in which the agreement has been concluded (in or outside of a shop or at a distance) and regardless of the way in which the digital content is delivered (on a durable medium, such as a DVD, by means of a download, by way of streaming or by providing access to the consumer)*"[16] where the consumer pays a price or provides personal data to be processed (and it isn't exclusively for the trader to comply with legal requirements or for the purpose of supplying said service or content[17]), and it isn't integrated, incorporated or inter-connected to a good[18] within the meaning of point 3 of article 2[19], fall within the scope of application of the Directive.

All the requirements referred above are only concerning the objective scope of the directive. The DCD is only applicable to consumer-trader relations – the subjective scope is therefore limited to cases where the substantive requirements for a consumer and a trader are met. Their definitions are in points 6 and 5 of article 2, respectively, and should be interpreted in conjugation with recitals 17 and 18. For the cases where there is a dual-purpose contract (the consumer uses the digital service or content for both purposes that are outside and within their trade, business, craft or profession), the member-states are free to decide to either extend or not the application of the Directive[20]. The DCD also widens the concept of trader to platform providers that act for purposes related to their business and as a direct contractual partner of the consumer for the supply of digital content or services.

In a practical perspective, what kind of digital services and content are encompassed? The DCD gives us some examples: "*computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, (…) digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-*

[14] See page 4 of KARIN SEIN and GERALD SPINDLER, "The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1", European Review of Contract Law Vol. 15 Nº 3, pages 257-279, 2019 https://doi.org/10.1515/ercl-2019-0016. (30/05/2021).
[15] With the exception of contracts regarding the subject matters referred in article 3 nº5, interpreted in conjunction with Recitals 27 to 33. See also pages 9 to 13 of KARIN SEIN and GERALD SPINDLER 'The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1', European Review of Contract Law Vol. 15 Nº 3, pages 257-279, 20192019 https://doi.org/10.1515/ercl-2019-0016. (30/05/2021).
[16] Page 14 paragraph 2 of MARCO LOOS "European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content" (May 31, 2016). Amsterdam Law School Research Paper No. 2016-27; Centre for the Study of European Contract Law Working Paper Series No. 2016-08. Available at SSRN: https://ssrn.com/abstract=2789398. (30/05/2021).
[17] Article 3 nº1 (second paragraph), recital 25 and article 3 nº5 f).
[18] If the tangible good in question exclusively serves as a carrier, a form of storage of said digital content, the DCD still applies – art. 3(3) and recital 20.
[19] See Recitals 20 to 22 and pages 13 to 20 of KARIN SEIN and GERALD SPINDLER, "The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1", European Review of Contract Law Vol. 15 Nº 3, pages 257-279, 2019 https://doi.org/10.1515/ercl-2019-0016. (30/05/2021).
[20] For an in-depth analysis, see pages 6 and 7 of JORGE MORAIS CARVALHO "Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771", July 18, 2019. Available at SSRN: https://ssrn.com/abstract=3428550. See also pages 71 and 72 of JORGE MORAIS CARVALHO, Venda de Bens de Consumo e Fornecimento de Conteúdos e Serviços Digitais – As Diretivas 2019/771 e 2019/770 e o seu Impacto no Direito Português, in RED - Revista Electrónica de Direito, Outubro 2019, Vol. 20 Nº 3, pages 63-87, DOI: 10.24840/2182-9845_2019-0003_0004.

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"[21].

It is important to refer that this variety of possible digital services and content are supplied in a myriad of forms and that the DCD applies independently of the method chosen for a specific case[22]. The method used for the initial supply/giving access to the content or service, may have an impact on the possibility and method employed for future modifications.

Some of the digital services and content refereed above can be transmitted in several ways to the consumer in a single initial act of supply that (i) can occur entirely offline (where the content provided is in a tangible storage medium); (ii) an installer can be provided in a tangible offline medium, which once online, will allow for the download and proper installation of the content in the consumer's equipment; (iii) can be downloaded from an host website; (iv) can be accessed online in the service provider's platform, and it is never downloaded to the consumer's equipment; (v) the software that is downloaded to the consumer's equipment requires that the consumer must be online and logged-in to his/her personal account to access the content/service that it is already properly installed in its equipment – this is the use of Digital Rights Management (DRM) tools, which are implemented to restrict the use of copyrighted works, their modification and distribution by the user (consumer).

3. What is a modification of the digital content or service of a contract?

The term modification finds no clear single definition on the text of the Directive[23], neither in the recitals, nor in its articles, namely, article 2 (definitions). Instead of trying to define this concept with a strict formula that could shorten the scope of application of the Directive due to unforeseen technological developments, the European Legislator opted to make allusions, references to what a modification could entail in practice and what the rationale of the provisions intends to regulate. This cautionary approach is commendable in a sense - large multinational tech-companies often look for ways to circumvent obligations imposed by national regulations that frequently cannot keep up to the level of experimentation and disruptive innovation carried out by these enterprises. Since this Directive is of maximum harmonization[24], in its transposition to national law, the member states may not provide stricter definitions that those found in the European text that could limit the consumer's protection provided by this Directive.

[21] Recital 19 of DCD.
[22] Recital 19 (last part).1
[23] We have discussed the definition of this concept in JORGE MORAIS CARVALHO and MARTIM FARINHA "Goods with Digital Elements, Digital Content and Digital Services in Directives 2019/770 and 2019/771" (October 22, 2020). Revista de Direito e Tecnologia, Vol. 2 (2020), No. 2, 257-270, Available at SSRN: https://ssrn.com/abstract=3717078. Pages 266-268.
[24] Article 4 DCD.

So, without a clear-cut definition provided by the legislator, the task of deciphering the substantive content of this concept falls onto us. As refereed above, it is obvious that the concept should be interpreted broadly, has to be applicable to a diverse range of contracts, different types of digital content and digital services, and to be malleable to adapt to unpredictable innovations[25].

Another aspect that needs to be acknowledge before proceeding is that the meaning of the legal concept of modification (of the digital content or service) does not refer to changes made to a contract's provisions, unilaterally or consensually – it refers, instead, to changes made to the characteristics of a digital service or content, through alterations made to digital code of the software of said service or content – independently of whether carried out by the consumer, the trader or a third party. It is an autonomous concept that refers to a technological modification – not a contractual one. Even though this Directive is only applicable to consumer-trader relations, with the rationale of protecting the former, having this in mind is essential to reach a complete and informed interpretation of its provision.

To modify is to change, to alter "something" - a modification could be understood as any alteration done to the source code, the software that runs the service, whether the alteration 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. A modification could also then encompass the cases where the digital content, its accessibility, quality, functionality, interoperability with other services, are affected – through not just overall changes to the service/platform that are equally applicable to all consumers of that service, but also targeted changes, that only affect a given consumer's personal account in said platform.

This broader interpretation finds ground on the Directive's text in the definition of digital content and digital service (article 2 points 1 and 2) – to "*modify*" (either by adding, deleting or rewriting) the data which is produced and supplied in digital form, or to alter in any way the characteristics (in broad sense) 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 other users of that service.

Recital 74 also refers that modifications can be "*updates, upgrades or similar modifications (…) Some modifications, for instance those stipulated as updates in the contract (…) other modifications can be required to fulfil the objective requirements for conformity of the digital content or digital (…)*". Recital 75 refers "*In addition to modifications aimed at maintaining conformity, the trader should be allowed under certain conditions to modify features of the digital content or digital service (…) The extent to which modifications negatively impact the use of or access to (…) should be objectively ascertained having regard to the nature and*

[25] Page 4 CAROLINE CAUFFMAN, New EU rules on business-to-consumer and platform-to-business relationships, Maastricht Journal of European and Comparative Law, Vol. 26(4) 2019, DOI:10.1177/1023263X19865835, available: https://www.researchgate.net/publication/335252108_New_EU_rules_on_business-to-consumer_and_platform-to-business_relationships (2/06/2021)

purpose of the digital content or digital service and to the quality, functionality, compatibility and other main features which are normal for digital content or digital services of the same type".

Without going into too much detail, what do the provisions on modifications in the DCD aim to accomplish, what was the rationale of the European Legislator? In some instances (article 8(2) and 14(1 to 3)) it imposes the duty to modify the digital service or content so that it remains in conformity with the contract while also imposing in some way an ancillary obligation to notify the consumer of said modification; for other modifications that are carried out by the trader, which are not demanded by the contract per se (article 19), the contract must have clauses that allow said modifications to be carried out for valid reasons, and the consumer must be informed in a clear manner – and where those modifications impact negatively the consumer, the obligation to inform is strengthen and the consumer is allowed to terminate the contract.

The common rationale of these provisions on modifications is actually very simple: to inform adequately the consumer of said modifications and force the trader to act within the margins of the contract – not only the trader cannot deviate from the conformity requirements, but also cannot modify the service or content freely to the detriment and ignorance of the consumer.

So, starting from a common understanding of the concept of modification, coupled with the definitions of what is being modified, and in which instances it can occur, we arrived to the conclusion that the concept of modification should be interpreted broadly (to guarantee a uniform application among the member-states, as it is intended by the maximum harmonization of the DCD and its core provisions), and to prevent unforeseen innovations and technical breakthroughs, as to any changes that affected the criteria listed in article 2 points 1 and 2, coupled with points 10, 11 and 12 – the features of the said content or service.

In the context of bilateral relations between the consumer and trader, the concept of modification needs to be carefully applied – a case-by-case analysis is required to recognize if a said modification is an actual modification of the service or content in relation to a certain consumer (that could therefore trigger some provisions of the DCD). This is important to consider because "not all modifications are the same" – in a given online service, the trader may impose a modification that only affects some of the consumers that use that service – was the digital service of the unaffected consumers modified? No, it wasn't.

3.1. Some practical examples of modifications[26]

[26] For the purposes of this exercise, the reader should assume that the DCD is applicable. There is a consumer, a trader and the digital services and content provided don't fall in any of the exceptions to the objective scope of the Directive. Also, even when the service is provided without the payment of a price, the trader collects and processes personal data for other purposes than those required for the performance of the contract or compliance with legal requirements.

(i) Spotify changes the user interface to all users – modification of the digital service to all users.

(ii) Spotify changes the quality of the transmission to premium users, by increasing it – this modification is only performed in the digital service provided to these premium users. The users of the free version are unaffected, the service provided to them wasn't modified.

(iii) Instagram changes the algorithm that rules how users' publications are displayed on the feed of their followers (from a chronological order to a perceived order of relevancy calculated using machine learning) - this change affects how the content is shared on the platform, therefore it is a modification, and it is a modification that affects all users.

(iv) Blizzard, as the service provider of the online videogame World of Warcraft, receives a complaint that user X used methods prohibited by the Terms of Use to acquire an item. After it confirms the veracity of the complaint, Blizzard removes the said item from user X's personal account – this is a modification of the digital service that only affects a single user.

(v) Facebook makes a small aesthetic change to the user interface and it rearranges the access to its platform's features, in order to make the most used features more easily accessible – modification to all users.

(vi) Microsoft provides monthly security updates for Windows 10 users – modifications that in light of the DCD are required to be carried out.

(vii) Netflix changes the TV shows that it has available for streaming to its consumers, due to acquiring licenses for the distribution of said TV shows, and losing the rights to stream other TV shows – it's a modification that affects the conformity of the service, caused by third-party rights[27].

(viii) Twitter places warnings or flags misleading claims in a user's tweets, due to violations of the Terms of Use – it is a modification that affects the user's generated digital content.

In all the cases above we have modifications - what varies is the kind of change carried out and the trader and who is affected. This is fundamental because in more complex cases, generally related to online platforms, the nature of the exact service or content provided and the modifications that it suffers are not always clear – and whether the modification was performed to maintain/bring back into conformity or if it was within the discretionary change that does not affect conformity.

4. When can a modification be implemented by the trader?

As refereed in the section 2, the DCD in its articles and recitals points towards three instances where modifications can be carried out by the trader: (i) in the cases where such modifications are necessary to bring into conformity a digital service or content; (ii) the modification is

[27] See recitals 53 and 54.

implemented in compliance with the contractual obligation to provide updates or an objective requirement of conformity with the contract; (iii) other discretionary modifications decided by the trader; In this section each of these three possibilities, their requirements and effects will be analyzed.

4.1. Modifications to bring the service or content into conformity

This is a very broad category of modifications. In any instance where a lack of conformity arises, due to a failure to comply with either the objective or subjective requirements of the contract, the trader could potentially offer a modification intending to bring the service or content into conformity with the contract. In the present work we separated the obligation to provide updates derived from obligations of the contract into its own category, but both could be understood as falling within a broader category, since the failure to supply said updates does result in a lack of conformity.

It is important to note that the supply of this kind of modifications can be either requested by the consumer, "*The Right to have the Digital Content or Digital Service brought into Conformity*"[28], or it could be "imposed"/offered defensively by the trader that does not want the consumer to use the other remedies provided on article 14 nº1, the reduction in the price or termination.

Art. 14(1 and 2) of the DCD stipulates that in case of lack of conformity the consumer is entitled to request that the digital service or digital content are brought into conformity – which could be achieved through a downloadable update in the cases where the service or content are installed and function from the consumer's equipment or a simple unilateral change in the online platform (its software or a more "surgical" alteration of a database related to an aspect of the consumer's personal account).

In article 14(4)(b) *a contrario*, the remedy of the reduction of price could be avoided by the trader, by bringing the service or content into conformity in accordance to paragraph 3 of the same article. This paragraph 3 describes the procedure that such modification (be it requested by the consumer or offered by the trader) must comply with: (i) supplied within a reasonable time, (ii) free of charge to the consumer, and (iii) without causing any significant inconvenience. When applying this provision to a specific case, a certain degree of proportionality and reasonableness is necessary, as the nature and purpose of the specific digital content or service in question must also be taken in consideration.

[28] See page 12 of 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" European Review of Contract Law Vol. 15 Nº 4, 2019, pages 365-391. Available in https://doi.org/10.1515/ercl-2019-0022.

4.2. The Obligation to supply updates – modifications to maintain conformity

The DCD brings an innovation to EU consumer contract law: it recognizes the very self-evident necessity that consumers have for a continuous support of digital services[29] and the market practice that imposes that duty onto the trader, to supply said support in the form of updates.

Article 8(2) refers to this obligation as one of the main objective requirements for conformity with the contract, which is applicable to both (i) contracts with a single act or a series of individual acts of supply, for the period of time that the consumer may reasonably expect, taking into account the type, nature and purpose of the specific digital service or content in question, and (ii) contracts for a continuous supply over a period of time, for the duration of said supply.

The content, type and periodicity of said updates should be interpreted broadly, in a case-by-case basis taking into account the criteria listed in (a) and (b) of of article 8(1) – they must fit with the reasonable expectations of the average consumer of that service or content, while also not deviating from sector-specific codes of conduct, recognized market practices and legal obligations imposed by the EU or national law.

The DCD in several of its provisions includes (and stresses) that this obligation to supply updates covers security updates[30]. The technical security standards are not defined in the DCD, so there is some lack of understanding on what exactly the consumers can expect in the contractual context – most Member States don't have concrete reliable standards or proper provisions on this matter (and the most recent EU Regulation on IT-security[31] leaves this type of standards to national legislation)[32].

Now to help distinguish between these two proposed categories – modifications to bring a service into conformity with the contract vs to maintain – are two simple examples: 1) a videogame is released missing critical features heavily promoted in its advertisement, trailers and promotional material and also has technical problems that do not allow it to perform in computers and machines with the hardware requirements that were presented to consumers. One week after launch, the developer of said videogame released a patch, an update that fixes the technical problems of the videogame and adds most of the missing features; 2) a (different) videogame is released with all the promised features and functionalities, without any technical problems. In the promotional material it was heavily promoted that the game would receive free updates every 3 months for the first 2 years after release, with specific

[29] Page 10 of CHRISTIANE WENDEHORST, "Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age", Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, 2016 available: https://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf (3/6/2021)
[30] Article 8(2) and Recital 47.
[31] 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.
[32] See page 5 of 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" European Review of Contract Law Vol. 15 Nº 4, 2019, pages 365-391. Available in https://doi.org/10.1515/ercl-2019-0022.

features, very detailed characters, etc. For the duration of those 2 years, the developer complied with its promises dutifully.

Example 1) is a case where the digital content was not in conformity with the contract and the trader performed a series of modifications to correct the issues and bring the service into conformity. For the duration of that first week, the consumers had at their disposal all the remedies, including the termination of the contract itself, since the lack of conformity was not minor (art. 14(6) DCD). After those modifications were performed by the trader, there was still a minor lack of conformity (the patch added "most of the missing features") and so, the trader still needs to perform another modification to fully bring the service in conformity with the contract.

Example 2) is a case where the modifications (the updates every 3 months) were performed to maintain the digital service in conformity with the contract – with the promises made by the trader which are part of contract. For the duration of that contract, there was no period where there was a lack of conformity, the digital service was always in accordance with the expectations of the consumer, no harm was ever caused and there was not need to invoke any remedy.

4.3. Discretionary modifications carried out by the trader under article 19

Article 19 of the DCD (article 15 of the Commission's Proposal[33]), establishes the applicable regime to all other modifications that do not fall within the section's 4.a and 4.b of this text. They can range from a multitude of alterations with different purposes and nature.

In the past, before the DCD established a regime for the conformity of digital services that bound the trader, this was considered to be a gap on the regulation of e-commerce, usually solved with the extension of some traditional principles and rules of contract law to encompass this new digital reality, which was finally answered with those provisions of the DCD - the matter of other modifications that do not concern the main aspects of a contract fell into an actual legal vacuum, leaving both traders and consumer to figure out the optimal market and contractual practice – which undeniably favored the traders and service providers.

The DCD in its article 19 attempts to solve the main problems: (i) lack of pre-contractual information, (ii) lack of information received by the consumers about the changes operated in the service or content that affects them; (iii) remedies to alterations with negative effects to the consumer in long-term contracts.

[33] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final - 2015/0287 (COD) Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0634. (30/05/2021)

It is important to refer that the trader still has a lot of freedom in this regard, a big margin in which it can operate and alter the content and or service – it just has to comply with some requirements, that in practice won't be too difficult to abide by. Besides, the European legislator recognized that many modifications made in this context will certainly be made benefiting the consumer, providing even some examples "*to adapt the digital content or digital service to a new technical environment or to an increased number of users or for other important operational reasons (…) as they improve the digital content or digital service*"[34].

Art. 19 is applicable to any contract for the supply of digital content or a digital service which is either to be supplied or made accessible over a period of time. With this scope, contracts for the continuous supply of content or that allow an indefinite number of individual acts of supply or a combination of both are encompassed by this provision. The rationale is clearly to target the contracts where a long-term relationship between the trader and the consumer exists, which can be because of the business model – the consumer pays a subscription for the service and or allows the trader to process personal data for the purposes other than the strictly legal requirements and or the fulfillment of the contract's purpose; - or due to a technological solution: even if the consumer pays the price in the beginning of the contract and there is no processing of personal data for other purposes, the service or content has components or is entirely accessible only online.

The requirements for a lawful modification that does not trigger remedies are listed in 19(1) and will now be scrutinized:

a) Contractual clauses that allow modifications

If one would read the full text[35] of the Terms and Conditions(T&C) or the End User License Agreements(EULAs) of software (and the copyright and related rights of the content provided) that consumers accept when subscribing to the grand-majority of digital services or when acquiring digital content, it would already notice that the trader often already stipulates in the contract that it has the possibility to modify the service or content at will, or for some reasons (usually quite vague and provided as mere examples), without being liable to the consumer – this is will referred in section 5 – while also blocking the consumer/user from having this capability.

As referred above, the DCD recognizes that advantageous outcomes can come from the trader modifying its content or service in order to remain competitive and more attractive, and so

[34] Recital 75 DCD.
[35] And it has been widely recognized that, unfortunately, the overwhelming majority of people don't even try to read them, and even if they did try, "The Court seems to recognise that standard terms are often not understood by consumers, irrespective of their degree of vulnerability." In page 4 of GERAINT HOWELLS, "Unfair Contract Terms" in GERAINT HOWELLS, CHRISTIAN TWIGG-FLESNER, THOMAS WILHELMSSON "Rethinking EU Consumer Law" Routledge, July 2017, pages 129-168, available in https://www.taylorfrancis.com/books/9781315164830 and https://doi.org/10.4324/9781315164830.

reaffirms the private autonomy, the freedom of the parties to include such clauses[36] - but the text of art.19(1)(a) goes a bit beyond these understanding and places some boundaries – without these clauses, the trader cannot modify the digital service or content in question, and can only carry out these modifications to the extent that the clauses allow him/her, with a valid reason to do so.

This provision aims to reign in on ubiquitous practice on "blank check" clauses that allow traders to freely modify the service without having to provide justifications for their actions – a dire concern in many platforms (for example social media) – and forces traders to become much more transparent from the get-go. This effectively will push traders to draft and adopt much more complete and comprehensive Codes of Conduct and more exhaustive T&C.

Paradoxically, even though there is a wide concern with the fact that T&C and EULAs are already extremely long, and the grand majority of consumers do not read them, the European Legislator concluded that in a variety of cases they actually need to be more complete, and probably longer. Our understanding is that this was the correct decision (for even if the average consumer does not fully read the contract, it can always go and consult it once necessary), especially when coupled with the application of the Unfair Terms Directive (UTD)[37].

The UTD is applicable since these terms are part of consumer pre-formulated contracts – they aren't individually negotiated between the parties within the meaning of art. 3(2) UTD. The UTD has two provisions very useful to grant some protections to consumers: art. 5 (prescribes how the terms should be drafted (plain and intelligible language) and the most favorable interpretation to the consumer) and art. 6(1) (applied in conjunction with art.4 and the Annex), which prescribes that terms which are deemed unfair (art. 3(1)) will not be bidding to the consumer (art. 6).

With the application of the UTD, any term which allows modifications in such a manner that it is contrary to the requirement of good faith and causes a significant imbalance in the relationship between the parties, in detriment to the consumer, will be null towards the former.

It is important to refer that the UTD is a minimum harmonization directive[38] and that there is no common strict understanding (besides the examples in the Annex) of "*unfairness*" – it varies from case to case, and between member states, as the CJEU leaves the final decision to the national courts[39] and only enunciates and clarifies general criteria used to interpret this concept – as stated in the ruling in *Freiburger Kommunalbauten* case.[40]

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[36] Recital 75 DCD.
[37] Council Directive 93/13/EC of 5 April 1993, amended by Directive 2011/83/EU and Directive 2019/2161 of 27 November 2019.
[38] Page 130 of GERAINT HOWELLS, "Unfair Contract Terms" in GERAINT HOWELLS, CHRISTIAN TWIGG-FLESNER, THOMAS WILHELMSSON "Rethinking EU Consumer Law", Routledge, July 2017, available in https://www.taylorfrancis.com/books/9781315164830 and https://doi.org/10.4324/9781315164830. (30/05/2021).
[39] Page 13 of MARTIJN W. HESSELINK and MARCO LOOS, Unfair Contract Terms in B2C Contracts (June 12, 2012). Amsterdam Law School Research Paper No. 2012-68; Centre for the Study of European Contract Law Working Paper Series No. 2012-07. Available at SSRN: https://ssrn.com/abstract=2083041. (25/05/2021)
[40] Case C-237/02 Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter and Ulrike Hofstetter [2004] ECR I-03043.

b) Valid reasons to modify

For a term that allows the trader to implemented modifications to be valid, it must also contain legitimate reasons as to why the trader should carry on with the modifications. This legitimacy needs to be assessed taking in consideration the nature of the digital service or content in question and its validity needs to be grounded on good faith – the unfairness test of the UTD should be applied here.

In the recital 75, the DCD provides that not all modifications need to necessarily provide an advantage to the consumer – an important consideration to have in mind. It's possible therefore that there are modifications that don't benefit the consumers and even some that can have a minor negative impact (as long as they don't impose actual additional costs, as it will be seen below), if they have a valid reason to do so – this could correspond to the possible enforcement of rules in T&C and Codes of Conduct, by way of sanctions.

Consider the non-exhaustive list below of general justifications that could be assessed to be valid reasons in the context of specific contracts.

a) Compliance with legal requirements (from requiring more identification and certification procedures, to comply with data protection law, stop and denounce criminal activity and remove criminal content such as child pornography, among others);

b) Updating the trademarks of the trader, and changing other aesthetic aspects of digital service and content;

c) Adding features, functionalities and adapt the service or content for a higher degree of interoperability with other services and digital environments;

d) Improving already present features and functionalities;

e) Change algorithms to increase user's engagement with content;

f) Removing content uploaded by the consumers which is protected by intellectual property rights;

g) Removing interoperability with third-party software which is used for malignant reasons – from spyware, malware, to combat the use of bots;

h) Apply sanctions, flag or delete user content which infringes stablished rules on civility and combat misconduct;

i) Patch exploits and bugs that don't cause a lack of conformity;

j) Create, change or diminish space for advertisement;

k) Limiting the platforms and trader's potential liability to third parties.

It is extremely important to note that there are a lot of possible modifications, with a variety of effects on the digital service and content, and how it is used and accessed by the consumers, and that the validity of the reason behind will also differ a lot, being very dependent on the

nature of services provided. To arrive at sound conclusions, we recommend a case-by-case approach based on the unfairness test of the UTD. The examples ii, iii, iv, v and viii given section in 2.1 are all modifications under art. 19(1) with arguably very valid reasons.

c) No additional costs to the consumer

This condition present on art. 19(1)(b) is quite direct but it still hides some complexity. The first and most obvious meaning of this provision is a prohibition of new payments for the access to the digital content and service – in whole or partly. If old features or parts of the content itself that were previously accessible to the consumer are placed behind a new paywall with the implementation of such modification, the modification is violating this rule (the consequences for these violations will be explained in section 5 of this text). It's important to refer that this is applicable to both paid services (with the creation of extra tiers of paying consumers or hiding parts of what was available in an "expansion pact") and "gratuitous" contracts (by taking away content or features from the free version to the "premium")[41].

Besides the payment of money, there are more hidden costs to consumers that may fit within this provision: namely the increment of the hardware requirements to support and run the digital service. The implementation could stop a consumer from using the service with its electronic equipment (computer, smartphone…) by demanding more RAM or putting a strain in the graphics card. These would therefore not only violate this condition but could also constitute a lack of conformity, if the new minimum hardware requirements are superior to those specified in the pre-contractual information. If the consumer is forced to upgrade his/her equipment, this kind of modification is effectively blocking the consumer from the digital service and content by placing an additional cost on the consumer.

It is important to refer that there could be an exception: the modification simply requiring more memory storage[42]. It is a problematic assessment – while some modifications could just increase the memory space demanded by a negligible amount that consumers would not actually be harmed by – some modifications could increase the amount of storage space required to such an extent that it would amount to the effect described of barring the consumer to access the content, by making the electronic equipment unable to store the required data to run the software of the digital service.

There are also those cases where the increment of memory required is not actually too big, yet still be prejudicial – the cases where the consumer is already using the memory storage of the equipment to its limit, and would therefore be forced to delete other digital content or

[41] Page 9 of CHRISTIANE WENDEHORST, "Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age", Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs, 2016 available: https://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf (3/6/2021)
[42] This specific problem is of course only relevant for those digital services and content which are downloaded to the consumers' equipment.

services to allow the implementation of that modification. On the other hand, it is practically inevitable that the large majority of modifications, such as security updates, would fill more memory space – whether the modification is implemented to maintain/bring a digital service into conformity or is performed under article 19(1). For these reasons, a cautionary approach is necessary: requiring more data storage from the consumers' equipment is an inevitability, and most instances of these demands would probably not amount to be "actual" new costs for consumers at large – a case by case basis method is necessary to pinpoint those cases which do not violate this provision but also go beyond the threshold of minor negative impact of Art. 19(2). Some factors that could be considered on these assessments are the proportion of the memory storage required by the modification in relation to the prior total value, the kinds of electronic equipment that will have the digital service installed and their storage capabilities – and crucially, not violating the objective requirements for conformity in article 8(1)(a)(b) and (d), which are still relevant to solve these problems. Not complying with these requirements would lead us to a case of non-conformity.

There are still two more instances of additional costs: a) locking features and content previously available offline behind a requirement of the consumer being online, and b) requiring other digital services (from the same trader or a third party) to access what was previously accessible[43] - in the former with have the cost of being online which can be very significative for some consumers which may have difficulty to be online when using the digital service and acquired it because this was not an expected requirement, while in the latter it is adding requirements.

Firstly, in a) the new cost would be the requirement that the consumer needs to have internet connection. This could happen when the trader implements a certification scheme that forces the consumer to be online to, for example, perform a mandatory login in order to access the digital service or content which was, in whole or partly, available before without this requirement. Another instance is the trader removing some features and or content from the consumers' equipment and having its access be online – this could be justified with the addition and or improvement of features and easing the demands of memory storage on the consumers' equipment – while potentially well intentioned, it would still be an additional cost to the consumer.

d) The duty to inform the consumer of the modification

This obligation is applicable to all modifications made within the scope of article 19 – with some differences depending on whether the modification has a negative impact on the consumer. If it does not or the impact is only minor, a normal notification to the consumer is adequate. It could consist of a pop-up or a message informing the consumer of the changes in a simple,

[43] This assessment is self-explanatory and in line with the rationale used.

clear and comprehensible manner. The message should appear to the consumer the first time it accesses the digital service or content after the implementation of the modification and remain available to be read for some time. It is highly advisable that the trader maintains a log, a list of sorts that has all these notifications registered and is easily accessible to the consumer and not hidden.

It's important note that these simpler notifications for modifications which do not cause a negative impact on the consumer are already market practice in several kinds of digital services, where its non-compliance could lead to a case of lack of conformity with the objective requirements of such services or content. The recommendations above actually followed some of the best observed practices. It could be argued that these notifications are considered in many cases to be beneficial to the trader, by showing its continuous support and improvements to the service – still, market practice or not, the DCD stablishes this requirement to all modifications performed under art. 19(1) on all contracts for the supply of digital services and or content under its scope, following the rationale of increasing, and forcing transparency in the relation between the consumer and the trader – if in article 19(1)(a) there is a demand for transparency on the contract and its terms, their subsequent usage (when it comes to the implementation of the modifications) should also be transparent.

For the matter of modifications that have a negative impact on the consumer that isn't minor, the obligation to notify and inform the consumer has higher requirements to increase the visibility and comprehension of the modification in specific and the remedies available to the consumer – that have a time limit to be exercised by him/her[44]. Instead of a simple notification, the DCD imposes that the consumer be informed "*reasonably in advance on a durable medium of the features and time of the modification*"[45]. The durable medium concept is developed in recital 76, referring the need for long term storage "*as long as necessary to protect the interests of the consumer*", the exercise of the rights to compensation arising from liability and access to the remedies. The recital gives as examples that would meet these criteria: "*paper, DVDs, CDs, USBs sticks, memory cards or hard disks as well as emails*". While very different, they all have in common one trait besides the basic capability to store information: they all work independently, outside of the digital service in question[46], which reveals a preoccupation of preventing the possibility of this communication being done within the digital service itself, and therefore issues to accessibility to it by the consumer.

If the trader offers to the consumer the possibility to maintain the digital service or content in the previous version, without the modification that has a negative impact, then this possibility should be included in the notification on durable medium.

[44] The remedies expire 30 days after the consumer receives the information Art. 19(2)
[45] Article 19(1)(d)
[46] The only exception is the email, in relation to the contract to supply the email address as a digital service in question. This is usually solved in practice by having the consumer provide other emails address as backup, as well as phone number.

5. The consumer's right to termination of the contract

To protect the consumer from modifications that cause a significant negative impact on the features and characteristics of a digital service and digital content, the DCD gives as a remedy the possibility of the consumer in a long-term contract the option of termination of said relationship[47].

It could be criticized that this solution does not go much beyond what could be derived from the general principles of contract law[48], but this affirmation is unfounded. The DCD establishes a series of procedures and effects upon the request of the user to terminate a contract that offer a still significant protection to both the consumer and trader in a balanced manner.

Before proceeding to describe said effects, namely the rights and obligations that fall on both parties, it is important to analyze how exactly this provision may be triggered by the consumer.

5.1. Conditions of the right to termination of the contract by the consumer

The exact wording of article 19(2) is "if the modification negatively impacts the consumer's access to or use of the digital content or digital service (…)" – the European Legislator has once again, as described in section 2 of this paper, employed two terms - to impact both access and use - that irrevocably imposes a very broad definition of modification. Based on this, the first condition that must be met to allow the consumer access to right to termination is that the modification has a negative impact.

Negative impact will necessarily include the cases of "additional costs to the consumer" of art. 19(1)(b), described above, but also any other aspect that it is worsen by the implementation of the modification (affects use) or blocks access, even if it does not create a situation of lack of conformity (with both objective and subjective requirements), since those cases are already solved with the remedies in art. 14.

These cases where conformity isn't affected by the modification but there is a negative impact to the consumer are therefore solved with this regime – but only if such negative impact isn't minor, the second condition to allow the right of termination. So, the applicability of this provision is severely shortened and requires the understanding of two unclear concepts – constituting an instance of "negative impact", which is not "minor". Recital 75 sheds some light

[47] In some cases, the consumer may not be allowed the option to terminate the contract, if the trader has enabled the possibility of the consumer maintaining the digital service or content without the modification with negative effects and additional costs, if said service or content remain in conformity – art. 19(4), that clearly deviates in the good way from the orientation in article 8(3).
[48] For example, should the DCD give this right to consumers without giving the trader the possibility to repair said relationship first, in opposition to said demand?

on this issue, by providing some criteria to be considered on the necessary case-by-case approach: "*should be objectively ascertained having regard to the nature and purpose of the digital content or digital service and to the quality, functionality, compatibility and other main features which are normal for digital content or digital services of the same type*". An attentive eye will spot the major flaw with this indication – it is still vague and points towards the same criteria used for ascertaining compliance with the objective requirements of conformity.

If both the previous are met, then according to art. 19(1)d) the trader must notify in advance of the modification, explaining its effects and the consumer's rights and to exercise them – art. 19(2) indicates that the right to terminate the contract free of charge needs to be exercised within 30 days of either the receipt of information described in art. 19(1)(d) or when the modification occurs "*whichever is later*".

Art. 19(4) allows the trader to offer the possibility to the consumer to maintain the digital service or content without the modification with considerable negative impact, and compromises to maintain this version in conformity (as referred in recital 77). With this offer the consumer can either opt-out of the modification or accept it, it does not have the right to terminate the contract. It should also be stated that this possibility is an option for the trader, not a right of the consumer.

Finally, recital 77 clears a loophole in art. 19, by referring the consequences of modifications that to do not met all the requirements in art. 19(1) (that were developed in section 3) and that therefore result in lack of conformity[49] – the consumer shall have access to the remedies in art. 14, including termination.

There is also the case of "package" updates that may add positive features beyond what is necessary to maintain conformity – and others that trigger art. 19(2) because they create new additional costs for the consumer, were not included in the contractual clauses and do not have a valid reason behind them,… which affect the consumer in a grave manner - the consumer is effectively forced into a corner. It can only opt between accepting the detrimental modifications performed in violation of article 19, or terminate the entire relationship and give up the digital service – or, if the trader gives this option, stay in the older version of the digital service without the positives features. This has the potential of becoming a very malignant practice by traders to force consumers to accept modifications in violation of article 19, when it is sure that the grand majority of consumers will not use the right of termination (due to dependency of the digital service and or the network effect). The DCD solution for these cases is that the trader allows the consumer to stay on a non-modified version of the software which as to stay in conformity but does not include the discretionary positive features[50].

[49] It can easily be argued that if a modification is made when the right to it isn't present in the contract with a valid motive, that the result is a lack of conformity with the subjective requirement of conformity with the contract.
[50] Article 19(4).

5.2. Effects of Termination

When the consumer terminates the contract, according to the requirements described in 4.1 of this work, Article 19(3) refers to articles 15 to 18 of the DCD that contain the regime applied to use of this remedy. These articles have provisions on the following aspects:

- Reimbursement of the price paid by the trader (art. 16(1));
- Retrieval of user's personal data and user generated content by the consumer (art. 16(2) and 4 DCD and art.15 and 20 GDPR)
- Trader's duty to refrain from using consumer's personal data and user generated content (art. 16(3) DCD and art. 5(1)(c) GDPR);
- Consumer's duty to refrain from using the digital content and services (art. 17(1));
- Consumer's duty to return durable medium (art. 17(2)).

This framework stablishes obligations to both parties, aiming to return them to not just the original state they were before concluding the contract, but also the protect the consumer on the matters of personal data and user generated content – an innovation of the DCD. Before delving more in depth on this topic, a short rundown of the other obligations is needed.

The rules on the reimbursement of the price are quite straight forward – article 16(1) and recital 68 aim to find a balance between the legitimate interests of the consumers and the trader when the contract in question stablished a long term relation between both parties. In these cases, where the supply of the digital service and content is to be supplied over a period time, the reimbursement needs to be calculated in relation to the period of time that the content and service was not in conformity – or from the moment the negative modification is implemented. Two considerations arise: (i) the difference between contracts where the consumer paid the price once, at the beginning of said contract, and the contracts where the consumer pays a subscription (be it weekly, monthly, yearly,…); (ii) the nature of the price.

(i) The Directive does not distinguish between both. In the contract with subscription-based payment, it is easy to identify that the reimbursement will not consider the payments related to past periods where the service or content was on conformity. For the contracts where there is only the payment of the initial price (even if it is arranged to be paid in parts), unless the trader specifies the total duration of the contract[51], the expected total period in which the service and content need to be in conformity is assessed under objective conformity.

(ii) The definition of price is in art. 2(7), and in conjunction with recital 23, it will raise many questions in the transposition of the DCD related with the use of e-vouchers and coupons and virtual currencies (which encompass both cryptocurrencies and other currencies supplied by certain platforms, if they have legal tender). Ideally the reimbursement should be in the same kind, but if not possible, the conversation rate should be the one at the time of transaction.

[51] Infringing this stipulation (whether in the contract or part of the pre-contractual information that, in accordance to Directive 2011/83/EU) corresponds to not complying with the subjective requirement for conformity, article 7 (if the time stipulated for the contract is not below reasonable standards, in which case, the duration under objective conformity applies according to recital 45.

The obligation that the consumer has to refrain to use the content or service in article 17(1) is intended to mimic the return of a physical good to the trader, where the consumer ceases to be able to continue to use it. It should be achieved through the deletion of it from the consumer's electronic devices and other copies stored elsewhere (recital 72). This provision is also in line with CJEU's decision on the UsedSoft case (paragraph 87)[52].

Finally, concerning the consumer's personal data and user generated content, article 16(2) transfers the legal obligations of the data controller (that could be the software provider) under the GDPR to the trader[53], and art. 16(3 and 4) - which should be read with recitals 70 and 71, while having in mind the provisions of the GDPR on data portability and the right to erasure (as both regimes are applicable) - creates similar rights regarding user generated content.

Given that the definition of personal data is very broad in art. 4(1) of the GDPR, in conjunction with the definition of pseudonymisation and the high thresholds for anonymization on CJEU's jurisprudence and the works of the Article 29 Data Protection Working Party[54] – it could be argued that there is little user content that does not fall within the meaning of personal data. Still, art. 16(3 and 4) act as back-up rules to protect the content created by the consumer that does not have any personal data present (for example identifiers that could be lead to infer the identity of the author). It is important to stress that user generated content should be interpreted broadly has to include not just instances of works protected by copyright and related rights or other forms of intellectual property created using the digital service, but also works that created by the consumer that do not met the thresholds for these rights, and also works and content that is stored/uploaded by the consumer to the digital service.

6. Short commentary on some practical examples: Dropbox and Netflix's Terms

In this section, two examples of digital services and its terms will be analyzed in light of the DCD, for purely academic purposes: Dropbox and Netflix.

[52] Case C-128/11 UsedSoft GmbH v Oracle International Corp. [2012] ECLI:EU:C:2012:407.
[53] See page 27 para. 1 of 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" European Review of Contract Law Vol. 15 Nº 4, 2019, pages 365-391. Available in https://doi.org/10.1515/ercl-2019-0022. (30.05.2021)
[54] The Article 29 Data Protection Working Party ceased to exist as of 25 May 2018 and has been replaced by the European Data Protection Board (EDPB), according to recital 139 and article 94 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC. See https://ec.europa.eu/newsroom/article29/items/629492 (25.05.2021)

6.1. Dropbox

> *"Modifications*
>
> *We may revise these Terms from time to time to better reflect:*
>
> *(a) changes to the law,*
>
> *(b) new regulatory requirements, or*
>
> *(c) improvements or enhancements made to our Services.*
>
> *If an update affects your use of the Services or your legal rights as a user of our Services, we'll notify you prior to the update's effective date by sending an email to the email address associated with your account or via an in-product notification. These updated terms will be effective no less than 30 days from when we notify you.*
>
> *If you don't agree to the updates we make, please cancel your account before they become effective. Where applicable, we'll offer you a prorated refund based on the amounts you have prepaid for Services and your account cancellation date. By continuing to use or access the Services after the updates come into effect, you agree to be bound by the revised Terms."*[55]

Dropbox's Terms seem to be in line with the requirements and rationale of both the UTD and the DCD. The language used is plain and intelligible, being perceptible to the well-informed consumer (that is not educated in law). It refers to the modifications under art. 19 and it seems to fully comply with this provision's conditions on nº1 (valid reasons to modify, uses the durable medium for notifications), and guarantees the right of termination under para. 2, within 30 days and the corresponding refund. The only question left unanswered is the matter on the right of retrieval of user generated content and personal data, which is especially tricky regarding the fact that Dropbox is cloud storage service. In light of the DCD, Dropbox will need to allow consumers that terminate their contract the right to retrieve all their belongings during a minimum amount of time, without hindrances, while being allowed to block the access to other features of the service, according to art. 16(4) and recital 71.

6.2. Netflix's Terms of Use

> *"6. Netflix Service*
>
> *4. We continually update the Netflix service, including the content library. In addition, we continually test various aspects of our service, including our website, user interfaces, service levels, plans, promotional features, availability of movies and TV shows, delivery and pricing. We reserve the right to, and by using our service you agree that we may, include you in or exclude you from these tests without notice. We reserve the right in our sole and absolute discretion to make changes from time to time and without notice in how we offer and operate our service."*[56]

[55] Dropbox's Terms and Conditions can be consulted here https://www.dropbox.com/terms. (25.05.2021)
[56] Netflix Terms can be consulted here https://tldrlegal.com/license/netflix-terms-of-use#fulltext. (25.05.2021)

Netflix Terms of Use are a flagrant example of terms that are in dire need of being revised once the DCD's provisions are transposed to the member states law. They refer that their streaming service is not only being updated to all consumers, but also the possibility of targeted modifications, affecting some users. These modifications could be carried out under art. 19 and also as a means to maintain the conformity of the service (inclusion of promised content in advertisement or in-service announcements, for example). The conditions of art. 19(1) are not met, as no valid reasons to modify are provided and the notifications requirements are gleefully denied. The right of termination and the other remedies (for the possible lack of conformity regarding the removal of content[57]) are also missing.

7. Conclusion – Digital Force, Trade Secrets and the enforceability of transparency and notifications requirements of the DCD

Cyberspace has often been equated with being its own jurisdiction as separate from the tangible reality, with its own system of rules and societal norms. Providers of digital services have been described as occupying and mixing the roles of legislators, judges and enforcers – not only by drafting and imposing Terms and Conditions on the users, but also because of the unique position that they occupy which allows them to exercise a "digital force" – to create even the most fundamental rules of what is possible or not within a given digital service, by creating, modifying and removing features and functionalities (which even lead some academics to described their position has being even superior than that of the State towards its citizens)[58].

One of the most fundamental problems for users has always been the susceptibility and uncertainty that they face in relation to the service provider when it comes to modifications – the trader effectively holds all the cards in their hands and the way many contracts have been written has continuously reaffirm this position and limited the remedies accessible to the consumer.

In this context, the DCD solves many problems as presented in the several sections of this paper, but still leaves a lot of unclear room to fill and some unanswered questions that could lead to differing regimes on the transposition (and the fact that the UTD isn't applied evenly across the EU). There is also the matter of the contracts extension growing exponentially and the possibility of over-saturation of the average consumer with notifications concerning minor modifications. Another question is the required level of transparency on the notifications and communications made by the trader, especially when it starts crossing into the field of trade secrets underlying the technology employed by the trader (highly important on the matter of

[57] Article 10 and recital 54.
[58] Page 105 of PRZEMYSŁAW PAŁKA, "Virtual Property Towards a General Theory", Thesis submitted for assessment with a view to obtaining the degree of Doctor of Laws of the European University Institute Florence, 20 December 2017

algorithms and search engines). However, these concerns do not detract from the rights and remedies given to consumers, which are commendable, namely the remedies for lack of conformity and the protection of user generated content[59].

The DCD leaves to the member states the task of enforcement of the rules contained in it, which must also contemplate access to these tools to the list of entities in art. 21(2), and through its maximum harmonisation and mandatory nature (art. 22(1)), it guarantees the applicability of the norms to consumers – if they have access to means to enforce their rights, be it through courts or alternative dispute resolution entities, but that is another story…

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[59] There is still some criticism left, regarding Arts.15-18 - the fact that these articles do not address the protection of the consumers' rights regarding the termination of the contract when it is invoked by the trader.

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