



Digital content services for consumers

Comparative analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content services

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REPORT 1: COUNTRY REPORTS

With an executive summary of the main points

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Executive summary of main points

1. The Centre for the Study of European Contract Law (CSECL) and the Institute for Information Law (IViR), both affiliated to the Law Faculty of the University of Amsterdam, were commissioned by the European Commission to conduct a study on digital content services for consumers. Throughout this study we employ the following definition of digital content services: “all digital content which the consumer can access either on-line or through any other channels, such as a DVD or CD, and any other services which the consumer can receive on-line”. This definition was prepared by Europe Economics in their study on “Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers - LOT 1”.

2. This document represents Report 1. It contains the country reports of 9 Member States – Finland, France, Germany, Hungary, Italy, The Netherlands, Poland, Spain and the United Kingdom – and two legal systems from outside the EU, i.e. Norway and the United States. The country reports contain the responses of national experts to a questionnaire developed by the CSECL and the IViR. A first draft of these country reports was received by 15 September 2010. After feedback from researchers from the University of Amsterdam, subsequent amendments were made by the reporters. The country reports therefore also reflect the efforts and expertise of the national experts, not of CSECL and IViR researchers. The definitive country reports were submitted by 22 October 2010.

This executive summary provides an overview of the main points that follow from the country reports. It does not provide for a comparative analysis of the country reports; this analysis will be part of Report 2.¹

3. The country reports show, first of all, that in many legal systems there is uncertainty as to the **classification of digital content services**. Most legal systems apply rules on consumer sales law in the case where a consumer purchases a piece of software on a DVD and the DVD fails to function in his computer as a consequence of a flaw in the *software on the DVD*. However, this is not the case in Finland and in Scotland. Nor is it in France where courts and literature make use of different classifications and therefore apply different rules to such cases. In the case where the software was downloaded through an online (automated) update service or a real-time (remote) software support service, the contract is most likely classified as a sales contract in Germany and Italy, and in effect also in the UK, but as a service contract in Finland and France. In Hungary, Norway, and Spain, the contract will possibly be classified as a service contract, but sales rules may be applied by way of analogy. In many of these legal systems, however, the classification of the contract – and thus the question of which legal rules apply to the contract – is far from settled. By contrast, in the US there is a tendency to consider digital products as goods or as *sui generis* products, to which the rules on the sale of goods apply rather than the provisions on service contracts. This classification applies to all digital content contracts.

¹ M.B.M. Loos, N. Helberger, L. Guibault, C. Mak, L. Pessers, K.J. Cseres, B. van der Sloot & R. Tigner, Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts, Final Report, Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts, June 2011, online available at: http://www.ivir.nl/publications/helberger/digital_content_contracts_for_consumers.pdf



4. In practice, Member States do not differ much in their approach as to how to determine whether or not the digital content service is performed correctly. In fact, in all legal systems a functional approach is taken. The **conformity test** then would be whether the consumer's legitimate expectations of the service are met. This test would also apply with regard to the question whether the promised security or privacy is provided, as is explicitly mentioned in the reports from Italy, the UK and the US. Yet, the US report indicates that there is serious uncertainty as to the level of quality the consumer may expect.

5. Under most legal systems, irrespective of the classification of the contract, the **remedies** of repair and replacement, termination and price reduction are available to the dissatisfied consumer, as well as a claim for damages. In most of these legal systems, the hierarchy of remedies applies as well, with the exception of France (in so far as remedies under general contract law may be applied), Italy (with regard to tailor-made software) and Poland. The outstanding exception here is the UK, where only the remedies of termination and damages are available if the contract may not be classified as a consumer sales contract. If the contract may be classified as a consumer sales contract – in accordance with the general situation in these legal systems – the consumer may also resort to the regime of the *vices cachés* (hidden defects) in France or to the right to reject the 'goods' in the UK. The right to reject is also available in the US, where a right to repair or replacement is not recognised. However, the US report mentions that, given the costs of litigation and the uncertainty as to the level of quality that may be expected, in practice an individual consumer does not have a remedy.

6. While both the conformity test and the available remedies appear to be largely the same in the Member States, this is not the case with regards to the **period within which these remedies may be exercised**. Here, the difference between the classification of the contract as a sales or service contract becomes decisive, with periods diverging from 1 year for remedies under a services contract in Poland up to 15 years in Spain, and from 2 years for remedies under a sales contract in France, Germany, and Italy up to 6 years in the UK.

7. In the case of a distance contract, if the contract is classified as a consumer sales contract, the consumer may withdraw from the contract within 7 working days after delivery of the digital content. However, if the contract is classified as a service contract, the cooling-off period commences with the conclusion of the contract and the consumer loses his **right of withdrawal** once the service has commenced with his consent during that period. In Spain – where largely the same rules apply to sales and service contracts – the rules on services apply with regards to the right of withdrawal. Given the absence of an equivalent instrument to the Distance selling directive, there is no statutory right of withdrawal for goods or services in the case of distance selling in the US.

In Finland, Norway, Spain and (according to the public regulator) in the UK, the consumer retains his right of withdrawal if he was not informed of the fact that by consenting to the early performance of the contract, he would lose his right of withdrawal. On the other hand, the consumer would lose his right of withdrawal even in that case in Italy, The Netherlands, and Poland. The same is true in Germany in case both parties have fully performed their obligations under the contract, in fault of which the consumer retains his right of withdrawal. Where the consumer is still entitled to withdraw from the contract after the



digital content was delivered, and the digital content cannot be returned, he will be required to pay a price for the value of the service in most legal systems, but not in Hungary and the UK.

8. In so far as the contract contains standard terms preventing the consumer to copy a music file or restricting its playability to only a certain region, such terms will be subjected to the unfairness test of the **Unfair Terms** Directive. So far, such clauses have not been considered unfair by courts. In Spain, the legislation on intellectual property rights even indicates that, when certain conditions are met, traders are allowed to impose such access control technologies. Terms that respect such conditions will not be considered unfair.

Standard terms which conflict with privacy legislation will normally be considered non-binding or unfair in most legal systems. However, in Germany, it is controversial whether such standard terms in contracts with service providers according to which the consumer agrees to the use of his personal data for future approaches by the said service provider or third parties, unless he or she declares otherwise, are to be considered unfair.

9. In most legal systems, standard terms may become binding on the consumer also by an implicit manifestation of assent, e.g. by taking the service in use. This is different, however, in Poland and Spain, where an express declaration of consent is required. In all legal systems, **click-wrap and** possibly also **browse-wrap licenses** are considered valid and enforceable contracts, provided the consumer has given his consent before the conclusion of the contract. Moreover, in all Member States, legislation is in place requiring the service provider to ensure to the consumer a reasonable opportunity to take note of the standard terms before the conclusion of the contract. Such regulation may be based on unfair terms legislation (Finland, Germany, Hungary, Italy, Poland, Spain, UK) or on rules on the provision of information under distance selling and unfair commercial practices legislation (Finland, Germany, Italy, Poland, Spain, UK). In the latter case, specific reference is made to the need to supply information in a manner suitable for the technique used for distance communication. In all cases, the information must be clear, comprehensible and in clear and intelligible language. Standard terms that were not provided before the conclusion of the contract do not bind the consumer in Poland and the UK, and may be voided in The Netherlands. A breach of the information obligations under distance selling and unfair commercial practices legislation is considered a breach of competition law in Germany. In Italy and Spain, a breach of information obligations is punishable by an administrative sanction.



10. Providers of digital content services are allowed to sell or market their product to minors, but restrictions apply with regards to morally and physically harmful content in all legal systems. Moreover, in all legal systems, **contracts concluded with minors**, i.e. with individuals under the age of 18, can be voided, unless parents have given their consent to the conclusion of the contract. In some legal systems, an exception is made with regards to contracts which relate to every day purchases (Finland, France, Hungary, Poland), or contracts which can be considered to be paid by pocket money (Norway). In some legal systems, contracts cannot be concluded validly by young minors even with parental consent (7 years in Germany, 13 years in Poland). In The Netherlands, the minor is deemed to have obtained consent if it is common a contract of this type be concluded independently by minors of his specific age. In Italy, the contract may not be voided where the minor has fraudulently concealed his true age. In Hungary, such a contract may be voided, but the minor is required to pay compensation if the contract is voided after the service has already been rendered in case it cannot be returned, unless the service provider should have known the minor was underage. In such cases, the minor need only pay compensation as far as the digital content service has been to the minor's true advantage in Italy, Norway, The Netherlands, and Spain. However, in all of these legal systems, such 'true advantage' is accepted only in rare cases. In Poland, the service provider is only entitled to compensation if there was also a disadvantage for the service provider – which is questionable in the case of a digital content service. In Finland and Germany, the minor is not required to pay compensation. The situation is unsettled in France and the UK.

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FINLAND

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2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

In Finland no specific consumer protection rules pertaining to digital content services have been developed. The provisions of consumer sales are included in the Consumer Protection Act (Chapter 5, Sale of Consumer Goods, 16/1994). This Chapter is applied to the sale of goods where the seller is a business and the buyer is a consumer. Services fall outside the application of the Chapter. That's why consumer sales provisions cannot be applied directly digital content services. There is neither such case law where consumer sales provisions had been applied by analogy to digital content services.

The questionnaire does not examine common cases where software is provided in connection with purchases of physical goods, e.g. with digital cameras and gps-devices. The Finnish Consumer Dispute Board has given a decision on such a case in 2008 (16.6.2008). A consumer had bought a gps-device and a digital map on CD from a web shop. The consumer downloaded the map into computer and into the gps-device in order to try the device. The consumer was not satisfied with the purchase and wanted to withdraw from the contract in accordance with the distance sales provisions. The seller did not accept the withdrawal because the consumer had opened the seal on the cover of the CD. The Consumer Dispute Board considered that the consumer had the right to withdraw from the contract, because the consumer was entitled to try the product and the use of software was necessary for that purpose.

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the *software on the*

CD/DVD, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

The physical platform (CD/DVD) can be regarded goods but the main subject matter of the purchase will be treated as service. If the CD fails to function because of defective software the consumer sales provisions cannot be applied. Instead the provisions of the EULA will be applicable as far as they cannot be regarded unfair.

It can be mentioned that in the above mentioned decision of Consumer Dispute Board it was considered that the software was subordinate to the testing of the hardware.

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer's computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

The contract will be treated as service contract. In case of defective software the consumer sales provisions are not applicable. Instead the provisions of the EULA will be applicable as far as they cannot be regarded unfair.

3 Defining consumers and producers

Q.3.1 Are individuals who offer digital content services to consumers considered to be 'consumers' or 'traders'? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

The Finnish Consumer Protection Act applies to the offering, selling and other marketing of consumer goods and services by business to consumers. Consumer goods and services are defined as goods, services and other merchandise and benefits that are offered to natural persons or which such persons acquire, to an essential extent, for their private households. Consumer is defined as a natural person who acquires consumer goods and services primarily for a use other than business or trade. Business is defined as a natural person or a private or public legal person who, in order to obtain income or other economic benefit, deals in, sells or otherwise offers consumer goods or services on a professional basis and for consideration.

In accordance with the definitions above an individual can be regarded as a business if certain conditions are fulfilled. The key conditions are the purpose to obtain economic benefit, professional activity and for consideration (=against payment) . The Finnish Consumer Dispute Board has made some decisions addressing the meaning of “on a professional basis”. The Consumer Dispute Board has paid attention to the frequency of economic activity. If private persons have e.g. sold puppies every year during the last three years or if they have had at least two litters of puppies during the same or previous year, they have been treated as business and Consumer Protection Act has been applied (1884/36/07, 21.9.2009).

Let’s take an example. A student develops a mobile computer game and sells it through Apple Store with the price of one euro. The game becomes quite popular and the total earnings per the first year are 1000-2000 € The sales are undoubtedly against payment. But is the activity professional and is the purpose to obtain economic benefit? Professional activity normally includes the purpose to obtain economic benefit. On the other hand the purpose to obtain economic benefit does not necessarily require professional activity. Therefore in our case the strongest argument against business status would be the notion that the activity cannot be (yet) treated professional.

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

Finnish legislation does not differentiate between the activities of professionals and ‘prosumers’. The service provider is treated either as a business or as a consumer. If the service provider is treated as a business then consumer protection contractual regulations are applied. If the service provider is treated as a consumer then general contractual rules are applied (such as the Sales of Goods act if the subject matter of the purchase is goods). To sum up, consumer protection law applies to B2C contractual relationships and general contractual law applies to B2B and C2C contractual relationships.

4 Sector-specific consumer law

Q.4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to the conclusion of the contract for digital content services; the pre-contractual information

consumers need to be given²; the termination of the contract (for non-performance or termination for other reasons) for digital content services?

In the proposition for the review of TV- and Radio Law (87/2009) the Government of Finland argued that AMS Directive Art. 3a need not to be separately implemented because the Act on the Exercise of Freedom of Expression in Mass Media (460/2003) already includes similar provision. The Section 5 (Duty of disclosure) states that a publication, a periodical and a network publication shall contain information on the identity of the publisher. The publisher and the responsible editor shall see to it that a periodical and a network publication contains information also on the identity of the responsible editor. The broadcaster and the responsible editor shall see to it that broadcasts contain information on the identity of the broadcaster and the responsible editor. Everyone has the right to be informed of the identity of the responsible editor. The act (460/203) does not include any other information requirements than mentioned above. As far as I know there has not been discussion about this issue.

The act on provision of information society services (458/2002) transposes the provisions of “Directive on electronic commerce” (2000/31/EC) into Finnish law. The Act includes the same contractual provisions as the e-commerce Directive does (Article 5: General information to be provided), Article 10: Information to be provided and Article 11 (Placing the order). In relation to contractual provisions Finnish e-commerce legislation are equal to the provisions of EU’s e-commerce legislation.

The Finnish Communications Market Act (394/2003) is applied to communications markets by which is meant markets of network services, communication services and related services. The Act does not apply to the content of messages transmitted in a communications network. The Act includes e.g. detailed provisions for user’s rights in relation to communications services (communication services agreement). However the Act does not cover the contractual relationship between the digital content service provider and the consumer.

Telecommunications Market Act does not especially require that information needs to be comparable or searchable by electronic means. The Section 66 (Agreement terms and tariff information) only states that standard agreement terms and tariff information must be “easily available to consumers without charge”.

² For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

The Communications Regulatory Authority may impose an obligation on a telecommunications operator to publish comparable and up-to-date data on the quality of the services it offers. The decision shall specify the data to be published and the publishing method. The data to be published may concern e.g. the delivery time of a subscriber connection, the number of faults per subscriber connection, the fault repair time, the call set-up time, and the response time of a directory inquiry service and correctness of invoicing. It can also be mentioned that the Communications Regulatory Authority and the Consumer Ombudsman have parallel authority with regard to communications services contracts with consumers.

The Finnish Personal Data Act (523/1999) does not include any provisions in relation to the conclusion of contract for digital content services, pre-contractual information obligations or the termination of the contract for digital content services.

To sum up, there are no sector specific rules in Finnish law applied to contractual issues of digital content services between service providers and consumers.

Q.4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

TVvF- and AVMS-directives have been implemented into the Television and Radio Operations Act (74/1998). This act includes also the marketing provisions of the said directives. In addition to these provisions no sector specific (digital) consumer rights legislation has been developed addressing specifically the marketing of digital content services to consumers. In addition to EU marketing legislation (e.g. comparative marketing, price indications, consumer credits, TV-advertising, spam, unfair commercial practices) the Finnish Consumer Protection Act includes a general clause forbidding inappropriate marketing. Marketing is inappropriate if it is in contradiction with generally accepted societal values (Section 2). The impropriety of marketing has been addressed in numerous decisions of the Finnish Market Court (e.g. 1984:5, 1988:11, 1990:16, 1994:07, 1995:06, 1995:16, 1998:18, 1998:21, 2000/12, 2001:6, 2001:08, 2003/120, 2007/436, 2009/257). Some on these cases are explained in the Guidelines on consumer protection for “Minors, marketing and purchases” (see the link beneath).

Finnish Consumer Agency has published marketing guidelines for certain digital content services, e.g. “Guidelines for Sales and Marketing of Mobile Content Services” (2008) and

“Guidelines for TV Games and Other Fee-based Interactive Contests and Quizzes” (2006). These guidelines do not have formal legal status meaning that the courts are not obliged to follow them. However courts normally decide in line with the guidelines and their factual weight is high. The guidelines are often based on negotiations between the consumer ombudsman and the particular industry association, which makes the guidelines rather representative. A list of guidelines can be found here: <http://www.kuluttajavirasto.fi/en-GB/guidelines/>

Q.4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law, does sector-specific law determine any remedies? could a consumer invoke general consumer and contract law remedies³?

Please indicate if there is case law on any of the points mentioned. If so, please provide a reference, a short summary of the facts and of the decisions of the courts.

General consumer protection legislation is in principle secondary. Thus the provisions of sector specific legislation would overrule the provisions of general consumer protection. The provisions of specific and general consumer law can interplay e.g. in cases where the sector specific law does not cover all the issues. As an example can be taken the marketing provisions of TV and Radio Operations Act. In addition to EU-based provisions the Act includes a marketing provision addressing the protection of minors. The act states that this issue is to be evaluated in accordance with the provision of inappropriate marketing in consumer protection act.

5 Formation of contract and pre-contractual information

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

In Finland there is no channel specific provisions addressing directly transparency and comprehensibility of contract terms. The limitations of mobile handsets (e.g. small display and limited memory capacity) are taken into consideration in case of pre-contractual

³ E.g. unfair commercial practices, unfair contract terms, avoidance/voidability of the contract, termination or damages.

information on distance selling. Consumer Protection Act (Section 3, Prior Information in Distance Selling) states that the information shall be supplied in a manner suitable for the distance communication used, clearly, comprehensibly and in a manner that makes clear the commercial purpose of the information. In case of mobile purchases the complementary pre-contractual information can be given e.g. on web page provided that the web address is specified during the mobile interaction. This interpretation is based in the legislative proposition of Finnish government (79/2000) implementing the Distance Selling Directive.

Mobile content services are still causing a lot of trouble to Finnish consumers. Finnish Consumer Agency informs on its web page that it has received during this year ca. 1500 notices or complaints from consumers addressing mobile content services. A consumer may have become tied to a continuous contract without awareness of such commitment, she has not been able to contact the mobile content provider or the charges have been unexpectedly high. One reason for the quantity of the complaints is the practice to add the price of the mobile content service to the telephone bill. The implementation of Payment Services Directive is bringing some improvement to the current situation.

<http://www.kuluttajavirasto.fi/File/872b1031-9981-4b1a-92d2-aa096ef9b544/M-commerce%20and%20the%20relevance%20of%20the%201999%20Guidelines%20on%20E-commerce.pdf>

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

In accordance with the general contractual principles all terms should be made available to the consumer before the conclusion of the contract. The only exception is distance sales of financial services in case when the means of distance communication does not enable providing the terms and conditions before concluding of the contract. In this case the contractual terms shall be given in a permanent manner immediately after the concluding of the contract. The exception comes from “Distance Selling of Financial Services” Directive (2002/65/EC, Article 5).

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license⁴, considered to be validly concluded contracts?

In Finland there is no case law considering the validity of click-wrap or browse-wrap contracts. In accordance with general contract principles these contracts are deemed to be

⁴ ‘Browse-wrap’ means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

valid if the consumer has given his/her consent (e.g. by clicking on the “accept” icon) before concluding of the contract.

Q.5.4 Under what conditions are the terms of a standard form agreement⁵ binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms⁶ necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?⁷

The terms may become binding on the consumer also by an implicit manifestation of assent, e.g. by taking the service in use. As an example of such contracting can be mentioned a recent precedent of the Finnish Supreme Court (2010:23). The Supreme Court considered that a valid contract had been concluded in accordance with the terms written on a notice board when a person had parked his car on a private parking lot.

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy⁸, or may the information also be given via electronic means?⁹

1) If an order for information society services is placed using technical means, service provider must immediately notify receipt of the order. An acknowledgment of the receipt is not necessary if the ordered services are delivered electronically without delay. (Act on Provision on Information Society Services, Chapter 3, Section 10).

Furthermore in distance selling the pre-contractual information and some additional information must be conformed to the consumer as soon as possible after the conclusion of the contract. The confirmation need not be delivered, if the information has been supplied to the consumer before the conclusion of the contract. The confirmation need not be supplied if a service is provided through a means of distance communication at a single occasion and if *it* is billed for by the business whose distance communication service is being used for the

⁵ For instance those included in the click-wrap or a browse-wrap license.

⁶ E.g. by clicking ‘I agree’ in a dialog box.

⁷ E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

⁸ E.g. on paper or on CD/DVD.

⁹ E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer’s computer.

purpose. (Consumer Protection Act, Chapter 6, Section 14 Confirmation of information in distance selling).

2) In accordance with the Act on the Provision of Information Society Services service providers must supply recipients of services with contractual terms so that the recipients may store and reproduce them (Chapter 3, Section 9). In addition the service provider must provide information whether the service provider is storing the contract and whether it is accessible to the other party (Chapter 3, Section 8).

3) Confirmation of information in distance sales shall be confirmed to the consumer in person in writing or electronically so that the consumer may save and reproduce the information unchanged (Consumer Protection Act, Chapter 6, Section 14). A hardcopy is not needed.

Q.5.6 Are you aware of any specific information duties for providers of digital content services?¹⁰ If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

In the Finnish legislation there is no special information duties for digital content services. There is neither relevant case law regarding this issue. The general information rules of consumer protection legislation apply to digital content services. Thus it can be argued that e.g. interoperability issues of digital content services could be treated as “the main characteristics” for digital content services, which should be included in the pre-contractual information of distance sales. This is the writer’s own interpretation.. The issue has not been discussed in the literature and there is no case law regarding this question.

In accordance with Consumer Protection act (Chapter 6, Distance selling, Section 14) the consumer shall always be informed of the visiting address of the business providing the service where the consumer may file complaints.

Q.5.6 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer?¹¹ If so, please specify.

¹⁰ For example about the fact that a piece of music or video is subject to technical restrictions so that it cannot be copied or only played in a certain region; or that when using the service personal data will be collected (spyware); that a service is incompatible with certain software; about eventual sponsoring or other commercial influences.

¹¹ E.g. before the signing of a contract, in clear and comprehensible language, in sufficiently large letters, etc.

In accordance with the Consumer Protection Act (Chapter 6, Section 14) the confirmation of information in distance selling shall be confirmed in person in writing or electronically so that the consumer may save and reproduce the information unchanged.

The Finnish Consumer Protection Act (Chapter 4, Section 4) states that where there is doubt about the meaning of a term, the interpretation most favorable to the consumer shall prevail. Unfair Contract Terms Directive (art. 5) states also that the contract terms must be written in plain, intelligible language. This provision has not been expressly included into Finnish law. The reason for that is not defined in the legislative proposition implementing Unfair Contracts Terms Directive. My guess is that such a rule was thought to be valid in accordance with the general contract law. There are neither such requirements in Finnish law that the information should be comparable or written in an easily comprehensible manner. Finnish law does not expressly state that general contract terms must be written in Finnish. The terms should be written in Finnish in case where the service is specifically directed to Finnish consumers. The problem of “information overload” is well known in Finland but for the time being no solutions have been developed to that problem. In my opinion the solution could come by combining innovative uses of information and communication technologies to self-/go-regulative standardization. Creative commons license scheme is a good example of such an innovative approach.

Q.5.7 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?¹²

In accordance with the Consumer Protection Act (Chapter 6, Distance selling, Section 15) the time of withdrawal shall extend until three months if the confirmation does not meet the criteria set in distance selling provisions of the Consumer Protection Act. If the confirmation is rectified during that period, the consumer is entitled to withdraw from the contract within 14 days when he/she received the rectified confirmation. If the confirmation is not supplied at all, the contract shall not be binding on the consumer. If the consumer wishes to invoke this non-bindingness, he/she shall notify the business within one year of the conclusion of the contract.

¹² E.g. voidability or termination of the contract, damages, prolongation of the period for the exercise of a right of withdrawal.

6 Right of withdrawal

Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

Finnish legislation does not entitle the consumer to withdraw from the contract if the digital content service has begun during the cooling-off period with the consumer's express prior consent. The issue has not been much debated in Finland. As far as we know there is only one conference paper dealing with this issue: Huttunen Anniina, Oksanen Ville, Laine Juha: Cooling-Off the Over-Heated Discussion of Consumer Digital Rights Discourse by Extending the Cooling-Off Period to Digital Services. Governance of new Technologies: the Transformation of Medicine, Information technology and Intellectual Property. An International Interdisciplinary Conference, March 29-31, 2009, University of Edinburgh.

Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

The Finnish law states that if the provision of the service has in accordance with the consent of the consumer begun before the end of the withdrawal period and the consumer has been informed of the non-existence of the right of withdrawal in the confirmation, the consumer shall not be entitled to cooling-off period. (Consumer Protection Act, Chapter 6, Section 16). The confirmation must thus include the information that the consumer gives his/her permission for instant provision of the service and therefore there is no cooling-off period for the consumer. So the answer is that the right of withdrawal will be available if the consumer has not been informed of his right of withdrawal before the service was provided.

Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

The Consumer Protection Act states (Chapter 6, Section 23) that if the consumer gains benefit of a non-returnable performance in a withdrawal situation, he/she shall compensate the business for the same with a reasonable amount. The proposition of the government explains that in calculating the amount of “reasonable” compensation among other things the price, quality and duration of the delivery and the value for the consumer shall be taken into consideration (proposition of the government for the amendment of Consumer Protection Act 79/2000). For the time being there is neither relevant case law nor discussion in the literature addressing this issue. This provision means indeed that in many situations there is effectively no right of withdrawal.

Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

The Finnish consumer law does not contain any provisions addressing this issue. There is neither relevant case law. It can be however argued that if the services are jointly ordered but interdependent, the consumer should be able to use the right of withdrawal regarding all interdependent services. And where that is not the case, a withdrawal from one part does not affect the rest of the contract. The provisions of the Sales of Goods Act (Section 56, Avoidance of instalment contracts) could be applied by analogy.

7 Unfair contractual terms

Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a ‘main obligation’ under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

The Finnish regulation on unfair contract terms in consumer contracts is in many respects different from the “Unfair Contracts Terms” Directive (93/13/EEC). First of all, the main subject matter of the contract and the adequacy of the remuneration are taken into consideration, when assessing the fairness of the contract. Also the changes in circumstances after concluding the contract are taken into consideration in favor for the consumer, (Consumer Protection Act, Chapter 4, Sections 1 and 2). So in accordance with Finnish law a (any) term of a contract can be regarded unfair irrespective of whether it is classified as “the main obligation”.

In Finland there is no case law addressing the unfairness of contract terms restricting private copying or setting region limitations.

There has been some discussion addressing consumer rights in relation to copyrighted works such as <http://www.kuluttajavirasto.fi/Page/fb92d018-8dbc-4d82-abab-2d5588e16d69.aspx>. However a pro-active debate between relevant stakeholders - including academics - is still missing in Finland.

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

Contract terms against privacy legislation could be regarded as non-binding or unfair depending on the nature of the provision and on the circumstances. Contract terms against mandatory law are treated void by law and there is no need to evaluate the unfairness in these cases. Thomas Wilhelmsson argues that norms of dispositive law can sometimes serve as a point of comparison when unfairness issue is being evaluated. Wilhelmsson refers here to such norms of dispositive law that recommend certain kind of behavior and are not outdated. (Thomas Wilhelmsson, Vakiosopimus ja kohtuuttomat sopimusehdot¹³, 2008 p. 152)

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

In Finland there is no case law regarding to this issue.

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

This issue has not been debated in Finland. It seems however that digital content services are not specifically addressed in the annex of presumably unfair contracts terms. The wording of the terms in the annex is in many respects indefinite and ambiguous and it is difficult to figure out what would its effect be regarding digital content services.

¹³ Standard contract and unfair contract terms

8 Failure to function properly

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

I presume that the judges would mainly stress the conformity with the description including pre-contractual information and the functionality of the service.

Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what 'normal use' of a service is, e.g. - the ability to make private copies according to copyright law,

- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),

- the suitability of certain contents for minors as stipulated under audiovisual media law,

- journalistic codes of conducts, etc.

The standards mentioned in the question above have not played any remarkable role in assessing reasonable consumer expectations of the service.

Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?¹⁴ If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and middleware?

In Finland there is so far no case law regarding to this issue. The prevalent opinion (at least among consumer protection researchers) is that the service provider is obliged to inform the consumers about interoperability requirements and limitations. If the service provider fails to give adequate information, the service can be treated defective. It should be noted that this issue has not really been discussed in the literature. I have checked all the Finnish law journals from the year 2000 and I could not find a single article addressing digital content

¹⁴ Idem.

services as defined in this project. But the issue has been discussed e.g. in seminars organized by the Association of Finnish Consumer Law. Also the Finnish Consumer Agency clearly emphasises interoperability of digital content services e.g. by supporting “Consumer Digital Rights” declaration of the BEUC, see <http://www.kuluttajavirasto.fi/Page/f80718b9-b8bf-4e24-b463-1c160b3735cc.aspx>.

Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

The Finnish legislation does not include special provisions regarding this issue. The prevailing opinion is that provisions of the sales of consumer goods do not apply. The general contract law remedies are in principle available (e.g. correcting bugs, price reduction, avoidance of the contract and damages) but they are normally displaced by the contract. Licenses tend to limit the liability to bare minimum (e.g. maximum compensation is equal to license fee). There is no relevant case law or literature addressing the fairness of these clauses.

Q.8.5 For how long after delivery of the digital content service (weeks, months, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)?¹⁵ If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

Finland has not implemented the rule of 2 years prescription (consumer sales directive art. 5.1, which is a minimum directive). Consumer goods have to work properly for a reasonable time after the delivery. This time can be more than 5 years e.g. in relation to critical systems/parts of cars. There are numerous decisions of Consumer Dispute Board regarding the time of proper functioning for different types of consumer goods. The starting point is similar in digital content services. There is no legal provision of prescription for proper functioning. Thus the general approach is that the service should work properly for a reasonable time after the delivery. However relevant case law and literature regarding this issue is missing. So the starting point in practice is the license contract’s defects liability/warranty clauses. “As is” type contract terms (in services against remuneration) should in my opinion be treated as unfair from the consumer’s reasonable expectations point of view.

¹⁵ Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

There is no relevant case law or discussion in the literature regarding this issue. In my opinion consumers can normally expect that digital content purchased for an unlimited period works properly with new hardware and software. Thus when e.g. the operating system of computer is updated, earlier purchased digital content and applications should work properly with the updated operating software. This applies also to new releases of operating systems, e.g. when updating Windows XP to Windows 7. Necessary interoperability updates should always be provided free of charge. The best means to secure the interoperability for the future is the use of open formats (such as MP3 and ODF).

Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identify, geographical address or further details?

a) the operator of that platform, or

b) the third party application service himself?

Should this be done before or after the contract is concluded?

The operator such as OVI or Apple Store should have the responsibility to take care that the required identity and contact information is given in their platform. Such an obligation is not codified in law and there is no relevant case law addressing this question. Of course the service provider is responsible to give its identity and contact information.

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

In accordance with the general contract principles the intermediary (the platform operator) is not a party of digital content service contract. Thus the starting point is that the platform operator is not responsible if the third party application or service fails to function because of defect in the application or in the service. It can be however required that the consumers are informed about the role of the platform operator as an intermediary and about its effects regarding responsibility. The platform operator is naturally responsible if the malfunction is

caused by the platform. The platform operator may also become (jointly) responsible e.g. in the case where it has acted negligently in choosing the service operator for the platform. The consumer carries the risk in regard to the user device provided that adequate interoperability information is given before concluding of the contract.

9 Remedies for non-performance and termination of a long term contract

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

In Finland no specific remedies of non-performance have been developed in relation to digital content services. This issue has not been discussed in the literature and there is no relevant case law in relation to this issue.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

A specific hierarchy between the remedies in the case of non-performance of digital content services has not been developed in Finland. If digital content services were classified as goods (that is not the case in Finland), the hierarchy of remedies indicated in the Consumer Sales Directive would apply.

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format?

The consumer is obliged to give a notice to the service provider specifying the non-performance. In case of defects the consumer loses the right to rely on a defect if he does not give the notice to the service provider within a reasonable time after he discovered or ought to have discovered it. If the consumer has not terminated the contract in connection with the first notice and if he wishes to terminate the contract, he has to send a separate notice of termination to the service provider. Both notices can also be sent in electronic format.

The length of the reasonable period has to be decided on a case- by-case evaluation taking into consideration all the relevant circumstances. This is a typical and flexible way to define notice periods in Scandinavian law.

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?¹⁶

If the contract is concluded for an undetermined period, then the consumer is able to terminate the contract without the pre-condition of contract breach. The consumer has to observe a reasonable notice period. If the contract is concluded for determined period (e.g. for 2 years), then the consumer is not allowed to terminate the contract without a fundamental breach of contract from the side of service provider. If the consumer terminates the contract without being allowed to do so, the consumer must pay damages.

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

In Finland there is no specific legislation relating to this issue in digital content services. The Sale of Goods act includes provisions regarding avoidance in installment contracts (Section 44). These principles could be applied mutatis mutandis to jointly ordered or interdependent digital content services. Section 44 of the Sales of Goods Act states:

- 1) If the contract is for delivery of goods by instalments and any instalment is delayed or defective, the buyer may declare the contract avoided with respect to that instalment in accordance with the general provisions of this Act that govern avoidance.
- 2) If the delay or defect gives the buyer good grounds to conclude that a breach entitling him to avoidance will occur in respect of one or more future instalments, he may declare the contract avoided for such future instalments, provided he does so within a reasonable time.
- 3) A buyer who declares the contract avoided in respect of any instalment may, at the same time, declare it avoided in respect of previous or future instalments if, by reason of their interdependence, he would suffer substantial detriment if he had to remain bound by the contract in respect of those instalments.

¹⁶ For instance: is the notice of termination invalid or must the consumer pay damages?

10 After sales services

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

For the time being there are no legal norms or guidelines regarding to this issue.

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

If the service provider is declared bankrupt, the consumer is in same position as other non-privileged creditors, who in practice get nothing from the bankruptcy estate. If the service provider decides to discontinue the online service, the consumer could raise a civil action because of contract breach. However this would normally not be practical because of economic interest of the consumer compared to the economic risk relating to the proceedings.

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service¹⁷ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

There are no such legal norms in Finland.

11 Unfair commercial practices

Q.11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

¹⁷ E.g. to play the obtained music or video content.

a. the use of incompatible standards to prevent users from switching to other services or hardware;

The practice would be considered unfair provided that the consumer has not been informed about the limitations relating to interoperability.

b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);

Legal aspects relating to behavioural and viral marketing have been hardly discussed in (Finnish) legal research. I would say that they couldn't per se be regarded as unfair commercial practices. This has to be decided through case-by-case evaluation. Surreptitious advertising and spam are clearly contrary to the requirement of professional diligence. These practices can materially distort an average consumer's economic behaviour and they would be treated as unfair commercial practices.

c. the use of Digital Rights Management to prevent unauthorised use;

The practice would not be treated as unfair commercial practice provided that adequate information is given before concluding of the contract. For the time being there is no rule, case law or doctrine that actually can prevent that this information requirement is abused by overloading consumers with information with the aim to rid oneself from responsibility.

d. the use of Digital Rights Management to restrict use to a certain region or country;

The practice would not be treated as unfair commercial practice provided that adequate information is given before concluding of the contract.

e. the collection of personal data for marketing purposes or through spyware;¹⁸

As far as I know this question has not been raised before in relation to Finnish legislation. Neither the Finnish Consumer protection Act nor Personal Data Act addresses possible

¹⁸ E.g. in order to enable the provider of the digital content service or third parties to adjust advertisement to the specific circumstances of the consumer.

overlapping scopes of application. The issue is not discussed in Finland and there exists no relevant case law regarding this issue. I would say that personal data protection provisions would apply and not the marketing provisions.

f. the collection of sensitive personal data for marketing purposes or through spyware;

If the collected data has not yet been used in marketing, the personal data protection provisions would apply and not the marketing provisions.

g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;

In addition to data protection provisions also marketing provisions could be applied, because the “Unfair Commercial Practices Directive” covers also the time after the commercial transaction. In my opinion the practice should be treated as unfair commercial practice. It is contrary to the requirement of professional diligence and it is likely to distort consumer’s economic behaviour.

In Finland the practice would also be treated as inappropriate marketing. In addition to the provisions of unfair commercial practices the Finnish Consumer Protection Act includes e.g. provisions for inappropriate marketing. Marketing is inappropriate if it is in contradiction with generally accepted societal values (Consumer Protection Act, Chapter 2, Section 2). Practice is treated as inappropriate especially, (1) if it offends human dignity, religious or political conviction; (2) if it includes discrimination based on gender, age, ethnic or national heritage, nationality, language, health, disability, sexual orientation or on another inappropriate person related issue; (3) if it takes an approvingly attitude towards activities which endanger health, public security or environment without acceptable reasons to do so in relation to the marketed goods or services. Marketing targeted to underage persons is deemed to be inappropriate e.g. in situations when it abuses the inexperience or credulity of underage persons. Interoperability or private use is not covered by this general marketing provision. The list above is not exhaustive and selling sensitive personal data after termination of the contracts is in my opinion clearly in contradiction with generally accepted societal values.

h. the use of default options to entice consumers to the purchase of additional services;¹⁹

As far as I know in Finland there is no legal praxis regarding to this issue. In my opinion the practice should be treated as unfair commercial practice because it is against reasonable consumer expectations and because it would distort the economic behaviour of the consumer.

i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors.

The practice would be treated both as inappropriate and as an unfair commercial practice.

j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers. If there is case law, please provide references and a brief description.

The practice would be treated both as inappropriate and as an unfair commercial practice.

Q.11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

I am not aware of other instances of unfair commercial practices.

Q.11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;
- the consumer may apply general contract law remedies such as avoidance or adaptation of the contract for mistake or abuse of circumstances;
- the consumer may terminate the contract without having to compensate the trader for the loss of profit; and
- the consumer may claim reduction of the contract price?

¹⁹ See also Art. 31 of the Proposal for A Consumer Rights Directive.

The Consumer Protection Act does not include any provisions in regard with contractual effects of unfair commercial practices. This does not mean that unfair commercial practices could not have contractual effects. I would say that contractual effects have to be decided on case-by-case basis taking all the circumstances into consideration. I would also say that the possible effects would not be limited to certain contract law remedies. Every suitable contractual remedy should be potentially available.

Q.11.4 To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

In my opinion public law prohibitions would normally be regarded as a dominant factor when interpreting whether a practice is in accordance with professional diligence.

12 Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

The Finnish Consumer Protection Act (Chapter 2, Section 2) states that it is inappropriate to target marketing to minors by abusing the inexperience or credulity of the minors, if the marketing may have harmful effects on balanced mental development of the minors or if the marketing aims to disregard the possibilities of the parents to educate their children. In evaluating the inappropriateness of the marketing the age and the mental development of the minors, and other circumstances are taken into consideration.

Thus the marketing to minors (or other vulnerable groups such as handicapped or elderly persons) is not forbidden per se but it is been evaluated much stricter than other marketing. If the content of the service may be considered harmful or offensive, the marketing will always be considered as inappropriate.

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

In accordance with the Finnish marketing law injunctions and criminal sanctions (in certain cases) are available when marketing provisions have been infringed. Consumers are not entitled to damages in accordance with the marketing provisions. Illegal marketing can have contractual effects e.g. in case where the consumer includes a contract in case of false or insufficient marketing information. In this case all contractual remedies are potentially available.

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

Age, disability or other vulnerabilities indeed play a role when interpreting general consumer and contract law. The Finnish law does however not require any specific form for information when marketing is targeted to children or to other vulnerable groups. Judges will require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user.

Q.12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?²⁰

In Finland it is up to the parents to make purchases on behalf of their children unless the purchases are of minor importance and customary for children to buy.

In accordance with the Guardianship Services Act (442/1999) an incompetent person is defined as a person under 18 years (minor) or the person who has attained the age of 18 years (adult) but who has been declared incompetent. A guardian may be appointed if an adult person needs support in managing his/her affairs. If the appointment of the guardian is not sufficient in order to safeguard the person's interests, his/her competence can be restricted.

An incompetent person may enter into transactions, which are usual, and of little significance. An incompetent person has the right to decide on the proceeds of his/her own work (provided

²⁰ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as 'normal' for a child of a certain age.

that the proceeds have been earned during the time of incompetence), as well as on property given to his/her administration by the guardian.

If a minor (or other incompetent person) has made a purchase for which he/she has not been entitled, the contract shall be treated void, unless his/her guardian has afterwards accepted it. This is applied also to digital content services.

There are a couple of published decisions (recommendations) of the Consumer Dispute Board that aim to draw the line in relation to “minor importance or customary” for minors to buy. As examples three of the latest decisions are explained beneath:

An 8-year old girl had bought a prepaid card from a kiosk to be used in a virtual game (Habbo). The purchase price was 65 euro and it was paid in cash. The Consumer Dispute Board came to the conclusion that the purchase was not of minor importance or customary for an 8-year old minor and recommended that the seller should return the purchase price. (2715/39/07, given 21.1.2009).

An 15-year old girl acquired tongue jewelry with perforation. The combined price for the purchase was 45 euro. The merchant took of the tongue jewelry at the request of the minor but refused to return the purchase price. The Consumer Dispute Board recommended that also the purchase price should be returned because the purchase was not as minor importance and customary for an 15-year old minor. (3291/36/09, given 13.7.2010)

An 17-year old girl had bought an evening dress and other clothes for her personal use. The purchase price was 856 euro and it was paid at the point of sale. The Consumer Dispute Board did not consider the purchase as minor importance or customary and recommended that both the purchase price and the clothes should be returned. (1840/30/09, given 21.7.2010).

These decisions imply that it is not easy to define exact sums for “minor importance and customary” because it depends e.g. on the age (in above cases 8-17 years) and on the characteristics of the goods or services to be purchased.

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

The minor (or his/her parents) does not in this case have pay for the service.

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

If the contract is declared void (e.g. when the person has been declared incompetent of managing his/her financial affairs) there is normally no obligation to pay for the used service.

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?²¹

Finnish law does not generally require technological systems of age verification or organizational systems to ascertain the ability to conclude legally binding contracts.

13 Towards a model ‘digital consumer law’

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

As far as I know there are currently no such initiatives pending in Finland.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

As far as I know there are currently no such initiatives pending in Finland. Minors and other vulnerable persons are already protected reasonably well in Finland.

²¹ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

In my opinion the data subject should be seen as the owner of his/her sensitive (and other) personal data. Gathering personal sensitive data for resale purpose infringes this principle. Resale of sensitive data should be as transparent as possible (inc. unambiguous consent of the data subject).

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

Before answering the first “table questions” some remarks has to be done. First of all, it is unclear what is meant by the protections of “regular sales contract”. Does this refer to non-conformity issues of sales contracts or does it refer to the consumer’s right to dispose of the goods or does it refer to something else? Second, with regard to digital content services the scope of license is normally decisive when evaluating reasonable expectations of the consumer. It is totally different to buy a video for viewing it once than to buy the same video with unlimited uses. Thirdly, “digital content services” consists of a mixture of “search goods” and “experience goods” as these terms are used in information economics (e.g. Philip Nelson, “Information and Consumer Behavior”, 78 Journal of Political Economy; MIT Press 200, page 223). Search goods are products or services with features and characteristics easily evaluated before purchase. Experience goods are products or services where product characteristics such as quality and price are difficult to observe in advance, but these characteristics can be ascertained only after consumption. I would claim that consumer reasonable expectations are often different when she is buying search goods compared with purchases of experiment goods. Finally I see the existence of remuneration also relevant when evaluating the possible protections and comparisons to sales of goods contracts. If an end user has acquired software free of charge with e.g. for 30 days trial period, her expectations would be totally different compared to the case where the license has been sold to her for an unlimited period. So my philosophy in answering the questions beneath is that the protection could be similar (as in the sales of goods) provided that the service is against remuneration, the service can be regarded as “search goods” in economic terms and the license is for an unlimited period.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	..	x	..		..
Film or music on a website (streaming)	..	x	..		..
Downloaded films or music	..	x	..		..
Games on a CD or DVD*	x		..
Games on the Internet	..	x	..		..
Downloaded games	x		..
User created content (UCC) ²² on a CD or DVD*	..	x	..		..
UCC on a website	..	x	..		..
Downloaded UCC	..	x	..		..
Personalisation services ²³ on the Internet	..	x	..		..

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

²² Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

Downloaded personalisation services	..	..	x		..
Software-as-a-Service on a website ²⁴	..	x	..		..
Downloaded software ²⁵	..	..	x		..
Software on a CD or DVD*	..	..	x		..
Communication through a website ²⁶	..	x	..		..
E-learning services on the internet ²⁷	..	x	..		..
Downloaded e-learning services	..	..	x		..
E-learning service on a CD or DVD*	..	..	x		..

²³ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

²⁴ E.g. image editing, photoshopping, automatic translation services.

²⁵ E.g. anti-virus programs.

²⁶ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

²⁷ E.g. an online language course.

Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Please indicate this in the table below.

Some remarks has also to be made in relation to the second table. First, there are different types of updates, e.g. security updates, bug correction updates or updates, which add new features or which change existing features of the app. Different rules may be applied depending of the type of the update. It remains also unclear whether the questions concern only updates to the content itself (e.g. application, video, music etc.) or are also updates in the user interface (e.g. digital movie player) included. That's why the answers of the "update questions" may be difficult to interpret. Second it remained unclear to me whether the question: "no commercial use of personal data by provider of service unless consumer consents" includes the internal commercial use of the service provider. I presumed that it does and that's why all the squares were left unchecked.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	x	..	x	..	x	..	x	......
'Free' film or music on	x	x	..	..	x	..	..	Security and bug correcting updates...

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

a website (streaming)								...
Paid film or music on a website (streaming) ²⁸	x	x	**	**	x	**	x	Security and bug correcting updates...
'Free' downloaded films or music	x	**	x	**	x	**	**	
Paid downloaded film or music	x	**	x	**	x	**	x	
Paid games on a CD or DVD*	x	**	**	**	x	**	x	
'Free' games on a website	x	x	**	**	x	**	**	Security and bug correcting updates...
Paid games on a website	x	x	**	**	x	**	x	Security and bug correcting updates...
'Free' downloaded games	x	**	**	**	x	**	**	
Paid downloaded	x	**	**	**	x	**	x	

²⁸ E.g. video on demand services.

games								
Paid User created content (UCC) ²⁹ on a CD or DVD*	x	**	x	**	x	**	x	
'Free' UCC ³⁰	x	x	**	**	x	**	**	Security and bug correcting updates...
Paid UCC	x	x	**	**	x	**	x	Security and bug correcting updates...
'Free' personalisation services ³¹	x	x	**	**	x	**	**	
Paid personalisation services	x	x	**	**	x	**	x	
Paid software on a CD or DVD* ³²	x	x	**	**	x	**	x	

²⁹ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

³⁰ E.g. video sharing websites, such as YouTube.

³¹ E.g. ringtones and Apps for mobile phones.

³² E.g.. anti-virus programmes, Office, etc.

'Free' downloaded software ³³	x	x	**	**	x	**	**	
Paid downloaded software	x	x	**	**	x	**	x	
'Free' software-as-a-service on a website ³⁴	x	x	**	**	x	**	**	Security and bug correcting updates...
Paid software-as-a-service on a website	x	x	**	**	x	**	x	
'Free' communication services ³⁵	x	x	**	**	x	**	**	Security and bug correcting updates...
Paid communication	x	x	**	**	x	**	x	
Paid e-learning service on a CD or DVD* ³⁶	x	x	**	**	x	**	x	

³³ E.g. anti-virus programmes.

³⁴ E.g. image editing, photoshopping etc..

³⁵ E.g. social networking, such as Facebook, and e-mail services.

³⁶ E.g. an online language course.

'Free' downloaded e-learning services	x	**	**	**	x	**	**	
Paid downloaded e-learning services	x	x	**	**	x	**	x	
'Free' e-learning service on a the internet	x	x	**	**	x	**	**	Security and bug correcting updates...
Paid e-learning service on a the internet	x	x	**	**	x	**	x	

FRANCE

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2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have specific rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system pertaining to digital content services? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

There is no specific law relating to digital content services to consumers. There is however a law relating specifically to the digital economy, the *law of June 21, 2004 for the confidence in the numerical economy*³⁷ which transposes the E-Commerce Directive³⁸ but also regulates others aspects of the digital economy which are not covered by the Directive (*e.g.* e-voting). Title II of the law concerns e-commerce, which article 14 of the LCEN defines as the activity by which a person offers or guarantees at a distance and through electronic means the supply of goods or services. Also fall within the ambit of e-commerce, the services which consist in the supply of information online, commercial communications and research tools, of access and retrieval of data, of access to a communication network or to the hosting of information, included when they are not remunerated by those who receive them.

The rules of the LCEN which specifically concern the consumer were integrated into the consumer code³⁹.

Q. 2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the software on the CD/DVD, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

- In French law, the qualification of a contract determines the legal regime to which it is subjected. The qualification of the purchase of a CD or DVD containing software is not envisaged by French law, and case law as well as literature diverge on the matter⁴⁰. Some decisions and authors consider the operation to be a sales contract⁴¹, while others see it as a variant of a contract of hiring⁴², and yet others consider it to be a *sui generis* operation⁴³.

³⁷ Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, *JORF* n°143 du 22 juin 2004, p. 11168 [law of June 21, 2004 for the confidence in the numerical economy]. Hereafter "LCEN".

³⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Hereafter the "E-commerce Directive".

³⁹ Code de la consommation [consumer code]. Hereafter "C. cons.".

⁴⁰ *Lamy Droit de l'Informatique et des Réseaux* (2009), n°809 *et seq.*, especially n°820.

⁴¹ Cass. com, *LCE c/ Artware*, Mai 22, 1991, n° 89-11390; [Cass. com., Mai 9, 1995, n° 93-16.539](#); [Cass. com., April 2, 1996, n° 94-17.644](#); [Cass. 1^{re} civ., January 30, 1996, n° 93-18.684](#); Cass. com., November 25, 1997, *Bulletin civil IV*, n° 318; CA Paris, 25^e ch., section B, June 22, 2001, *Communication commerce électronique* (2001) 25, note L. Stanc; [CA Bastia, November 19, 2002, n° 2002/00772](#); J. Huet, "De la vente de logiciel", in

- If the software has *not* been purchased *at a distance* (see Q.2.3 for distance contracts) (e.g. in a supermarket), the rules of consumer sales law (thus provided the contract is qualified as a sales contract) concerning flaws to the good will be of little help to the consumer. Indeed, even though the consumer code does provide a specific⁴⁴ rule which covers flaws to a good in consumer sales contracts, the “legal warranty of conformity” (see Q. 2.3), such warranty only applies to movable *tangible* goods. It is very likely a judge will consider a flaw in software to be a flaw affecting an *intangible* good, thus excluding any recourse to the said warranty. Elsewhere, according to article L 216-1, the provision of book II (articles L 211 to L 225) of the consumer code apply to services.

Q. 2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer’s computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

As for the purchase of software on a material support, the question of the purchase of software through purely immaterial means has not been envisaged by French law. If the contract is qualified as a sales contract, the buyer-consumer has several legal actions available under sales contract law and consumer sales law in case of a flaw in the sold product. Here is a brief general overview of such legal actions⁴⁵. The general overview is also available for Q.2.2: consumers who buy software on CD or DVD can use consumer sales law and general sales law. These actions can still be used when the software is downloaded: although others actions exist in distance contracts, general sales law is still available. But, moreover, as a distance contract is concluded, the buyer can invoke the automatic liability in e-commerce contracts and, if he is a consumer, the automatic liability in distance contracts.

Sales contract law

Claim for non conformity: articles 1603 *et seq* of the French civil code⁴⁶ require the seller to deliver a product which is conform to that which he sold (know as the “obligation of conform delivery”), that is, according to the predominant case law and literature, one that is conform to what has been contractually agreed upon and is exempted of any apparent vices⁴⁷. If this is not the case, the seller will be considered to have violated his obligation of conform delivery. The buyer will have available to him all the remedies in general contract law for non-performance⁴⁸. In principle, the

Le droit privé français à la fin du XXe siècle, Mélanges Catala, Litec (2001) 799 *et seq.*; E. Mackaay, “Le marché du progiciel – licence ou vente ?”, 63 *Cahiers de propriété intellectuelle* (1994) 402.

⁴² A. Hollande et X. Linant de Bellefonds, *Pratique et droit de l’informatique*, 5^e éd., Delmas (2002) n°503.

⁴³ E. Montéro, *Les contrats de l’informatique et de l’internet*, Larcier (2005) 77.

⁴⁴ *I.e.* aside from general contract law and sales contract law.

⁴⁵ Direction générale de la concurrence, de la consommation et de la répression des fraudes (DGCCRF), *Guide sur les garanties*, available at

<http://www.dgccrf.bercy.gouv.fr/documentation/publications/depliants/garanties.pdf> (last visited September 12, 2010).

⁴⁶ Code civil [civil code]. Hereafter “C. civ.”

⁴⁷ *Lamy Assurance* (2009), n°2106; [Cass. com., November 24, 1966, n° 64-12.845, La Semaine juridique Edition générale \(1967\), II, n° 15288](#); [Cass. 1^{re} civ., November 26, 1980, n° 79-14.547, Gazette du Palais \(1981\) 120](#), [Revue trimestrielle de droit civil \(1981\) 647, obs. G. Cornu](#); [Cass. 1^{re} civ., June 16, 1993, n° 91-18.924](#), [Dalloz jurisprudence \(1994\) 210](#); [Cass. 1^{re} civ., October 13, 1993, n° 91-16.344, Dalloz jurisprudence \(1994\) 210](#).

⁴⁸ See *infra*, question Q. 9.3.

buyer benefits from the period of prescription foreseen by article 2224 C. civ. which states that: “[p]ersonal or movable actions prescribe in five years from the date on which the holder of a right knew or should have know of the facts to enable him to exercise it”. However, he must be particularly vigilant when taking delivery of the product because many decisions have considered that the silence of the buyer when faced on delivery with a product which had an apparent vice or was not conform to what had been contractually agreed on could be interpreted as a tacit acceptance of the non-conformity, thus depriving the buyer of any future claim for non-performance of the obligation of conform delivery relating to the said non-conformity⁴⁹.

Warranty against hidden vices: articles 1641 *et seq.* C. civ. protect the buyer against hidden vices in the good provided three conditions, put forth by case law⁵⁰, are met: the vice must be hidden (1), it must exist prior to the sale (2) and must render the good unfit for its *normal use*, insofar as the vice must be of a certain gravity (3). The buyer has an option⁵¹ between keeping the good and asking for a price reduction (“action estimatoire”) or giving the good back against refund (“action rédhibitoire”). If the seller knew of the vice, in which case he is said to be of bad faith, he may owe damages to the buyer⁵². Per the French Cour de cassation, the professional seller is irrebuttably presumed to be of bad faith⁵³. The buyer must act within 2 years of the discovery of the vice⁵⁴.

Automatic liability (responsabilité de plein droit) in e-commerce contracts⁵⁵: article 15, I of the LCEN foresees that any natural or legal person pursuing an activity as defined by article 14 (see Q. 2.1) is automatically liable towards the buyer for the correct execution of the obligations resulting from the contract whether such obligations are to be fulfilled by the professional who concluded the contract or by another service providers, without prejudice to his right of recourse against the latter. However, this person may gain exemption from some or all of his liability by proving the non-performance or poor performance is attributable either to the buyer, or to the unforeseeable and insurmountable fact of a third party stranger to the prestations foreseen by the contract, or by force majeure.

Consumer sales law

Legal warranty of conformity:

Note: this warranty only applies to *tangible* goods. It is thus improbable it would apply to flaws in software. When a software is placed on a CD or DVD, French case law

⁴⁹ Cass. com., February 12, 1980, n° 78-11.358, D. 1981, jur., p. 278, note C. Aubertin; S. Pimont, “La garantie de conformité - Variations françaises autour de la préservation des particularités nationales et de l’intégration communautaire”, *Revue trimestrielle de droit commercial* (2006) 261; *Lamy Droit de l’Informatique et des Réseaux* (2003) n°1117.

⁵⁰ *Lamy Assurance* (2008), n°3480; D. Campell and S. Cotter, 18 *Comparative Law Yearbook* (1996) 355.

⁵¹ Article 1644 C. civ.

⁵² Article 1645 C. civ.

⁵³ Cass. 1^{re} civ., *Aff. du pain de Pont-Saint-Esprit*, January 19, 1955, *Bulletin civil I*, n°52; Cass. 1^{re} civ., January 22, 1974, n°72-14.014, *Dalloz jurisprudence* (1974) 288; Cass. com., March 12, 1979, n°77-13.018, *Bulletin civil IV*, n°98; Cass. com., November 23, 1982, no 81-14.802, *Bull. civ. IV*, no 367; Cass. com., 27 nov. 1984, no 83-14.057; Cass. com., December 11., 1985, no 83-11.917; Cass. 1^{re} civ., July 20, 1988, no 86-19.559; *Lamy Droit Économique* (2010) n°5323.

⁵⁴ Article 1647 C. civ.

⁵⁵ B. Tabaka, “Retour sur les premières applications de la responsabilité de plein droit aux acteurs du commerce électronique”, *Lamy Droit de l’Immatériel* (2006) 13.

distinguishes between the sale of the support and the sale of the software: Court of Cassation, Commercial section, November 9, 1993, bull. civ. IV, n° 395.

If articles L. 211-1 et seq. C. cons. are strictly applied, it is necessary to determine if the flaw is due to the support or to the software. As the support is a tangible good, legal warranty of conformity can be invoked. Conversely, if the defect is due to the software, legal warranty of conformity should not be used because software is an intangible good.

Note: We found no French case law about the legal warranty of conformity in case of flaws in software.

Articles L. 211-1 *et seq.* C. cons. foresee a warranty which specifically applies to the sale of *movable tangible goods to consumers* by professionals. Per certain authors, the warranty of conformity is a contraction of the two aforementioned remedies as it encompasses both the consensual approach of the claim for non conformity (the good is not conform to what has been agreed upon) and the functional approach of the warranty against hidden vices (the hidden vice hinders the normal use of the good). Indeed to be conform to the contract, the good must be proper to the use *usually expected* of a similar good⁵⁶ or present the characteristics *defined by common accord* by the parties or be proper to any *special use* intended by the buyer, brought to the attention of the seller and accepted by him⁵⁷. The seller is liable for any lack of conformity which exists at the time of delivery⁵⁸. According to article L. 211-7 C. cons., in the absence of proof to the contrary, any lack of conformity appearing within six months of delivery of the product is presumed to have existed at the time of delivery. If the consumer makes a claim under his legal warranty, he shall be faced with a hierarchy of remedies: he must first settle for repair or replacement, and if such remedies are impossible, he must obtain restitution. The action resulting from lack of conformity lapses two years after delivery of the product⁵⁹. Elsewhere, it must be noted that a claim under the legal warranty does not preclude the consumer from using the aforementioned rights he derives from sales law as a buyer⁶⁰.

Automatic liability in distance contracts: article 15, II of the LCEN inserted two end paragraphs to article L. 121-20-3 C. cons. to provide automatic liability of the professional towards the consumer. Its regime is almost identical to that of article 15, I (see *supra*), except it applies to distance contracts in general, and not only those concluded through electronic means.

3 Defining consumers and producers

Q. 3.1 Are individuals who offer digital content services to consumers considered to be ‘consumers’ or ‘traders’⁶¹? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

⁵⁶ Article L. 211-5, 1° C. cons.

⁵⁷ Article L. 211-5, 2° C. cons.

⁵⁸ Article L. 211-4 C. cons.

⁵⁹ Article L. 211-12 C. cons.

⁶⁰ Article L. 211-13 C. cons. and DGCCRF, *loc. cit.*

⁶¹ In French law, general sales law and contract law apply in B2C, B2B, and in C2C.

First of all, as to the wording of the question, it must be noted that the concept of « trader » (le commerçant) bears a specific meaning in French law⁶². Within the ambit of consumer law, the “professional” is a concept which was preferred by the French legislator in the consumer code as it emanates from the transposition of various consumer directives⁶³. In the following lines, I shall thus answer the question by reference to the notion of the professional rather than the trader.

The professional is not defined by the consumer code. One must thus turn towards other sources. Three main criteria seem to surface in case law in determining if a person is a professional: the pursuit of a regular activity (1), in an organized form (2) and the will to make a profit (3)⁶⁴. It must be noted that all three criteria are not necessarily used cumulatively. For example, in a 2006 case⁶⁵ the Tribunal de Grand Instance de Mulhouse recognized the quality of professional seller to a person selling goods through e-bay by application of criteria 1 and 3. Also, in a case where a person working for an air travel company offered free air flights on a helicopter to a well-know actor provided he pose in front of a company helicopter and accept that his picture be put on the front page of *Paris Match*, the Cour de cassation decided that the question of determining if such an operation was done truly gratuitously or not was irrelevant as to the person’s status as a professional⁶⁶.

Q. 3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

There is an interesting set of concepts in French law which may leave room for interpretation in the way of the prosumer: the “non-professional” or the person acting on a “non-professional basis” (à titre non professionnel). The non-professional is a notion that is referred to by the consumer code in its sections relating to electronic communications services⁶⁷ and unfair terms⁶⁸. It is always found adjacent to the notion of the consumer and follows the same regime as him.

A notable manifestation of a person acting on a “non-professional basis” can be found in the LCEN. Article 6, III, 2 of the LCEN regulates the status of the person editing a service of communication to the public on a non-professional basis, essentially pertaining to information duties. The LCEN use the word « editing ». But this action is large: an editor is defined in article 6, III, 1, of the LCEN as the one “*whose activity is to publish a communication service to the public online*”, that is to say public dissemination of information which he is the author. Therefore, the maker of an amateur video, or a non professional who created an iphone application, is the author. And they can be also considered a editor if they diffuses the video or the application on internet. This covers for example bloggers. Provisions in LCEN about the non professional editor were made to regulate blogger’s activities. But the definition of

⁶² On this matter see *Lamy Droit du Contrat*, n°190-22 ; *Lamy Droit Commercial* (2010) n°2868 ; *Lamy Code de Procédure Civile Commenté*, COJL721-3.

⁶³ The E-Commerce Directive; Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, hereafter the “Unfair Terms Directive”; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, etc.

⁶⁴ B. Tabaka, “Le spectre du paracommercialisme électronique ”, 19 *Revue Lamy Droit de l’Immatériel* (2006); Le Forum des droits de l’internet, *Recommandations – Commerce entre particuliers sur internet* (2005), available at <http://www.foruminternet.org/telechargement/documents/reco-pap-20051108.pdf> (last visited September 13, 2010).

⁶⁵ T. corr , *Mulhouse, Ministère public c/ Marc Didier W.*, January 12, 2006, n° 122/2006.

⁶⁶ Cass. Crim., October 23, 1991 – J. C... - pourvoi n° 90-84074.

⁶⁷ Article L. 121-85 C. cons.

⁶⁸ Articles L. 132-1, L. 133-2, L. 135-1 and L. 136-1 C. cons.

the editor is large, which permit to include other activities like UCC (for example Youtube or Dailymotion): if the website is only made to store information, he must be considered host. But, if this website gives other services, he becomes an editor. this qualification has been chosen for EBay in Court of Appeal of Reims, July 20, 2010, Communication commerce électronique 2010, comm. 96.

The editor is not the only responsible: the author of the information (videos for example) which have caused damages is also responsible (art. 93-3 of the law about Audiovisual communication, July 29, 1982).

The legal regime is less stringent than that of the professional editor dealt with under article 6, III, 1, as his information duties are lighter and he may conserve greater anonymity.

The professional editor has to inform the public about:

- 1: If he is a physical person: his family name, first name, address, phone number, and, if he is submit to the registration on Register and Companies or on Business directory, the number of registration
- 2: If he is a corporation, its denomination, headquarters, phone number, and, if it is submit to the registration on Register and Companies or on Business directory, the number of registration, headquarters's address, and capital
- 3: the name of the publication's director or managing editor
- 4: the name, address and phone number of the provider who is in charge of the store of the informations, videos..

If the editor is not a professional, he only has to inform the public about his name (not his family name and first name, which implies that he can provide the name he usually use for his editing activity), and about the address of the provider who store the informations, in order to preserve anonymity.

It must be noted that if these open concepts *could* be used to introduce into French law the notion of the prosumer, there is however no certainty.

As to the non-professional, one will recall that the concept only appears in certain parts of the consumer code. Its reach is thus limited. Also, many authors have criticised the concept which they perceive as a redundancy of that of the consumer. This objection is however called into question by a recent decision of the Cour de cassation concerning unfair terms. The European Court of Justice stated in the decision *Idealservice*⁶⁹ that the consumer in the Unfair Terms Directive only referred to natural persons. The Cour de cassation confirmed this in interpreting the notion of consumer under article L. 132-1 *et seq* C. cons. relating to unfair terms, but at the same time stated that this did not exclude interpreting the non-professional as a legal person⁷⁰. The non-professional thus has a relative autonomy from the consumer as of this decision. One may however wonder if such an interpretation will survive the Consumer Rights Directive⁷¹, which is of full harmonisation, and does not allow any expansion of the protection of unfair terms⁷².

⁶⁹ ECJ, Cases C-541/99 *Cape Snc v Idealservice Srl* and C-542/99 *Idealservice MN RE Sas v OMAI Srl* (, [2001] ECR I-09049.

⁷⁰ Cass. 1^{er} civ., March 15, 2005, *Dalloz jurisprudence* (2005), M. Durin, "La protection des personnes morales par le droit de la consommation : la Cour de cassation française prend enfin position", 1 *European Consumer Law Journal* (2005).

⁷¹ Proposal for a Directive of the European Parliament and of the Council on Consumer Rights, COM (2008) 614 final, hereafter the "proposed CRD".

⁷² Article 2 of the proposed CRD defines the consumer only as a natural person.

As to the person acting on a non-professional basis, a Senate bill has been introduced aiming at riding French law of the differential regime between article 6, III, 1 and 2⁷³.

4 Sector-specific consumer law

Q. 4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to

- the conclusion of the contract for digital content services;
- the pre-contractual information consumers need to be given⁷⁴;
- the termination of the contract (for non-performance or termination for other reasons) for digital content services?

Conclusion: there is no sector-specific rule relating to the conclusion of the contract. However, the LCEN⁷⁵ has inserted in the civil code a Chapter VII in Book III, Title II which deals specifically with contracts in electronic form. Section 2 of the said Chapter regulates the conclusion of such contracts. According to article 1369-5 C. civ.:

“For the valid conclusion of a contract, the recipient of the offer must have had the possibility of checking the particulars of his order and its whole price, and of correcting possible errors, before confirming it in order to express his acceptance.

The author of the offer shall acknowledge without undue delay and by electronic means the receipt of the order which has been addressed to him in this way.

The order, the confirmation of the acceptance of the offer and the acknowledgement of receipt must be deemed received when the parties to whom they are addressed are able to access them.”

This article establishes a “double click” procedure⁷⁶. In practice the procedure is the following: the recipient of the offer will browse through the specifics of the offer and click in the options he wishes. This is the “first click”. Then, he must be provided with an overview of the particulars of the offer he has chosen and confirm them with a “second click”. This second click signifies acceptance. One will notice the law doesn’t expressly use the word “click” or any similar expression. This procedure is thus open to technological evolution, provided the two steps rational is respected.

Information

General information in the consumer code

Following article L. 111-1 *et seq.* C. cons., all professionals (suppliers of goods or services) must *prior to conclusion* of the contract, ensure that the consumer is made aware of the *essential characteristics* of the good or service.

⁷³ Proposition de loi tendant à faciliter l'identification des éditeurs de sites de **communication** en ligne et en particulier des “**blogueurs**” professionnels et non professionnels, Sess. ord., 2009-2010, n° 423.

⁷⁴ For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

⁷⁵ Article 25 LCEN.

⁷⁶ L. Grynbaum, “Après la loi ‘économie numérique’, pour un Code européen des obligations... raisonné”, *Recueil Dalloz* (2004) ; Le Forum des droits de l’internet, *Recommandations sur le droit de la consommation appliqué au commerce électronique*, August 31, 2007, 41 ; J. Rochfeld, “Accomplissement de certaines formalités contractuelles par voie électronique”, *Revue trimestrielle de droit civil* (2005) 843.

Additional general information is required and varies depending if the professional is a supplier of goods or services. For example, if he is a supplier of services, he shall have to provide the consumer with the coordinates with which he may be rapidly and directly reached⁷⁷.

Specific information relating to distance contracts in the consumer code

In accordance with the division made by Europe between distance contracts relating or not to financial services, France transposed the distance selling⁷⁸ and marketing⁷⁹ directives under separate sub-sections 1 and 2 respectively of section 2 of the consumer code relating to the sales of goods and supply of services at a distance.

Articles L.121-18 and L. 121-19 C. cons. concerning distances contracts not relating to financial services⁸⁰ determine a series of information which must be provided in the contract offer to the consumer “without prejudice to the information referred to in articles L. 111-1 and L. 113-3 (...)”. One will notice the obligation of supplying a phone number, which is a notable addition to the information obligation under the DSD.

Likewise, article L. 121-20-10 C. cons. provides for specific information with regards to distances contracts relating to financial services⁸¹, which must be given to the consumer in good time and before he is bound by a DCFS.

Specific information relating to electronic communications services contracts⁸²

Article L. 121-83 C. cons. provides certain information which electronic communications services contracts concluded by a consumer must contain.

The Audiovisual Media Service Directive (2007/65/CE) requires the provider to provide informations : his name, geographical address, mail, website or other mean to contact him quickly, and the name of the regulatory and supervisory bodies.

Such information is required in French Law in the LCEN when the provider is considered as an editor (see *commentaire G13*).

The article 43-1 of the law n° 86-1067 of September 30, 1986, about Freedom of communication, also requires the provider of audiovisual media (that is to say television in this case) to make available information about

- 1- his name, headquarters' address, name of his legal agent and of his three major shareholders
- 2- the name of the publication's editor and of his managing editor
- 3- the list of publications issued, and of the others audiovisual media services he provides
- 4- the price when the services give rise to compensation

⁷⁷ Article L. 111-2, II, first dash.

⁷⁸ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, hereafter “DSD”.

⁷⁹ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, hereafter “DMD”.

⁸⁰ Hereafter “DCNFS”.

⁸¹ Hereafter “DCFS”.

⁸² Anything in French law requires that the information needs to be comparable or searchable by electronic means.

However, article L. 121-83 of the consumer code requires accurate information, such as the quality of the service, his price... As the same information has to be given by all the providers of electronic communications services, the consumer is able to make a comparison by himself.

Article 19 of the LCEN determines information that must be provided by any person who pursues an activity described by article 14 of the LCEN (see Q. 2.1). It is expressly stated that this information obligation applies without prejudice of the information obligations foreseen in the legislative or reglementary texts in force. Nothing is said as to the precise moment when the information should be supplied, though the rational of the law and the articulation between this obligation and the ones foreseen in others provisions of law might suggest this information be supplied at the latest before the contracting party be bound by a contract.

Article 1369-4 C. civ. foresees that any person who, in a professional capacity, by electronic means, proposes the delivery of goods or the provision of services, shall make available the applicable contract terms in a way that allows their filing and reproduction. It also provides certain information that must be stated in his offer.

Data protection

Following the *law of 6 January 1978 concerning information technology, files and freedoms*⁸³, the person whose personal data are collected is informed, except if he has already been beforehand, by the responsible for treatment of such data or his representative, of *inter alia*, the identity of the responsible for the treatment, the purpose of the treatment, etc.

The person whose personal data are collected has the right to access these data, modify them or oppose their treatment⁸⁴.

Termination: One will refer to the rules of general contract law (see Q. 9.3).

Q. 4.2 and 4.3 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- does sector-specific law determine any remedies?
- could a consumer invoke general consumer and contract law remedies⁸⁵?

Please indicate if there is case law on any of the points mentioned. If so, please provide a reference, a short summary of the facts and of the decisions of the courts.

Marketing transparency

- Following articles L. 121-15-1 *et seq.* C. cons., advertising, among which promotional offers, such as discounts, bonuses or gifts, as well as contests or promotional games, sent through e-mail must be able to be identified in a clear and unequivocal matter as from their reception by their recipient, or in case of technical impossibility, in the content of the message.

⁸³ Loi n°78-17 relative à l'informatique, aux fichiers et aux libertés du 6 janvier 1978, *JORF* du 7 janvier 1978, p. 227 [6 January 1978 concerning information technology, files and freedoms]. Hereafter "loi informatique et liberté" or "LIL".

⁸⁴ Articles 38 *et seq.* of the LIL.

⁸⁵ E.g. unfair commercial practices, unfair contract terms, voidance/voidability of the contract, termination or damages.

- Pursuant to article 20 of the LCEN, any advertising, regardless of the form, accessible through a service of communication to the public online, must be able to be clearly identified as such. It must make clearly identifiable the natural or legal person on behalf of which it has been made.

Lack of marketing transparency can essentially be settled on the grounds of lack of information duty (see Q. 5.7) or on that of a misleading commercial practice under articles L. 121-1 C. cons. *et seq.* These provisions apply irrespectively of the professional or non professional character of the person responsible for the commercial practice⁸⁶. Misleading commercial practices are condemned by penal law as they constitute a *delit pénal*⁸⁷.

In French law, there are three types of infractions: crimes, délits and contraventions. Engaging penal proceedings against these infractions is called “la mise en mouvement de l’action publique”. The ministère public carries the task of the detection of infractions and of the mise en mouvement de l’action publique. However, in some cases, the victim of a délit or contravention, to see the alleged author of the infraction be condemned by penal law or to obtain damages, may pursue the mise en mouvement de l’action publique. Either by directly assigning the alleged author before the penal jurisdictions, or by putting in a claim and constituting himself as a civil party with the juge d’instruction (plainte avec constitution de partie civile par voie d’action). Where the “mise en mouvement de l’action publique” has already been engaged, the victim may also constitute himself as a civil party (constitution de partie civile par voir d’intervention).

A person who considers to have been the victim of a misleading commercial practice may try and set in motion public action against the person responsible for the practice, by directly assigning this person in front of the penal jurisdictions or by entering a claim while constituting himself as a civil party with the juge d’instruction⁸⁸ to see the person condemned by penal law and/or to claim damages on the basis of contractual liability⁸⁹ if he entered a contract or civil liability if not⁹⁰, or if the contract was annulled, or if the conditions of the cumul of civil and contractual responsibility are met^{91 92}.

In French law, one contracting party may only attack another contracting party on the grounds of civil liability if very strict conditions are met. Otherwise, the claim will have to be entered on the grounds of contractual liability.

Where the public action has already been set in motion by the ministère public, he may likewise constitute himself as a civil party to claim damages⁹³.

In case the victim was misled by the commercial practice into entering a contract, termination of the contract may not be asked to the penal judge but is of the competence of

⁸⁶ [Cass. crim., March 24, 1987, no 85-94.694, Bulletin criminel, n° 139, La Semaine juridique Edition générale 1988, II, n° 21017, note G. Heidsieck, Gazette du Palais \(1987\) 774, note J.-P. Marchi, Revue trimestrielle de droit commercial. \(1988\) 149, obs. P. Bouzat; Cass. crim., August 1, 1987, n° 86-96.708 ; Cass. crim., April 26, 1988, no 84-94.354.](#)

⁸⁷ Article L. 121-6 C. cons.

⁸⁸ M-F Clavel-Fauquenot and N. Marignier, *Thematis*, 566-6; [Cass. crim., Mai 17, 1989, n° 87-80.817](#); CA Paris, June 18, 1980, *Gazette du Palais* (1980) 770, note J.-C. Fourgoux ; CA Paris, Ire ch., sect. A., April 29, 1986, *La Semaine juridique Edition générale* (1986) n°15486

⁸⁹ CA Paris, 2 juill. 2001, *Contrats, conc., consom.* 2002, comm. 84

⁹⁰ TGI Paris, March 1, 1982, *Gazette du Palais* (1982) 100.

⁹¹ Cass. Ire civ., March 1, 2005, n°04-10.063, *Bulletin civil I*, no 109, *La Semaine juridique Edition générale* 2005, II, n°10164.

⁹² *Lamy Droit Économique* (2010) n° 5152.

⁹³ *Lamy Droit Pénal des Affaires* (2009) n°4705.

the civil judge⁹⁴. The victim may act on the basis of general contract law, for example by claiming the contract be annulled (*e.g.* through *dol*⁹⁵) or resolved⁹⁶.

Discontinuance of the commercial practice may be ordered by the *juge d'instruction* or by the court to which the proceedings have been referred, either by requisition of the public prosecutor or on its own initiative⁹⁷. In the event of sentencing, the court orders publication of the judgment. It may, in addition, order the publication, at the expense of the convicted party, of one or more corrective statements⁹⁸.

Prospecting

- Repeated and unwanted solicitations through telephone, fax, e-mail or any other mean of distance communication are considered aggressive commercial practices under article L. 122-11-1, 3 C. cons. They constitute a *délit penal* (see *supra*)⁹⁹. Following article L. 122-15 C. cons., when such practices have led to the conclusion of a contract, the said contract is to be “nul et de nul effet”.

- Article L. 33-4-1 of post and telecommunications code,¹⁰⁰ as modified by the LCEN¹⁰¹, states that it is prohibited to directly canvass, using automatic calling machines or fax machines, telecommunications network subscribers or users who have not consented to receiving such calls.

No specific sanction is foreseen; however this could be regarded as an aggressive commercial practice under article L. 122-11-1, 3 C. cons.

Inertia selling

Pursuant to article L. 122-3 C. cons., the provision of goods or services without a prior order from the consumer is forbidden if it is linked to a request for payment. No obligation may be imposed on a consumer who receives goods or services in breach of this prohibition. The professional must return any sums he has wrongfully received without the consumer's express prior consent. (also, see introductory comment in Q. 11.1 for inertia selling as an aggressive commercial practice).

5 Formation of contract and pre-contractual information

Q. 5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

See Q. 4.1 – *Pre-contractual Information*

Concerning **m-commerce**, article 28 of the LCEN provides that “the information duties and the transmission of the contractual conditions dealt with under articles 19 to 25 are satisfied on mobile communication terminal equipments following the modalities prescribed by decree”¹⁰². To this date, no decree has been taken¹⁰³.

⁹⁴ *Lamy Droit Économique* (2010) n° 6750; [Cass. crim., October 18, 1988, no 87-91.090, BID 1989, no 5.](#)

⁹⁵ Article 1116 C. civ.

⁹⁶ Article 1184 C. civ.

⁹⁷ Article 121-3 C. cons.

⁹⁸ Article L.121-4 C. cons.

⁹⁹ Articles L. 122-12 *et seq.* C. cons.

¹⁰⁰ Code des postes et télécommunications [Posts and telecommunications Code,]. Hereafter “C.P.T.”.

¹⁰¹ Article 22 of the LCEN.

¹⁰² Translated by the author.

Q. 5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

See Q. 4.1. – *Pre-contractual Information*

Q. 5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license¹⁰⁴, considered to be validly concluded contracts?

For click wrap, see Q 4.1 – *Conclusion*

Acceptance through browse wrap is not settled in French law. In French law, conclusion of contracts by electronic means is governed by articles 1369-4 and seq of the Civil Code. Specifically, article 1369-5 regulates the process of contract conclusion: the offeree must have had the opportunity to verify the details of the order and its total price, and to correct any errors, before confirming it to express its acceptance. Moreover, The offeror shall acknowledge receipt without undue delay and by electronic command that has been well addressed.

The only exemption is about contracts which are concluded using mails. In that case, previous forms of the article 1369-5 are not required.

Therefore, because of these forms, browse wrap seems to be unavailable in French law.

Q. 5.4 Under what conditions are the terms of a standard form agreement¹⁰⁵ binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms¹⁰⁶ necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?¹⁰⁷

The question is not settled in French law. In French law, a contract is well concluded by the exchange of consents. But, if the delivery's value is more than 1500€ this contract can only be proved by writing.

This is also available in B2C. But, in that case, the contract is generally a “contract of adhesion”, that is to say a contract which has only been written by the professional and which cannot be negotiated by the consumer. The consumer's agreement is now manifested in its signature, or a click in a box provided for that purpose (“I have read and accept the terms of the contract”). Under these assumptions, acceptance is expressly provided.

When the contract is written, it must be clear and understandable. Therefore, if the contract drafted by the professional is unclear, judges must interpret the meaning most favorable to the consumer.

¹⁰³ Ass. Nat., 23 janvier 2008, *Rapport d'information déposé en application de l'article 86, alinéa 8, du Règlement par la commission des affaires économiques, de l'environnement et du territoire sur la mise en application de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique et présenté par M. Jean Dionis du Séjour et Mme Corinne Erhel.*

¹⁰⁴ ‘Browse-wrap’ means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

¹⁰⁵ For instance those included in the click-wrap or a browse-wrap license.

¹⁰⁶ E.g. by clicking ‘I agree’ in a dialog box.

¹⁰⁷ E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

The contract between the professional and the consumer can also be verbal. According to general contract law, this will necessarily have a contract in an amount less than 1500 € It will therefore be more difficult for the trader to prove it has fulfilled its obligation of general information. A typical example is the purchase of a loaf of bread at a bakery. It is indeed a contract between a seller and a consumer, but there is no writing between the parties.

To my knowledge, the courts have not answered to this question. A simple implicit agreement can also be available to practice in the provision of digital content. Ex: Watching videos on Youtube, including consumer acceptance is deduced from the mere fact that the consumer continues to use the site. One can nevertheless ask the question of the compatibility of that system with articles 1369-4 et seq of the Civil code, which requires an acceptance by "double-clicking" for every electronic contracts, whether entered into for free or at cost (see *commentaire G20*).

Q. 5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy¹⁰⁸, or may the information also be given via electronic means?¹⁰⁹

Confirmation of conclusion

The only provision which specifically treats of the matter is the civil code in its section relating to electronic contracts (see Q. 4.1). Pursuant to article 1369-5 C. civ. “[t]he author of the offer shall acknowledge without undue delay and by electronic means the receipt of the order which has been addressed to him in this way”.

Confirmation of information

General information in the consumer code

Articles L. 111-1 C. *et seq.* C. cons. are silent in this regard.

Specific information relating to distance contracts in the consumer code

DCNFS According to article L. 121-19, 1 C. cons. the consumer must receive in writing or on some other durable medium available to him, in good time and upon delivery at the latest, confirmation of the information referred to in 1 to 4 of article L. 121-18 C. cons. (see Q. 4.1), as well as that of article L. 111-1 C. cons., article L. 113-3 C. cons. (see Q. 4.1) and article L. 214-1 C. cons., unless the professional fulfilled that obligation before the contract was concluded. At that time, he must also receive additional information set forth by article L. 121-19 C. cons.

DCFS Article L. 121-20-11 C. cons. requires that in good time, and before any commitment is made, the consumer shall receive the contractual conditions and the information referred to in article L. 121-20-10 (Q. 4.1) in writing or on any durable medium available to him.

Article 27 of the LCEN inserted into the consumer code an interesting provision which doesn't concern *per se* confirmation of information but rather conservation of information and is worth notice: article L. 134-2 C. cons. provides that “[w]hen a contract is entered into via electronic means and involves a sum equal to or greater than an amount determined by decree,

¹⁰⁸ E.g. on paper or on CD/DVD.

¹⁰⁹ E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer's computer.

the supplier shall retain the document which embodies it for a period determined by that same decree and shall provide access thereto to the other contracting party whenever the latter so requests.” Such a decree has been taken¹¹⁰. The sum mentioned in article L. 134-2 C. cons. is at the moment of EUR 120¹¹¹. The period of conservation is of ten years as from the conclusion of the contract when the delivery of goods or rendering of service is immediate¹¹².

Article 19 of the LCEN is silent in this regard.

The civil code does not require confirmation of the information provided in accordance with article 1369-4 C. civ. or article 1369-5 C. civ. However, it is most likely the confirmation of conclusion provided for under article 1369-5 C. civ. will contain a confirmation of the (core) terms of the contract.

Durable medium

Specific information relating to distance contracts in the consumer code

DCFS and DCNFS Articles L. 121-19 and L. 121-20-10 C. cons. speak of “in writing or on a durable medium”. This durable medium can potentially be anything and it shall be up to case law to determine when a medium can be deemed durable in light of technological evolution¹¹³.

Q. 5.6 Are you aware of any specific information duties for providers of digital content services?¹¹⁴ If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

See Q. 4.1 – *Pre contractual information*

Q. 5.6 bis Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer?¹¹⁵ If so, please specify.

No. Article L. 133-2 of the consumer code requires that the contract must be clear and understandable, that is to say in French. French Law does not distinguish the nature of the technique used to contract (mobile phone, computer...).

Case law has completed this article.

For example, if the police is too small, the clause is unavailable.

Clauses which are written in a schedule are also unavailable if the consumer does not have this schedule. Now, this question is the one of links to another websites. Some authors consider that this method cannot be available in order to transmit information to consumers.

¹¹⁰ Décret n° 2005-137 du 16 février 2005, *JORF* n°41 du 18 février 2005, p. 2780 [Decree n°2005-137 of 16 February 2005].

¹¹¹ Article 1 of the decree.

¹¹² Article 2 of the decree.

¹¹³ *Lamy Droit Pénal des Affaires* (2010) n°2539.

¹¹⁴ For example about the fact that a piece of music or video is subject to technical restrictions so that it cannot be copied or only played in a certain region; or that when using the service personal data will be collected (spyware); that a service is incompatible with certain software; about eventual sponsoring or other commercial influences.

¹¹⁵ E.g. before the signing of a contract, in clear and comprehensible language, in sufficiently large letters, etc.

Conversely, case law allow this practice if the link is clearly visible: Court of Appeal of Versailles, February 15, 2008, RLDI 2008/36, n° 1217.

Q. 5.7 What are the remedies¹¹⁶ (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?¹¹⁷

General information in the consumer code

The consumer code is silent to this regard. The consumer may always turn to remedies in general contract law and civil liability.

If the consumer **has entered into a contract**, he may try and obtain the **resolution**¹¹⁸ of the contractual relationship (the contract has existed but its effects are retroactively destroyed) or get it **annulled** by proving his consent was flawed¹¹⁹ (the contract never existed) and/or claim **restitution** (on the basis of contractual liability if the contract is maintained¹²⁰ or resolved¹²¹ and extra-contractual liability if it is annulled¹²² or if the conditions for the cumul of contractual and extra-contractual liability are met¹²³). In some cases, case law has considered that the violation of the obligation of information of the professional renders the contract voidable because such an obligation is one of public policy of protection¹²⁴.

French law traditionally distinguishes three types of normative nature of rules:

The rules of public policy of direction (*ordre public de direction*) protect the general interest. It is never possible to waive rights protected by such norms, and the judge has a duty to ensure the enforcement of these rights and raise them of his own motion where parties have failed to do so. They are said to be of absolute nullity (nullité absolue)¹²⁵.

Rules of public order of protection (*ordre public de protection*) aim at protecting a private interest. It is only the party protected by the imperative norm who may require the enforcement of this right. The party who is not protected by the imperative norm, but also the judge, are not allowed to do so, except where provided by law. For example, the consumer code under article L. 141-4 provides that the judge may raise of his own motion any provision of the consumer code in disputes born of its application. A person protected by an imperative norm may not waive his right in advance. However, he may waive the benefit of his right *a posteriori*, i.e. when a conflict occurs and the protection offered by the said right comes into play. They are said to be of relative nullity (nullité relative)¹²⁶.

¹¹⁶ If the editor is not a professional, the remedies in the consumer code cannot be invoked.

¹¹⁷ E.g. voidability or termination of the contract, damages, prolongation of the period for the exercise of a right of withdrawal.

¹¹⁸ Articles 1184 C. civ., see infra Q 9.3 for more extensive developments on this article.

¹¹⁹ Articles 1108 *et seq.* C. civ.

¹²⁰ Article 1147 C. civ.

¹²¹ Article 1184 C. civ.

¹²² Article 1382 C. civ.; F. Cohet-Cordey, "Nullité et restitutions", *L'actualité juridique, droit immobilier* (2005) 331.

¹²³ It must be noted however that the line between contractual and extra-contractual liability when it comes to pre-contractual information duties is somewhat unclear, as it could be envisaged under both regimes. On this matter, see H. Bitan, *Droit des contrats informatiques et pratique expertale*, Lamy (2007) 253.

¹²⁴ CA Paris, 25e ch., sect. B, October 4, 1996, 5 *Revue de Jurisprudence de Droit des affaires* (1997), n°629

¹²⁵ G. A. Bermann and E. Picard, *Introduction to French law*, Kluwer Law International (2008) 221.

¹²⁶ *Idem*.

Suppletive laws are legal norms designed to supplement the parties' will. Parties may waive these rights in advance and the judge will, in principle, not enforce them of his own motion¹²⁷.

If the consumer **has not entered into a contract**, he may claim **restitution** on the basis of extra-contractual liability¹²⁸.

Specific information relating to distance contracts in the consumer code

In addition to the aforementioned remedies, the consumer may also turn towards specific remedies foreseen by the consumer code.

DCNFS According to article L. 121-20 C. cons., when the information referred to in article L. 121-19 C. cons. (see Q. 5.5) has not been provided, the seven day time limit applicable to the exercise of the right of withdrawal is increased to three months. If such information is provided within three months of receipt of the goods or acceptance of the offer, however, this shall activate the seven-day time limit.

DCFS According to article L. 121-20-12 C. cons, the consumer has a period of fourteen clear calendar days in which to exercise his right of withdrawal without being required to give a reason therefore or bear a penalty. The period during which the right of withdrawal may be exercised commences

- (1) either on the day on which the distance contract is concluded;
- (2) or on the day on which the consumer receives the contractual conditions and information pursuant to article L. 121-20-11 C. cons. (see Q. 5.5), if the latter date is subsequent to that referred to in 1.

Article 19 of the LCEN is silent to this regard.

Article 1369-5 C. civ. is silent to this regard

Data protection

Infringement to data protection rules on information is sanctioned by penal law as a *délit pénal*^{129 130} (see Q. 4.2 and 4.3). Also, the person who finds out his data are collected without his being informed may bring this to the attention of National Commission for Information Technology and Civil Liberties (CNIL) which may take measures going from a simple warning to the person collecting the data to coercive measures such as pecuniary sanctions¹³¹.

6 Right of withdrawal

Q. 6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

¹²⁷ F. Eudier, *Ordre public substantiel et office du juge*, (1994) 282; M. Coipel, *Éléments de théorie générale des contrats*, Bruxelles, Kluwer, 1999 ; *Lamy Droit du Contrat* n°s 236-109.

¹²⁸ Article 1382 C. civ.

¹²⁹ [Articles 226-16 à 226-24](#) of the Code pénal [penal Code] hereafter “C. pen. ”

a. ¹³⁰ TGI Paris, June 6, 2003, n°0205001163.

¹³¹ Article 45 of the LIL.

French law does not foresee any specific right of withdrawal pertaining to digital content services to consumers in addition to that available in case of distance selling contracts. There is at present no talk of introducing one in French law.

Q. 6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

Loss of the right of withdrawal

DCNFS According to article L. 121-20-2 C. cons, the right of withdrawal cannot be exercised by the consumer for contracts of services which performance began, with the consumer's consent, before expiry of the seven-clear-day time limit¹³².

DCFS By virtue of article L. 121-20-12, II, 2° C. cons., the right of withdrawal does not apply to contracts *fully* performed by both parties at the consumer's express request before he exercises his right of withdrawal. In other words, where the contract has not been entirely performed, the consumer keeps his right of withdrawal. This is a key difference with non financial distance contracts. In this regard, France has faithfully kept the differential regime set forth by the DMD and DSD.

Lack of consumer awareness about the existence of the right of withdrawal prior to the supply of service

This question concerns mainly DSNFS, since the right of withdrawal concerning DSFS may still be exercised even if the service has begun with the consumer's consent. The question is not settled under French law. Article L. 121-18 C. cons. (DCNFS) requires that the professional inform the consumer of his right of withdrawal. If this requirement is not met, one will recall the extension of the withdrawal period (see Q. 5.7). Also, the consumer must receive a written confirmation of certain information under article L. 121-19 C. cons., amongst which information concerning the terms and conditions applicable to the exercise of the right of withdrawal. However, if the service has begun with the consumer's consent but he was not informed of his right of withdrawal, neither prior to contracting nor in the written confirmation, French law is silent.

It must be noted that the rules pertaining to the right of withdrawal are of public policy of protection¹³³. The consumer could thus try and get the contract voided.¹³⁴ Elsewhere, the consumer could act on the grounds of contractual (arguably extra-contractual¹³⁵) liability for non-performance of the duty to inform (see Q. 5.7) and claim restitution (*e.g.* get a sum of money, or be allowed to exercise his right of withdrawal notwithstanding the commencement of the service).

¹³² Art. L. 121-20-2 C. cons.

¹³³ For this concept, see *supra* Q. 5.7.

¹³⁴ M. Combet, "L'obligation d'information du droit de rétractation du professionnel et la protection du consommateur : la Cour de justice n'en ferait-elle pas trop ?", *Revue Lamy Droit des Affaires* (2010) 47.

¹³⁵ See note 97.

Q. 6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

DCFS According to article L. 121-20-13, I C. cons., when the consumer exercises his right of withdrawal, he is only required to effect payment proportional to the financial service actually provided, and no penalty shall apply. Rates specified in contract are essentials to calculate the amounts due.

DCNFS The question is not settled in French law. It will depend on the judge's appreciation.

Q. 6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

The consumer code deals with this question as regards to credit contracts.

By virtue of article L.121-20-12 C. cons., the consumer may withdraw from a loan agreement concluded through means of distant communication within 14 days from the conclusion of the contract (provided the professional has correctly fulfilled his duty to inform; see Q. 5.7). However, the exercise of the right of withdrawal only entails automatic cancellation of the contract of sale or service if it takes place within seven days of the conclusion of the loan agreement.

Moreover, when the consumer makes an express request for immediate delivery or supply of the goods or services, the exercise of the right of withdrawal only entails automatic cancellation of the contract of sale or service if it takes place within three days of conclusion of the loan agreement.

Conversely, under article L. 311-25-1 C. cons., where payment of the price of the goods or services is totally, or partly, financed by credit granted by the supplier or by a third party on the basis of an agreement between this third party and the supplier, the consumer's decision to exercise the right to withdraw involves the automatic cancellation of the credit agreement intended to provide the financing, without costs or compensation, with the possible exception of costs incurred for the opening of the credit file.

7 Unfair contractual terms

Q. 7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a 'main obligation' under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

This question is not envisaged by legislation or case law through the scope of unfair contract terms. Indeed, beyond the *contractual* restrictions (be it to readability, interoperability or copying) there usually lies a *technical* restriction which physically prevents the user from infringing the contract. In France, the whole debate thus revolves around these technical restrictions.

Playability and interoperability have essentially been dealt with in case law through information duties, hidden vices and false description¹³⁶.

For example, the Cour d'appel de Versailles¹³⁷ found that a restriction to copy on an audio CD, which rendered it impossible to be read on a car radio, could be considered as a hidden defect.

The Tribunal de Grande Instance de Nanterre found *EMI Music France* guilty of false description contrary to articles L. 213 C. cons. and 121-2 C. pen. for knowingly commercialising audio CDs which could not be read on a certain number of readers, in particular car radios, because they were not up to date with the new norms relating to the technical characteristics of audio CDs¹³⁸.

As for limitations to the possibility of copying, it has been approached through two angles: the exception of private copy and information duties.

The “Mulholland saga”¹³⁹ is in this regard quite relevant. Mr. S.P. bought the *Mulholland drive* DVD and tried to make a cassette copy of it to be able to read it at his parents' house where there was no DVD reader. However the copy turned out to be of poor quality because the DVD was equipped with an anti-copy mechanism. No information was provided as to the existence of this restriction. Mr. S.P. sued the producers and distributors of the DVD for the copy restriction and advanced two main arguments in support of his claim: the anti-copy restriction constituted an essential characteristic within the meaning of article L 111-1 C. cons concerning pre-contractual information duties to the consumer (see supra, Q 4.1) (1) the user has a right to private copy under articles L. 122-5 and L. 21 1-3 of the intellectual property code¹⁴⁰. In the end decision of the proceedings, the Cour d'appel de Paris rejected both arguments. As to the information obligation, it noted that restrictions to copying were not an essential characteristic of the contract. As to the right to private copy under articles L. 122-5 and L. 21 1-3 C.P.I, the court noted that the said articles did not establish a « right » to private copy but were only an exception to the rule which prohibits any complete or partial performance or reproduction of a work made without the consent of its author¹⁴¹. This position was later confirmed by the Cour de cassation¹⁴².

A law of 2006¹⁴³ inserted an article L. 331-5 to the intellectual property code which provides that technical protection measures are allowed provided they do not affect interoperability or the free use of the work. “Free use of the work” means that the CD or DVD, for example, can be played. Private copy could be included in the “free use of the work”, but this case is specifically treated in article L. 331-10 of the intellectual property code. Also, an article L. 331-10 was added to the code which foresees that measures restricting the exception to private copy must be brought to the attention of the user. According to the article L. 331-10, the provider has to inform the consumer about restrictions on playability (that is to say interoperability, usage restrictions...) and on private copy because of the use of DRM. This article does not require forms for this information. But, if the contract is concluded with a consumer, this information has to be clear, understandable, and noticeable (article L. 111-1 et seq of the consumer code). Moreover, the law of June 12, 2009 inserted an article L. 336-4

¹³⁶ G. Gomis, “L'influence des mesures techniques sur les pratiques contractuelles”, 49 *RLDI* (2009) 73.

¹³⁷ CA Versailles, *Françoise M., UFC-Que Choisir c/ SA EMI Music France*, April 15, 2005.

¹³⁸ TGI Nanterre, 15^e Ch., Mai 31, 2007.

¹³⁹ TGI Paris, April 30, 2004; CA Paris, 4^e Ch. B, April 22, 2005, Cass, 1^{re} civ., February 28, 2006; CA Paris, 4^e Ch, section A, April 4, 2007.

¹⁴⁰ Code de la propriété intellectuelle, [the intellectual property code]. Hereafter “C.P.I.”.

¹⁴¹ Article L. 122-4 C.P.I

¹⁴² Cass., 1^{re} civ., June 19, 2008, n° 07-14..277, F-P+B

¹⁴³ Loi n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, *JORF* n°178 du 3 août 2006, p. 11529.

to the code which provides that” the essential characteristics of the authorized use of a work or a protected object, made available through a service of communication to the public online, are brought to the attention of the user in a way which is easily accessible, in accordance with article L. 331-10 of the present code and article L. 111-1 of the consumer code”. Thus restrictions to the exception of private copy are now part of the essential characteristics of a work (the aforementioned decisions with regards to the right to private copy concerned situations prior to the laws of 2006 and 2009). Also, one will notice the express reference made to the general information duty to the consumer established by the consumer code (see Q. 4.1).

Q. 7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

It has occurred that judges condemn contract terms which diverge from rules protecting privacy through the scope of unfair terms.

For example, the Tribunal de Grande instance de Paris¹⁴⁴ knocked down a clause of the general terms of an Internet Access Provider (IAP) which read that “with the exception of communications concerning the subscription and services the use of collected information for commercial purposes is only performed with the express acceptance of the subscriber”, because the exception it established in favor of the IAP was not provided by any legal texts and was thus illicit.

This is however not the preferred method as such terms are more often fought through specific legislation pertaining to privacy protection (see Q. 5.7).

Q. 7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

According to article L. 132-1 C. cons., in contracts concluded between a professional and a non-professional or consumers, clauses which aim to create or result in the creation, to the detriment of the non-professional or the consumer, of a significant imbalance between the rights and obligations of the parties to the contract, are unfair. Unfair terms are deemed to be null and void.

Additionally, there exists a black and grey list of unfair terms decreed (a decree executes the law) by the Council of State upon advice of the Unfair Terms Committee¹⁴⁵. Also, since 1991, the Cour de cassation has recognized an autonomous power to the judge to declare a term unfair and deprive it of its efficiency without a decree having done so beforehand¹⁴⁶. This power has since 2008¹⁴⁷ been enshrined in the consumer code. One will recall that the *Pannon*¹⁴⁸ case unequivocally makes the *ex officio* declaration of unfairness mandatory.

Case law provides many illustrations of unfair terms in contracts for digital content services. To name just a few, have been declared unfair the terms which:

¹⁴⁴ TGI Paris, April 05, 2005, 1 ch. sociale, 04/02911.

¹⁴⁵ Décret n° 2009-302 du 18 mars 2009 portant application de l'article L. 132-1 du code de la consommation

¹⁴⁶ Cass. Mai 14, 1991, n°89-20.999. *Bulletin civil I*, n°153.

¹⁴⁷ Loi n° 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs, *JORF* n°0003 du 4 janvier 2008, p. 258, [law of 3 January 2008 on the development of competition in favour of consumers] hereafter “Chatel law”. See article L. 141-4 C. cons..

¹⁴⁸ Case C-143/09, *Pannon GSM Távközlési Rt. v Nemzeti Hírközlési Hatóság Tanácsa*, Official Journal C 051 , 27/02/2010 P. 0016 – 0016.

- require consumers to contact the professional before exercising their right of withdrawal,
- foresee other causes of exemption in addition to absolute necessity¹⁴⁹,
- etc.

Finally, the Unfair Terms Committee issues recommendations concerning the suppression or modification of terms which present an unfair character¹⁵⁰. Such recommendations¹⁵¹ may guide the judge in determining the unfair nature of terms under review. Regarding digital content services, one will particularly notice recommendations:

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

The Committee may deliver an opinion (avis) when seized by a judge, the minister in charge of consumption, or by interested professionals. It can also do so of its own volition¹⁵².

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

See Q. 7.3.

8 Failure to function properly

Q. 8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

When parties enter a contract, they make their own rules, set their own law, according to the autonomy of will. In enforcing the contract, the judge must search for the intention of the parties according to their will and apply the law of the parties in an *objective* manner. This means that considerations which have not been contractually agreed upon (which may encompass subjective intentions, but that are “objectivised” by their being agreed upon at the very conclusion of the contract) or inherent to the contract (functional approach, again, objective) will in principle not come into play, except where provided by law (e.g. rules of public policy). French Law adopts a functional use. But, if the buyer wants personal considerations to be taken in account, he has to inform the seller about it, and they have to agreed. Here is the original answer provided by the French point of contact:

“The concept of legitimate expectations has already been used in French law. Article L. 211-5 of the consumer code provides that the service is consistent with the contract if it has the qualities that a buyer might reasonably expect given the public information provided by the

¹⁴⁹ TGI Bordeaux, March 11, 2008, CCE 2008, comm. 69

¹⁵⁰ L. 534-3 C. cons.

¹⁵¹ Available at <http://www.clauses-abusives.fr/recom/index.htm> (last visited September 16, 2010).

¹⁵² L. 534-2 C. cons.

trader. An assessment of compliance should be objective, that is to say according to a functional understanding of the use of the good. Conversely, if the consumer wants personal considerations to be taken into account, that is to say subjective considerations, linked to its own needs, they must be mutually agreed between the professional and the consumer.

Even if the consumer must be protected, functional understanding of consumer's legitimate expectations remains fair. Indeed, adopting a subjective understanding would allow consumers to challenge the quality of digital content service based only on personal considerations. In this case, controls should be illusory. This solution is justified because information requirement supported by the professional often allows consumers to know whether the service provided will meet their own expectations. However, in distance contracts, consumers will always uphold its own interests because they will have a right of withdrawal which can be used without justification."

- Q. 8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what 'normal use' of a service is, e.g. - the ability to make private copies according to copyright law,**
- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),**
 - the suitability of certain contents for minors as stipulated under audiovisual media law,**
 - journalistic codes of conducts, etc.**

It is mainly when the service does not function that the question of its "normal use" arises. Therefore, it is in the field of hidden vices or the warranty of conformity that one will find most developments (see Q. 2.3). Defining the normal use of a service has been the task of case law. The judge will analyse the *contract* as well as *common practice*¹⁵³. It is rare that *legal* standards formulated elsewhere directly "play a role" in defining the normal use within hidden vices or warranty of conformity. The French civil system is text based. If a legal provision formulated in another area of law envisages normality, it is on the grounds of that provision the conflict will be settled.

For example, one will recall copyright law allows for technical measures of restriction provided they do not affect the free use of the work (see Q. 7.1). Freedom of use does not equate normality of use. A service can be free but not function normally. However, if the service is not free, is it still normal? In other words, does normality encompass freedom? If so, restriction measures effect normality. But it still remains that the dispute will then be settled on the ground of copyright law rather than copyright law "playing a role" in defining normality within hidden vices and warranty of conformity.

- Q. 8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?¹⁵⁴**
If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and middleware?

¹⁵³ [Cass. com., November, 8, 1982, n° 81-14.994](#); [Cass. 3^e civ., March 8, 1989, n° 86-19.659](#) ; [Cass. com., January 3, 1991, n° 88-19.904.](#)

¹⁵⁴ *Idem.*

French law contains no specific provision requiring the provider of digital content services to inform consumers, before the conclusion of the contract, about required hardware and software. However, in practice, professionals provide such information for two reasons.

On the one hand, article L. 111-2 C. cons. requires the trader inform the consumer of the essential characteristics of the supplied service (see Q. 4.1), which one may contend includes the hardware requirements for using the service.

On the other hand, case law recognises that professionals have a general duty to inform their contracting party¹⁵⁵

The intensity of the obligation varies according to the level of knowledge of the contracting party and the envisaged field. The obligation is stronger if the contracting party is a consumer rather than a professional, a minor rather than a fully capable adult, etc. and is, for example reinforced when it comes to informatics because of the high complexity of products and services and the general lack of information of users in that field¹⁵⁶. If the seller is a non-professional, the contract is not submitted to the consumer code. The general duty of information in the consumer code does not apply. Therefore, the duty of information is less detailed and is limited to main information about the concluded contract (see *commentaire G52* about the variability of the degree of this information).

Furthermore, one will notice that the Unfair Terms Committee has found to be unfair in its recommendation concerning triple play, clauses which demand the consumer to verify the compatibility of his hardware in relation to the offered services and exonerate the ISP from any liability in this regard¹⁵⁷.

Q. 8.4 and 8.5 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

For how long after delivery of the digital content service (weeks, months, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)?¹⁵⁸ If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

If the contract is qualified as a sales contract, see Q. 2.3 (legal actions in sales contract and consumer law in case of flaw in the product).

In any case, see Q. 9.3 (remedies in general contract law). In French law, some remedies are not submitted to the article 2224 C. civ. For example, warranty against hidden vices have to be invoked during a period of two years until the discover of the vice. Also, in the consumer code, the legal warranty of conformity has to be invoked during a two years period until the delivery of the good. See Q.2.3.

¹⁵⁵ C.A. Agen (1re ch. civ.), August 14, 2007 - R.G. n° 05/01622; CA Paris, January 4, 1980, *La semaine juridique* (1982), II, n° 19734, note J.-L. Goutal; Cass. 1^{re} civ., July 3, 1985, *La semaine juridique*. (1986), I, n° 14884; [Cass. 1^{re} civ., June 11, 1996, n° 94-18.250, Revue de jurisprudence de droit des affaires \(1996\), n° 1452, p. 1022](#); [Cass. com., February 2, 1988, n° 86-16.112](#) ; *Lamy Droit et Patrimoine* (2005) 142.

¹⁵⁶ Cass. com., December 5, 2000, n° 98-12.827 et 98-14.018, n° 35, n° 2218, obs. L. Costes ; *Lamy Droit de l'Informatique et des Réseaux* (2010) n° 3756.

b. ¹⁵⁷ Recommandation n°07-01 relative aux contrats proposant aux consommateurs les services groupés de l'Internet, du téléphone et de la télévision ("triple play"), July 07, 2007, Consideration 2.

¹⁵⁸ Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

Under general contract the period is, in principle, five years following article 2224 C. civ. which states that: “[p]ersonal or movable actions prescribe in five years from the date on which the holder of a right knew or should have known of the facts to enable him to exercise it”.

Q. 8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

This question is not specifically dealt with under French law.

It can naturally be envisaged through the scope of information duties (see Q. 4.1) or failure to function (see Q. 2.3 and 9.3).

Q. 8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application’s) identify, geographical address or further details?

a) the operator of that platform, or

b) the third party application service himself?

Should this be done before or after the contract is concluded?

This question is not envisaged by French law.

Moment of transmitting information: Information on the professional’s identity, geographic address, or service’s essential features, is considered as prior information. Therefore, this information must be provided before the conclusion of the contract.

Identity of the debtor's information: This question is not envisaged by French law.

However, it can be reconciled with cases in which a merchant operates a website on which he offers third party manufacturers’ products to consumers. The contract is concluded with the site operator, which is then liable for the obligation of information. This solution is also the easiest for consumers who are connected with a single interlocutor. By analogy, on platforms, the debtor of the information due to consumers would be the platform’s operator.

Q. 8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

One shall recall (see Q. 2.3) that article 15, I of the LCEN foresees that any natural or legal person pursuing an activity as defined by article 14 (see Q. 2.1) is automatically liable towards the other contracting party for the correct execution of the obligations resulting from the contract, whether such obligations are to be fulfilled by the person who concluded the contract or by other service providers, without prejudice to his right of recourse against the latter. The rationale of the law is to limit the number of interlocutors of the final beneficiary of the sales or service contract.

Article L. 121-20-3 C. cons. provides a similar rule in professional to consumer relations and has a larger scope seeing it applies to distance contracts, and not only to the activities of article 14 of the LCEN.

These provisions could be applied to digital content services. The beneficiary of a digital content service could hold the operator of the service liable, if the service fails to function, even if the failure is not due to his fault, but to that of a the third party application for example. The operator who is found liable could still benefit from a right of recourse against the third party application.

9 Remedies for non-performance and termination of a long term contract

Q. 9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

French law does not provide any specific remedies for non performance in digital content services.

See Q. 2.1, Q. 2.3 and Q. 8.8 concerning automatic liability. The provider is responsible without any fault, but just because the contract has not been well executed by himself or by a third one who had in charge the performance of the service.

Q. 9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

As French law does not provide specific remedies for digital content services, one will refer to the remedies of general contract law (see Q. 9.3).

Q. 9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

Contract law provides that if the debtor of an obligation does not run, one can send him a formal notice in order to require the professional to perform his obligations. The formal notice can be done by writing, without express exclusion of electronic documents. This formal notice is not mandatory. Indeed, case law have held that the summons to court to rescind the contract is similar as a formal notice. Therefore, the question of a reasonable period between the request for repair or replacement of the provision and application of resolution does not arise: the breach only needs to be sufficiently serious to warrant termination of the contract.

Note: The legal warranty of conformity, referred to in articles L. 211-1 and following of the consumer code, provides a delay between consumer demand and the resolution, for the sale of tangible personal property. If the repair or replacement cannot be implemented within one month following the claim of the buyer, he may rescind the contract.

In general contract law, in case of non-performance, a party has several options¹⁵⁹.

Firstly, in contracts which are synallagmatic (parties have reciprocal obligations), the party faced with the other party's non-performance may withhold performance (provided naturally he was not supposed to be the first to execute his obligation).

Secondly, article 1184 C. civ. gives an option to the party faced with non performance of his contracting partner: he may either require specific performance or resolve the contract without prejudice of damages.

In case of specific performance, performance in nature is preferred, except where it constitute a constraint upon the failing party's person contrary to article 1142 C. civ. (*nemo potest praecise cogi ad factum*) or is not satisfactory or possible, in which case performance in kind will follow.

Resolution of the contract is subject to strict conditions. Resolution is in principle reserved to synallagmatic contracts, though case law has admitted resolution for unilateral contracts¹⁶⁰.

Resolution may occur if the non-performance is of a certain gravity, even though it may be only partial. According to article 1184 C. civ., resolution must be asked in justice. However, in case of an express resolution clause, the contract may be resolved automatically, following prior reasonable notice enjoining the failing party to execute his obligation to the risk of resolution. This notice may be performed through a simple letter, though parties will prefer sending a charged letter (lettre recommandée) which offers certainty proof wise to its date of emission and/or reception. According to article 1316-1 C. civ., a writing in electronic form is admissible as evidence in the same manner as a paper-based writing, provided that the person from whom it proceeds can be duly identified and that it be established and stored in conditions calculated to secure its integrity. Furthermore, article 1369-8 C. civ. enables for electronic charged letters. Additionally, when the non-performance is grave to the point the judge would have pronounced the immediate resolution of the contract, a party may resolve the contract without going before the judge, even where no express resolution clause has been foreseen. He does so however at his own risk and peril¹⁶¹, and may incur liability if this unilateral resolution was unjustified. Resolution is in principle retroactive.

Finally, the party may act on the basis of contractual liability and claim restitution¹⁶².

Q. 9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?¹⁶³

This question covers the issue of what is called "unilateral resiliation" (résiliation unilatérale) in French law. It is a termination which emanates from one party, is not retroactive and does not result from any breach in contract or flawed consent (for annulment, see Q. 4.2 and 4.3, and Q. 5.7 and for resolution, *idem* and Q. 9.3).

¹⁵⁹ There is no hierarchy, but aims are different. The most serious is the resolution (art. 1184) because the contract disappears for the future and retroactively. Conversely, there is a hierarchy in the remedies in the legal warranty of compliance of the consumer code (see commentaire G42).

¹⁶⁰ *Lamy Droit Économique* (2009) n°45.

¹⁶¹ [Cass. 1^{re} civ., October 13, 1998, n° 96-21.485, *Bulletin civil I*, n° 300, *Dalloz jurisprudence* \(1999\) 197, note Ch. Jamin, *Dalloz* \(1999\) 115, obs. Ph. Delebecque, *Defrénoi* \(1999\) 374, note D. Mazeaud, *Revue trimestrielle de droit civil* \(1999\) 394, obs. J. Mestre, *Revue trimestrielle de droit civil* \(1998\) 506, obs. J. Raynard.](#)

¹⁶² *Lamy Droit du Contrat* (2010) n° 462-5.

¹⁶³ For instance: is the notice of termination invalid or must the consumer pay damages?

To determine to what extent a party may unilaterally renege a contract, French law distinguishes two types of contract: undefined duration contracts and fixed-term contracts.

In undefined duration contracts, either party may request termination of the contract at any time upon respecting a notice. This right stems from the idea -of public policy¹⁶⁴ and constitutional¹⁶⁵ force- that none may be kept in a contract perpetually. Jurisprudence recognizes this rule applicable to all contracts¹⁶⁶. In the absence of any legal or express conventional determination, the notice must be of a “reasonable period”¹⁶⁷. What must be understood by a reasonable period is casuistic.

If the contract is of a fixed term, each party must respect the stipulated period (*pacta sunt servanda*¹⁶⁸) and commits a fault if he doesn't¹⁶⁹. Naturally, parties may agree to consensually terminate the contract (résiliation anticipée par consentement mutuel des parties)¹⁷⁰.

The non observance of these rules may result in the payment of damages¹⁷¹.

With regards to digital content services, article L. 121-84-2 C. cons. provides that the notice period which may be imposed on the consumer wanting to renege a contract of services of electronic communication in the sense of article L. 32, 6° C.P.T. may not exceed 10 days. Also, article L. 121-84-6 C. cons. provides that the supplier of a electronic communications services contract in the sense of article L. 32, 6° C.P.T. who imposes to the consumer a minimum execution period clause of over 12 months must allow the consumer to anticipatively renege the contract as from the twelfth month following the acceptance of the said clause provided the consumer pay at most a quarter of the sum due for the non elapsed fraction of the foreseen minimum execution period.

Q. 9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

This question is essentially dealt with in France under the concept of the “ensemble contractuel indivisible”. This refers to contracts which form an ensemble to the point that their mutual existence is indivisible. Case law has, on many occasions, admitted the termination of one contract could affect the existence of another contract if these were part of an ensemble contractual indivisible, as was confirmed in the Cour de cassation's decision of April 4, 2006¹⁷².

In this decision, a hospital manager had concluded a contract for the heating of the hospital (hereafter “the heating contract”) with a company called *Cofreth*. The contract was concluded

¹⁶⁴ *Lamy Droit du Contrat* (2010) 465-54.

¹⁶⁵ [Cons. const., November 9, 1999, n° 99-419 DC, Journal Officiel, November, 16, 1999, p. 16962, Revue trimestrielle de droit civil. \(2000\) 109, obs. J. Mestre et B Fages.](#)

¹⁶⁶ [Cass. 1^{re} civ., February 5, 1985, n° 83-15.895, Bulletin. civil. I, n° 54.](#)

¹⁶⁷ *Op. cit.* n°465-66.

¹⁶⁸ Article 1134 C. civ.

¹⁶⁹ [Cass. com., July 9, 1996, n° 94-15.875, Revue de jurisprudence de droit des affaires \(1996\) n° 1438.](#)

¹⁷⁰ Article 1134, §2 C. civ.

¹⁷¹ *Lamy Droit du Contrat* (2010) n° 465-22.

¹⁷² [Cass. 1^{re} civ., April 4, 2006, n° 02-18.277, Dalloz \(2006\) 1186.](#)

for a five year period, tacitly renewable. *Cofreht* turned to *Gaz de France* (hereafter “GDF”) and concluded a contract for the provision of the combustible required to heat the hospital (hereafter “the provision contract”). The contract was also concluded for a determined period, though its period did not coincide with that of the heating contract, as it came to term later.

At the end of the five year period, the hospital manager notified his intention not to renew the heating contract with *Cofreth*. In turn, the company demanded to resiliate the provision contract which tied it to GDF seeing that it had no use for the combustible anymore. GDF refused and required *Cofreth* pay damages for anticipatory unilateral resiliation in a fixed-term contract (see Q. 9.4). It must be noted that GDF knew from the conclusion of the contract that the combustible was going to be used to heat the hospital.

The case ended in front of the Cour de cassation, who decided that the heating contract and the provision contract formed part of an ensemble contractuel indivisible and that the resiliation of the heating contract had resulted in the provision contract loosing its cause and becoming obsolete¹⁷³.

10 After sales services

Q. 10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

This question is not specifically dealt with under French law.

Q. 10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

The position of consumers depends on the reasons for the interruption of the service.

If the interruption comes from the trader, it is similar to a unilateral termination of the contract, punished by the payment of damages. However, if the contract is concluded for an indefinite period, it may be terminated at any time upon reasonable notice.

Conversely, **if the disconnection of the online service is due to the bankruptcy (la faillite) of the supplier**, consumers must state their claim in order to obtain reimbursement of the benefits they would have received if the contract had been completed (article L. 622-24 of the Commercial Code).

Q. 10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service¹⁷⁴ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

This question is not specifically dealt with under French law.

¹⁷³ For many other examples, *Lamy Droit de l'Informatique et des Réseaux* (2010) n^{os} 918 *et seq.*, *Lamy Droit du Contrat* (2010) n^{os} 320-3 *et seq.*

¹⁷⁴ E.g. to play the obtained music or video content.

11 Unfair commercial practices

Q. 11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

France transposed the Unfair Commercial Practices Directive¹⁷⁵ in its consumer code by the law of January 3, 2008 (Chatel law) and of August 4, 2008¹⁷⁶. In its current configuration, the Code contains a Title II dedicated to commercial practices. The said Title contains a Preliminary Chapter which defines unfair commercial practices. The preliminary nature of the Chapter and the wide phraseology of its only article seem to indicate it may be of a general reach, and set criteria which apply to subsequent chapters¹⁷⁷. Chapter I concerns regulated practices of which Section 1 deals with misleading practices and advertising. Article L. 121-1-1 of the said Section transposed the blacklisted misleading practices of Annex I of the UCPD, with the exception of snowball sales (see *infra*). Chapter II deals with illicit commercial practices, of which section 5 deals with aggressive practices. Article L. 122-11-1 of the said section transposed in whole the blacklisted aggressive practices of Annex I of the UCPD.

This illicit commercial practices Chapter is a pre-directive national vestige which may lead to some confusion because there are some practices which may be considered misleading or aggressive in the sense of the directive, or are even blacklisted as by Annex I of the directive and fall neither in Chapter I, section 1 nor in Chapter II, Section 5. For example, snowball sales, blacklisted under point 14 of the Annex, is dealt with under Section 3 of Chapter II. Inertia selling, blacklisted as aggressive in point 29 of the Annex, is dealt with under section 2 of Chapter 2 (Refusal and subordination of sale or supply of service) and again in article L. 122-11-1, 6° of Section 5 of the same Chapter (transposition of the blacklisted aggressive practices).

a-The use of incompatible standards to prevent users from switching to other services or hardware: To our knowledge, this question has not been dealt with under unfair commercial practices.

Article L. 331-5 C.P.I. allows for technical measures of restriction provided they do not hinder interoperability or affect the free use of the work (see Q. 7.1 and Q. 8.2). Furthermore, article L. 122-1 of the Consumer Code prohibits tying sells (“bundling”?), that is to say, the subordination of a sale of product or providing a service to the purchase of another product or service. Using an inconsistent standard in order to force the purchase of a suitable reader to this standard is prohibited.

¹⁷⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Hereafter the “UCPD”.

¹⁷⁶ Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie, *JORF* n°0181 du 5 août 2008, p. 12471 [Law of 4 August, 2008 for the modernisation of the economy]. Hereafter “LME”.

¹⁷⁷ *Lamy Droit Pénal des Affaires* (2010) n°2392 but, recently, *contra*, Cass. com. July, 13th, 2010, Comm. Com. Elect. 2010, comm. n° 98, obs. M. Chagny.

b-behavioral advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc): The various provisions of Title II of the consumer code (see introductory comment) can be applied depending on the type of advertising or marketing in question. For example,

- Astroturfing¹⁷⁸ could be condemned under article L. 121-1-1, 21° C. cons.
- For spamming, see Q. 4.2 and 4.3 under prospecting.
- etc.

Behavioral advertising will most likely be dealt with under data protection law: cookies are only allowed with the consumer's consent. Otherwise, they will be seen as a fraudulent collection of personal data¹⁷⁹, and a fraudulent retention of information in an automated data processing system¹⁸⁰.

c-The use of Digital Rights Management to prevent unauthorized use: See a.

d-The use of Digital Rights Management to restrict use to a certain region or country:

Idem

e- The collection of personal data for marketing purposes or through spyware: To our knowledge, this question has not been dealt with under unfair commercial practices.

Pursuant to the LIL, the person whose personal data are collected must in principle be informed of this collection, and have the right to access these data, modify them or oppose their treatment (see Q. 4.1) The collection of personal data must be done in a loyal and licit manner.

f-The collection of sensitive personal data for marketing purposes or through spyware:

Idem

g-The gathering, processing or selling of (sensitive) personal data after termination of the contract:

Idem

h-The use of default options to entice consumers to the purchase of additional services: This practice could be envisaged through several focal points. It could for example be considered as a *de facto* joint offer. This is however not the way it is approached in France, but rather through inertia selling. In a recent 2008 case the consumer rights organization *Union fédérale des consommateurs que choisir* sued the company *CDiscount* for having put in place a system on its online ordering platform which automatically pre-selected annex

¹⁷⁸ R. Tigner, "Online Astroturfing and the European Union's Unfair Commercial Practices Directive", *Unité de droit économique de l'ULB* (2010) available at [http://www.droit-eco-ulb.be/index.php?id=5&tx_ttnews\[tt_news\]=71&tx_ttnews\[backPid\]=1&cHash=38cd091a41](http://www.droit-eco-ulb.be/index.php?id=5&tx_ttnews[tt_news]=71&tx_ttnews[backPid]=1&cHash=38cd091a41) (last visited September 21, 2010).

¹⁷⁹ Article 226-18 C. pen: five years imprisonment and a fine of €300 000.

¹⁸⁰ Article 323-1C. pen: two years imprisonment and a fine of €30 000.

elements to the consumer's order. The Tribunal de Grande Instance de Bordeaux¹⁸¹ found *CDiscourt* to have violated article L. 122-3 C. cons. which prohibits inertia selling.

(For the possible overlap with the blacklist of the UCPD's Annex I, see introductory comment).

i- The marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors:

To our knowledge, this question has not been dealt with under unfair commercial practices.

j-sponsorship or commission arrangements on price comparison websites without clear notification to consumers :

Sponsorship or payment of commissions to comparison websites may result in biased information and be condemned under misleading commercial practices and advertising¹⁸².

More specifically, article L. 121-1, 2° C. cons. deems misleading any practice which is founded on false or misleading allegations, indications or presentations and which concern one of or several elements enumerated in the said article (*inter alia* the price of a good or service, its essential characteristics, etc.).

Also, according to article L. 121-8 C. cons., “[a]ny advertising which makes a comparison between goods or services by identifying, implicitly or explicitly, a competitor or goods and services offered by a competitor is only legal if: 1° It is not false or likely to mislead; 2° It relates to goods or services fulfilling the same requirements or having the same objective; 3° It objectively compares one or more essential, pertinent, verifiable and representative characteristics of these goods or services, one of which may be price.”

Q. 11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

For snowball sales, see introductory comment.

Joint offers are regulated under Section 1 of Chapter II Title II C. cons. This one-article section (entitled Refusal and subordination of sale or supply of service) establishes a general ban on joint offers. One will recall the European Court of Justice (hereafter “ECJ”) condemned such a ban¹⁸³. In conformity with the ECJ’s ruling, the Cour d’appel de Paris¹⁸⁴ in a recent case where *France Telecom* and its subsidiary company *Orange sports* were sued for offering a special football channel, *Orange Foot*, only if combined with a France telecom internet subscription, set aside the enforcement of the French ban and verified *in specie* if the practice under review constituted an unfair commercial practice. The court found it did not.

Q. 11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result?

¹⁸¹ TGI Bordeaux, March 11, 2008.

¹⁸² Title II, Chapter I, section I of the consumer code

¹⁸³ ECJ, joined cases *Galatea v Sanoma Magazines*, C-299/07 and *VTB-VAB v Total Belgium*, C-261/07.

¹⁸⁴ CA Paris, Mai 14, 2009, 09/03660 ; Cass. com., July, 13th, 2010, see *supra*.

See Q. 4.2 and 4.3.

Q. 11.4 To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

This answer joins with that of Q. 8.2. If the diligence of a professional is to be evaluated on the grounds of another legislation than that of consumer law, it is most probably on the basis of that legislation that the dispute will be settled. Naturally, this does not mean several provisions from different areas of law may not be combined. For example, it is very likely that the violation by a professional of many various provisions of law will cast doubts on his level diligence. But where the legislator wishes to insist on the interactions between consumer legislation and other legislation, he may do so by express reference, or even by entirely reproducing extracts from one law in the provisions of another law.

For example, one will recall the express reference of article L. 336-4 C.P.I. to article L. 111-1 C. cons. (see Q. 7.1) or notice that article L. 121-20-5 C. cons. reproduces integrally article L. 33-4-1 C.P.T. which prohibits directly canvassing, using automatic calling machines or fax machines, telecommunications network subscribers or users who have not consented to receiving such calls.

12 Minors and other vulnerable consumers

Q. 12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

In principle, one must be capable to enter a contract¹⁸⁵. Where a party lacks capacity, there can be no contract. Minors¹⁸⁶ are, according to article 1124 C. civ., incapable of entering into a contract. Case law, on the basis of article 389-3 of the code, which states that “[a] statutory administrator acts as an agent for the minor in all civil transactions, except cases where the law or usage authorizes minors to act for themselves”, has however tempered this categorical prohibition. Contracts pertaining to acts of daily life (*actes de la vie courante*) may be validly concluded by minors¹⁸⁷.

Elsewhere, if services may be considered harmful or offensive to minors, the service provider may not supply these to minors, under penalty of incurring penal liability. Articles 227-24 C pen. foresees that: “[t]he manufacture, transport, distribution by whatever means and however supported, of a message bearing a pornographic or violent character or a character seriously violating human dignity, or the trafficking in such a message, is punished by three years' imprisonment and a fine of €75,000, where the message may be seen or perceived by a minor.”

Furthermore, some products may not be sold to minors. This is for instance the case of alcoholic beverages¹⁸⁸.

¹⁸⁵ Article 1123 C. civ.

¹⁸⁶ Article 388 of the Civil Code: the minor is everyone who is aged under 18 years.

¹⁸⁷ *Lamy Droit des Médias et de la Communication* (2010) 468-70.

¹⁸⁸ Article. L. 3342-1 du Code de la santé publique [Public Health Code]. Hereafter “C.S.P”.

Q. 12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers¹⁸⁹), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

Seeing that minors are incapable of entering a contract (except for those pertaining to acts of the daily life), contracts with minors are nul. This nullity is relative (see Q. 5.7) in the sense that only the minor or his legal representative may rescind the contract. According to article 1307 C. civ., a mere declaration of majority, made by a minor, is not a bar to rescission.

Pursuant to article 1312 C. civ., where minors are entitled to rescission against their undertakings, the repayment of what may have been paid during the minority in consequence of those undertakings, may not be demanded, unless it is proven that what has been paid has turned to their benefit.

Q. 12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

See Q. 8.3 concerning the general information duty. The Consumer Code does not make any distinction (See commentaire G50). However, in general contract law, case law requires all providers to inform, on the basis of article 1135 of the Civil Code. Its intensity varies. This requirement may be an obligation to counsel when it comes to professionals to inform consumers about the appropriateness of the operation. It may even be a duty to warn if the operation is risky. This variability of the obligation of information allows the trader to provide consumers with information that meets their expectations and capacity: It is thus possible that the information supplied to a minor or a mentally ill will be adapted to his mental state and experience, including using simple language and drawing attention to points that major should not ignore.

Q. 12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?¹⁹⁰

See Q. 12.1.

Q. 12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

This question is not settled in French law.

¹⁸⁹ About vulnerable consumers (mentally ill) and general contract law, see Q.12.6. Consumer code does not distinguish between consumers. Therefore, there is no specific rules for mentally ill or minors in the consumer code.

¹⁹⁰ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as 'normal' for a child of a certain age.

Q. 12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

Pursuant to article 414-1 C. civ., in order to enter into a valid transaction, it is necessary to be of sound mind. It is for those who seek annulment on that ground to prove the existence of a mental disorder at the time of the transaction. This nullity is relative. Article 425 C. civ. provides that any person who is unable to act in his or her interests because of a medically attested alteration of his mental or bodily faculties which prevents the expression of his desires may benefit from measures of legal protection. There are three types of legal measures of protection, pronounced by the judge and which vary in time and intensity: judicial supervision, curatorship and tutorship.

Judicial supervision may not exceed one year, renewable once under certain conditions¹⁹¹. The adult keeps the exercise of his rights, save certain exceptions¹⁹². The acts he has taken and engagements he has concluded during the time of the measure may be rescinded for simple lesion or reduced when excessive, without prejudice of them being declared nul under article 414-1 C. civ.

If legal supervision does not insure sufficient protection, curatorship is pronounced¹⁹³. If neither legal supervision nor curatorship insure sufficient protection, tutorship is pronounced¹⁹⁴.

Curatorship and tutorship may not exceed five years, renewable for the same period by the judge¹⁹⁵.

Curatorship is a measure of assistance¹⁹⁶. The assistance of a curator is necessary for the adult under curatorship to accomplish any acts of disposition, defined as acts which engage the patrimony in a substantial and durable manner¹⁹⁷. The adult may in principle still perform administration and conservatory acts. An act which the adult has done beyond his capacity may be annulled under the condition that the act has caused him a prejudice¹⁹⁸.

Tutorship is the most drastic protection measure. In principle, the tutor represents the adult under tutorship in all acts pertaining to the management of his patrimony¹⁹⁹.

If the adult under tutorship has accomplished alone an act which required him to be represented, the act is automatically nul without it being necessary to demonstrate any prejudice²⁰⁰.

Q. 12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?²⁰¹

¹⁹¹ Article 439 C. civ.

¹⁹² Article 435 C. civ.

¹⁹³ Article 440 C. civ.

¹⁹⁴ *Id.*

¹⁹⁵ Article 441 and 442 C. civ.

¹⁹⁶ Article 440, §1 C. civ.

¹⁹⁷ Article 496 C. civ.

¹⁹⁸ Article 465, 2° C. civ.

¹⁹⁹ Article 496 C. civ.

²⁰⁰ Article 465, 3° C. civ.

²⁰¹ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

See Q. 12.1

13 Towards a model ‘digital consumer law’

Q. 13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

The State Secretary responsible for Forward Planning and Development of the Digital Economy launched a public consultation on the Action about “uses, services and innovative digital contents” on June 7, 2010. The French government plans to heavily invest in the development of the digital society. The aim is twofold: to accelerate the deployment of broadband networks on the national territory on the one hand and to guide the development of new applications, services and innovative digital contents on the other. The selected areas especially include digitization and enhancement of cultural, educational and scientific contents, e-health and e-education.

Also, a law proposal aiming at reinforcing consumers’ protection with regards to distance selling contracts is currently under discussion²⁰².

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

There are no specific norms geared at protecting minors in digital content services.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

See Q. 4.1 – *Data protection*.

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

²⁰² A.N, Rapport fait au nom de la commission des affaires économiques sur la proposition de loi de M. Jean-Pierre Nicolas, Mme Laure de la raudiere, Mm. Bernard Gerard et Jean-Michel Ferrand et plusieurs de leurs collègues, visant a renforcer la protection des consommateurs en matiere de vente a distance, december 16, 2009, available at http://www.assemblee-nationale.fr/13/rapports/r2166.asp#P433_138626 (last visited September 14, 2010).

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	..	..	o		..
Film or music on a website (streaming)	o	..	..	Ensure that the movie or music is not subject to intermittent outages due to a slowly server to provide information to multiple consumers.	..
Downloaded films or music	o	..	..	Ensure that the download is not interrupted by a server's default and, if so, to what the consumer does not lose data downloaded or does not have to pay again for data that were already downloaded.	..
Games on a CD or DVD*	..	..	o		..
Games on the Internet	i	..	..	Ensure that the server can ensure the smooth running of the network game without disconnections.	..
Downloaded games	i	Ensure that the movie or music is not subject to intermittent outages due to a server too slow to provide information to	..

				multiple consumers.	
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User created content (UCC) ²⁰³ on a CD or DVD*	█		..
UCC on a website	█	Content Sufficient server rate	Checking ..
Downloaded UCC	█	..	..	Content Sufficient server rate	Checking ..
Personalisation services ²⁰⁴ on the Internet	█	..	..	Undisturbed reception of service	..
Downloaded personalisation services	█	..	..	Ensure that the download is not interrupted by a server's default and, if so, to what the consumer does not lose data downloaded or does not have to pay again for data that were already downloaded.	..
Software-as-a-Service on a website ²⁰⁵	█	..	..	Undisturbed reception of service	..
Downloaded software ²⁰⁶	█	..	..	Ensure that the download is not interrupted by a server's default and, if so, to what the consumer does not lose data downloaded or does not have to pay again for data that were already downloaded.	..
Software on a CD or	..	..	█		..

²⁰³ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

²⁰⁴ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

²⁰⁵ E.g. image editing, photoshopping, automatic translation services.

²⁰⁶ E.g. anti-virus programs.

DVD*					
Communication through a website ²⁰⁷	■	..	..	Personal data protection Ensure and regulate access to privacy data.	..
E-learning services on the internet ²⁰⁸	■	..	..	Undisturbed reception of service	..
Downloaded e-learning services	■	..	..	Ensure that the download is not interrupted by a server's default and, if so, to what the consumer does not lose data downloaded or does not have to pay again for data that were already downloaded.	..
E-learning service on a CD or DVD*	..	..	■		..

Q.13.5 : What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made? Please indicate this in the table below.

²⁰⁷ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

²⁰⁸ E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware / software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	■	..	■	..	■	■	..	No risk for the hardware (viruses ...) • ...
'Free' film or music on a website (streaming)	■	■	..	• ...
Paid film or music	■	■	■	■	No risk for the hardware (viruses ...)

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

on a website (streaming) ²⁰⁹								
'Free' downloaded films or music	..	..	█	..	█	█	..
Paid downloaded film or music	█	..	█	..	█	█	█	No risk for the hardware (viruses ...)
Paid games on a CD or DVD*	█	..	█	..	█	█	..	No risk for the hardware (viruses ...)
'Free' games on a website	..	..	..	..	█	█	..
Paid games on a website	█	..	..	..	█	█	█	No risk for the hardware (viruses ...)
'Free' downloaded games	..	..	█	..	█	█	..

²⁰⁹ E.g. video on demand services.

Paid downloaded games	■	..	■	..	■	■	■	
Paid User created content (UCC) ²¹⁰ on a CD or DVD*	■	..	■	..	■	■	..	No risk for the hardware (viruses ...)
'Free' UCC ²¹¹	..	..	■	..	■	■	..
Paid UCC	■	..	■	..	■	■	■	No risk for the hardware (viruses ...)
'Free' personalisation services ²¹²	..	..	■	..	■	■	..
Paid personalisation services	■	..	■	..	■	■	■	No risk for the hardware (viruses ...)
Paid software	■	■	■	..	■	■	..	No risk for the hardware (viruses ...)

²¹⁰ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

²¹¹ E.g. video sharing websites, such as YouTube.

²¹² E.g. ringtones and Apps for mobile phones.

on a CD or DVD* ²¹³								
'Free' downloaded software ²¹⁴	..	■	■	..	■	■	..	
Paid downloaded software	■	■	■	..	■	■	■	No risk for the hardware (viruses ...)
'Free' software-as-a-service on a website ²¹⁵	..	..	..	..	■	■	..
Paid software-as-a-service on a website	■	..	..	..	■	■	■	No risk for the hardware (viruses ...)
'Free' communic	..	..	..	..	■	■	..

²¹³ E.g., anti-virus programmes, Office, etc.

²¹⁴ E.g. anti-virus programmes.

²¹⁵ E.g. image editing, photoshopping etc..

ation services ²¹⁶								
Paid communication	■	..	..	..	■	■	■	No risk for the hardware (viruses ...)
Paid e-learning service on a CD or DVD* ²¹⁷	■	..	■	..	■	■	..	No risk for the hardware (viruses ...)
'Free' downloaded e-learning services	..	..	■	..	■	■	..
Paid downloaded e-learning services	■	..	■	■	■	■	■	No risk for the hardware (viruses ...)
'Free' e-learning service on the internet	..	..	..	..	■	■	..

²¹⁶ E.g. social networking, such as Facebook, and e-mail services.

²¹⁷ E.g. an online language course.

Paid e-learning service on a the internet	■	■	■	■	■	No risk for the hardware (viruses ...)
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GERMANY

Prof. Dr. P. Rott (University of Copenhagen, Copenhagen, Denmark)

2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

No specific consumer law pertaining to digital content services has been developed until now in Germany.

German courts have applied sales law to digital products on hardware since the mid-1980es and Germany has, in principle, extended the Europeanised sales law to contracts concerning the sale of other than movable tangible products, such as immovable property and intangible products, in 2002. Thus, the sale of software comes under sales law – if the contract is a sales contract and not any different type of contract, such as a contract on works and services, a licensing contract or a rental contract. Accordingly, much case-law and academic debate is available regarding the distinction of these types of contract.²¹⁸

In Germany, the question as to whether the transfer of software against payment constituted a sales contract was first discussed in the context of software in tangible form, i.e. on a computer or a CD ROM. Initially, the debate had centred around the question as to whether digital products in tangible form *are* goods so that sales law would have applied directly. The BGH has, at this early stage, decided that they should at least be treated *like* goods, with the clear intention to bring them under the sales law regime related to non-conformity (or “defects” in the German terminology) and to remedies.²¹⁹

The reasons of the BGH were the following: First of all, the normal purchase of digital products is a one-off transaction and does not establish a long-term relationship between the parties. The trader delivers the digital product to the consumer who shall have the right to use it without any time limit; and the consumer pays the agreed amount in one transaction.²²⁰ In this way, the contract is distinguished from long-term contracts such as rent or lease. The latter type of contract is applicable where the product is let to the customer on a temporary basis only. This does happen quite frequently in a commercial context; the rent is then usually complemented by maintenance obligations. In contrast, it seems to be rare in the B2C setting.

²¹⁸ See, e.g., the extensive analysis by *U. Grübler*, *Digitale Güter und Verbraucherschutz*, 2010 (publ: Nomos Verlagsgesellschaft, Baden-Baden), at 91-127, and by *C. Cichon*, *Internet-Verträge*, 2nd ed. 2005 (publ.: Dr. Otto Schmidt, Cologne), at 239-310.

²¹⁹ See only BGH, BGHZ 102, 135, at 144.

²²⁰ See BGH, JZ 1990, 972, at 973; BGH, NJW 2000, 1415. Of course, payment of the purchase price in instalments is also possible under a sales contract, see BGH, NJW 2000, 1415, but would be unusual.

The problem has been settled with the reform of the law of obligations of 2001 when the new § 453 BGB was introduced, according to which the provisions on the purchase of things apply with the necessary modifications to the purchase of rights and other objects. This was explicitly meant to apply to software, amongst others.²²¹

Taking this further, it was then discussed whether or not this also applies to software that was transmitted online. Here, the problem obviously arises that without a CD ROM or DVD, there is no ownership to software (in the sense of property law) that could be transferred.²²² Nevertheless, the courts have applied sales law in many instances, with certain modifications.²²³ The prevailing opinion in Germany has concurred with this case law.²²⁴

As mentioned above, Germany has extended most of the rules of the Consumer Sales and Guarantees Directive 1999/44/EC to non-consumer sales contracts. The concept of conformity as laid down in Article 2 of the Directive now applies broadly, and so do the remedies that are provided in Article 3 of the Directive. Merely the seller's redress, Article 4, the reversal of the burden of proof, Article 5 (3), some features of the consumer guarantee, Article 6, and the mandatory nature of the rules, Article 8 (1), were reserved to consumer sales contracts.

The problem here is that the rules are only mandatory for consumer sales contracts, and § 474 BGB has followed the definition of Article 2(b) and restricted the scope of application of the specific consumer sales rules to "tangible movable items". Some German authors have argued that data becomes part of a tangible product and is therefore itself tangible once it has been transmitted to the consumer's hardware. They have therefore proposed to apply the mandatory consumer sales law derived from the Consumer Sales Directive to the online purchase of music, software and the like.²²⁵

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the software on the CD/DVD, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

Indeed, some authors regard the purchase of software and other copyright protected products as special types of licensing contracts, arguing that what is transferred to the customer is not a good but the use of an idea and that therefore the rules on the sales of goods are inappropriate. Instead they prefer licensing law to be applied.²²⁶

²²¹ See, for example, *T. Kraul*, *Multimedieverträge nach deutschem und englischem Recht*, GRUR Int. 2009, 1, at 5.

²²² See OLG Nuremberg, CR 1993, 359, at 360; *H. Redeker*, *Wer ist Eigentümer von Goethes Werther?*, NJW 1992, 1739 f.; *C.-D. Müller-Hengstenberg*, *Computersoftware ist keine Sache*, NJW 1994, 3128 ff.; against *M. König*, *Software (Computerprogramme) als Sache und deren Erwerb als Sachkauf*, NJW 1993, 3121 ff.

²²³ For the irrelevance of the handing out of a tangible product see in particular BGH, NJW 2007, 2394.

²²⁴ See, for example, *E. Wente*, *Gewährleistung für Software*, Diss. Bonn, 1999, at 33; *Cichon*, n. 1 above, at 293 ff.; *M. Hoenike and L. Hülsdunk*, *Leistungskomponenten und Vertragsbeziehungen bei kommerzieller Musik-Download-Plattformen im Internet*, MMR 2004, 59, at 65; *C. Holzbach and C. Süßenberger*, *Online-Vertrieb (B2C)*, in: H.-W. Moritz and T. Dreier (eds), *Rechts-Handbuch zum E-Commerce*, 2nd ed. 2005 (publ.: Dr. Otto Schmidt, Cologne), 478, at 480; *F. Lenhard*, *Vertragstypologie von Softwareüberlassungsverträgen*, 2006 (publ.: Herbert Utz Verlag, Munich), at 218 ff.; *Grübler*, n. 1 above, at 93 f.

²²⁵ See *S. Lorenz*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol. 3, 5th ed., 2007 (publ.: C.H. Beck, Munich), § 474, no. 10. For software: *B. Grunewald*, in: *Erman, Bürgerliches Gesetzbuch*, 12th ed., 2008 (publ.: Dr. Otto Schmidt, Cologne), § 474, no. 3. See also *G. Spindler and L. Klöhn*, *Neue Qualifikationsprobleme im E-Commerce*, CR 2003, 81, at 85, who reject the idea that software is a tangible product (once received) but still want to apply consumer sales law by analogy.

²²⁶ See, for example, *H.-W. Moritz*, *Überlassung von Programmkopien – Sachkauf oder Realakt in Vertrag sui generis?*, CR 1994, 257, at 263; *H. von Herget and M. Reimer*, *Rechtsformen und Inhalte von Verträgen im Online-Bereich*, DStR 1996, 1288, at 1289.

The Bundesgerichtshof has clearly rejected the separation of the idea from the good in which it is incorporated and has in fact held that copyright-related issues in a contract are merely of an ancillary nature but do not determine the type of contract otherwise.²²⁷

Thus, where software on the CD/DVD is flawed, a consumer can take recourse to consumer sales law.

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer's computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

As mentioned above, sub Q.2.1., the contract will be treated in accordance with the rules for contracts for the sale of goods. Thus, the rules on conformity and the remedies of the Consumer Sales and Guarantees Directive 1999/44/EC apply. Case law as to whether the rules of §§ 474 ff. BGB that are reserved to consumer sales contracts apply is not yet available.

3 Defining consumers and producers

Q.3.1 Are individuals who offer digital content services to consumers considered to be 'consumers' or 'traders'? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

Case law concerning individuals who offer digital content services to consumers is not yet available. Generally speaking, § 14 BGB defines the traders as a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession. In its landmark decision on this notion, the Bundesgerichtshof held that this requires independent and planned activities to offer goods or services on the market for a certain time. In contrast, the trader does not need to aim to make profits from his activities.²²⁸ In the particular case, a horse breeder who sold horses from his own breed was held to be a trader although this was only a side activity to his amateur breeding which by no means covered the costs.

²²⁷ See BGH, NJW 2007, 2394; consenting *J. Marly and N. Jobke*, Zur Rechtsnatur der Softwareüberlassung im Rahmen eines ASP-Vertrages, LMK 2007, 209583.

²²⁸ BGH, NJW 2006, 2250, at 2251.

What matters is the consumer perspective. If an individual offers their services entirely for free, and if this is not only a promotion, this individual would not be regarded as a trader²²⁹. With micro-payments, this may be different since small amounts are quite frequent on internet, and with a great number of users they may still sum up to a reasonable income, which would point at a trader. In the case of E-bay sales, the OLG Zweibrücken has argued that low profits from internet auctions do not necessarily exclude the legal classification as trader.²³⁰

As to the activities of individuals who do not formally have a trade but still sell more or less regularly, one can draw conclusions from case law on individuals who sell products on E-bay. The courts consider the circumstances of the individual case. In the case of so-called powersellers, the courts impose the burden of proof on the seller not to be a trader.²³¹ They have, however, also classified so-called private sellers as traders.²³² Indicators for a trade are: the number and frequency of auctions, the type of goods sold (whereby new goods and many goods of the same kind point at a trade), the professional impression of the internet presentation and so on.²³³ Sometimes courts have used the number of evaluations as indicators.²³⁴

It should however be noted again that the rules on conformity and the remedies of Directive 1999/44/EC also apply to C2C sales contracts. The major difference between B2C and C2C sales contracts is that consumer sellers can exclude liability, which traders obviously cannot, under § 475 para. 1 sentence 1, which implements Article 8 (1) of the Directive.

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

Distinctions between commercial and consumer sellers have been made by the courts in the sector of second-hand cars. For example, statements as to the mileage of a car may be interpreted, in a private context, in such a way that the consumer seller is not aware of any deviation from the odometer, whereas in a commercial context the purchaser may trust that the trader has examined the car as to its actual mileage.²³⁵

This is also reflected in tort law where, for example, a second-hand car trader is expected to conclude from the DOT number on tires to their age, whilst a private seller is not.²³⁶

4 Sector-specific consumer law

Q.4.1 Do specific rules in media²³⁷, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to

²²⁹ In which context should the individual be considered to be a trader. If it is sales law, then there is no sales contract but a gift (Schenkung). Thus, § 14 BGB would not matter anyway. For other purposes, such as tax law or public law, the view may differ but this is not subject to the question.

²³⁰ OLG Zweibrücken, WRP 2007, 1005.

²³¹ See, for example, OLG Frankfurt, NJW 2005, 1438; OLG Koblenz, NJW 2006, 1438; OLG Karlsruhe, WRP 2006, 1038.

²³² See, for example, OLG Frankfurt NJW 2004, 3433.

²³³ See, for example, OLG Zweibrücken, WRP 2007, 1005.

²³⁴ See, for example, AG Wernigerode, MMR 2007, 402: 1,378 evaluations.

²³⁵ See BGH, NJW 1998, 2207 (commercial sale), versus BGH, NJW 1984, 1454 (private sale).

²³⁶ See OLG Cologne, NJW-RR 2002, 530.

- the conclusion of the contract for digital content services;
- the pre-contractual information consumers need to be given²³⁸;
- the termination of the contract (for non-performance or termination for other reasons) for digital content services?

Under § 95d para. 1 of the Copyright Act (*Urhebergesetz*, UrhG), works that are protected by technical protection measures must be clearly labelled as such. Case law on this provision is not yet available.

Online shopping also comes under the Telemedia Act²³⁹ (*Telemediengesetz*, TMG), which regulates e-commerce and implements in §§ 5 and 6 TMG Articles 5 and 6 of the E-Commerce Directive 2000/31/EC²⁴⁰ and the general information obligations of the Audiovisual Media Service Directive 2007/65/EC. Additionally, the information obligations of Directive 2006/123/EC on services in the internal market have now been implemented in German law with the Regulation on Information Obligations of Service Providers (*Verordnung über Informationspflichten für Dienstleistungserbringer*; DL-InfoV). Whilst the application of the DL-InfoV and the Services Directive itself to online services is somewhat unclear and the DL-InfoV does not clarify anything by simply referring to Article 2 of the Services Directive, the new information obligations apply at least to some online services that are rendered against payment.²⁴¹ Most information obligations have already been imposed on traders by the Telemedia Act.

Telecommunications service providers have to fulfil information obligations under § 45n of the Telecommunications Act (*Telekommunikationsgesetz*, TKG) that relate to, amongst others, details of the offered services, prices, redress, standard terms, minimum duration of the contract, dispute settlement and important user rights. These can be published in the Official Journal of the Federal Network Agency (Bundesnetzagentur). The Federal Network Agency can also publish any relevant information on internet. Otherwise, § 45n TKG does not specify the way in which information has to be published.

The Telemedia Act also contains rules on data protection that render the collection and use of personal data unlawful unless the user has given his consent. Consent can be transferred electronically but only if the service provider ensures that the user has given consent intently and clearly, if the consent is documented and can be accessed at any time by the user, and if the user can withdraw his consent at any time with effect for the future, see § 12 TMG.²⁴² The same requirements are set by § 4 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG).

Of special rules regarding the termination of the contract I am only aware in the context of short number services (*Kurzwahldienste*). These are services where the consumer can use a short number, for example a five digits number, to download ringtones. According to § 45l para. 2 of the Telecommunications Act, the customer can terminate the contract with a period of one week to the end of the billing period, which latter may not be longer than one month.

²³⁷ The Audiovisual Media Service Directive introduced in its Art. 3a a new transparency obligation, requiring providers of audiovisual media to provide viewers with information about name, electronic and geographical address, etc. This provision has been implemented in German media law. The Telemedia Act. I have included this in the first sentence of the second paragraph and have included § 5 TMG to the table of legislation

²³⁸ For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

²³⁹ Federal Gazette (BGBl.) 2007 I, 179.

²⁴⁰ See T. Hoeren, *Das Telemediengesetz*, NJW 2007, 801, at 802.

²⁴¹ For detailed analysis see B. Lorenz, *Auswirkungen der Dienstleistungs-Informationspflichten-Verordnung auf Internetangebote*, VuR 2010, 323 ff.

²⁴² The rules have been criticised for being overly complicated, see Hoeren, NJW 2007, 801, at 805.

Q.4.2 Have specific rules in media, telecommunications²⁴³, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

Spamming has always been prohibited under the German law of unfair competition,²⁴⁴ a law which however does not give remedies to individual consumers. Unsolicited e-mails are only allowed once the user has opted-in into receiving them, see now § 7 para. 2 no. 3 UWG. In addition to this, § 6 para. 2 Telemedia Act (TMG) has introduced a duty to indicate the true sender and to mark commercial communications as such in their headings. This of course only applies once the user has consented to receiving unsolicited e-mails from that service provider.²⁴⁵ According to § 6 para. 3 TMG, the rules of unfair competition law are not affected by § 6 para. 2 TMG.

Minors are protected by the Treaty on the Protection of Dignity and of Minors in Broadcasting and Telemedia (*Jugendmedienschutz-Staatsvertrag*; JMStV), a treaty between all the German *Länder* that have the legislative competence in this area. Apart from the prohibition of some generally unacceptable and therefore unlawful contents, such as the denial of Nazi crimes or child pornography (see § 4 JMStV), the JMStV also contains special rules related to the protection of minors. Most rules apply to children (below 14) and to minors (14 to 17)²⁴⁶ but some are specifically dedicated to children only. For example, advertisements must not impair children or minors physically or psychically, and it must not contain direct calls on children or minors that abuse their inexperience and credulity, it must not call on children or minors to ask their parents or others to purchase goods or services, it must not abuse the trust that children and minors have in their parents, teachers or other persons of trust, and it must not show children or minors in dangerous situations without good reasons (§ 6 para. 2 JMStV). Another example is that advertisement for alcohol must not be directed towards children or minors, it must not attract them particularly, and it must not show them drinking alcohol (§ 6 para. 5 JMStV).

Q.4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- **does sector-specific law determine any remedies?**
- **could a consumer invoke general consumer and contract law remedies²⁴⁷?**

²⁴³ There are no information requirements in the telecom law. The information obligations have been included in the previous section.

²⁴⁴ See only BGH, NJW 2004, 1655.

²⁴⁵ See also *Hoeren*, NJW 2007, 801, at 805.

²⁴⁶ For the definitions see § 3 para. 1 JMStV.

²⁴⁷ E.g. unfair commercial practices, unfair contract terms, avoidance/voidability of the contract, termination or damages.

The Copyright Act does not determine any specific remedy in the situation that a work is protected by technical protection measures but not labelled as such. In such a case, the product must be regarded as being not in conformity with the contract so that sales law remedies apply.²⁴⁸ Moreover, § 95d para. 1 UrhG is meant to serve the fair competition between traders.²⁴⁹ Non-compliance with § 95d para. 1 UrhG is therefore an unfair commercial practice in the terms of § 4 no. 11 of the Unfair Competition Act (UWG).²⁵⁰ Under the old UWG, the OLG Munich had regarded the non-indication of technical protection measures as a misleading practice.²⁵¹ Under German law, however, consumers themselves have no remedies available under unfair competition law. Only consumer associations could take action, and also competitors (see § 8 UWG).²⁵²

The protection of children and minors under the JMStV is enforced by public authorities, the media authorities of the *Länder* that can take the necessary measures (which are not specified in the law). Some breaches of the JMStV, in particular those related to the generally unacceptable practices that are outlined in § 4 JMStV, may trigger criminal law sanctions or public law fines but not those mentioned above in § 6 paras 2 or 5 JMStV. However, non-compliance with the JMStV is also an unfair commercial practice in the terms of § 4 no. 11 UWG²⁵³ so that consumer organisations and competitors can take action against the violator. It is likely that courts might also find breaches of the sector specific rule on advertisement in media law an unfair commercial practice

Equally, all breaches of information obligations, for example those imposed on traders by the Telemedia Act, the Telecommunications Act or the Regulation on Information Obligations of Service Providers, are unfair commercial practices in the terms of § 4 no. 11 UWG.

Unfair competition law also applies to unsolicited e-mails if the addressee has not consented to receiving such e-mails so that consumer organisations and competitors can take action against the violator. Interestingly, whereas cold calling can be sanctioned under § 20 UWG with a fine of up to 50,000 Euros, spamming cannot. However, service providers can be fined up to 50,000 Euros if they intently breach § 6 para. 2 TMG, see § 16 paras 1 and 3 TMG. The issue also plays a role in the law of unfair contract terms. The BGH has consistently held standard terms unfair according to which the consumer consents to receiving unsolicited e-mails unless she notifies her disagreement, since the opt-in requirement could otherwise be turned into an opt-out requirement.²⁵⁴ Recently, however, higher regional courts have disagreed with this line of case law and have argued that such standard terms are not necessarily unfair if they are not surprising and sufficiently transparent.²⁵⁵

²⁴⁸ See also *U. von Diemar*, Die digitale Kopie zum privaten Gebrauch, 2002 (publ.: LIT Verlag, Hamburg), at 153; *H. Schack*, Schutz digitaler Werke vor privater Vervielfältigung – zu den Auswirkungen der Digitalisierung auf § 53 UrhG, ZUM 2002, 497, at 506; *P. Rott*, Privatkopie und Urhebervertragsrecht aus der Perspektive des Verbraucherrechts, in: R. M. Hilty and A. Peukert (eds), Interessenausgleich im Urheberrecht, 2004 (publ.: Nomos Verlagsgesellschaft, Baden-Baden), 267, at 283.

²⁴⁹ See *T. Dreier*, in: T. Dreier and G. Schulze, Urhebergesetz, 3rd ed. 2008 (publ.: C.H. Beck Munich), § 95d margin note 2.

²⁵⁰ See also *A. Wandtke and C. Ohst*, in: A. Wandtke and W. Bullinger, Urhebergesetz, 3rd ed. 2009 (publ.: C.H. Beck, Munich), § 95d margin note 12.

²⁵¹ OLG Munich, ZUM-RD 2001, 244, at 246 f.

²⁵² See, for example, *R. Sack*, Regierungsentwurf einer UWG-Novelle – ausgewählte Probleme, BB 2003, 1073, at 1077 f.

²⁵³ See BGH, GRUR 2008, 534; OLG Munich, MMR 2009, 126.

²⁵⁴ See BGH, WRP 2009, 56. See also BGH, MMR 1999, 477, on cold calling. See also *S. Ernst*, Die Einwilligung in belästigende telekommunikative Werbung nach neuer Rechtslage in UWG und BDSG, WRP 2009, 1455, at 1459.

²⁵⁵ See OLG Hamburg, WRP 2009, 1282; OLG Cologne, WRP 2008, 1130. See also *D. Pauli*, Die Einwilligung in Telefonwerbung per AGB bei der Gewinnspielteilnahme, WRP 2009, 1192 ff.

5 Formation of contract and pre-contractual information

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

Provisions related to the transparency and comprehensibility of standard terms stem from the law of unfair contract terms. Firstly, incorporation of standard terms requires traders to give the other party the reasonable opportunity to take note of the standard terms, § 305 BGB. Whilst this is not problematic on internet, it can become an issue when mobile phones are used since in that case space is extremely limited. Secondly, surprising terms are not incorporated into the contract even if the standard terms as such are, § 305c para. 1 BGB. The surprising character of terms may, for example, stem from their place within the standard terms. Thirdly, and this is also expressed in the Unfair Contract Terms Directive, terms may be invalid if they are unclear as to their meaning.

Moreover, courts have held that the information obligations stemming from distance selling law also have to be fulfilled in m-commerce.²⁵⁶

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

This is regulated under distance selling law. The German legislator has extended the requirements of Article 5 (1) of Directive 2002/65/EC on the distance marketing of financial services to all distance contracts. According to § 312c para. 1 BGB with Article 246 § 2 para. 1 no. 1 EGBGB, the trader must communicate to the consumer the contract including the standard terms at the latest with the delivery of the goods or services. This must be in the so-called text form of § 126b BGB, which excludes the mere making available on internet. In contrast, an e-mail satisfies the requirements of § 126b BGB.

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license²⁵⁷, considered to be validly concluded contracts?

Contracts including standard contracts can of course be concluded by electronic means. The click-wrap issue merely relates to the incorporation of the standard terms into the contract. In order to include the standard terms, the user of the standard terms must bring them to the attention of the other party and must give the other party the reasonable opportunity to take note of the standard terms. The crucial factor is time: This must happen before the contract is concluded, see § 305 para. 2 BGB. Thus, if the standard terms are presented after software has been purchased and downloaded, they are not incorporated into the contract.

²⁵⁶ See, for example, OLG Hamm, VuR 2009, 431; LG Cologne, 6/8/2009, 31 O 33/09 (available in juris)

²⁵⁷ 'Browse-wrap' means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

Q.5.4 Under what conditions are the terms of a standard form agreement²⁵⁸ binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms²⁵⁹ necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?²⁶⁰

Consent is a requirement of the incorporation of standard terms, according to § 305 para. 2 BGB, but consent can be implied from the consumer's actions, such as using a webpage after having been directed to the existence of standard terms (always provided that there was a reasonably opportunity to take notice of them).

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy²⁶¹, or may the information also be given via electronic means?²⁶²

As mentioned above, sub Q.5.2., the trader must communicate to the consumer the contract including the standard terms at the latest with the delivery of the goods or services. This must be in the text form of § 126b BGB, which excludes the mere making available on internet. In contrast, an e-mail satisfies the requirements of § 126b BGB. A hardcopy is not necessary.

Q.5.6 Are you aware of any specific information duties for providers of digital content services?²⁶³ If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

Of course, there are also the information obligations of the E-Commerce Directive, as implemented in the Telemedia Act (TMG). The question as to whether the service provider has to give a telephone number was subject to much debate. Finally, the BGH referred this issue to the ECJ;²⁶⁴ which decided, in the case of *Internet-Versicherung*, that Article 5 of the E-Commerce Directive did not require a telephone number to be given if one alternative way of contact is offered in addition to an e-mail address.²⁶⁵ German courts of course implement this interpretation, although the OLG Frankfurt has mentioned that the telephone number was obviously the easiest way to comply with § 5 TMG.²⁶⁶

²⁵⁸ For instance those included in the click-wrap or a browse-wrap license.

²⁵⁹ E.g. by clicking 'I agree' in a dialog box.

²⁶⁰ E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

²⁶¹ E.g. on paper or on CD/DVD.

²⁶² E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer's computer.

²⁶³ For example about the fact that a piece of music or video is subject to technical restrictions so that it cannot be copied or only played in a certain region; or that when using the service personal data will be collected (spyware); that a service is incompatible with certain software; about eventual sponsoring or other commercial influences.

²⁶⁴ BGH, NJW 2007, 2352.

²⁶⁵ ECJ, judgment of 16 October 2008, Case C-298/07 *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v. deutsche internet versicherung AG*, [2008] ECR I-7841.

²⁶⁶ OLG Frankfurt, 29/7/2009, 6 W 102/09 (available in juris).

Q.5.6 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer?²⁶⁷ If so, please specify.

The only specific discussion related to this issue turned on the issue as to whether or not a link to another webpage satisfied the requirements of § 312c BGB on pre-contractual information in distance selling law and of the Telemedia Act. Whilst the OLG Frankfurt had denied this in an early decision,²⁶⁸ the BGH has accepted that a link was sufficient;²⁶⁹ provided of course that the link itself is clearly indicated.

Of course, there is also a general discussion on information overload that is brought up whenever new information obligations are proposed. Attempts have been made to work with “traffic lights” labeling products or services with the colours red, yellow and green. In the area of financial services, such labeling performed by the Verbraucherzentrale Hamburg (“Ampelcheck Geldanlage”) has been attacked by one service provider (Debeka), which started interim litigation but lost their case in the LG Berlin.²⁷⁰ In the area of digital services, I am not aware of any similar sector specific attempt.

Q.5.7 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?²⁷¹

Non-compliance with the information obligations of § 5 TMG is at the same time a breach of unfair competition law, see § 4 no. 11 UWG.²⁷² The same applies to non-compliance with pre-contractual obligations under distance selling law.

In general contract law, there is also the right to damages for the breach of pre-contractual obligations, §§ 311 para. 2, 241 para. 2, 280 para. 1 BGB. Of course, the breach of pre-contractual information must have caused damage. This is normally not the case if the consumer could avoid damage by simply exercising his or her right of withdrawal.

6 Right of withdrawal

Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

In academic writing, the question as to whether digital products are goods or services in the terms of § 312d para. 3, which implemented Article 6(3) of Directive 97/7/EC, was discussed

²⁶⁷ E.g. before the signing of a contract, in clear and comprehensible language, in sufficiently large letters, etc.

²⁶⁸ OLG Frankfurt, DB 2001, 1610.

²⁶⁹ BGH, NJW 2006, 3633.

²⁷⁰ LG Berlin, 10/9/2009, 27 O 778/09 (available in juris and at http://www.vzhh.de/geldanlage/30469/ampelcheck_urteil_lgberlinpdf.aspx?sid=e74466a0-5851-47b7-a93b-f149ec1eeb6b).

²⁷¹ E.g. voidability or termination of the contract, damages, prolongation of the period for the exercise of a right of withdrawal.

²⁷² See, for example, OLG Frankfurt, 29/7/2009, 6 W 102/09 (available in juris).

controversially.²⁷³ The prevailing view in German academic writing is that a contract related to the download of digital products constitutes a contract on the delivery of goods, in the terms of § 312d para. 3 BGB, provided that the digital product is meant to remain permanently available to the consumer.²⁷⁴ One reason is of course that digital products are treated like goods under sales law, as explained above. The mere service of transmitting the digital product has no meaning for the contract, just as the transportation of a physical good.²⁷⁵ In contrast, a true service contract, such as a contract related to a database search, comes under § 312d para. 3 BGB.²⁷⁶

Consequently, discussions centred around the issue as to when the provision of a service started. For example, the LG Mannheim held that the sending of an access code does not meet the requirements of § 312d para. 3 BGB but that the service is only begun to be provided once the consumer has used the service (here: database access) for the first time.²⁷⁷

§ 312d para. 3 BGB has been amended with effect from 4 August 2009. In its original form, the exemption related to the provision of services if performance had begun, with the consumer's agreement, before the end of the withdrawal period. This included situation in which the consumer had initiated the service, for example by pressing the button. After numerous cases of so-called subscription traps, where consumers had initiated seemingly free of charge services without realising that somewhere, in the small print at the bottom of the page, there was a statement according to which by pressing the button the consumer enters into a long-term contract with, for example, monthly payment obligations, the legislator reacted with the Act to Fight Cold Calling and to Improve Consumer Protection in the case of Special Distribution Methods (*Gesetz zur Bekämpfung unerlaubter Telefonwerbung und zur Verbesserung des Verbraucherschutzes bei besonderen Vertriebsformen*).²⁷⁸ Under the new § 312d para. 3 BGB, the right of withdrawal only expires once both parties have fulfilled their obligations before the expiry of the withdrawal period; which is not the case if the consumer has not paid yet.²⁷⁹

The question as to what happens, in a contract on the provision of a service, after the trader has begun to render the service is also subject to controversies. Some academics have argued that § 312d para. 3 BGB should only be applied to inseparable services whereas the termination of a contract for continuous services, such as a mobile phone contract or a fast internet connection contract, should remain possible.²⁸⁰ Some courts have followed this approach,²⁸¹ whereas others have rejected it.²⁸² A BGH judgment is not yet available.

²⁷³ For classification as services see *J. G. Meents*, *Ausgewählte Probleme des Fernabsatzgesetzes bei Rechtsgeschäften im Internet*, CR 2000, 610, at 613; *A. Fuchs*, *Das Fernabsatzgesetz im neuen System des Verbraucherschutzrechts*, ZIP 2000, 1273, at 1284.

²⁷⁴ See only *B. Roth and G. Schulze*, *Verbraucherschutz im Electronic Commerce*, RIW 1999, 924, at 928; *Rott*, *Privatkopie*, n. 29 above, at 285; *N. Härting*, *Internetrecht*, 3rd ed. 2008 (publ.: Dr. Otto Schmidt, Cologne), at 155; *J. Marly*, *Praxishandbuch Softwarerecht*, 5th ed. 2009 (publ.: C.H. Beck, Munich), at 333; *Grübler*, n. 1 above, at 167.

²⁷⁵ See also *Grübler*, n. 1 above, at 167.

²⁷⁶ See also *Härting*, *Internetrecht*, n. 55 above, at 154.

²⁷⁷ See LG Mannheim, MMR 2009, 568.

²⁷⁸ BGBl. 2009 I, 2413.

²⁷⁹ See, for example, *F. Buchmann, C. F. Majer, J. Hertfelder and A. Vögelein*, "Vertragsfallen" im Internet – Rechtliche Würdigung und Gegenstrategien, NJW 2009, 3189.

²⁸⁰ See, for example, *C. Wendehorst*, in: *MünchKomm BGB*, 5th ed. 2007, § 312d BGB, margin note 56; *G. Thüsing*, in: *Staudinger, BGB*, 2005 (publ. C.H. Beck, Munich), § 312 d BGB, margin note 36.

²⁸¹ See AG Elmshorn, NJW 2005, 2404; AG Montabaur, VuR 2008, 355; AG Berlin-Mitte, VuR 2009, 152.

²⁸² See OLG Brandenburg, VuR 2009, 313.

Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

Under the old § 312d para. 3 no. 2 BGB, the consumer lost his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer. In a case concerning return calls, the Bundesgerichtshof had held that this even applied if the consumer was not informed of his right of withdrawal before the service was provided. The very formal argument was that § 312d para. 3 no. 2 BGB does not contain such a requirement.²⁸³ This decision was heavily criticised in academic writing.²⁸⁴ Nevertheless, lower instance courts had followed the approach of the BGH.²⁸⁵ At least, the trader could be held liable for the breach of a pre-contractual duty.²⁸⁶

As mentioned above, in the meantime the additional requirement was introduced that both parties have fulfilled their obligations. In contrast, information of the right of withdrawal is still not a prerequisite for the loss of the withdrawal right.

Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

Under German law, this can only happen if the consumer has neither consented to the rendering of the service before the expiry of the withdrawal period nor initiated the service herself. In such a case, the consumer has to return the value of the service, which is determined in accordance with the agreed price, see § 357 para. 1 sentence 1 with § 346 para. 2 sentence 1 no 1 and sentence 2 BGB. In other words, in such a situation the right of withdrawal is fairly useless.²⁸⁷

However, again the law has changed with the Act to Fight Cold Calling and to Improve Consumer Protection in the case of Special Distribution Methods. Under the new § 312d para. 6 BGB, the consumer only has to compensate the trader for services if she was informed about this legal consequence of the withdrawal before she entered into the contractual agreement. Prior to the amendment, this rule had only applied to the distance marketing of financial services.

²⁸³ See BGH, NJW 2006, 1971.

²⁸⁴ See *B. Schinkels*, Die Wertersatzverpflichtung des Verbrauchers bei Widerruf von Fernabsatzverträgen – Rechtsfortbildungsvorschläge, ZGS 2005, 179, at 181.

²⁸⁵ See, for example, AG Sinsheim, NJW-RR 2009, 1290. For a deviating opinion see AG Wuppertal, VuR 2009, 314.

²⁸⁶ See BGH, NJW 2006, 1971. See also *C. Wendehorst*, in: MünchKomm BGB, 5th ed. 2009, § 312d margin note 62; *P. Rott*, in: K. Tonner, A. Willingmann and M. Tamm, Vertragsrecht, 2009 (publ: WoltersKluwer, Neuwied), § 312d margin note 20.

²⁸⁷ For doubts as to the compliance with EC consumer law see *P. Rott*, Widerruf und Rückabwicklung, in: Micklitz et al. (eds), Verbraucherschutz und Schuldrechtsmodernisierung, 2001 (publ: Nomos, Baden-Baden), 249, at 272 and 287.

Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

If the services are separable, i.e. they still make sense without the withdrawn service, the other contract remain unaffected. With regard to contracts over several goods, this can be concluded from § 357 para. 2 sentence 2 BGB, which is worded in such a way that it refers to the value of the returned good as opposed to the value of the contract. There is no reason why contracts over several services should be treated differently.

7 Unfair contractual terms

Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a ‘main obligation’ under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

As far as I am aware, these issues have not yet been dealt with by courts. Generally speaking, German courts take a narrow approach to core obligations that are exempted from the unfairness control. For example, insurance contracts frequently exclude insurance coverage in specific situations. German courts usually argue that a clause in an insurance contract only is a core term if the contractual promise cannot be determined without this clause. Otherwise it merely modifies the contractual promise and is subject to the fairness test.²⁸⁸ In German doctrine, it is generally thought that use restrictions in software contract are not main obligations in terms of the law of unfair contract terms.²⁸⁹

Since the purchase of online music or movies is regarded as a sales contract (even if the purchaser’s right to use the goods is heavily restricted),²⁹⁰ sales law with its obligation to transfer property (or anything that would come anywhere near) would be the default rule for the main obligation, whilst limitations to this would be regarded as secondary and therefore as subject to the law of unfair contract terms.²⁹¹

Case law on the reduction of playability or on limitations to copying is not yet available. In academic writing, the full prohibition of making copies of software has been said to be unfair in the terms of § 307 BGB since this includes prohibitions to make backup copies, a right that cannot be excluded according to §§ 69d para. 2 and 69g para. 2 Copyright Act (UrhG).²⁹² In this context, it should be noted that too broadly drafted limitations to making copies are void in their entirety, even if some limitations could be justified.²⁹³ Otherwise, if drafted sufficiently carefully, such limitations may not be unfair, provided the contractual terms are transparent.

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

²⁸⁸ See BGH, NJW-RR 1993, 1049.

²⁸⁹ See C. A. Baus, *Verwendungsbeschränkungen in Softwareüberlassungsverträgen*, 2004 (publ.: Dr. Otto Schmidt, Cologne), at 213.

²⁹⁰ See BGH, CR 1997, 470, at 472. See also AG Ansbach, CR 1995, 278, at 279.

²⁹¹ See also Baus, n. 70 above, at 30 ff.

²⁹² See Baus, n. 70 above, at 224 f.; Marly, n. 55 above, at 635 ff.

²⁹³ See Rott, *Privatkopie*, n. 29 above.

Service providers have used standard terms, according to which the consumer consents with the use of his personal data for future approaches by that service provider or by third parties unless he or she declares otherwise. Whether or not such terms are unfair is subject to controversial debate. The BGH has declared unfair similar terms that aimed at the consumer's consent to unsolicited e-mails, see Q.4.3. In contrast, some academics have opined that the situation is different with the consent to the use of personal data under the Data Protection Act.²⁹⁴ The OLG Brandenburg has shared this view.²⁹⁵

Is the following decision relevant for this question? *BGH Urteil vom 11.11.2009 VIII ZR 12/08 "HappyDigits" JurPC Web-Dok. 38/2010, Abs. 1 – 47* If so, would you please expand on it?

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

In February 2010, the BGH dealt with the possible unfairness of a standard term in a contract on a computer game (*Half-Life 2*) on DVD, according to which the game (which was then played online) could only be used after having been activated with a particular number that the purchaser was not allowed to pass on to a third person. Thus, reselling was made factually impossible. The suing consumer association had argued that this term was unfair since it violated the principle of exhaustion (§ 17 para. 2 UrhG). The BGH held that the term was not unfair. The court argued that it was allowed, under the contract, to pass on the property on the DVD, it was merely useless since it could not be used for playing the game online. Moreover, the conditions were set out in sufficient clarity on the cover of the DVD.²⁹⁶

It should be added in this context that the majority of German courts have held that the principle of exhaustion merely applies to physical works (including software on a pc)²⁹⁷ but not in an online-context.²⁹⁸

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

I am not aware of such terms, and I have not seen any such debate in German academic writing.

²⁹⁴ See, for example, *H. Wegmann*, Anforderungen an die Einwilligung in Telefonwerbung nach dem UWG, WRP 2007, 1141, at 1145.

²⁹⁵ OLG Brandenburg, CR 2006, 490.

²⁹⁶ BGH, WRP 2010, 1174.

²⁹⁷ See BGH, BGHZ 145, 7.

²⁹⁸ See LG Munich I, CR 2007, 356, confirmed by OLG Munich, CR 2008, 551; OLG Frankfurt, CR 2009, 423. See also OLG Dusseldorf, CR 2009, 566, according to which pre-installed software cannot be resold without the computer on which it was installed, without the consent of the author.

8 Failure to function properly

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

Under the old German sales law prior to the reform of the law of obligations that came into effect in 2002, the conformity rules were by and large limited to the physical properties of goods. From this approach, the courts appear to deviate only very slowly and overly cautiously, although the Consumer Sales Directive would seem to be much broader. Thus, a bold approach related to the journalistic quality or freedom of expression is not likely to happen. No such case law is available to my knowledge.

**Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what 'normal use' of a service is, e.g. - the ability to make private copies according to copyright law,
- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),
- the suitability of certain contents for minors as stipulated under audiovisual media law,
- journalistic codes of conducts, etc.**

Generally speaking, German lawyers assume that the German legal order is harmonious and individual fields of law do not contradict each other. Therefore, standards formulated outside the BGB, for example in the Copyright Act, do have the capacity to inform the consumer's legitimate expectations. Thus, since § 95d of the Copyright Act requires traders to lay open technical protection measures, one may safely assume their absence under sales law if they are not mentioned.

In the same way, goods must not be in breach of the law, and therefore digital products must not be in breach of the provisions related to the protection of minors of the *Jugendschutz-Medienstaatsvertrag*. Otherwise, they are not in conformity with the contract under sales law. In contrast, codes of conduct do not play an important role in Germany. Consumers would not normally be aware of them unless of course the seller explicitly points at them.

Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?²⁹⁹ If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and middleware?

²⁹⁹ Idem.

There are no express information obligations as to compatibility. Surely, the consumer who runs a usual operating system and usual software may expect new digital products to be interoperable unless the trader has explained otherwise.³⁰⁰ In 1996, the OLG Cologne decided a case in which the seller had sold a computer without hard disc and controller. The purchaser then bought a usual hard disc and controller, which however did not work properly with the computer. The court held that the computer was therefore not in conformity with the contract.³⁰¹ The same court held in 1996 that an image editing programme must be able to cope with the usual graphics formats.³⁰²

In contrast, the OLG Cologne had argued in 1992 that a laptop on which three rather unknown programmes could not be run was not defective, and also the incompatibility with the purchaser's streamer was no ground for incompatibility since, in principle, the laptop could be used with a streamer and the purchaser could not prove that he had been told that the laptop would be compatible with his particular streamer.³⁰³

Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

Although this may not seem immediately obvious, the German legislator has maintained the hierarchy of remedies as provided for in Article 3 of the Directive.³⁰⁴ In German law, § 437 BGB provides that a purchaser of defective goods has a number of remedies available to him: § 437 no. 1 BGB specifies the right to require repeat performance, a notion that includes replacement and repair, whilst § 437 no. 2 BGB mentions the rights to rescission and price reduction. In addition, the purchaser can claim damages under § 437 no. 3 BGB.

Interestingly, unlike contracts of work and materials, the purchaser does not have the explicit right to remedy defects himself and then seek compensation for expenses incurred afterwards. This has been a highly controversial issue under the new German sales law. In a number of cases, the consumer had his car repaired by a third person and then passed the bill on to the seller who of course refused to pay. The question then was whether or not the seller at least had to pay for his saved expenses. A similar rule, § 326 par. 2 s. 2 BGB, exists in the general part of the German law of obligations. A number of authors had argued that this rule should be applied directly or by analogy to sales law since the consumer would otherwise lose out completely, and the seller would be better off than he deserves. The Bundesgerichtshof rejected this approach in February 2005, predominantly with the formal argument that the legislator had introduced the right to self-help in the law on contracts for services but deliberately not in sales law. Moreover, the Bundesgerichtshof referred to the intention of the Directive always to give the seller a second chance.³⁰⁵

The Bundesgerichtshof has also dealt with the relationship between repair and replacement on one hand and damages on the other. Although damages do not form part of Directive 1999/44/EC, the court argued, in a judgment of February 2005, that the hierarchy in Article 3 and in the German implementation also relates to damages, and that damages can only be claimed after the reasonable waiting period has expired.³⁰⁶

³⁰⁰ See also *Wente*, n. 7 above, at 79 f. *Marly*, n. 55 above, at 594, refers to Microsoft compatibility.

³⁰¹ OLG Cologne, CR 1996, 601.

³⁰² See OLG Cologne, NJW 1996, 1683. See also *Holzbach and Süßenberger*, n. 7 above, 478, at 486.

³⁰³ OLG Cologne, CR 1993, 208.

³⁰⁴ See *S. Jorden and M. Lehmann*, *Verbrauchsgüterkauf und Schuldrechtsmodernisierung*, JZ 2001, 952, at 957.

³⁰⁵ See BGH, NJW 2005, 1348. See also LG Gießen, DAR 2004, 454; *M. Tonner*, *Ansprüche des Käufers bei Selbstvornahme der Mängelbeseitigung*, VuR 2005, 207 ff.

³⁰⁶ See BGH, NJW 2005, 1348.

Q.8.5 For how long after delivery of the digital content service (weeks, months, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)?³⁰⁷ If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

Again, goods and services must be distinguished. For the sale of goods, the normal prescription period is two years after the delivery of the goods, see § 438 para. 1 no. 3 BGB. Whether or not this period can be reduced by contractual agreement depends upon the classification of the sales contract as consumer sales contract or otherwise, which has not yet been decided by the courts.

In other cases, i.e. for true services, §§ 631 ff. BGB apply. Again, under § 634a para. 1 no. 1 BGB the regular prescription period is two years after the acceptance of the service. However, there is no “consumer services law” so that no restrictions apply as to the reduction of the prescription period by contractual agreement.

In both cases, the purchaser may still reject payment after the two years prescription period if she could otherwise still rescind the contract (§ 438 para. 4 and § 634a para. 4 BGB); which obviously is only possible if she has not paid for two years.

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

Recent case law on this issue is not available. In 1990, the AG Konstanz had rejected the purchaser’s right to avoid the contract due to a mistake (the purchaser had only noticed after the purchase that there was no update service),³⁰⁸ arguing that the right to updates was not a characteristics of the software.

Otherwise, the availability of updates is of course first of all subject to the contractual agreement. However, it seems obvious that there is a time dimension to the conformity of a product with the contract. Software, for example, may not be in conformity with the contract if it cannot be used anymore after unduly short time. Here, the non-conformity lies in its lack of sustainability, or flexibility.³⁰⁹ Examples from German case-law related to the year 2000 problem³¹⁰ and to the introduction of the Euro.³¹¹ Software that could not cope with these foreseeable events was held not to be in conformity with the contract. Regarding the duration of an update obligation, the usual life circle of software would seem to be a reasonable indicator.

Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application’s) identify, geographical address or further details?

- a) the operator of that platform, or
- b) the third party application service himself?

³⁰⁷ Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

³⁰⁸ AG Konstanz, NJW 1991, 1360.

³⁰⁹ See also *Marly*, n. 55 above, at 592 ff.

³¹⁰ See OLG Munich, CR 2000, 731; LG Leipzig, CR 1999, 620.

³¹¹ See LG Coburg, CR 2002, 325.

Should this be done before or after the contract is concluded?

It is not the platform provider but the third party service provider who has to give, for example, the pre-contractual information required under distance selling law. German courts even held the third party service provider liable, under the law of unfair competition, for breaches of distance selling law that had been caused by the platform provider who had 'optimised' the platform, arguing that a breach of the Unfair Competition Act did not require fault.³¹²

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

Again, it would be the third party service provider who, as the contracting partner, would be liable. Obviously, the consumer would have to prove the defectiveness of the product in question. Equally, the platform operator's fault would have to be established by the consumer if he or she were to make any claims against the platform operator. The only situation in which the platform operator could be made responsible anyway would be if the platform operator had guaranteed the functioning of the third party application; which would not normally be the case.

9 Remedies for non-performance and termination of a long term contract

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

No, the normal remedies of the general law of obligations apply. The purchaser may rescind the contract after having set a reasonable additional period for performance (§ 323 para. 1 BGB) or claim damages (§ 280 para. 1 BGB). She can also do both, rescind the contract and claim damages, see § 325 BGB.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

No, see Q.9.1. The hierarchy of consumer sales law does not apply since the consumer sales law remedies do not apply to non-performance at all.

³¹² See OLG Hamm, 20/5/2010, 4 U 225/09 (available in juris), for an i-phone; LG Cologne, 6/8/2009, 31 O 33/09 (available in juris), for e-bay.

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

According to § 323 para. 1 BGB, the purchaser may only rescind the contract after having set a reasonable additional period for performance. There are, however, some exceptions to that rule, for example the situation that the trader has already firmly declared that he would not deliver anyway.

No formal requirements apply to the notification.

What is reasonable depends on the circumstances of the individual case. In the case of digital product, it is difficult to see a reason for long delays. Anyway, if the consumer determines a too short additional period, the notification is not invalid but it is interpreted to mean the “correct” additional period.

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?³¹³

According to § 314 para. 1 BGB, a contracting partner can terminate a contractual relationship with continuous obligations (*Dauerschuldverhältnis*) without respecting a termination period if he or she has an important reason to do so. In this respect, an important reason means that the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period, see § 314 para. 1 sentence 2 BGB. As § 314 para. 2 BGB³¹⁴ shows, this does not necessarily require a breach of the obligations of the other contracting partner but this is obviously the normal case. § 314 para. 1 BGB does not pave an easy way out of a contract; normally, a fix term contract must be honored.

If the consumer simply stops paying without fulfilling the requirements of § 314 para. 1 BGB, his or her obligation to pay does not cease, and the trader can sue for payment. The same applies for the period of time until the correct notification period has expired. The trader can also claim damages, for example for lawyer’s fees.

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

³¹³ For instance: is the notice of termination invalid or must the consumer pay damages?

³¹⁴ “If the compelling reason consists in the breach of a duty under the contract (...)”.

This depends upon whether or not the several services are independent or whether they only make sense taken together. In case of part-performance and if the services are inseparable, the contracting partner may terminate the whole package if he or she has the right to terminate one part of it, see § 323 para. 5 BGB.

10 After sales services

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

German legislation does not provide any rules for after sales services, and no case law is available on fixing bugs or on updates.

As to bugs, it should be mentioned that it was sometimes suggested in German literature that “unavoidable flaws” should not be regarded as defects;³¹⁵ which was objected by other authors.³¹⁶ The BGH took this issue up in one decision of 1987 but did not need to decide because the product in question was clearly too flawed and its functionality too severely affected by flaws.³¹⁷ However, the reasoning of the BGH also showed some scepticism as towards the argument that complex software should be allowed to be lightly flawed. In a decision of 1999, the OLG Cologne held that standard software had of course to work from the outset.³¹⁸

The availability of updates is of course first of all subject to the contractual agreement. Again, I would like to refer the year 2000 problem and to the introduction of the Euro (see supra, Q.8.6.). The same principles would seem to apply to updates to anti-virus software or to road maps. Regarding the duration of such after sales services, the previous conduct of the companies concerned or the usual life circle of the relevant type of software would seem to be reasonable indicators.

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

³¹⁵ See, for example, *C.-D. Müller-Hengstenberg*, *Bemerkungen zum Software-Gewährleistungsrecht*, CR 1986, 441, at 442.

³¹⁶ See, for example, *J. Mehrings*, *Computersoftware und Gewährleistungsrecht*, NJW 1986, 1904, at 1905. See also *W. Kilian*, *Bemerkungen zum Software-Gewährleistungsrecht*, CR 1986, 632, who argued that this was merely a claim by industry that was meant to limit the development costs and to lower the expectations of software users.

³¹⁷ See BGH, BGHZ 102, 135.

³¹⁸ See OLG Cologne, CR 2000, 354.

Here, one would have to distinguish one-off transactions (with secondary subsequent obligations flowing from them) from long-term contracts. In the case of a long-term contract, the consumer can ask for specific performance, she can terminate the contract and/or claim damages. If the contract is a one-off transaction with secondary subsequent obligations flowing from them, and the consumer has already paid the full price, specific performance and/or damages are the possible remedies; which is obviously of a theoretical nature if the service provider is bankrupt.

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service³¹⁹ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

The product must of course satisfy the express statements of the seller and also of the producer regarding its compatibility with hardware and other software;³²⁰ which may include a time dimension (see Q.8.6 and Q.10.1). During such an expressly agreed period, or the period within which the product must be kept in operation according to the legitimate expectations of consumers, the seller would seem to offer conversion software free of charge. Otherwise, for example related to the time after the normal life circle of the product, there are no rules in German law on the availability of spare parts that could be transferred to the availability of conversion software. There is only one judgment from one German first instance court, the AG Rüsselsheim, according to which there is an obligation flowing from the principle of good faith (§ 242 BGB) to make spare parts available for a reasonable period of time in order to prevent that products cannot be used any longer once they are defective.³²¹

11 Unfair commercial practices

Q.11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

a. the use of incompatible standards to prevent users from switching to other services or hardware;

The closest to this was a case where competitors complained against Deutsche Telekom AG who had acquired the exclusive right to market Apple i-phones in Germany. They argued that this was unfair competition but failed in the Landgericht Hamburg.

b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);

³¹⁹ E.g. to play the obtained music or video content.

³²⁰ See also *T. Hoeren*, Gewährleistung bei Softwareüberlassungsverträgen, in: B. Dauner-Lieb, H. Konzen and K. Schmidt (eds), *Das neue Schuldrecht in der Praxis*, 2003 (publ.: Carl Heymanns Verlag, Cologne et al.), 515, at 523. See also OLG Saarbrücken, CR 1990, 713; LG Baden-Baden, CR 1994, 288; LG Stuttgart, CR 1986, 382.

³²¹ See AG Rüsselsheim, DAR 2004, 280.

Spamming is an unfair commercial practice according to § 7 para. 2 no. 3 UWG. Prior information is irrelevant since only the explicit consent of the addressee makes the e-mails lawful.

c. the use of Digital Rights Management to prevent unauthorised use;

This must be laid open under § 95d of the Copyright Act. A breach of this information obligation would amount to a breach of the law of unfair competition under § 4 no. 11 UWG (see Q.4.3). Obscuring information would also be a breach of the UWG when it is suited to mislead the consumer. For example, the BGH has recently decided that information in very small print is equal to non-information. Information plays a role in product liability law etc. but courts would always look at the way in which it is presented, i.e. whether the average consumer would have found it.

d. the use of Digital Rights Management to restrict use to a certain region or country;

This must be laid open under § 95d of the Copyright Act. A breach of this information obligation would amount to a breach of the law of unfair competition under § 4 no. 11 UWG (see Q.4.3).

e. the collection of personal data for marketing purposes or through spyware;³²²

Spyware implies that the service provider has not asked for the consumer's consent. This is in breach of the Telemedia Act (TMG) and the Federal Data Protection Act (BDSG), and breaches of the TMG and the BDSG are usually also a breach of the law of unfair competition under § 4 no. 11 UWG.³²³

f. the collection of sensitive personal data for marketing purposes or through spyware;

Again, this is in breach of the Telemedia Act, and breaches of the Telemedia Act are usually also a breach of the law of unfair competition under § 4 no. 11 UWG.

g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;

Again, this is in breach of the Telemedia Act, and breaches of the Telemedia Act are usually also a breach of the law of unfair competition under § 4 no. 11 UWG.

h. the use of default options to entice consumers to the purchase of additional services;³²⁴

The use of default options is not unlawful as such but can be unlawful if the purchase of additional services is hidden so that the consumer is misled.

³²² E.g. in order to enable the provider of the digital content service or third parties to adjust advertisement to the specific circumstances of the consumer.

³²³ See also OLG Cologne, MMR 2009, 845.

³²⁴ See also Art. 31 of the Proposal for A Consumer Rights Directive.

i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors;

This would be unfair in the terms of § 4 no. 11 UWG since the marketing of harmful content to minors is prohibited under the JMStV, and the trader who still engages in this activity gains an unfair advantage over his honest competitors. According to a judgment of the OLG Munich, it is even a breach of the law of unfair competition to place an advertisement, which is in itself legal, on a website that contains content that is harmful to minors.³²⁵

j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers.

If the price comparison is true, I cannot see the unfairness. If the price comparison is not true but an offer is claimed to be the cheapest which is not the cheapest, the price comparison is misleading anyway.

Q.11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

No.

Q.11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;
- the consumer may apply general contract law remedies such as avoidance or adaptation of the contract for mistake or abuse of circumstances;
- the consumer may terminate the contract without having to compensate the trader for the loss of profit; and
- the consumer may claim reduction of the contract price?

In principle, the law of unfair competition does not provide for any remedies for the individual consumers. A previous version of the Unfair Competition Act had provided for a right of withdrawal in cases where the consumer was deliberately misled (§ 13a UWG old version) but this right was abandoned with the 2004 reform of the Unfair Competition Act. Therefore, the consumer merely avails of remedies under general contract law, such as the right of avoidance for mistake or fraud, and under sales law, which, however, all have their specific prerequisites and do not cover all situations of unfair commercial practices.

³²⁵ See OLG Munich, MMR 2009, 126.

Q.11.4 Furthermore, certain commercial practices are prohibited by public law. One example is surreptitious audiovisual advertising because of its negative effect on consumers. Other examples are spam, which has been extensively regulated by the e-commerce directive, and behavioural marketing strategies that are not in line with data protection law. In some Member States, the use of harmful or offensive (digital) content may be prohibited. To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

They are of direct importance since § 4 no. 11 UWG declares unfair such practices that are in breach of laws (including public law rules) that are, amongst others, meant to protect consumers. The reason is that the trader who still engages in such activities gains an unfair advantage over his honest competitors.

12 Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

This question appears to relate to public law and to the law of unfair competition. As mentioned above, minors are protected by the Treaty on the Protection of Dignity and of Minors in Broadcasting and Telemedia (*Jugendmedienschutz-Staatsvertrag*; JMStV), which, in principle, allows marketing to minors but a number of provisions contain special rules related to the protection of minors. For example, advertisements must not impair children or minors physically or psychically. Violation of these rules trigger public law sanctions as well as remedies under the law of unfair competition (see Q.4.2 and Q.4.3). The same goes for situation in which the content is considered harmful or offensive. (see Q.4.2 and Q.4.3)

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

No such remedies would appear to exist under general contract law since – due to the specific contract law rules dedicated to minors – normally no contract would be concluded (see infra, Q.12.4). The only remedy I can think of would be the skimming-off procedure under the law of unfair competition. Consumer organizations can bring a claim against a trader who has intentionally breached the Unfair Competition Act. The action does not aim at damages but at skimming off the unlawful profits. Thus, the trader shall be put into the position in which it would be if he had not engaged in unlawful commercial practices. In other words, he shall be put on a par with his honest competitors. The skimmed-off profits are not transferred to the consumer organisation but to the state budget.³²⁶

³²⁶ For more details, see, for example, P. Rott, Kollektive Klagen von Verbraucherverbänden in Deutschland, in: M. Casper et al. (eds), *Auf dem Weg zu einer europäischen Sammelklage?*, 2009 (publ.: Sellier, Munich), 259 ff.

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

Different standards apply for advertising, as also envisaged by Article 5 (3) of the Unfair Commercial Practices Directive 2005/29/EC. In general contract law, different standards could theoretically stem from the general principle of good faith (§ 242 BGB). However, in the case of minors, this would be rare since in most cases the parents have to consent to the contract anyway. Special contract law rules concerning persons with disabilities or other vulnerabilities do not exist. However, again, the extent of the necessity of pre-contractual information under the general principle of good faith always depends on the individual case. A particular vulnerability that is known to the contracting partner may trigger a higher level of care in the pre-contractual stage.

Q.12.4 In most legal systems, specific rules to protect minors have been developed in general contract law. Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?³²⁷

German law distinguishes minors under 7 and minors from 7 to 17 years, whilst persons over 18 are adults, § 2 BGB. Children under 7 have no capacity to act whatsoever. Their contracts are always void, § 105 BGB.

Minors from 7 to 17 years are limited in their capacity to act, § 106 BGB. They need the prior consent of their parents to conclude a contract, § 107 BGB. If the parents have not consented prior to the conclusion of the contract, the validity of the contract concluded by a minor is suspended, which means that the contract only becomes valid once the parents consent, § 108 para. 1 BGB. Thus, it does not need to be voided. In principle, the contract could be pending for a long time. However, the contracting partner can ask the parents for a decision. Once that request has been communicated to the parents, a two weeks period begins to run. If the parents reject the contract, or do not respond within two weeks, no contract has been made.

An exception exists in § 110 BGB for contracts that the minor has fulfilled with financial means that his or her parents have given him or her to that particular end or at his or her disposal. This however cannot be simply concluded from the mere fact that the minor was allowed to use a mobile phone or a pc.³²⁸ Courts have dealt with the issue of ringtones that a minor ordered by mobile phone, and the AG Düsseldorf, for example, has argued that the normal use that parents would allow a minor to make is to call home or to call friends but not to order ringtones..³²⁹

These rules apply to all types of contracts, including contracts related to digital content.

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

³²⁷ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as 'normal' for a child of a certain age.

³²⁸ See also *P. Mankowski*, Anmerkung, MMR 2007, 405 ff.

³²⁹ See, for example, AG Dusseldorf, VuR 2008, 119.

This situation comes under the law of unjustified enrichment, §§ 812 ff. BGB. In principle, the contracting partner could claim restitution or compensation of the value of services rendered. This is, however, different when it comes to minors. The protection of minors is extended into the law of unjustified enrichment in order to prevent them to have to pay as restitution what they do not need to pay as contractual obligation.

The only exception is where a minor has acted fraudulently. Here, tort law comes into play, and minor over 7 may be liable under tort law if they had the insight to understand that their activities was tortious, § 828 para. 3 BGB.

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

Persons that are in a state of pathological mental disturbance, which prevents the free exercise of will, lack the capacity to contract, unless the state by its nature is a temporary one, see § 104 no. 2 BGB. Their contractual declarations are void, § 105 para. 1 BGB, unless they enter into an everyday transaction that can be effected with funds of low value and the performance has been effected and consideration rendered, § 105a BGB. The conditions of § 105a BGB would not normally be fulfilled in the case of the purchase of digital products.

Moreover, a declaration of intent that is made in a state of unconsciousness or temporary mental disturbance, is also void under § 105 para. 2 BGB.

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?³³⁰

The use of technological systems of age verification or other technical and/or organizational measures is not required under German law. However, the risk of concluding a contract with a minor, with the consequences outlined above, is on the service provider.

Nevertheless, the use of age verification or similar measures improves the legal position of service providers insofar as he may have a claim against the minor (who claims to be an adult) under tort law, if the minor's conduct constitutes fraud (§ 823 para. 2 BGB with § 263 of the Criminal Code (*Strafgesetzbuch*, StGB)). The service provider would however only be able to cover his damage, which should be minimal in the case of digital products.

13 Towards a model 'digital consumer law'

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

No, there are no current initiatives.

³³⁰ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

No, there are no current initiatives.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

The use of personal data of consumers is restricted by the Telemedia Act. It contains rules on data protection that render the collection and use of personal data unlawful unless the user has given his consent. Consent can be transferred electronically but only if the service provider ensures that the user has given consent intently and clearly, if the consent is documented and can be accessed at any time by the user, and if the user can withdraw his consent at any time with effect for the future, see § 12 TMG.³³¹ The same requirements are set by § 4 of the Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG).

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

³³¹ The rules have been criticised for being overly complicated, see *Hoeren*, NJW 2007, 801, at 805.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<ul style="list-style-type: none"> • Comment: sales law rules are not mandatory when it comes to digital products (discussed controversially) • Applies to all the examples on this page; only difference 	<input type="checkbox"/>
Film or music on a website (streaming)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<ul style="list-style-type: none"> • This does not exist as tangible product. • 	<input type="checkbox"/>
Downloaded films or music	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Games on a CD or DVD*	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Games on the Internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded games	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
User created content (UCC) ³³² on a CD or DVD*	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
UCC on a website	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded UCC	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Personalisation services ³³³ on the Internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded personalisation services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Software-as-a-Service on a website ³³⁴	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded software ³³⁵	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Software on a CD or	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

³³² Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

³³³ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

³³⁴ E.g. image editing, photoshopping, automatic translation services.

³³⁵ E.g. anti-virus programs.

DVD*					
Communication through a website ³³⁶	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
E-learning services on the internet ³³⁷	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
E-learning service on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>

In principle, all those digital products that would be classified as sales contracts enjoy the same protection as tangible products, however the rules are only mandatory for tangible products (this being discussed controversially, see Q.1). Some of the digital services mentioned above would however not qualify as “goods” and therefore come under different rules, in particular the rules on works and services. This would concern streaming services, software-as-a-service on a website and communication through a website

Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made? Please indicate this in the table below.

³³⁶ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

³³⁷ E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • Free from DRM due to § 95d Copyright Act, applies to all categories • ...
'Free' film or music on a website (streaming)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ...
Paid film or music on a website (streaming) <small>338</small>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded films or music	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid downloaded film or music	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid games on a CD or DVD*	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Private copy for own use (backup etc.)
'Free' games on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

³³⁸ E.g. video on demand services.

Paid games on a website	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded games	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid downloaded games	<input checked="" type="checkbox"/>	Private copy for own use (backup etc.)						
Paid User created content (UCC) ³³⁹ on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' UCC ³⁴⁰	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid UCC	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' personalisation services ³⁴¹	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid personalisation services	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid software on a CD or DVD* ³⁴²	<input checked="" type="checkbox"/>	Private copy for own use (backup etc.)						
'Free' downloaded software ³⁴³	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid	<input checked="" type="checkbox"/>	Private copy for own use (backup etc.)						

³³⁹ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

³⁴⁰ E.g. video sharing websites, such as YouTube.

³⁴¹ E.g. ringtones and Apps for mobile phones.

³⁴² E.g., anti-virus programmes, Office, etc.

³⁴³ E.g. anti-virus programmes.

downloaded software								
'Free' software-as-a-service on a website ³⁴⁴	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid software-as-a-service on a website	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' communication services ³⁴⁵	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid communication	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid e-learning service on a CD or DVD* ³⁴⁶	<input checked="" type="checkbox"/>	Private copy for own use (backup etc.)						
'Free' downloaded e-learning services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid downloaded e-learning services	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' e-learning service on the internet	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

³⁴⁴ E.g. image editing, photoshopping etc..

³⁴⁵ E.g. social networking, such as Facebook, and e-mail services.

³⁴⁶ E.g. an online language course.

Paid e-learning service on a the internet	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
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HUNGARY

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2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

Hungarian law does not contain a specified “digital content services” regulation, as defined above. The EC-laws are incorporated into the Hungarian legal regime and the electronic commerce and electronic signature and all other preliminary instruments, like electronic communication, are regulated. The traditional contract law was amended by EC-law regulation, the copyright law were also accordingly modified. A major milestone was the promulgation of the Act no CVIII of 2001 on Electronic Commerce and on Information Society Services which has more than nine year practice. Since that the original 1999 distance selling rules was modified, and a modern distance selling regulation is in force (no 17 of 1999, governmental decree, as amended).

A Hungarian speciality is that the consumer sale directive (1999/44/EC) was incorporated into the Hungarian contract law in such a way that the consumer protection clauses of the said directive are applicable all kinds of contracts and is not limited to sale and purchase contracts. Due to this legislation the Hungarian contract law has an extensive consumer protection character which basically applies to all contracts entered into by consumers (as defined “consumer” and “consumer contract” in the Civil Code – see Q.2.2).

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the *software on the CD/DVD*, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

“Piece of software” shall mean software, as defined in Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. A software, as a product protected by copyright law, can not be sale, only a right of use can be acquired. The right to use and the special contract for use of copyright products governed in the Act no. LXXVI of 1999 on Copyright (Copyright Act) and as a secondary rule, the Civil Code of Hungary, Act no. IV of 1959, as amended (Civil Code).

If the software on the CD or DCD is faulty, this is a simple breach of contract, and the obligor, in this case the seller, who sold the CD /DVD is obliged to repair and replace or for other remedies under the general rules of Civil Code.

The consumer protection is not limited to sales of goods under Hungarian law. The EU-consumer protection rules were incorporated into Hungarian law in such a way that all kinds of contracts, even special commercial contracts, can be consumer contracts and the special rules for consumer contracts are applicable. The extension of the application has two main streams. First, the subject of the contract and secondly the legal definition of “consumer”. The rules of the consumer protection are not limited to the sale of goods to individuals. The general material rules of the consumer protection on formation of the consumer contract, the interpretation of contract, the special remedies are applicable all kind of contracts. The “consumer” is defined very broadly in the Civil Code and covers not only individuals: section 685 (d)

(d) 'consumer' shall mean any person who is a party to a contract concluded for reasons other than economic or professional activities;> and any person covers non-individuals as well.

Based on this legal “consumer” definition, the Civil Code defines also the terms “consumer contract” as follows: *<“consumer contract” shall mean any contract concluded by a consumer and a person acting within the scope of his business or professional activities; in the application of the provisions of this Act pertaining to guarantee and warranty, a consumer contract shall be construed as any contract the object of which is a movable property (consumer goods) with the exception of electricity, water and gas sold in tanks or bottles or in any other measured quantity, articles sold under judicial execution or some other regulatory procedure, and used articles sold by auction in which the consumer is also allowed to participate.>*

Although the definition of the Civil Code states that the subject of the consumer contract can be “movable property” (chattel), I would like to say that the “consumer contract” can be applied for other goods as well, including intangible assets. This view can be supported by the former practice of the Supreme Court relating to the business share of the limited liability company. The Supreme Court said, the business share is a intangible property and shall be deemed as a chattel.

Based on this legal regime, a software license agreement is also can be deemed as consumer contract and the general rules on consumer contract of the Civil Code are applicable. Please note that no such a case was published yet where a software licence agreement was qualified as consumer contract.

Based on the above, if the software is defective, the consumer may seek remedies. For detail see Q.8.4.

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer’s computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

The method and way of the contracting does not challenge the qualification of the contract itself. Should the contract entered through an online update service or real-time software support service, this contract can not be qualified as sale and purchase.

If the software is defective the consumer may seek remedies under the general rules of the contract law. We would like to stress that this contract can be deemed as consumer contract as well.

The rules implementing 97/7/EC directive into Hungarian law, decree of the government no. 17/1999, does not provide any special rule on online contracting.

Please note that the subject matter of the Distance Selling Decree is limited to products (chattels) and services. Distance Selling Decree does not contain any definitions of legal terms, but Distance Selling Decree was made in connection with the Consumer Protection Act. The Consumer Protection Act defines “product” and “service” as follows:

„f) ‘product’ shall mean any goods of a tangible nature that are capable of being delivered, including natural resources that can be utilized as capital goods, exclusive of money, securities and financial instruments;

g) ‘service’ shall mean, with the exception of the sale of products, immovable property and rights, any activity carried out for consideration aimed to achieve a certain result or performance, or to engage in some similar forms of conduct with a view to satisfying the needs of the customer or employer;”

Based on these definitions DSC are out of the scope of the wording of the Consumer Protection, however the legal term “good” shall cover DCS as well.

“l) ‘goods’ shall mean any product or service including immovable property, rights and obligations;”

Where „goods” mentioned in the Consumer Protection Act it relates to DCS.

3 Defining consumers and producers

Q.3.1 Are individuals who offer digital content services to consumers considered to be ‘consumers’ or ‘traders’? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

Consumer protection law applies in B2C, but not inC2C relationships

An individual can be considered as “trader” or “undertaking”/”enterprise” and so party of the consumer contract. A service provider or trader, producer, even if it is an individual, can be “trader” or “producer” – in the Hungarian legal language “undertaking” (“enterprise”) is the service provider is very extensively applied for consumer protection both in the perspective of the Judge and the consumer.

Various act are defined the “consumer” and “undertaking” (enterprise), as the parties to the consumer contract. Act CLV of 1997 on Consumer Protection defines the concept of “consumer” and “enterprise” as follows:

“a) ‘consumer’ shall mean any natural person who is acting for purposes of purchasing, ordering, receiving and using goods or services which are outside his trade, business, craft or profession, and who is the target of any representation or commercial communication directly connected with a product;

b) ‘enterprise’ shall mean any natural or legal person who is engaged in the activities referred to in Section 1 for purposes relating to his trade, business, craft or profession;”

Civil code defines both legal terms as well. According to my best knowledge, eight different statutory definitions are given on the “consumer”.

The legal definition of the “enterprise” relates on the business, economy activity of the undertaking. This is a not non-profit, non altruistic, basically profit oriented business activity. It is important that the product or services are offered for payment, even for micro-payment. A certain profit oriented activity is needed, but it is not necessary. The business activity shall perform continuously, it shall perform for certain period of time, for example summer months. An individual can be treated as professional service provider, if his activity is obviously business and economy activity.

Please note the definition of “consumer contract” of the Civil Code relates only chattels and its extensive application for rights only an approach which cannot be proved by case law.

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

Our law does not know the expression of “prosumer”. A simply hobby-activity or altruistic services can not be regarded as protected by consumer protection. Since the political and economy regime has been changed about twenty years before, a lot of first generation entrepreneur, trader or similar professionals are acting in the business.

The Hungarian law and legal practice is not so far developed that would make a clear distinction between professionals and “prosumer”. But, Hungarian judges and case law are favour to consumer protection and stands for more protection of consumers. In my opinion, in practice professional merchants have to face stricter obligations than occasional sellers. Selling activity has to be businesslike to make the general consumer protection rules applicable.

4 Sector-specific consumer law

Q.4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to

- **the conclusion of the contract for digital content services;**
- **the pre-contractual information consumers need to be given³⁴⁷;**
- **the termination of the contract (for non-performance or termination for other reasons) for digital content services?**

The media law, Act no. I of 1999, as amended, on broadcasting and radio (“Media Act”), does not provide any specific rule on DCS. The tv-shopping is governed in this Act, its limit and other circumstances, but does not relate the contracting through tv-shopping.

The telecommunication law, Act no. C of 2003, as amended, does not provide any rule on DCS. The consumer is protected in relation to the telecommunication service providers.

³⁴⁷ For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

The electronic signature, Act no. XXXV of 2001, as amended, does not provide special rules on DCS-contracts. This Act governs that activity of the providers offer electronic signature, the certifying of the electronic data and signature. An important general rule is to mention. Section 4(1) of the said Act states that if the law requires written form, this can be fulfilled by electronic document with safety electronic signature unless otherwise regulated.

Hungarian data protection act, act no. LXIII of 1992, as amended, does not provide special rule on DCS.

Copyright Act provides special rules on the terms and conditions of the use of software. Section 59-60 of the said Act.

Section 59 (1) Unless otherwise agreed, an author's exclusive rights do not cover reproduction, alteration, adaptation, translation, or any other modification of the software - including the correction of mistakes - as well as the reproduction of the results of these acts in so far as the person authorized to acquire the software performs these actions in accord with the intended purpose of the software.

(2) Use contracts cannot prohibit users from making safety copies of software if it is necessary for use.

(3) Persons authorized to use copies of software are entitled, without the author's authorization, to observe and study the operation of the software and make a trial use thereof in the processes of its input, display on the monitor, running, transmission or storage in order to get to know the idea or principle serving as a basis for any of the software components.

section 60 (1) The author's authorization is not required for reproducing or translating a code that is indispensable for acquiring the necessary information for the combined operation of the independently created software with another software, provided that

a) these acts of use are performed by the authorized user or another person entitled to use the copy of the software or a person put in charge of performing these acts by the persons referred to in this Paragraph;

b) the necessary information for combined operation has not become easily accessible to the persons referred to in Paragraph a);

c) these acts of use are limited to those parts of the software that are necessary for permitting combined operation.

(2) The information obtained through application of the provisions of Subsection (1) cannot be

a) used for a purpose other than combined operation with independently created software;

b) communicated to another person unless it is required for combined operation with independently created software;

c) used for developing, producing, and distributing another software essentially similar in its form of expression or for any other act related to copyright infringement.

(3) The provisions of Subsection (2) of Section 33 must be clearly applied to the acts stipulated by Subsections (1)-(2).

(4) Subsection (2) of Section 34 and Subsection (1) of Section 38 cannot be applied to software. The period stipulated in Subsection (1) of Section 49 is four months in the case of software.

(5) In case copies of the software are procured through commercial distribution, it is not obligatory to put in writing a contract relating to the use of the software.

Special regulation relates data basis (sections 60/A-62 CA).

Special remedies are given for the breach of the technical protection. Copyright Act provides remedies for violation of the copyright law by unlawful evade technical measures (section 95 CA).

section 95 (1) The consequences of copyright infringement shall apply to all acts that enable or facilitate unlawful circumvention of effective technical measures designed to provide copyright protection, provided the person performing the acts referred to knows or, with the due care expected in the given situation, has reasonable grounds to know that the aim of these acts is the circumvention of the technical measure.

(2) The consequences of copyright infringement shall apply to all acts, such as the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services that

a) are promoted, advertised or marketed for the purpose of circumvention of any effective technical protection;

b) have only a limited commercially significant purpose or use other than to circumvent effective technical protection; or

c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technical protection.

(3) For the purposes of Subsections (1) and (2), 'technical measures' shall mean any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts and are not authorized by the copyright holder. Technical measures shall be deemed 'effective' where the use of a protected work is controlled by the rightholders through application of an access control or protection process such as encryption, scrambling or other transformation of the work or a copy control mechanism that achieves the protection objective.

(4) The provisions of Subsections (1) and (2) shall apply without prejudice to what is contained in Section 59 and Subsections (1)-(3) of Section 60. With respect to software, Subsection (2) shall apply only in connection with the distribution of equipment, product or component, or for their possession for commercial purposes, whose only intended purpose is to enable or facilitate the unauthorized removal or circumvention of the technical means installed for the protection of the software.

The law contains no obligation regarding Digital Rights Management. The consumer does not have to be informed about the employment of DRM.

E-commerce law, Act. No. CVIII of 2001, as amended, implemented the EU-regulation, it provides some additional rules on the formation of contract. Those rules derogate from the general rules of the Civil Code. The subject matter of the E-Commerce Act is broader compared to the Civil Code. Section 1 (a) defines for the purposes of the said Act:

a) 'Electronic commercial service' shall mean any information society service provided in the form of business operations where the purpose is to encourage the sale, purchase or exchange of and access by other means to any goods of a fungible nature that are capable of being delivered, including money and securities and natural resources that can be utilized as capital goods, also including services, immovable property and rights (hereinafter referred to as "goods");

In addition to goods (chattel) E-Commerce Act relates contract on services and rights (intangible goods), so I would say on DCS-related contract as well.

Section 4 of the E-Commerce Act states the information that the services provider shall make available to the consumer³⁴⁸: name, registered site, its availability, licence or registration number, if it is required by the law, VAT-number, the chamber of commerce or other chamber where member, professional qualifications, academically qualifications.

Section 5 and 6 state the special rules on the formation of the contract.

c. ³⁴⁸ Service providers shall render easily, directly and permanently accessible at least the following data and information by way of electronic means:

- d. a) the name of the service provider;
- e. b) the registered office or permanent establishment, or failing this, the home address of the service provider;
- f. c) the details of the service provider, including his electronic mail address, which allow him to be contacted by recipients of the service rapidly and communicated with in a direct and effective manner;
- g. d) where the service provider is required to register in a public register as a precondition for coming into existence and/or for engaging in his activities, the name of the court of registry or other authority entering the service provider into the register and his registration number;
- h. e) where the service provider's activity is subject to authorization by law, an indication of this fact and the name and the particulars of the relevant supervisory authority, and the number of the authorization;
- i. f) if the service provider is liable to pay value added tax, the relevant tax number;
- j. g) as concerns the exercise of regulated professions:
- k. ga) the name of any professional body or similar institution (chamber) with which the service provider is registered, whether under legal requirement or voluntarily,
- l. gb) if the service provider is a natural person, an indication of the vocational skills or professional and scientific title and the Member State where it has been granted,
- m. gc) a reference to the applicable professional rules for exercising the regulated profession in question in the Member State of establishment and the means to access them.

Section 5.

(1) Providers of information society services shall make available to the recipient of the service the contract terms and general conditions concerning the information society service they provide in a way that allows him to store and reproduce them.

(2) The following information shall be given by the service provider clearly and unambiguously and prior to the order being placed by the recipient of the service:

- a) the different technical steps to follow to conclude the contract by way of electronic means;*
- b) whether or not the concluded contract is considered made in writing, whether or not it will be filed by the service provider and whether it will be accessible;*
- c) the technical means for identifying and correcting input errors prior to the placing of the order;*
- d) the languages offered for the conclusion of the contract;*
- e) the relevant codes of conduct - relating to the service activities in question - to which he subscribes in connection with the services in question and information on how those codes can be consulted by way of electronic means.*

(3) The service provider and any recipients of the service who are not consumers may agree to derogate from the provisions set out in Subsection (2) in connection with the above-specified contracts.

(4) The provisions of this Section shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 6.

(1) The service provider shall make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order by way of electronic means. In the absence of such technical means any communication of the recipient of the service shall not be treated as an order.

(2) The service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means. If such acknowledgement is not received by the recipient of the service within a reasonable time consistent with the nature of the service, or within forty-eight hours maximum following the time of dispatch of the recipient's order, the recipient of the service shall be relieved from any contractual commitment.

(3) The order and the acknowledgement of receipt are deemed to be received by the service provider or the recipient when the parties to whom they are addressed are able to access them.

(4) In connection with contracts concluded between the service provider and recipients of the service who are not consumers, the parties may agree to derogate from the provisions set out in Subsections (1) and (2).

(5) The provisions contained in Subsections (1) and (2) of this Section shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Q.4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

Advertising and marketing is not subject to the Telecommunication, Copyright and Data Protection Act. The Media Act provides general restriction on advertising and marketing (sections 10-17), no special rule on DCS.

E-commerce Act provides the rules on electronic advertisement, as follows:

- section 14 defines the electronic advertising
- section 14/A states the scope of the information to be provided with the advertising (persons related, conditions of the sale,
- section 14/B information to be provided to the National Media and Communication Authority
- section 14/C special rules on advertising of certain special professionals

section 14 (1) For the purposes of this Act, 'electronic advertisement' shall mean any information society service or, exclusive of voice telephony services, any electronic message in the form of:

a) commercial advertisement as specified in Paragraph d) of Section 3 of Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities (hereinafter referred to as "CAA"), or

b) information relating to the implementation of social and societal aims, other than advertisement.

(2) *Electronic advertisement shall also mean any form of communication conveyed for the sole purpose of obtaining the consent defined in Subsection (1) of Section 6 of the CAA.*

(3) *The following do not in themselves constitute electronic communications:*

a) *information allowing direct access to the activity of the company, organization or person, in particular a domain name or an electronic-mail address;*

b) *communications relating to the goods, services or image of the company, organization or person compiled in an independent manner, particularly when this is without financial consideration.*

(4) *For the purposes of this Act:*

a) *'Electronic advertiser' shall mean the person on whose behalf the electronic communication is published, or who orders the publication of electronic communication for his own purposes;*

b) *'Provider of electronic communications services' shall mean any service provider whose business is to prepare and create electronic communication, and/or to provide other related services;*

c) *'Publisher of electronic communications' shall mean a person with equipment suitable for the publication of electronic communications and using such equipment for sending electronic communications;*

d) *'Publication of electronic communications' shall mean transmission of electronic communications either to the general public or to a single recipient.*

(5) *The provisions set out in Section 6 of the CAA shall also apply to the electronic advertisement referred to in Paragraph b) of Subsection (1) and to the form of communication referred to in Subsection (2).*

section 14/A (1) The following information shall be presented clearly and unambiguously in connection with any electronic advertisement:

a) *it shall be clearly identifiable as such immediately when it is made accessible for the recipient of the service;*

b) *the electronic advertiser, or the person on whose behalf the electronic advertisement is transmitted by way of electronic mail or equivalent individual communications shall be clearly identifiable immediately when it is made accessible for the recipient of the service;*

c) *promotional offers, such as discounts, premiums and gifts shall be clearly identifiable as such, including the conditions which are to be met to qualify for them;*

d) *promotional competitions or games shall be clearly identifiable as such, including the conditions for participation.*

(2) *In connection with Paragraphs c) and d) of Subsection (1), the conditions to obtain the discounts, premiums and gifts and the conditions for participation in the promotional competitions shall be easily accessible.*

(3) *The electronic advertiser, the provider of electronic advertisement, and the publisher of electronic advertisements shall be liable for any infringement of the provisions contained in Paragraphs a) and b) of Subsection (1) jointly and severally. Liability for any infringement of the provisions contained in Paragraphs c) and d) of Subsection (1) lies with the electronic advertiser.*

section 14/B (1) In order to enable the identification of the electronic advertiser or the publisher of electronic advertisement, the intermediary service provider shall supply, upon request, to the National Communications Authority (hereinafter referred to as "Authority") the following information, provided that they are available to the intermediary service provider:

a) *the electronic communication identification code of the sender or publisher of electronic communication the Authority has indicated; and*

b) *the name and address of the recipient of the service indicated in the records under the said electronic communication identification code.*

(2) *The Authority shall be authorized to process the aforesaid data as supplied for sixty days following the final and binding conclusion of the relevant oversight proceedings, or until the conclusion of any ensuing court review proceedings by final decision, solely for the purpose of identification of the electronic advertiser or the publisher of electronic communications.*

(3) *The intermediary service provider, in the event of non-compliance with the obligation set out in Subsection (1), shall be subject to collective liability with the electronic advertiser, the provider of electronic communications, and the publisher of electronic communications for any infringement of the provisions contained in Section 6 of the CAA. Liability for damages caused by such infringement lies with the intermediary service provider, the electronic advertiser, the provider of electronic communications, and the publisher of electronic communications jointly and severally.*

section 14/C (1) In connection with any information society service provided by a member of a regulated profession within the framework of operations relating to electronic advertisements on behalf of an electronic advertiser, the regulations governing the exercise of such regulated profession, such as the codes of conduct laid down by the relevant trade organizations and chambers pertaining to their own members, may contain, without prejudice to the applicable statutory provisions, stricter and more elaborate requirements.

(2) Additional regulations may be drawn up regarding the exercise of regulated professions specified in Subsection (1) regarding, in particular, the independence, dignity and honor of the profession, fairness towards clients to whom the services are provided, and other members of the profession, as well as for the protection of professional secrecy.

As far as I see, there is no interface between consumer law and sector-specific information law in this relation.

[According to the Advertising Act, in case of prohibited advertising, the authority entitled to carry out a process is the consumer protection authority, however, in special cases, the Hungarian Financial Supervisory Authority, the Hungarian Competition Authority, or the courts are entitled to act. This means, that the basic rule is that the Consumer Protection Authority acts, but the law regulates special cases that fall under the competence of the other three authorities listed above.]

According to Annex of the Unfair Commercial Practices Act, the infringement of the rules on advertisements might be considered as unfair commercial practice, so these activities are to be sanctioned under this act. However, there is an Act XLVIII of 2008. on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities. According to this Act, the Consumer Protection Authority is entitled to act in case its regulations are infringed.

Q.4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- **does sector-specific law determine any remedies?**
- **could a consumer invoke general consumer and contract law remedies³⁴⁹?**

The E-commerce Act does not provide any special remedies in connection with the violation of sections 4 and 5. Section 16/A. of the E-Commerce Act states that the competence authority is defined in the Act no. XLVII of 2008 on Unfair Market Practice and the rules of the referred Act are applicable. Violation of section 6 of the E-Commerce Act shall fail the competence of the Consumer Protection Authority, in special case the State Supervision Authority for Financial Services (section 16/A (2) E-Commerce Act). This Authority can impose the following remedies pursuant to Consumer Protection Act Section 47:

- a) order the cessation of the infringement with immediate effect;*
- b) order the termination of the infringement with immediate effect;*
- c) order the business entity in question to terminate within the prescribed time limit the deficiencies and disparities exposed, and to notify the consumer protection authority concerning the measures carried out to eliminate such deficiencies and disparities;*
- d) ban, restrict or impose conditions regarding the supply and offering of goods until the infringement is eliminated;*
- e) order the products which are considered dangerous to the life, health or physical safety of consumers to be withdrawn from the market;*

³⁴⁹ E.g. unfair commercial practices, unfair contract terms, voidance/voidability of the contract, termination or damages.

- f) order the products which are considered dangerous to the life, health or physical safety of consumers to be destroyed in observation of environmental protection regulations;
- g) order for the period until the infringement is eliminated the temporary closure of the commercial establishment affected, where deemed necessary for the protection of human lives, health, physical integrity, or for the prevention of dangers posing significant threats to a broad range of consumers;
- h) ban the sale of alcoholic beverages, tobacco products and sex products in connection with any infringement of the provisions under Subsections (1)-(3) of Section 16/A for a maximum period of one year from the effective date of the infringement, and in the event of any repeated offense, may order the temporary closure of the establishment affected for a maximum period of thirty days; or
- i) impose a consumer protection fine (hereinafter referred to as "fine").

There is no particular authority responsible for digital services. E-Commerce Act does not provide any civil law remedy. In case a consumer suffers damage because of the unlawful action of the provider, he can apply general civil law remedies set out in the Civil Code.

No case law has been published on this issue.

Section 14 (6) of the E-Commerce Act states that the electronic advertiser, the provider of electronic advertisement, and the publisher of electronic advertisements shall be liable jointly and severally for any infringement of the provisions contained in Section 6 of the Copyright Act. Liability for damages caused by such violation lies with the electronic advertiser, the provider of electronic advertisement, and the publisher of electronic advertisement jointly and severally.

Section 6 of the Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities states the rule of direct advertising.

Section 6 (1) Unless otherwise provided by specific other legislation, advertisements may be conveyed to natural persons by way of direct contact (hereinafter referred to as "direct marketing"), such as through electronic mail or equivalent individual communications - subject to the exception set out in Subsection (4) -, only upon the express prior consent of the person to whom the advertisement is addressed.

(2) The statement of consent may be made out in any way or form, on condition that it contains the name of the person providing it, and - if the advertisement to which the consent pertains may be disseminated only to persons of a specific age - his place and date of birth, furthermore, any other personal data authorized for processing by the person providing the statement, including an indication that it was given freely and in possession of the necessary legal information.

(3) The statement of consent referred to in Subsection (1) may be withdrawn freely any time, free of charge and without any explanation. In this case all personal data of the person who has provided the statement must be promptly erased from the records mentioned in Subsection (5), and all advertisements mentioned in Subsection (1) must be stopped.

(Subsection (4)-(8) are not printed).

Other sanctions and consequences can be given, for example a tort liability or breach of the rules of unfair market practices.

[The failure to comply with the information duties can be complained for, first before the service provider, and second, if the service provider still does nothing to fulfil the requirements, before the court, under Section 13. of the E-Commerce Act. If the information duty is breached in a way that does not fall under the E-Commerce Act, the Consumer Protection Act can be applied, according to which, the consumer protection authority is entitled to act.]

5 Formation of contract and pre-contractual information

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

The E-Commerce Act states that providers shall make available to the recipient the contract terms and general conditions in a way that allows him to store and reproduce them (section 5(1)). Provider shall clearly and unambiguously inform the client (consumer) prior to the order being placed by the recipient of the service: a) the different technical steps to follow to conclude the contract by way of electronic means; and b) whether or not the concluded contract is considered made in writing, whether or not it will be filed by the service provider and whether it will be accessible. (section 5 (2) a), b) E-Commerce Act).

The rules on general terms of the contract are regulated in the Civil Code. These rules are not restricted to consumers, are general applicable.

Section 205/A Civil Code states the “general contract term” as follow:

(1) Any term that had been drafted in advance by one of the parties in the context of a pre-formulated standard contract, and the other party has therefore not been able to influence the substance of the terms and conditions and that has not been individually negotiated shall be construed as a standard contract term.

(2) Where any party claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. This provision shall also apply where there is no agreement between the parties as to whether a contractual term that has been drafted in advance by the party entering into a consumer contract with the consumer had been individually negotiated or not.

(3) The extent of contractual terms, the way they have been formulated and fixed, and whether they are integrated into the written contract or provided in a separate document is irrespective of whether a contractual term should be considered a standard contract condition.

The general contract terms will be a part of the contract between the parties if (i) it was available prior the contracting to the other party and (ii) the general contract terms were accepted by him. A further obligation of the enterprise that he shall call the other party’s attention to the contract term differs from the general rules and standards. Without warning about this clause, the contract term will not be part of the contract between the parties.

section 205/B

(1) Contract terms which have not been individually negotiated shall become part of a contract only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance.

(2) The other party shall be explicitly informed of any standard contract conditions that differ substantially from the usual contract conditions, the regulations pertaining to contracts, or any stipulations previously applied by the same parties. Such conditions shall only become part of the contract if, upon receiving special notification, the other party has explicitly accepted it.

section 205/C If a standard contract condition and another condition of the contract differ from one another, the latter shall be integrated into the contract.

These rules are very clear, should the general terms and conditions not have been made available, this will be not part of the contract of the parties. The burden of proof shall rest on the service provider, who has to prove that the general terms and conditions were made available and that a warning was made concerning the “surprising rules” and all provisions which differ from the rules of the Civil Code or from other laws, were presented to the client (consumer) and were accepted. If the enterprise fails to do so, the general contract term and/or the “surprising clause” will not part of the contract.

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

E-Commerce Act states that it must make available prior to the contracting. Section 5(1) states that providers of information society services shall make available to the recipient the general contract terms and conditions concerning the information society service they provide in a way that allows the recipient to store and reproduce them.

Civil Code does not provide any exact rule about the timing when the general contract terms and conditions are to be made available. The only time requirement of the Civil Code that prior of the contracting this obligation shall be fulfilled (section 205/B (1)), this can be 5 minutes before or 1 month before. The real meaning of this section is that the other party should have the physical possibility to read the general contract terms and reasonably time to consider those terms. The general requirement is applicable both for consumer and non-consumer contracts, even for B2B, business-to-business relations. Based on this the circumstances of the pre-contractual contact and the availability of the general contract terms and conditions is subject to the parties and the business.

The implementation of the Distance Selling Directive into Hungarian law, was made by the decree of the government no. 17/1999 (Distance Selling Decree). Section 2 Distance Selling Decree states that the enterprise shall inform the customer about the important part of the contract in advance (feature of the product, price and other fees, conditions of delivery, the period of the binding force, the minimum period of the contract).

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license³⁵⁰, considered to be validly concluded contracts?

According to Act CVIII of 2001 on Electronic Commerce and on Information Society Services Section 5, an electronic contract has to fulfill several requirements in order to be valid, e.g.: the provider has to make available to the recipient of the service the contract terms and general conditions concerning the information society service they provide in a way that allows him to store and reproduce them, has to provide certain information...etc. In case all the requirements are fulfilled, Hungarian law recognises the electronic contract as valid.

Q.5.4 Under what conditions are the terms of a standard form agreement³⁵¹ binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms³⁵² necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?³⁵³

³⁵⁰ 'Browse-wrap' means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

³⁵¹ For instance those included in the click-wrap or a browse-wrap license.

³⁵² E.g. by clicking 'I agree' in a dialog box.

³⁵³ E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

The standard form agreement must be accepted by the consumer with express manifestation, with a clear and unambiguous acceptance act. Usually the consumer signs this declaration or signs the sentence by which he accepts the standard contract terms. In special cases, where the usage or the circumstances of the formation of the contract is not so formal, an implicit manifestation should be deemed as acceptance. In cases where *bonus paterfamilias* should consider a certain regulation, standardization of the contracting terms, those terms can be regarded as accepted, for example in a parking house.

Basically all those acts, click-wrap or a browse-wrap can constitute an acceptance and can be deemed as acceptance of the contract terms offered by the provider. In exceptional cases I can imagine that even a click-wrap or a browse-wrap the court would say this does not constitute an acceptance, because the click-wrap or a browse-wrap was made by mistake, or misled or similar way.

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy³⁵⁴, or may the information also be given via electronic means?³⁵⁵

The E-Commerce Act states that the service provider shall clearly and unambiguously and prior to the order being placed by the recipient inform whether or not the concluded contract is considered made in writing, whether or not it will be filed by the service provider and whether it will be accessible; (section 5 (2) b)). This obligation relates only to information. Section 6 (2) states that „the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means. If such acknowledgement is not received by the recipient of the service within a reasonable time consistent with the nature of the service, or within forty-eight hours maximum following the time of dispatch of the recipient’s order, the recipient of the service shall be relieved from any contractual commitment.”

Section 3 Distance Selling Decree requires that hard copy shall be delivery on paper or by “durable data-carrier” to the consumer, provided that the application of the Decree is extended to DCS.

Q.5.6 Are you aware of any specific information duties for providers of digital content services?³⁵⁶ If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

³⁵⁴ E.g. on paper or on CD/DVD.

³⁵⁵ E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer’s computer.

³⁵⁶ For example about the fact that a piece of music or video is subject to technical restrictions so that it cannot be copied or only played in a certain region; or that when using the service personal data will be collected (spyware); that a service is incompatible with certain software; about eventual sponsoring or other commercial influences.

Yes, some duties were discussed under Q.5.2. above. In addition, the address of the main or other office of the enterprise where the consumer can deliver its claim, the condition of the express warranty, if any granted, the conditions of the après sale services, the terms and condition of the termination of the contract if the contract is entered into for indefinite period of time or its terms exceeds one year and the condition of the rescission and its consequences.

- section 3 (2) Distance Selling Decree.

The information of course has to be in Hungarian, and it has to be made possible to access, for any consumer, under Act CVIII of 2001 on Electronic Commerce and on Information Society Services.

No case law has been published on this issue.

Please note that it is questionable whether Distance Selling Decree applicable for DCS, since this Decree was made in accordance with the authorization of the Consumer Protection Law. Based on this regulation, the definitions of the expressions “consumer contract” in a different interpretation as the Civil Code. Pursuant to the Decree consumer contract has a narrower application, its scope limited to chattles and defined services³⁵⁷ by and between the consumer and an enterprise³⁵⁸. The Civil Code states a wider definition, says that:

'consumer contract' shall mean any contract concluded by a consumer and a person acting within the scope of his economic or professional activities; in the application of the provisions of this Act pertaining to guarantee and warranty, a consumer contract shall be construed as any contract the object of which is a movable property (consumer goods) with the exception of electricity, water and gas sold in tanks or bottles or in any other measured quantity, articles sold under judicial execution or some other regulatory procedure, and used articles sold by auction in which the consumer is also allowed to participate.

Q.5.6a Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer?³⁵⁹ If so, please specify.

The law states that this information needs to be presented in writing “on paper or any other hard copy available for the consumer”. Section 3(1) Distance Selling Decree.

Hard copy is defined as any tool that makes the terms available for the consumer in such a way that he can store the data for long term and recover it in unchanged form – section 3(4) Distance Selling Decree.

³⁵⁷ f) ‘product’ shall mean any goods of a tradeable nature that can be possessed, including natural resources that can be utilized as capital goods, exclusive of money, securities and financial instruments;

g) ‘service’ shall mean, with the exception of the sale of products, immovable property and rights, any activity carried out for consideration aimed to achieve a certain result or performance, or to engage in some similar forms of conduct with a view to satisfying the needs of the customer or employer;

³⁵⁸ a) ‘consumer’ shall mean any natural person who is acting for purposes of purchasing, ordering, receiving and using goods or services which are outside his trade, business, craft or profession, and who is the target of any representation or commercial communication directly connected with a product;

b) ‘enterprise’ shall mean any natural or legal person who is engaged in the activities referred to in Section 1 for purposes relating to his trade, business, craft or profession;

³⁵⁹ E.g. before the signing of a contract, in clear and comprehensible language, in sufficiently large letters, etc.

See last sentence of the answer to Q.5.6.

Q.5.7 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?³⁶⁰

Section 4(3) Distance Selling Decree extends the time for the right of withdrawal (rescission from the contract) if the hard copy confirmation of the contract is delivered to the consumer only after the delivery of the goods or after 8 additional working days from the date of the contracting. After the three-months time from the delivery of the goods or the date of the contracting this right can not be used. See last sentence of the answer to Q.5.6.

Section 16/A of the E-Commerce Act states that in case of breach of the obligation to provide information to the customer about certain basic terms of the contract, the authority defined in connection with the Unfair Market Practice, Act no. XLII of 2008, shall have competence to make decision about this infringement of the law.

The Hungarian Competition Authority is entitled to make decision in such cases. The decisions this authority is entitled to make are regulated in Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition as follows:

Section 77.

(1) The competent Competition Council:

- a) shall adopt a decision in respect of the applications defined in Subsection (2) of Section 67;*
- b) may, in proceedings instituted on the basis of Subsection (3) of Section 67, authorize the merger of companies, or extend the one-year time limit in accordance with Section 25;*
- c) may - pursuant to Section 16/A - determine that aggregate exemption shall not apply to a specific agreement;*
- d) may declare a conduct to be illegal;*
- e) may order the termination of any illegal conduct;*
- f) may prohibit the continuation of any illegal conduct;*
- g) may prescribe certain obligations in connection with illegal conduct, such as ordering the parties to conclude contracts in cases of unreasonable refusal to enter into a business relationship or to continue an existing one as appropriate for the nature of the transaction [Paragraph c) of Section 21];*
- h) may order the publication of a statement of correction in connection with any unlawful communication of information;*
- i) may declare a conduct to be legal;*
- j) may withdraw or reverse its previous resolutions.*

No case law has been published on this issue.

6 Right of withdrawal

Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

³⁶⁰ E.g. voidability or termination of the contract, damages, prolongation of the period for the exercise of a right of withdrawal.

Distance Selling Decree, the consumer has 8 days after performance to withdraw from the contract. This is the general rule, however there are exemptions.

Some examples:

In case the parties contract for the performance of a service, the consumer is not entitled to withdraw from the contract if the performance had been started within the time for withdrawal with the assent of the consumer.

There is no possibility for withdrawal, if the price of the product or service depends on the uncontrollable fluctuation of the market.

In case of products or services that are made personally to the consumer or with respect to the consumer's instructions, furthermore when a product or service cannot be returned or perishes within a short time, withdrawal is also not possible.

In case of contracts on the sale of audio and picture recordings or software, If the package was opened, withdrawal is no longer possible.

Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

In our interpretation, cooling off period means, the period of time when the buyer may cancel purchase.

The Distance Selling Decree states that the consumer loses his right of withdrawal if the service is rendered during the cooling off-period, with the permission or at the request of the consumer. In case the consumer was not informed about his right of withdrawal, the Decree contains no rule which allows him to withdraw despite the occurrence of the situation described by Section 5. point a). However, in the Hungarian law, pursuant to the Civil Code, section 4. paragraph (4), „No person shall be entitled to refer to his own actionable conduct in order to obtain advantages. This means, the right of withdrawal remains in such a case. The breach of law can not make advantage against the consumer.

No case law has been published on this issue.

Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

Section 5 point c) of the Distance Selling Decree states, that the consumer has no right to withdraw from the contract if the performance is not possible to return.

Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

In case of the rescission of the service which was purchased with package of jointly ordered or interdependent services, the rescission shall relate only the defective service, if the services are divisible. If the services can not split (non-divisible), two or more services correlate to each other, the rescission shall relate the total packaged services. In this case pro rata value of the non-defective services has to pay. The rescission is valid only if the default relates an essential part of the package, minor default can not be a basis for rescission.

In case of jointly ordered services, the right of withdrawal can be practiced in respect of only one of the services too.

7 Unfair contractual terms

Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a ‘main obligation’ under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

The restriction of copying of a piece of music does not relate a “main obligation”, unless otherwise agreed by the parties. The right of copying under Copyright Law for personal use is not an absolute right, this is only an exception for free-of charge use and cannot be applied extensively. If the restriction on the use of the “piece of music” does not reflect into the fee paid, it can be deemed as unfair term.

Section 33 (3) of the Copyright Act states that the provisions pertaining to free use cannot be interpreted extensively.

Section 47 (2) of the same Act provides that a license to reproduce a work permits the user to fix the work in a video or phonogram or copy it by way of computer or onto electronic data media only if it is expressly stipulated.

The genesis of the free-charge use of the copyright product shall comply with the so called three-step test, based on Bern Convention Art 9 (2) and TRIPS Agreement Art. 13. These restrictions were incorporated into the Hungarian copyright law and two further conditions are required: (1) any free-charge use shall be made bona fidei; (ii) free-charge use cannot be abusive and shall be used in accordance with its function. For an example, it is in accordance with the function of the free-charge use to cite a product under copyright-law, but it is not if it is used in such a great extent that cannot be declared as a citation. It is very important, that the product has to be used for a purpose fit for free-charge use, for example scientific research, and not for e.g. commercial purposes. Basically this right is only an exception of the protection of the rights of the author and cannot be deemed as an absolute right.

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

Any deviation of the protection of the privacy can be deemed as unfair, if it is not reasonable from the privacy protection point of view. All those rights are absolute and cannot be waived if the waiver is such as to go against reasonability. Any contractual undertaking or unilateral waiver relating to the restriction of privacy is null and void (section 75(3) Civil Code).

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

I review the case law but no case was published in this topic.

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

It is unknown.

8 Failure to function properly

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

Under Hungarian law the judge will use the functional approach, any abstract interest will be disregarded. The quality and the quantity of the service shall comply with the rules and the terms and conditions of the contract and the service, at the time when supplied, a) shall be suitable for their intended purpose and in conformity with other services of the like, and b) shall be of a quality and performance that are normal in services of the same type and that the consumer can reasonably expect, given the nature of the services and taking into account any public statements on the specific characteristics of the services made about them by the obligor, the seller, the producer or his representative, particularly in advertising or on labeling, and c) shall be for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the time the contract was concluded and which the seller accepted, and d) shall comply with the description given by the obligor and possess the qualities of the services the obligor presented to the consumer as a sample or model. (section 277 (1) Civil Code).

The same spirit of law can be deduced from the Act on Consumer protection, Act no. CLV of 1997, especially its section 13. The Consumer Protection Act states that the product shall be safety, it shall be delivered with user tools. (Section 13 "Products for which mandatory conformity assessment is prescribed by statutory provision may be placed on the market only with the prescribed conformity certificate, declaration of conformity and conformity marking attached.")

See also the answer given to Q.5.2 regarding the subject matter of Consumer Protection Act.

Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what ‘normal use’ of a service is, e.g. - the ability to make private copies according to copyright law,

- **the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),**
- **the suitability of certain contents for minors as stipulated under audiovisual media law,**
- **journalistic codes of conducts, etc.**

- private copy

The right of copying is an absolute right of the author (legal beneficiary). The exact meaning and rules of the copying (reproduction) is regulated in detail in the Copyright Act (section 18-22). The right of the copying is handled by collective right management organisations. Any restriction is basically not prohibited by the author.

The Copyright Act states special rules for software. Unless otherwise agreed, an author’s exclusive rights do not cover reproduction, alteration, adaptation, translation, or any other modification of the software - including the correction of mistakes - as well as the reproduction of the results of these acts in so far as the person authorized to acquire the software performs these actions in accord with the intended purpose of the software. The contract of use of the software cannot prohibit users from making safety copies of software if it is necessary for use. (section 59). The second sentence is *ius cogens* rule which means that restriction of copying of software is allowed, but a safety copy shall be allowed in any case.

- protection of personal data

The law states a very clear prohibition for any data transferring.

Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?³⁶¹ If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer’s hardware and middleware?

The general rule of the Hungarian contract law that the parties shall inform each other all important facts relating to the contract (section 205 (3) Civil Code). This rule shall apply extensively. The rules of the performance require that the service shall be for any particular purpose for which the beneficiary requires them and which the beneficiary made known to the seller at the time the contract was concluded and which the seller accepted, and d) shall comply with the description given by the obligor (section 277 (c) Civil Code). The provider shall inform the consumer prior of contracting of the required hardware and software. If the provider fails to do it, this can be as (i) the contract is not valid (based on mistake or misleading), or (ii) defective performance. In the second scenario a proper product (services) can be requested.

³⁶¹ Idem.

Section 2(2) of the Distance Decree states also, that the consumer shall be informed on any important feature of the services. The hardware and software requirement is an important fact in this case. Section 11 of the Distance Decree provides special legal remedy for the breach of this obligation. Please also see last answer to Q.5.6.

Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

Irrespective from the special rules for consumer contracts, the remedies of the Civil Code can be apply, as follows:

- repair or replacement;
- repair the goods by the customer himself or have them repaired by others at the expense of the obligor;
- price (fee) reduction;
- rescission from the contract;
- seeking for damages, if any.

Section 306 (5) states that any deviation from the law of the statutory guarantee (implied warranty) is null and void in consumer contract which differs from the hierarchy of these rights.

The list of the right is a hierarchy, but the beneficiary has a right to select first between repair or replacement, after that he has a right to switch from the remedy he has selected to the alternative remedy. The costs of the switch caused to the obligor shall be reimbursed unless it was made necessary by the obligor's conduct or for other reasons. (section 306/A Civil Code)

Section 306 of the Civil Code:

a) beneficiary shall, in the first place, be entitled to choose either repair or replacement unless this is impossible or it results in disproportionate expenses on the part of the obligor as compared to the alternative remedy, taking into account the value the goods would have had there been no lack of conformity, the significance of the lack of conformity, and whether the alternative remedy could be completed without significant inconvenience to the beneficiary;

b) if the beneficiary is entitled to neither repair nor replacement or if the obligor refuses to provide repair or replacement or is unable to meet the conditions described in Subsection (2), the beneficiary may require an appropriate reduction of the price or have the contract rescinded. The beneficiary is not entitled to have the contract rescinded if the lack of conformity is minor.

(2) Any repair or replacement shall be completed within a reasonable time and without any significant inconvenience to the beneficiary, taking account of the nature of the goods and the purpose for which the beneficiary required the goods.

(3) If the obligor is unable or unwilling to repair the goods within a reasonable time, the beneficiary shall be entitled to repair the goods himself or have them repaired by others at the expense of the obligor.

(4) Until repair or replacement is completed, beneficiary shall be entitled to withhold a proportionate portion of the purchase price of the goods in question.

(5) Any clause in a consumer contract that deviates from the sequence of statutory guarantee rights to the detriment of the beneficiary shall be null and void.

Q.8.5 For how long after delivery of the digital content service (weeks, months, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)?³⁶² If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

The general rule for defective performance for six months, for consumer contract is two years (implied warranty term) which term can not be reduced only for used products (section 308 (4) Civil Code)

After the prescription period (six months or 2 years) the beneficiary within one year from the delivery, consumer has an additional one year to seek remedies for defective performance, but he has to prove that the recovery of the defect was beyond his control (section 308/A Civil Code).

Section 308/A. (1) If the beneficiary is unable to enforce his claim for an excusable reason, particularly if lack of conformity, owing to its character or the nature of the goods, is not apparent within the time limit described in Section 308, the beneficiary may enforce his warranty rights within one year or, in the case of goods designated for long-term use, within three years of delivery. If the statutory use period exceeds three years, this time limit shall apply to the enforcement of such claim. The omission of these time limits shall result in forfeiture of rights. (2) Any clause in consumer contracts stipulating a period shorter than the three-year period defined in Subsection (1) shall be null and void.

Should the defective service cause damages, the prescription period is five years. In this case the claim for the statutory guarantee already prescribed but the claim for damages still can be filed. (section 310 in connection with section 360 and 324).

Note: product liability rules relate only tangible asset, basically for chattels. (Act no X of 1993 on product liability)

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

This is subject to the terms and conditions of the contract, the service and the purpose of the contract. If the contract does not deal with the applicability under new hardware and software, I would say the consumer can not demand any updating even against payment.

Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identify, geographical address or further details?

a) the operator of that platform, or

b) the third party application service himself?

Should this be done before or after the contract is concluded?

³⁶² Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

The service provider shall inform about the possibility that third party may offer services to the consumer. This information shall be given in accordance with the law, basically prior enter into the contract, or at the latest during his performance – see section 3 Distance Selling Degree. See note at the answer to Q.5.6.

The third party provider shall give proper information about him and the services, as discussed above.

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

Basically the third party service provider is liable for the services provided by him. If the defect caused by several provider, they shall be liable jointly and severally. If the defect caused by a person is not a contracting party, a tort-based liability can be founded. If the third party is somehow linked to a contracting party, his service can be deemed as a performance entrusted to another (see 2:106 DCFR – Draft Common Frame of Reference).

Special rules are applicable for the liability for information under E-Commerce Act.

9 Remedies for non-performance and termination of a long term contract

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

In the recent law special remedies outside from the laws are not developed under Hungarian law. See: Fazekas Judit: Fogyasztóvédelmi jog, Budapest 2007, 286 pages [Law of Consumer Protection]

It is to mention three former development in the history of Hungarian civil law:

- the case law of the rules on general contract terms were crystallized by the Supreme Court and published a so called Opinion of the College of the Judges of the Supreme Court dealing with civil cases – 37 GK.
- the product liability was developed in the 70s based on the rules of the tort law (see Weiss, Emilia: A termék előállítóját a fogyasztó irányában terhelő felelősség, Budapest 1973 [Product liability of the Producer towards customer],
- the acceptance of the five-years prescription period for damages in case of defective performance which is de facto an extension of the statutory period of the implied warranty

Hungarian law was capable of dealing with new challenges, by applying old rules giving new answers in the earlier ages too.

No case law has been published on this issue.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

Special rules prevail over general rules, so any special rule for consumer contract, among other the rescission (withdrawal) is a strong right and cannot be elaborated, can be used without reasoning.

According to Section 313. of the Civil Code in case of non-performance, the consumer has the right to choose between the remedies of impossible performance, or late performance. Between these two there is no hierarchy. The remedies of impossible performance are the followings:

Section 312.

(1) If performance has become impossible for a reason that cannot be attributed to either of the parties, the contract shall be extinguished. The party gaining knowledge of the impossibility of performance shall immediately notify the other party thereof. The party failing notification shall be liable for damages originating therefrom.

(2) If performance has become impossible for a reason for which the obligor is liable, the obligee may demand indemnification for nonperformance.

(3) If performance has become impossible for a reason for which the obligee is liable, the obligor shall be relieved of his obligation and shall be entitled to demand compensation for damages therefrom.

(4) If performance of any of the alternative services becomes impossible, the contract shall be limited to the other services.

(5) If the party who has no right to choose is liable for subsequent impossibility, the other party may choose either the possible service or the consequences of subsequent impossibility.

(6) If the remnants of the object of a service that has become impossible have remained in the possession of the obligor, or if the obligor has received or might demand compensation instead of the object of the service from another person, the obligee shall be entitled to demand surrender of the remainder or compensation against a proportional part of the consideration.

The remedies of late performance are the followings:

Section 299.

(1) The obligor shall reimburse the obligee for damages caused by his default, unless he is able to prove that he has acted in the manner that can generally be expected in the given situation in order to prevent such default.

(2) If the obligor is unable to offer any reasonable excuse for his default, he shall be liable for all damages incurred in the object of the service during the period of default, unless he is able to prove that such damage would have occurred regardless.

Section 300.

(1) An obligee shall be entitled to demand performance, or, if performance no longer serves his interest, he shall be entitled to rescind from the contract irrespective of whether or not the obligor has offered an excuse for his default.

Section 301.

(1) In respect of a monetary debt, the obligor, unless otherwise provided by law, shall pay an annual interest at the central bank base rate in effect on the last day preceding the calendar half-year to which it pertains, even if the debt is otherwise free of interest. The obligation to pay interest shall be effective even if the obligor justifies his default.

No case law has been published on this issue.

Other general rules are applicable – see the answer to question Q.8.4 above.

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

The termination (rescission) of the contract based on the defective performance can be applied, only after the claim for repair or replacement. The outcome of the demand for repair and/or replacement can lead to rescind from the contract as special remedy for defective performance. The user/consumer shall first use his implied warranty right to repairing and/or replacement and if the obligor refuses or fails to reply, a notice before the rescission or termination is not required by the law. Despite the wording of the Civil code, all rights, including the implied warranty rights shall be used properly, in the practice a prior notice is required for a founded and safety termination/rescission.

The method of the correspondence depends on the terms and conditions contract, but a registered mail with receipt is need in any case for seeking remedies at the court.

The call-period for replacement subject to the service, based on the practice, is 3 days otherwise replacement is not applicable. No statutory period is given by the law and no case law has been published on this issue.

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?³⁶³

The termination can be based (i) on the terms of the contract, (ii) or based the law (section 320-321 Civil Code) and (iii) very exceptionally cases based on the case law.

If the contract does not provide any rule for termination, the Civil Code, or special law, shall apply. The basic idea is that a fixed period of contract cannot be terminated even if it is a consumer contract. In the case law has no such rule developed that would allow the consumer to terminate the contract. If the consumer terminates the contract, he shall pay all fee for the remaining period from the fixed period even those case when no service was provided or received. The fee is the basic fee or lack of basic fee the average fee.

³⁶³ For instance: is the notice of termination invalid or must the consumer pay damages?

If the contract signed for undetermined period, a termination is allowed by the case law, if a special termination is not given by the statute or other law. The termination notice shall provide a reasonable period to the obligor to cure his breach, I would say minimum 15 days in such a case.

No case law has been published on this issue.

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

The general rule of the contract law states that if the services are non-divisible, which is a legal term, the termination shall relate to the interdependent service as well. (Section 317. paragraph (2) of the Civil Code.) (Case law: EBH2006. 1404)

No case law has been published on this issue.

10 After sales services

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

The product or service is defective if it was faulty at the time of the delivery (performance). This is basic rule of the Hungarian contract law that faulty product was originally delivered by the obligor. Any other default, which came later on during the use of the product or service, is questionable whether this fault is an original one and existed already at the time of the delivery or came later on. If the bug came out during the warranty period, within 2 years from the delivery in case of consumer product, it can be considered that the service provider shall cure this default somehow. The burden of proof shall last the beneficiary (consumer) relating the fact, that the service was originally faulty. After 2 years-period (implied warranty period) it would be difficult to accept this approach, since it is difficult to prove whether the fault is an original one (the product was fault at the time of the fulfilment) or occurred after the performance. The burden of proof shall bear by the consumer.

If the bug does not constitute a faulty performance update and/or upgrade can not be claimed from the service provider.

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

The risk of bankruptcy and the existence of the business entities is an everyday risk and Hungarian law does not provide any further protection for consumers. These business risks cannot be excluded and the customers cannot be removed from the business environment.

We can not make any reference to a specific norm the consumer does not have general protection against bankruptcy, except special cases (travel contract secured by special insurance; or bank account are insured by a special national fund for a certain limit).

According to Hungarian law, only certain legal persons listed by the law are able to go bankrupt. The rules on this are fixed in Act XLIX. of 1991 on bankruptcy proceedings, liquidation proceedings. These rules fix the position of the creditors of the bankrupt company; however, the consumers using the services of a bankrupt service provider are not protected under this Act.

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service³⁶⁴ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

This obligation does not exist under Hungarian law for DCS.

11 Unfair commercial practices

Q.11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

a. the use of incompatible standards to prevent users from switching to other services or hardware;

Preliminary note.

The Act XLVII of 2008 on the Prohibition of Unfair Business-to-Consumer Commercial Practices (Unfair Business Practices Act) defines 'goods' as follow: <„goods” shall mean any goods of a fungible nature that are capable of being delivered, including money, securities and financial instruments, and natural resources that can be utilized as capital goods (hereinafter referred to collectively as “product”), including, furthermore, immovable property, services, rights;>

Based on the statutory definition of the „goods”, DSC can fall under the scope of the Act if it is considered as right or services.

Under Section 8 Unfair Business Practices Act this behaviour can be considered as aggressive commercial practice, and as such is unfair!

³⁶⁴ E.g. to play the obtained music or video content.

*Section 8 (1) A commercial practice shall be regarded as **aggressive** if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence for exploiting a position of power in relation to the consumer so as to apply pressure, it significantly impairs or is likely to **significantly impair the average consumer's freedom of choice or conduct and the consumer's ability to make an informed decision** with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise.*

(2) In determining whether a commercial practice is aggressive, account shall be taken of:

- a) the timing, location, nature or persistence of the commercial practice;*
- b) the use of threatening, frightening or abusive language or behavior in commercial practices;*
- c) the exploitation by the trader acting in commercial practices of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;*
- d) any onerous or disproportionate non-contractual barriers imposed by the trader acting in commercial practices where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader;*
- e) any threat to take any action that cannot legally be taken.*

b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);

Viral marketing and spamming are not illegal in Hungarian legislation. There are no special restrictions regarding online advertising. – Section 14-14/C E-Commerce Act governs the electronic advertising.

c. the use of Digital Rights Management to prevent unauthorised use;

Digital Rights Management is also not illegal in Hungarian legislation.

d. the use of Digital Rights Management to restrict use to a certain region or country;

Under our understanding DRM is not illegal and it is allowed (somehow out of the law), so it does not fail under unfair commercial practice.

e. the collection of personal data for marketing purposes or through spyware;³⁶⁵

In Hungary, data protection is strictly regulated in Data Protection Act. Pursuant to Data Protection Act, the collection of data is not legal without the approval of the data subject or special authorization of the law.

f. the collection of sensitive personal data for marketing purposes or through spyware;

In Hungary, data protection is strictly regulated in Data Protection Act. Pursuant to Data Protection Act, the collection of data is not legal without the approval of the data subject or special authorization of the law.

g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;

³⁶⁵ E.g. in order to enable the provider of the digital content service or third parties to adjust advertisement to the specific circumstances of the consumer.

Pursuant to Section 5 (2) Data Protection Act the personal data processed must be essential for the purpose for which it was collected, it must be suitable to achieve that purpose, and it may be processed to the extent and the duration necessary to achieve that purpose. Any other use or act with the data is prohibited. After the termination of the contract the personal data must delete from the system (section 13/A (7) E-Commerce Act).

h. the use of default options to entice consumers to the purchase of additional services;³⁶⁶

this issues is not clear - sorry

i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors;

It is to be considered unfair commercial practice to expressly call minor to purchase a particular product pursuant to section 3(4) with reference to clause 28 of the Annex of Unfair Business Practices Act.

“28. Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.”

j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers.

In Hungarian legislation it is not considered to be unfair commercial practice to sponsor or give commission to price comparison websites in case the website does not make misleading statements or impressions.

If there is case law, please provide references and a brief description.

Case law is not published yet, the Unfair Business Practices Act came into force only on 29 June 2008.

Q.11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

Not yet published.

Q.11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;

³⁶⁶ See also Art. 31 of the Proposal for A Consumer Rights Directive.

- **the consumer may apply general contract law remedies such as avoidance or adaptation of the contract for mistake or abuse of circumstances;**
- **the consumer may terminate the contract without having to compensate the trader for the loss of profit; and**
- **the consumer may claim reduction of the contract price?**

Section 1 (3) Unfair Business Practices Act states the negative scope of the regulation:

“This Act shall not apply to:

- a) the conclusion, validity and legal aspects of contracts, nor to civil claims arising out of or in connection with commercial practices;*
- b) the establishment, exercise and enforcement of intellectual property rights;*
- c) the certification and indication of the standard of fineness of articles of precious metal.”*

Section 1(3)(a) Unfair Business Practices Act excludes any civil law claims.

Pursuant to Section 15 Unfair Business Practices Act proceedings conducted under this Act shall not preclude the possibility for the aggrieved party to file a civil law suit at the court to enforce his claim arising in connection with unfair commercial practices. In court proceedings the burden of proof relating to the authenticity of any fact comprising a part of commercial practices lies with the business entity.

Violation of Unfair Business Practices Act fall under the competence of the Consumer Protection Authority (some exceptional cases the State Supervision Authority for Financial Services) (section 10 Unfair Business Practices Act).

Section 47 of Act CLV of 1997 on Consumer Protection provides the main consequences of unfair commercial practice. The list of the possible measure is discussed under Q.12.2.

Furthermore, certain commercial practices are prohibited by public law.

Q.11.4 To what extent are prohibitions as these also relevant when interpreting consumer law’s rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

The rules of Unfair Business Practices Act provide guidelines to the state court and other players in the consumer protection.

12 Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

There are no particular restrictions regarding the sale or marketing of digital content services however, the general provisions contain restrictions, to protect minors. Advertising is regulated in a specific Act and other acts also contain specific rules on advertising. Restrictions are set out in Section 8, 18, 19, and 21 of Act XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities:

Section 8 (1)

No advertisement may be disseminated if it is capable of harming the physical, intellectual or moral development of children and young persons.

(2) No advertisement addressed to children and young persons may be disseminated if it has the capacity to impair the physical, mental or moral development of children and young persons, in particular those that depict or make reference to gratuitous violence or sexual content, or that are dominated by conflict situations resolved by violence.

(3) No advertisement may be disseminated if it portrays children or young persons in situations depicting danger or violence, or in situations with sexual emphasis.

(4) No advertisement of any kind may be disseminated in child welfare and child protection institutions, kindergartens, grammar schools and in dormitories for students of grammar schools. This ban shall not apply to the dissemination of information intended to promote healthy lifestyles, the protection of the environment, or information related to public affairs, educational and cultural activities and events, nor to the display of the name or trademark of any company that participates in or makes any form of contribution to the organization of such events, to the extent of the involvement of such company directly related to the activity or event in question.

Section 18

(1) No advertisement may be disseminated relating to alcoholic beverages that:

a) is addressed to children or young persons;

b) depicts children or young persons;

(2) No advertisement may be disseminated relating to alcoholic beverages:

b) in theaters or cinemas before 20:00 hours, as well as immediately preceding any programs for children or young persons, during the full duration thereof, and immediately afterwards;

Section 19

(1) Advertising of tobacco products is prohibited.

Section 21

(1) No advertisement may be disseminated addressed to children and young persons containing a presentation to enter any games of chance. (2) No advertisement involving games of chance may be disseminated in any printed media which are published primarily to children and/or young persons.

General restrictions regarding the contract of minors are regulated in the Civil Code.

Minor is a kid under 18 years old. A minor over 14 years old has a limited capacity (if he/she is not incompetent). Minor under 14 years old is legally not competent, incompetent.

Any legal undertaking and statement by incompetent minor is null and void. Contracts of minor importance that are generally concluded in large numbers and do not require special consideration and have been concluded directly by incompetent minors and have already been performed shall not be considered null and void.

Any legal undertaking and statement of the minor with limited capacity is valid only with the consent of his/her parent, or

(3) Minors of limited capacity shall have a right

a) to make legal statements of a personal nature for which they are authorized by law;

b) to enter into contracts of minor importance aimed at satisfying their everyday needs;

c) to dispose of the earnings they acquire through work and undertake commitments up to the extent of their earnings;

d) to conclude contracts that only offer advantages.

(other special rules are not discussed.)

The Act CLV of 1997 on Consumer Protection forbids the sale of some goods to minors:

Section 16/A.

(1) Alcoholic beverages - with the exception of prescription medicinal products - may not be sold or served to persons under eighteen years of age.

(2) Sex products may not be sold or served to persons under eighteen years of age.

(3) Tobacco products may not be sold or served to persons under eighteen years of age.

(4) In the interest of enforcing the restriction specified in this Section, the business entity and any person acting on its behalf may demand the prospective consumer to produce some reliable form of evidence concerning his/her age. In the absence of any reliable proof of age, selling or serving the product shall be refused.

In case a harmful/offensive content is marketed, the Consumer Protection Authority is entitled to proceed, pursuant to Act CLV. of 1997. on Consumer Protection, sections 45/A-51/A.

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

General contract does not provide any special rule, the contract is valid, or, in case of violation of the law, it is null and void.

The various other acts provide different administrative sanctions, measures for violation. The Act XLVII of 2008, Advertising Act, does not provide special remedy for the infringement of rules protecting of minors. The general sanctions are applicable.

The competent authority is subject to the matter and type of the infringement: Competition Office, State Supervision Office of the Financial Institutions; National Communications Authority, National Consumer Protection Authority and state courts.

The sanctions of the infringement of the specific rules to protect minors are the general rules of sanctions. For example, section 47 (1) provides the following measures:

1. *order the cessation of the infringement with immediate effect;*
2. *order the termination of the infringement with immediate effect;*
3. *order the business entity to terminate within the prescribed time limit the deficiencies and disparities exposed, and to notify the consumer protection authority concerning the measures carried out to eliminate such deficiencies and disparities;*
4. *restrict or impose conditions regarding the supply and offering of goods until the infringement is eliminated;*
5. *order the products which are considered dangerous to the life, health or physical safety of consumers to be withdrawn from the market;*
6. *order the products which are considered dangerous to the life, health or physical safety of consumers to be destroyed in observation of environmental protection regulations;*
7. *order for the period until the infringement is eliminated the temporary closure of the commercial establishment affected, where deemed necessary for the protection of human lives, health, physical integrity, or for the prevention of dangers posing significant threats to a broad range of consumers;*
8. *the sale of alcoholic beverages, tobacco products and sex products in connection with any infringement of the provisions under Subsections (1)-(3) of Section 16/A for a maximum period of one year from the effective date of the infringement, and in the event of any repeated offense, may order the temporary closure of the establishment affected for a maximum period of thirty days; or*
9. *impose a consumer protection fine.*

These measures can be imposed jointly as well, additional sanctions may be laid down in specific other legislation for any infringement of provisions contained therein relating to consumer protection.

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

a. Hungarian law does not provide such special rules, to protect minors. The basic idea is that not the minor but his/her representatives has a right to enter into contract [Contracts of minor importance that are generally concluded in large numbers and do not require special consideration and have been concluded directly by incompetent minors and have already been performed shall not be considered null and void.

The question of minor importance shall be considered case by case, taking into account all the circumstances of the contract. All the above requirements (minor importance; concluded by the minor directly; concluded in large numbers; already performed) shall be fulfilled conjunctively to make the contract valid.] A value of €100 probably to high, even less can not be a guiding value, this is really depends on the circumstances of the cases and the minor.

Q.12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?³⁶⁷

In the Hungarian legislation, the contracts concluded by minors or other legally incapable or limited capacity persons are regulated by the Civil Code. These rules are applicable to digital content services too. The above issue is regulated as follows: the contracts and other undertakings of minor shall be null and void (section 12/C Civil code). Contracts of minor importance with low value are not affected by this rule.

The invalidity of the contract because of incapacity of the minor or other person can be cited only in the interest of the incompetent or limited capacity person (section 16/A f Civil Code). This means that the other party cannot ask to nullify the contract on the ground of the other party being legally incompetent. The incompetency can be cited by anybody who is entitled to act on behalf of the legally incompetent person, but only in his interest. Pursuant to the above rule, a contract can be nullified by citing the incompetence of one of the parties, however there is a rule that fixes, that in case the legally incompetent person concludes a contract knowing that he is not entitled to do it so, the court can declare the contract valid and oblige the legally incompetent person to perform the contract, as a sanction of the misleading behaviour. It is important to note, that this is an option of the court, that it can apply in case the relevant circumstances require the application of a sanction.

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

To answer this question it is important to see what type the contract concluded was.

³⁶⁷ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as 'normal' for a child of a certain age.

Under the Civil Code the minor is entitled to conclude “contracts of minor importance that are generally concluded in large numbers and do not require special consideration and have been concluded directly by incompetent minors and have already been performed shall not be considered null and void.”

Since the streaming of a movie, is to be considered as a contract of minor importance, the price has to be paid.

Pursuant to the Civil Code, if the contract is not of minor importance, but the incompetent person misleads the other party regarding his/her competence, the other party cannot be held liable, which means that the price has to be paid (section 16/A (2) Civil Code)

In case the other party knew or should have known about the incompetence, he/she shall take the risk of the invalidity of the contract.

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

Neither statutory law, nor case law is known in this topic.

Adult with limited capacity decided by the court and adults with incompetence fall under the same regulations of the Civil Code as the rules for minors with limited capacity and minors with incompetence.

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?³⁶⁸

The Hungarian law does not require any technological systems of age verification. In the Hungarian practice, by signing the standard contractual conditions, the buyer declares that he/she is entitled to conclude the particular contract. By this, service providers exclude their liability for performing their services to persons not entitled to access it.

13 Towards a model ‘digital consumer law’

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

There are initiatives to improve consumer protection law under debate recently. These initiatives are not about digital content services specifically, but they have effect on them. These initiatives are issued by the Ministry of Social Affairs and Labour, the Ministry of Economy and Transport, and the Ministry of Justice and Law Enforcement jointly. The initiatives are settled in one document called “Proposal to the Government on the modification of Act CLV of 1997 on Consumer Protection, and other acts regulating consumer protection”. (The English version of the Act is attached)

³⁶⁸ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

These initiatives aim to provide a higher level of protection to consumers, with special regard to minors. The main stream of the Proposal is to create a clear and understandable regulation regarding the procedures of the consumer protection authority in order to generate legal certainty. According to the Proposal, the higher level of protection can be served by giving wider publicity to cases that concern the interest of the consumers; therefore it would make these procedures open to public. The Proposal finds it important to support the civil organizations that deal with consumer protection.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

It is scheduled by the former government that the rules of Civil Code shall be amended in accordance with the „UN-Convention on the Rights of Persons with Disabilities” of 2006. This codification is still pending, but the new government has not made any decision yet. The mentioned UN-Convention was incorporated and published into Hungarian law by the Act no. XCII of 2007. The proposal contains the regulations set out in the UN-Convention.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

b. In Hungary, data protection is strictly regulated in Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (Data Protection Act). The basic rule of the Act is that personal data can be used and processed only with the approval of the related person or under the authorization of the law. This concept of the personal data and its processing does not allow any data transfer or sale or similar use.

Processing and the transfer of data is regulated by the Data Protection Act, both activity is very restricted. Personal data can be processed only for specified and explicit purposes, where it is necessary for carrying out certain rights or obligations. This purpose must be satisfied in all stages of operations of data processing. The personal data processed must be essential for the purpose for which it was collected for, it must be suitable to achieve that purpose, and it may be processed to the extent and the duration necessary to achieve that purpose.

c.

d. Section 8 of the Data Protection Act provides that personal data may be transferred, whether in a single or in a set of operations, if the data subject has given his consent or if the transfer is legally permitted, and if the safeguards for data processing are satisfied with regard to each and every personal data.

e. Strict regulations apply to the protection of data also. Data must be protected against unauthorized access, alteration, transfer, disclosure by transmission or deletion as well as damage and accidental destruction. For the technical protection of personal data, the controller, the processor or the operator of the telecommunications or information technology equipment shall implement security measures in particular if the processing involves the transmission of data over a network or any other means of information technology.

f. It is clear from the above regulations, that personal data cannot be seen as an economic commodity. The data processing, data transfer, and data protection is strictly regulated. Either of such actions require the authorization of the law, or the consent of the data subject. The infringement of the regulations regarding data processing, transfer or protection can be sanctioned by ordering the controller to provide the information, to correct or delete the data in question, to void the automated individual decision, to honor the data subject's objection, or to disclose the data requested. Data managers shall be liable for any and all damage caused to a data subject as a result of unlawful processing or by breaching the technical requirements of data protection.

Section 13/A of the E-Commerce Act regulates the data processing of the service provider. The data processing shall relate only the billing and the services rendered and the personal data cannot be used for any other purposes, cannot be transferred. The regulation states the cases of the deletion of the personal data (for example termination of the contract). The consumer has a right to check the data processed and to be informed what kind of data processed by the service provider.

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ... 	<input type="checkbox"/>
Film or music on a website (streaming)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<ul style="list-style-type: none"> • ... • 	<input type="checkbox"/>
Downloaded films or music	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Games on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Games on the Internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded games	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
User created content (UCC) ³⁶⁹ on a CD or DVD*	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
UCC on a website	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded UCC	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Personalisation services ³⁷⁰	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

³⁶⁹ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

on the Internet					
Downloaded personalisation services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Software-as-a-Service on a website ³⁷¹	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded software ³⁷²	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Software on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Communication through a website ³⁷³	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
E-learning services on the internet ³⁷⁴	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
E-learning service on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>

Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made? Please indicate this in the table below.

³⁷⁰ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

³⁷¹ E.g. image editing, photoshopping, automatic translation services.

³⁷² E.g. anti-virus programs.

³⁷³ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

³⁷⁴ E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ...
'Free' film or music on a website (streaming)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<ul style="list-style-type: none"> • ... • ...
Paid film or music on a website (streaming) <small>375</small>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded films or music	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded film or	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

375 E.g. video on demand services.

music								
Paid games on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' games on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid games on a website	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded games	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded games	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid User created content (UCC) ³⁷⁶ on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' UCC ³⁷⁷	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid UCC	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' personalisation	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

³⁷⁶ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

³⁷⁷ E.g. video sharing websites, such as YouTube.

services ³⁷⁸								
Paid personalisation services	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid software on a CD or DVD* ³⁷⁹	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded software ³⁸⁰	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded software	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' software-as-a-service on a website ³⁸¹	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid software-as-a-service on a website	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' communication	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

³⁷⁸ E.g. ringtones and Apps for mobile phones.

³⁷⁹ E.g., anti-virus programmes, Office, etc.

³⁸⁰ E.g. anti-virus programmes.

³⁸¹ E.g. image editing, photoshopping etc..

on services ³⁸²								
Paid communication	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid e-learning service on a CD or DVD* ³⁸³	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded e-learning services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded e-learning services	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' e-learning service on the internet	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid e-learning service on the internet	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

³⁸² E.g. social networking, such as Facebook, and e-mail services.

³⁸³ E.g. an online language course.

Annex

Act no. IV of 1959 on Civil Code of Hungary, as amended (Civil Code)

Act no. LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (Data Protection Act)

Act no. X of 1993 on Product Liability

Act no. I of 1996, on Broadcasting and Radio, as amended, (Media Act)

Act no. CLV of 1997, on Consumer Protection

Act no. LXXVI of 1999 on Copyright (Copyright Act)

Act no. XXXV of 2001 on Electronic Signature

Act no. CVIII of 2001 on Electronic Commerce and on Information Society Services

Act no. C of 2003 on Electronic Communication [telecommunication law]

Act no. XC of 2005 on Electronic Information Liberty

Act no. XLVIII of 2008 on the Basic Requirements and Certain Restrictions of Commercial Advertising Activities – Advertising Act

Act no. XLVII of 2008 on Unfair Market Practice -

Governmental decree no. 17/1999 on Distance Selling – Distance Selling Decree

Governmental decree no. 18/1999 on Unfair Contract Terms

Selected literature:

Weiss, Emilia: A termék előállítóját a fogyasztó irányában terhelő felelősség, Budapest 1973 [Product liability of the Producer towards customer],

Fazekas Judit: Fogyasztóvédelmi jog, Budapest 2007, 286 pages [Law of Consumer Protection

Freidler/Dudás/Szentkúti/Csuka/Gaspárezt/Tarján/Dósa/Bujki/Sum: Az informatikai jog nagy kézikönyve, Budapest 2009, Handbook of the law of the information science,

Verebics: Az információs társadalom joga, Budapest 2009 [pdf]The Law of the World of the Information Science] 120 pages

Gyertyánfy: A szerzői jog törvény magyarázata, Budapest 2000, Commentaries to the Copyright Act

ITALY

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2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

The peculiar issues at stake concern, on the one side, the qualification of the performance as object of the contract and, on the other side, digital content that must be regulated by copyright legislation and can be transferred only through a licence. The main purpose of a digital service contract cannot be limited to a single performance feature, but it is constituted by several actions that must be considered in the light of their common socio-economic function.

Service can be treated as a service contract (*appalto*) or as a lease agreement.

Having regard to the specific content, a service contract for a standardised digital content can be treated as a consumer service. On the contrary, consumer law cannot be applied to “tailored” service.

Again, sale contract element can be detected in the mechanism of transfer of the hardware containing the operating software. In any case consumer sale rules can be applied to immaterial goods.

Besides, service contract rules apply to contractual clauses regarding technical assistance related to both hardware and software and to agreed provisions on software development issue.

Applicable rules have therefore to be determined through analogy.

The regulation has to be determined on the basis of the existing legislation, insofar as it is compatible.

1. Consumer regulation

1.1. In the Consumers' Code

a) horizontal rules

- consumer forum
- unfair terms
- deceptive advertising
- unfair business practices

b) vertical rules

- distance contracts

1.2. Special regulation for e-commerce

2. Other special regulations

2.1. E-communication Code

2.2. Personal data protection Code

2.3. Law on Copyright

3. General rules on contracts

Relevant legislation:

No specific set of rules has been developed in Italy in the field of digital services. The consumer sales law, such as distance selling (97/7) and unfair contract terms (93/13), was enacted in different legislative instruments over the years, but is now included in a specific code (*Codice del Consumo*, d.lgs. 06.09.2005, n. 206, from now on: 'Cod. Cons.')

while the e-commerce (2000/31) directive was applied in Italy through a decree by the government (d.lgs. 09.04.2003, n. 70) and is mandatory for the B2C while it applies also to B2B transactions if the parties don't disagree. The Code of Consumer's Law is pointing to these specific norms for the e-commerce (art. 68), except for financial online services. The Civil Code section on sale (artt. 1470 ff) will also apply and sometimes the contract of service (*Appalto*) rules (art. 1650 ff).

There is little case law, because these contracts involve mainly small transactions, most of the time settled out of the courts.

Different issues arising from digital services transactions would be addressed through Personal Data Code, etc. In the Digital Public Agencies Code (*Codice dell'amministrazione digitale*), whose scope of application is not restricted to Pa2Citizens relationships despite the title, contains norms on digital signature and electronic communications. It also provides the definition of email as address.

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the software on the CD/DVD, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

The sale of software, according to courts, falls within the notion of movable intended for consumer. Therefore, the consumer-purchaser has to report the lack of conformity of the software within two months from the date of the discovery of the defect (already art. 1519 *sexies* c.c., now in the Title III of the Consumers' Code)³⁸⁴.

This rule, however, should not apply where the object is the arrangement of some specific application software for the production of data bases. In such case, indeed, there would be a tailored kind of service, which would be excluded from the consumer regulation.

The Court of Appeal of Rome has clarified, on the point, that the contract for the provision of electronic services shall be qualified as a contract of services (*contratto di appalto*), rather than sale of movables, when the required services do not concern the transfer of a "pre-packed" digital product, rather the arrangement of a specific application software for the production of data base: therefore, being a provision of works, and not the transfer of a good already made according to standard procedures, art. 1667.II c.c. shall to be applied, instead of the already mentioned art. 1495 c.c.³⁸⁵.

According to some others scholars, reference should be made to the rules on lease contracts (1578-1579-1581 c.c.), since the transfer of software is defined as a use licence agreement.

In this case, if at the moment of the delivery the leased good is affected by defects that considerably decrease the suitability for the use agreed upon, the consumer can request the cancellation of the contract or a reduction of the price, unless the consumer was aware or could have easily been aware of the defects.

³⁸⁴ Trib. Monza Sez. IV, 01-03-2005, D.A. c. S. s.r.l., in *Banca dati De Agostini*, 2005.

³⁸⁵ App. Roma Sez. II, 02-03-2006, R. s.r.l. e al. c. I. s.r.l., in *Banca dati De Agostini*, 2006

The provider has to compensate the lessee for the loss resulting from the defects of the good, unless he proves that he was not aware of the defects at the moment of delivery, without any fault on his part.

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer's computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

The rules on e-commerce can be applied where the parties enter into a digital contract, which was concluded by means of contractual statements sent by electronic means and in a context of standardised negotiation (point and click modality).

The scope of these regulation includes not only the e-commerce in the narrow sense, intended as an activity of electronic negotiation and related preparatory transactions (whose definition is lacking from d.lgs. n. 70/2003, as it was in the Directive n. 31/2000/CE), but also in a broader sense any kind of service, even not paid for by the recipient, insofar as it is an economic activity (such as the search engines services and on-line data base, the offer of information and commercial communication, online newspapers, on-demand videos and alike).

The software's failure due to flaws or bugs will allow the consumer to invoke the consumer sales law protection. In a formalistic approach, sometimes adopted by a few Italian courts as mentioned before (see before Q 2.2), the contract can be seen as a service contract but this would prevent the consumer to benefit from the more effective remedies of consumers law. Although at present there is not significant case law involving a consumer as a plaintiff, it's not likely to happen in the future that the courts will reduce the consumer law broad scope of protection.

3 Defining consumers and producers

Q.3.1 Are individuals who offer digital content services to consumers considered to be 'consumers' or 'traders'?

Thus far who offers digital content services to consumers certainly cannot be defined either as a consumer nor as a trader. Civil code provision on sales should be applied.

No case law is available on this point. Some author, in a broader context, calls "consumer" also the person selling goods or services *via* internet in order to distinguish this specific user from a professional one (F. Buffa, *Il consumatore elettronico. Comportamenti e strategie*, in *Dir. Internet*, 2006, 5, p. 525). Other authors recall the notion of "prosumer", but it does not correspond to an existing legal category for the moment (Pascuzzi, Lucchi). A more technical use of words should thus be acquainted, according to the existing legal regime on consumer law.

The Consumer Code maintains the definition of consumer (art. 1, comma 3a³⁸⁶) *strictu sensu* applicable, therefore, to distance contracts and deceptive advertising).

The actual notion of consumer is given by the *acquis communautaire*. The Italian legislation has therefore implemented the same formula: “for the purposes of this Code the following definitions are used: a) consumer or user: any natural person who is acting for purposes which are outside his trade, business or profession”.

Tribunals have often tried to over ride the substantiation of the nature of the purpose realized by a subjective criterion, in order to verify modalities of the act, the form, the circumstances of time and place, the conditions of payment. The ambiguous definition considers “to act for extraneous purposes” thus leave the room to contrasting interpretations.

Professional, on the other side, is defined as “any natural or legal person who is acting for purposes related to his trade, business or profession, or his intermediary”.

Such definitions are recalled by the regulation on e-commerce (outside the code): it is a restrictive interpretation, which does not take into account the specific features of the user of digital services.

Cass. civ. Sez. III Sent., 05 giugno 2007, n. 13083 (in *Diritto dell'Internet*, 2007, 6, p. 575, commented by I. Musso, *Provision of legal data base and applicability of the consumer protection regulation*): the legal consultant, in the event of purchase of on-line data base, shall not be considered as a consumer, whether he has subscribed the contract acting for purposes related to his profession.

Concerning the selling of products or services via eBay, an internal debate exists on the qualification of this specific form of selling.

According to some scholars an eBay purchase should be qualified as a distance sale contract ‘at open price’, to which the abovementioned legislation (contained in the Consumer Code) on distance sale contracts shall apply. According to a different opinion an eBay purchase should instead be qualified as an auction sale, as such expressly excluded from the range of application of distance sale contracts (art. 2 lett. e d.lgs. n. 185 del 1999, now art. 51 lett. e Cod. Cons.)³⁸⁷.

Please note that in the Italian system auction sales on the web are expressly prohibited by art. 18, par. 5 d.lgs. n. 114/1998. Nevertheless, in 2002 a Regulation issued by the Ministry of Productive Activities has limited this prohibition to the auction sales on the web stipulated by retailers on their behalf and for commercial purposes (Circolare 17 June, 2002, n. 3547/C). In other words: auction sales on the web are lawful if negotiated by non professionals, though - as explained hereabove - they cannot be considered as ‘consumers’ within the strict definitions of the Cod. Cons.

Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments?

This distinction is not been taken specifically into account by doctrine and case law.

Even if more common gratuitous contracts are provided by the Civil code, the principle is the freedom of parties to chose the value of their economic exchange.

Gratuitous services can be qualified as “interested (there must be an economic interests) unilateral promises” according to art. 1333 of the Civil code: these juridical acts can always

³⁸⁶ To the purposes of this code, where not otherwise provided for, the following definitions are used: a) consumer or user: any natural person who is acting for purposes which are outside his trade, business or handicrafts or profession.

³⁸⁷ Bressan, *Le problematiche relative alle aste on line*, in AA.VV., *Commercio elettronico e tutela del consumatore*, a cura di G. Cassano, Milano, 2003, p. 218.

be refused by the other party. On the contrary, they can form a contract if the service is offered for free against the duty on the other party to do something.

The exiguity is not equated to gratuity, as it qualifies the onerous nature of the contract.

The Supreme Court specified that the exiguity of the price is not relevant, as it is left to the assessment of the parties, and that it qualifies, for its own existence, the contract as being onerous: Cassazione civ. sez. III, 28 October 2009, n. 22803, *Cadenazzi C. Onnis*, in Red. Giust. civ. Mass. 2009, 10.

The only remark could emerge when assessing the standard of care referable to the provider of service in the performance of the contract.

See, recently, in the transportation field, where it has been clarified that the gratuity of the obligation, under a general principle, can mitigate but not exclude the liability of the other party (Cass. civ. sez. III, 2 April 2009, n. 8012, in Giust. civ. Mass. 2009, 4, 567, Foro it. 2009, 9, 2365)

According to art. 1371 of the Civil code, the contract lacking of consideration must be constructed as to the less demanding meaning for the party who owns the performance; should it be a contract for value, then the contract shall be constructed as to provide a fair balance of the opposite interests of the parties. This rule of construction shall apply only when, notwithstanding the application of the other criteria provided in arts 1362 ff c.c., the parties' will still remains unclear³⁸⁸.

E-commerce: The scope of these rules includes not only the e-commerce in the narrow sense, intended as an activity of electronic negotiation and related preparatory transactions (whose definition is lacking from d.lgs. n. 70/2003, as it was in the Directive n. 31/2000/CE), but also in a broader sense any kind of service, even not paid for by the recipient, insofar as it is an economic activity (such as the search engines services and o-line data base, the offer of information and commercial communication, online newspapers, on-demand videos and alike).

Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

The special regulation on e-commerce mentions the service provider, distinguishing (art. 2, par. 1b, d.lgs. n. 70/2003) between

- the 'service provider, defined as the natural or legal person that provides a service of the information society, and
- the "established service provider", provider that actually performs an economic activity through a stable organisation for and indefinite period.

In the last instance the law stresses the actual performance of the service as well as the stability of the provider's organization. Moreover, according to the abovementioned provision the stability shall be inferred by the actual performance of long-lasting economical activity. Therefore, as clearly stated in art. 2, lett. c), no relevance shall be given neither to the provider's registered seat, nor to the seat where the server's technology is placed: "the existence as well as the use of the necessary technologies devoted to the performance of the provider's services cannot be considered as the provider's established service".

The difference between a 'service provider' and an 'established service provider' can be inferred by the general rule stated in art. 3, 'decreto legislativo'. n. 70/2003, according to which a service provider having his/her course of business on the Italian territory shall comply with the national provisions applicable to the disciplined area of law, as well as with any provisions contained in the 'decreto legislativo' at stake.

³⁸⁸ Cass., 6 novembre 2008, n. 26626 in Giust. civ. Mass. 2008, 11, 1583.

In other words, this general rule adopts the so-called ‘internal market clause’, according to which the applicability of the Italian discipline is neither connected to the nationality of a provider, nor to his/her registered seat; it is rather connected to the actual performance of his/her technological activity on the Italian territory. As can be inferred by the recitals of Dir. n. 2000/31/CE, the *ratio* of this provision is to put any control over the services performed by the computer’s company on behalf of the member State where the technological activity is issued.

As a result, the information society services provided for by an agreed provider in Italy comply with “the national rules applicable in the coordinated field and with the rules of this decree”. This does not affect the free circulation of the information society services that derive from a provider established in another Member State, although the unfortunate legislative wording does not shed light on it.

Provision under art. 3 of the Directive has been subdivided, in the decree, into three articles: 3, 4, and 5, which hence need to be jointly read.

The free intra-Community provision of information society services would be the general principle. However, this statement requires some clarification, starting from what is provided for by the Directive: “Member States shall not, for reasons pertaining the coordinated field, limit the free circulation of the society information services originating from another Member State”.

The transposition/implementation into the decree differs partly:

“The provisions relating to the coordinated field referred to in art. 2, par. 1, h), shall not limit the free circulation of the information society services originating from a provider established in another Member State”.

It is not a mere lexical difference (“reasons pertaining the coordinated field” versus “provisions relating to the coordinated field”), but rather a substantial one, which concerns the “coordinated field”. It seems to refer to the case where in a Member State a certain e-commerce activity falls within the “coordinated field”, whereas in Italy it does not (and it is regulated in a narrow way). Following the wording of art. 3, par. 2, it could be possible to limit the free circulation of such services. For this reason, it is particularly relevant to clarify precisely the “coordinated field” – differently from what the decree did – as this affects not only the Italians, but also the European stakeholders.

The solution to the problem can be found in the asserted purpose of harmonisation of the Directive and in the connected principle of mutual recognition, which will most likely lead Italy to recognise the free circulation of services by foreign providers complying with the “coordinated field” of the Country of establishment.

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

There is no distinction between prosumers and professionals according to existing legislation. This term is used by scholars referring to the notion used at the European and international level.

4 Sector-specific consumer law

Q.4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to

- the conclusion of the contract for digital content services;
- the pre-contractual information consumers need to be given³⁸⁹;
- the termination of the contract (for non-performance or termination for other reasons) for digital content services?

Conclusion: According to the general law of contract, a contract is concluded whenever the offeror has (actual or implied) knowledge of the acceptance of the offeree: that is, whenever the offer reaches the permanent address provided in the offer by the offeror. (arts. 1326 and 1335 c.c.) . This general rule applies to digital services, no special rules being provided for by the legislator.

e-commerce: Art. 12 of d.lgs 70/2003 regulates the offer to the public, that is a contractual proposal directed to the public at large requiring an acceptance (art. 1336 c.c.), provided that

- the website is open to any user or to such a wide number of users that it actually makes the invitation of the offer disconnected from the person
- it contains all the essential elements of the contractual proposal

If, conversely, it is an invitation to deal, the principles on advertising communication and the pre-contractual rules referred to in art. 1337 c.c. will apply.

Pre-contractual information:

a) **Distance selling.** Art. 52 Consumer code, **information duties:** the information shall be clear and understandable for the consumer and relate to:

- identity of the provider
- address
- characteristics of the good/service offered; price (+ delivery costs)
- forms of performance of the contract
- potential additional costs, duration of offer, minimum contract duration and withdrawal rules
- consumer rights.

Such information shall be provided with any way appropriate to the means of distance communication technique used, and especially with due regard to the principles of good faith and fairness in commercial transactions, assessed in accordance with the standard of the “particularly vulnerable consumer”.

Art. 59 of the Consumers’ Code, concerning television and other audio-visual mass-media means selling, states the moment when, in particular, the information about the right to withdrawal shall be provided.

In the case of distance contracts involving the provision of goods or services, on the basis of offers made to the public at large via television or other audio-visual mass media means, where the purpose is a direct conclusion of the contract, and in the case of contracts entered into via the use of information technology or electronic instruments, such information shall be provided during the presentation of the good or the service to which the contract relates, in accordance with the special requirements of the type of instrument used and any related technological developments.

For contracts negotiated on the basis of an offer made on television, information must be provided at the beginning and during the broadcast containing sales offers.

³⁸⁹ For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

b) **e-commerce**: The e-commerce regulation provides for “general information” duties in order to identify precisely the provider (art. 7 d.lgs. n. 70/2003), information duties about commercial communication, in order to highlight its promotional nature and other indications (art. 8 and 9), further information duties about the conclusion of the contract, to be added to those provided by the distance contracts regulation at a pre-contractual stage (art. 12).

c) Personal data protection Code (Legislative Decree no. 196 dated 30 June 2003, hereinafter “Code on privacy”): this set of rules provides for general rules on the protection of personal data and specific rules for the field of electronic communications (Section X, Part II, which implemented directive 2002/58/CE on this specific area). Therefore, the use of personal data (that is to say any relating, directly or indirectly, to natural or legal persons) in the different stages of the execution of an online contract – starting from the collection of the data that are necessary to begin the contractual negotiations – shall comply with these rules.

Termination:

Withdrawal (art. 65 c.3 e 4 c.cons.):

Whether the professional has not satisfied, for distance contracts, the information duties imposed by art. 52, par. 1, f) and g), and 53, the period for exercising the right of withdrawal is, respectively, sixty or ninety days and it starts from the day of receipt by the consumer, for goods, and from the day of conclusion of the contracts, for services.

The provisions referred to in par. 3 shall apply even where the professional provides incomplete or wrong information that does not allow the correct exercise of the right of withdrawal.

Q.4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

a) **Distance contracts**: the information shall reveal a clear commercial purpose (art. 52, par. 2).

For telephone communications, the identity of the professional and the commercial purpose of the call shall be made clear and explicit; failure to observe this requirement shall invalidate the contract (par. 3).

In any case, if methods are used that allow personal communications, such information, along with confirmation and further information, shall be provided in Italian, if the consumer so requests.

b) **Business practices, advertising and other commercial communications**: Title III of the Consumer Code, as modified by d.lgs. 23 October 2007, n. 221: it applies to unfair business practices between professionals and consumers, carried out before, during and after a commercial transaction related to a product (art. 19 cons.c.).

The regulation applies, in particular, to any relationship between professionals and consumers where these are influenced by an unfair business practice that has some effects on their decisions, such as that of purchasing or not a product, on the free choice to purchase and on the decisions related to the exercise of a contractual right. On the basis of the new rules introduced by d. lgs. n. 146 of 2 August 2007, the following business practices are deemed as unfair:

- misleading practices, referred to in art. 21, par. 4, of the Consumers' Code, that is: misleading actions, in their diverse manifestations, which are listed in an exhaustive way in the aforementioned article; misleading omissions, as stated in art. 22 of the modified version Consumers' Code, as well as in art. 23, where an exhaustive list of certainly unfair practices is included;
- aggressive practices, referred to in art. 24 and 25 of the Consumers' Code, which can be expressed by nuisance, physical or moral coercion, undue influence or pressures that affect the freedom of choice or conduct of the average consumer in relation to the product, or in general those practices that concern the exploitation of any dramatic event or serious specific circumstance by the professional, in order to alter the consumer's ability to assess, thus influencing his decision about the product and any non-contractual serious or disproportionate hurdle, as well as, in art. 26 of the Consumers' Code, where an exhaustive list of business practices that the Community legislator deems surely aggressive is included.

Moreover, in relation to the provision of services not required, art. 20, 21, 22, 23, 24, 25 and 26 of d.lgs. n. 206 are referred to also in art. 57, par. 2, of the same decree, that is the Consumers' Code, as modified by art. 8 d.lgs. 23 October 2007, n. 221 (corrective and supplementary dispositions of d. lgs. 6 September 2005, n. 206 providing the Consumers' Code, pursuant art. 7 l. 29 July 2003 n. 229, providing interventions in the field of the quality of regulations, legislative reorganisation and codification- Simplification Act 2001, in G.U. 25 August 2003 n. 196).

The Authority for competition and market³⁹⁰ has considered as misleading advertising a message, expressed in a banner on the homepage of a website, logically connected through a hypertextual link to other web pages, providing an invitation to place your own commercial advertising for free whilst the user is actually asked to give his consent for the processing of personal data and the receipt of commercial e-mail. As these conditions constitute an obligation on the user, referring to a service "for free" is misleading on the basis that the user is not able to be aware of, together with the hypertextual link, the costs related to the free disposal of the service of free advertising.

³⁹⁰ The Authority is called "Garante concorrenza e Mercato". The Authority is empowered to enforce the provisions of legislative decrees 145/2007 and 146/2007, which implement EU Directives 2006/114/EC and 2005/29/EC.

Under the new rules the Competition Authority may investigate irregular commercial practices and misleading and comparative advertising acting on its own authority, that is to say, without having to wait for an external complaint to be submitted. It has investigative powers which give it the authority to access any relevant document, request information and documents of relevance to the investigation from any party whatsoever, impose penalties in the event of refusal or if untruthful information and documents are submitted, conduct inspections, use the offices of the Customs and Excise Police (Guardia di Finanza), and order expert testimony. Once a violation has been ascertained, the Authority may the party to stop it, order rectifying statements to be published at the expense of the company found liable, and issue penalties of between €5,000 and €500,000. If the practice relates to hazardous products, that could, even indirectly, threaten the safety of children or adolescents, the minimum penalty is €50,000. In the event of non-compliance with the Authority's measures, the penalty can range from €10,000 to €150,000.

According to the Consumer code's principle of transparency and fairness in advertising, the Internet trader has to make consumers obligations clearly understandable. Together with the emphasis on the gratuity of his service, the trader must point out the contractual obligations on the other party and explain in what do they consists. Otherwise, the consumer can be wrongly influenced by the supposed convenience of the offer³⁹¹.

c) **E-commerce:** Art. 8 provides that the commercial advertising shall contain, since the first dispatch, in a clear and unequivocal way, specific information in order to point out: *i)* that it is a commercial communication; *ii)* the natural or legal person on behalf of whom the commercial communication is carried out; *iii)* that it is a promotional offer such as discounts, bonus, or gifts and the related conditions; *iv)* that it is a competition or a promotional game, where permitted, and the conditions to apply.

Subsequently, art. 9 of d. lgs. 70/2003 concerns unsolicited commercial communications by email. They shall be identifiable in a clear and unequivocal way as a commercial communication since the moment when the recipient receives them and they shall contain the information that the recipient of the message can object to the receipt of future similar communications.

It is common practice to put "spam" or commercial communication as the object of the email. The proof of the solicited nature of the communication is left up to the trader.

In relation to the category of minors, the pre-existing art. 5, b) d.m. 2 March 2006 n. 145 provided that "the information or performances, directed to minors (...), shall not take advantage of their natural credulity or lack of experience and their sense of loyalty". In the field of premium rate services, the aforesaid decree states that "whatever the means employed, the advertisement shall reveal in an explicit and clearly readable way: a) the nature of the premium rate service, the maximum duration and the possible prohibitions in favour of minors; b) the cost of the service, VAT included" (art. 23, a) and b), d.m. 2 March 2006 n. 145). The current regulation, which implemented directive 25 May 2005 n. 29/2005/CE in the field of unfair commercial practices, does not provide an enhanced protection of minors, but rather contains some provisions that somehow improve the protection of this vulnerable category. In particular, the provisions included in d. lgs. n. 146, pertaining unfair practices, in the field of the protection of minors concern the case where the commercial practices, "although they reach wider groups of consumers, are capable of influencing in a relevant way only the economic behaviour of a group of consumer clearly identifiable, particularly vulnerable to the practice or the product to which they refer on the basis of their mental or physical infirmity, of their age or ingenuity" (art. 20, par. 3), or also the case where the practice, in any case considered aggressive, on the basis of the exhaustive list included in art. 26, par. 1, e) of the aforementioned d. lgs. n. 14 (black list), in a commercial message contains "an exhortation directed to children in order to purchase or persuade their parents or others to purchase their advertised products"³⁹².

A system of undertakings has also been instituted: except for cases of manifest unfairness and gross violations, the Authority may waive the need to prove that a violation has been committed if the trader undertakes to remove the unlawful aspects from its commercial practices.

<http://www.agcm.it/eng/index.htm>

³⁹¹ Garante concurr. Mercato, 20 dicembre 2001, n. 10276, in Giust. civ. 2002, I,1748. See <http://www.agcm.it>.

³⁹² On this matter, even before the coming into force of d. lgs. 146 cit., the Authority in a previous measure had highlighted that it ought to be deemed as deceptive the message that "under the perspective of the companies that provide mobile contents, it has emerged that the marketing strategies affect those that have a "purchase choice role", exercising a relevant power of persuasion towards those who purchase on his behalf, playing a compelling

The Authority, on this point, has stated that the messages intended to promote premium rate subscription services (purchase of ringtones through phone numbers with a premium rate) and spread on the Internet not only by the advertising operator, but also by the main phone services providers, through the contact with extra-price phone numbers are capable of misleading the consumers as to the characteristics, economic conditions and ways of utilisation of the premium rate ringtones services for mobiles. For this reason, they might jeopardise the economic behaviour of the consumers and take advantage of the natural credulity or lack of experience of teenagers³⁹³.

The same commercial practices have been sanctioned also if analogous banners appear during a TV programme³⁹⁴. During a live exhibition of well-known singers, a banner appearing of the TV screen was indicating a telephone number at which ring tones, with song of these singers, were available. The Authority considered this communication as an advertising, according to art. 20, par. 1, lett.a) of the Consumer Code. Moreover, such commercial communications integrate the definition of “advertising” according to art. 2, par. 1, lett. u) of the Unified Text on television broadcasting (*Decreto Legislativo* n. 177, 31 July 2006).

Therefore, the way in which the costs of the ring tone service have to be calculated or indicated must be clear, evident and visible according to art. 21b) of the Consumer code.

Moreover, the advertising induce to think that ring tones consist in original fragment of the songs displayed in the meanwhile. In the contrary, a ring tone is just the reproduction of electronic signs through alpha numerical data producing a sound similar to the announced songs and not the original live version.

Still in the field of mobile ringtones that can be activated by sms, the Authority has contended that some tv advertisings, which are broadcast during the children and teenagers programs tv schedule, constitute deceptive advertising, in particular whether the main point is the promise of a ringtone “as a gift”, by activating the advertised service “by subscription”, calling from a landline, from a mobile number by sms the number that is shown in the message captions. According to the Authority, there is a clear contradiction between the possibility to activate a subscription service and that of receiving “as a gift” a ringtone, which can be used only provided that the person accepts to pay a monthly or weekly rate and costs of the call volume to receive and download the ringtones, as it is possible to take advantage of the natural credulity and lack of experience of children, in particular where the information about the costs of the service or the omissions about the complex technical ways of activation and deactivation of the service come along with the promise of a ringtone as gift³⁹⁵.

The same problem had been previously treated concerning advertising of videogames for minors through a banner in which was indicated a phone number “144” having an additional rates, not clearly visible. In fact the information was presented into very small characters and for a very short period of time³⁹⁶.

The *Testo Unico* on telecommunications, contains a title II (CAPO II) concerning the protection of minors (articles 34 and 35). If not authorised according to specific conditions, TV programmes being prejudicial for the physical, psychological and moral development of minors must be forbidden. Art. 34 mentions explicitly programmes with a particularly violent or pornographic content.

role in persuading the parents in the decision to purchase in the field of products and brands” (AGCM, 6 February 2007 n. 16470, Pi5076, *Servizi Teleunit per maggiorenni su riviste per ragazzi*, in *Boll.* 26 February 2007 n. 6).

³⁹³ AGCM, 10 January 2008, n. 17856, in *Giust. civ.* 2008, 4, 1081.

³⁹⁴ AGCM, 21 September 2006, n. 15976, *Market e suonerie al numero 48412*.

³⁹⁵ AGCM, 31 May 2006, n. 15575, in *Giust. civ.* 2007, 2, 512. See also AGCM, 30 August 2007, n. 17209.

³⁹⁶ AGCM, 16 May 1996, n. 3897.

Specific information duties for the protection of general interests such as the prevention of torts and the protection of minors. They are regulated by:

- Deontology and good conduct for the electronic services Code, of the Association for the convergence in the communication services (ANFOV), which came into force on the 1st January 1998.

- Internet and Minor Self-regulation Code, of 2003, art. 4, types of responsibilities:

- i. the access provider shall insert clauses that give responsibility to the client for the use of services allowed to third parties
- ii. the housing/hosting provider shall identify his own client
- iii. the content provide shall identify the nature and contents of the communication
- iv. the internet point provider shall provide the instruments appropriate to surf the net and to identify the user of the services.

The interface between consumer law and sector-specific information law is a topic that has been often overlooked when discussing the legal position of the digital consumer. In other words, there is yet little research on and experience with how general consumer or contract law and sector-specific consumer law interact. For example, the existing sector-specific restrictions on advertisement in audiovisual or e-commerce law could become relevant when interpreting consumer law's rules on unfair commercial practices and whether a practice is in accordance with professional diligence? To give another example, rules in national copyright law that allow users to make copies for private purposes or backup might be relevant when assessing the fairness of contractual terms under general contract law. It is this set of problems that Q.4.3 aims at.

Q.4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- **does sector-specific law determine any remedies?**
- **could a consumer invoke general consumer and contract law remedies³⁹⁷?**

Please indicate if there is case law on any of the points mentioned. If so, please provide a reference, a short summary of the facts and of the decisions of the courts.

According to Art. 27 of the Consumers' Code, following an application by any subject or organisation that might be interested, the Authority forbids the prosecution of the unfair commercial practices and erases their effects. Where there is particular urgency, the Authority can order, by a reasoned measure, the temporary suspension of the unfair commercial practices, communicating the beginning of the procedure to the professional. Whether the purchaser is unknown, the Authority can request any information that could be useful to identify it from the owner of the means that spread the commercial practice. Furthermore, the Authority can require enterprises, companies and persons to give all the information and the documents they have, which could be relevant to ascertain the violation.³⁹⁸ In the event of failure to obey, administrative penalties shall apply.

³⁹⁷ E.g. unfair commercial practices, unfair contract terms, avoidance/voidability of the contract, termination or damages.

³⁹⁸ During the pre-investigation activity as well as during the investigation, the Case Officer may request information and documents from any party, whether private or public: see Articles 4 and 12 of the AGCM Resolution no. 17590 of November 15th, 2007 (Regulation on procedures for investigating misleading and unlawful comparative advertising, Official Gazette no. 283 of 5 December 2007, modified by Resolution no. 20223 of July 29th 2009, in Official Gazette no. 209 of September 2009) and art. 4 and 12 of the AGCM Resolution no. 17589 of November 15th, 2007 (Regulation on procedures for investigating unfair commercial

With the exception of the cases of evident unfairness and seriousness of the commercial practice, the Authority can obtain from the liable professional the assumption of the commitment to put an end to the violation, ceasing its diffusion or modifying it in order to eliminate the illegal features.

The Authority can also order the publication of the declaration of the commitment by the professional (and paid for by the same). In such circumstances, the Authority, after assessing the adequacy of these commitments, can make them compulsory for the professional and conclude the procedure without ascertaining the violation.

With the measure that forbids the unfair commercial practice, the Authority orders as well the infliction of an administrative pecuniary penalty from euro 5.000,00 to euro 500.000,00, taking into account the seriousness and the duration of the violation. In the case of unfair commercial practices under art. 21, par. 3 and 4, the penalty shall not be less than euro 50.000,00.

In case of failure to comply with the interim measures, the injunctive orders or the orders to remove the effects referred to in art. 3, 8 and 10 and in case of failure to comply with the commitments referred to in par. 7, the Authority shall apply an administrative pecuniary penalty from euro 10.000,00 to euro 150.000,00. In the cases of reiterated failure to comply, the Authority can order the suspension of the enterprise activity for a period not exceeding thirty days.

The jurisdiction of the ordinary judge shall remain unaffected in matters concerning:

- unfair competition, as covered by art. 2598 of the civil code
- infringement of the copyright law.

Before commencing such procedure, according to art. 27^{ter} it is possible for consumers, also through their associations and organisations, to contact the responsible subject or the body entrusted with the supervision over the conduct code related to a specific area, in order to pursue an agreed resolution of the dispute, prohibiting the prosecution of the unfair commercial practice.

5 Formation of contract and pre-contractual information

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

a) **E-commerce:** art. 7 of the decree 70/2003 provides that the provider shall render easily and constantly available to the users of the service and to the competent Authorities a vast list of information that identify the provider from a legal, administrative and fiscal standpoint (name or corporate name, domicile or registered seat, number of inscription in the register of economic activities or company register, VAT number, etc.). Among these, also the information, included the email address, which allow to contact the provider quickly and to communicate directly and effectively with it are also mentioned (c).

practices, in Official Gazette no. 283 of 5 December 2007, modified by Resolution no. 20222 of July 29th 2009, in Official Gazette no. 209 of 9 September 2009).

The following art. 8 states the transparency duty for all forms of communication intended to promote goods or services (excluding *domain name* and email addresses).

In order to comply with the need to translate the criteria for the awareness of the general conditions, pursuant to art. 1341 c.c., as regards the electronic negotiations, par. 3 of art. 12 provides that the clauses and the general conditions of contract shall be made available to users in order to allow the storage on their computer.

b) distance selling: Moreover, according to art. 52, c. 3 Cons. Cod. (distance sales) and art. 9 of the decree n. 70/2003 should professionals use the phone or internet in order to contact consumers they must clearly and unequivocally introduce themselves, their identity and the purpose of the contact. Non compliance with these provisions shall lead to the voidness (nullità) of the contract. (Art. 52, c. 3 Cons. Cod.)

c) **General rules on contracts:** the adequacy, the completeness, the comprehensibility and clearness of the information can always be considered under the perspective of the good faith principle under art. 1337 c.c.

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

a) **E-commerce:** par. 3 of art. 12 provides that the clauses and the general conditions of contract shall be available to users in order to allow the storage on their computer.

b) **Distance contracts:** (art. 53 cons.c.) the information shall be made available on a durable means before or at the moment of the performance of the contract.

There are no specific provisions related to the electronic means used by the consumer.

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license³⁹⁹, considered to be validly concluded contracts?

Yes, they are enforced contract under Italian Law.

Q.5.4 Under what conditions are the terms of a standard form agreement⁴⁰⁰ binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms⁴⁰¹ necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?⁴⁰²

The conclusion of an electronic contract is equated to the conclusion of standard contracts, specifically regulated by the Civil Code (art. 1342 c.c.).

³⁹⁹ 'Browse-wrap' means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

⁴⁰⁰ For instance those included in the click-wrap or a browse-wrap license.

⁴⁰¹ E.g. by clicking 'I agree' in a dialog box.

⁴⁰² E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

Supreme Court, 22 March 2006, n. 6314 (in Contratti, 2006, p. 445, commented by Minassi): even though there was no standard form, or any written form on a ‘take-it-or-leave-it’ basis to be filled in, also the reproduction of an electronic document or “file”, prepared by the enterprise / professional and intended to be used for an undefined number of relationships, constitutes an employment of a “standard form”, intended as a base-document to be used as a model for the reproduction in an undefined number of cases.

The existence on the web of a contractual text, intended for the conclusion of electronic contracts in the current legislative framework shall anyway entail the possibility, for the consumer, to reproduce it and save it (art. 12 d.lgs. 70/2003), so that, where the rule is correctly applied, a document of reference shall still exist, and can be reproduced by the consumer; in relation to which the same constructive procedures provided for the traditional contracts shall apply. The possibility that the document cannot be reproduced would imply the invalidity of the contract for violation of a special rule, resulting in the ineffectiveness of a potential unfair clause towards the consumer.

Under art. 1342, par. 2, the clauses of a standard contract shall be specially accepted by a consumer’s double signature in writing. These conditions have to be adapted to the Internet context.

For this purpose, some have deemed it sufficient that the standard terms appear on the computer screen of the user with subsequent screenshots and particularly clear forms; otherwise, as an alternative that it is required re-accept, at the end of the contractual clauses, the same unfair terms by the selection of an appropriate “button”, as it happens for the acceptance of the conditions of use licence for online sales of software. Thus, it should be possible to have a full awareness by the same cybernaut about the meaning of the clause accepted at the time when the cybernaut provides the specific “acceptance” of the unfair clause, by filling in an appropriate form, pre-arranged on a e-commerce website.

In order to solve the problem, it was suggested to confer a user id and a password to the purchaser, subject to registration of the personal data of the client. According to Uncitral, the authentication of the provenience of the statements included in an electronic document can be rendered on the basis of three categories: *something you know*, *something you are*, *something you have*; which refer respectively to a system of authentication based on the knowledge of the user (such as the knowledge of a password and a personal number of identification), on the physical characteristics of the user (such as the fingerprint or a retina scan) or on the possession of an object by the user (such as a magnetic card or a smart card).

Such possibility, however, seems to fall as a result of the new provisions on digital signatures (d.lgs. 7 March 2005, n. 82), according to which: “the electronic document subscribed by a qualified electronic signature or by an electronic signature that satisfy the legal requisite of the written form”, with the further requirement that it is formed in compliance with technical rules “that assure the possibility to identify the author and the integrity of the document”. Whether, therefore, the online contractual regulation arranged by a party provides for the insertion of unfair terms – in relation to the contract concluded by the “point and click” modality – either that the thesis of the express acceptance of the proposed conditions is favoured, either that, conversely, the thesis of the conclusion of the contract by conduct is preferred, the filling of a specific acceptance form of the unfair clause by the cybernaut, cannot be considered as sufficient to meet the requirements imposed by the law, which are essentially the specific written acceptance referred to in art. 1341 c.c.⁴⁰³.

⁴⁰³ **Justice of the Peace of Partanna**, 1st February 2002, in Contratti (I), 2002, 10, pp. 869 ss., commented by G. CASSANO – I. P. CIMINO, On-line contract and protection of the weak party: the conclusion of an on-line sale

Excepting to the case – thus far exceptional – of the use of the digital or the electronic signature, the party that concluded a point and click contract online could complete the contractual regulation in a second step. According to this hypothesis, he could successively provide in writing the specific signatures required to make these clauses binding.

In the case of failure to subscribe the paper copy there could, therefore, be a peculiar case of subscriber liability. In fact, the subscriber could be considered under the duty to integrate the contract already concluded online, as “promised” in the act of the conclusion of the agreement.

On the contrary, where the electronic acceptance of standard terms was pre-contractually granted in a way that could be deemed as sufficient to focus the subscriber attention on their content it shall be contended, in our opinion, that the need for protection of the consumer, that is the basis of art. 1341 c.c., will be satisfied.

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy⁴⁰⁴, or may the information also be given via electronic means?⁴⁰⁵

a) *Distance selling*: under art. 53 of the Consumers’ Code, the consumer shall receive written confirmation or, at his request, confirmation in another durable means accessible to him, of all the information referred to in art. 52 Cons.c.

By the conclusion of the contract, consumers shall also be provided with the following information:

- a) details of the conditions and procedures for exercising the right of withdrawal, pursuant to Section IV of this Chapter, including the cases pursuant to art. 65, par. 3;
- b) the address of the professional against whom the consumer may make claims;
- c) information about after-sale services and any existing guarantees;
- d) conditions for withdrawing from the contract when it is of unspecified duration or a duration exceeding one year.

Justice of the Peace of Bari, 5 May 2009, n. 3488, *Giurisprudenzabarese.it* 2009: on the basis of the consumer protection regulation, and in particular art. 53 of the Cons. Cod. (d.lgs. 6 September 2005, n. 206), the consumer has the right to receive written confirmation of the contractual terms in case of distance contracts, or on another durable means accessible to him, of all the information referred to in art. 52, among which is included the clearness about the essential characteristics of the service and the costs for the use of the distance communication technique, where it is considered on a different basis than the normal cost. Therefore, Telecom has the duty to provide the evidence that it has clarified all these details to the consumer at the time of conclusion (in the considered case: the costs of the whole service, including the net surfing with all the potential automatic risks), and the declared destruction of the evidence of what actually said and agreed upon and of the clarification provided, determines a presumption of liability on its part, as it is for Telecom to proof that it has complied with the statutory duties.

contract does not imply an unreserved acceptance of the clauses contained in the general conditions published on the web, as the d.P.R. n. 513 of 1997, although recognising the quality of private deed to the electronic document, does not constitute any exception to the regulation on unfair terms referred to in art. 1341, par. 2, c.c.

⁴⁰⁴ E.g. on paper or on CD/DVD.

⁴⁰⁵ E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer’s computer.

In the case of contracts concluded following an offer carried out through the television means, the information about the right of withdrawal shall be provided in written form and not later than the time of delivery of the goods.

a) E-commerce: Par. 2 of art. 13 (d.lgs. 70/2003) affirms the accessory duty to communicate the reception of the order, the failure of which does not jeopardise the conclusion of the contract.

The failure to comply with the duty to send the receipt has no remedy; surprisingly, the legislator even deprived it of the administrative penalty provided by art. 21, which has led to doubt its real binding nature.

Moreover, the article states that the receipt is deemed received when the recipients have the possibility to access it. This presumption of knowledge refers impliedly to the schemes of art. 1335 c.c.

As part of the contract formation process, consumers have the right to be informed about prices, costs and the main characteristics of goods or services prior to the conclusion of a transaction.⁴⁰⁶ This right cannot be waived. The following questions are meant to explore to what extent the legislation or case law of your country imposes additional specific information duties for digital content services.

Q.5.6 Are you aware of any specific information duties for providers of digital content services?⁴⁰⁷ If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

Art. 12, d.lgs. 70/2003: the provider, unless otherwise agreed by the parties that are not consumers, shall provide in a clear, comprehensive and unequivocal way, prior to the dispatch of the order by the recipient of the service, the following information:

- a) the different technical phases to be followed for the conclusion of the contract;
- b) the way in which the concluded contract will be stored and the related ways to access it;
- c) the technical means at the disposal of the recipient in order to determine and correct the mistakes in the insertion of the data, prior to the dispatch of the order to the provide;
- d) the potential conduct codes to which it adheres, and how to access them online;
- e) the languages available for the conclusion of the contract, other than Italian;
- f) the indication of the instruments to solve disputes.

These provisions are not applicable to contracts concluded exclusively by the exchange of emails or other comparable individual communications.

Special information duties are also requires by art. 52 cod.cons. (distance selling), though they do not concern the redress mechanism:

⁴⁰⁶ See for instance Article 5 of the Proposal for a Consumer Rights Directive.

⁴⁰⁷ For example about the fact that a piece of music or video is subject to technical restrictions so that it cannot be copied or only played in a certain region; or that when using the service personal data will be collected (spyware); that a service is incompatible with certain software; about eventual sponsoring or other commercial influences.

- A Identity professional and his/her address (should down payments be made by consumers);
- b) the essential characteristics of goods or service;
- c) the price of goods and services (taxes included);
- d) delivery expense
- e) payments, delivery and performance details;
- f) right of withdrawal, or exclusion of the right of withdrawal (the case being under art. 55, par. 2);
- g) restitution of goods details, should the right of withdrawal be exercised by consumer;
- h) costs of the use of distance technology, should they be calculated differently from the basic advertised fee;
- i) period of validity of the offer and of the price;
- l) minimum time period of the contract in case of supply contracts of goods or services

Special information duties upon the Provider:

Upon the internet services providers are placed particular information duties, in order to protect general interests such as the prevention of torts and the protection of minors. They are regulated by:

- Deontology and good conduct for the electronic services Code, of the Association for the convergence in the communication services (ANFOV), which came into force on the 1st January 1998

- Internet and Minor Self-regulation Code, of 2003, art. 4, types of responsibilities:

- v. the access provider shall insert clauses that give responsibility to the client for the use of services allowed to third parties
- vi. the housing/hosting provider shall identify his own client
- vii. the content provide shall identify the nature and contents of the communication
- viii. the internet point provider shall provide the instruments appropriate to surf the net and to identify the user of the services.

The ISP has also the duty to specify in the access contract that the processes of uploading and downloading programs or files through the web shall occur under the exclusive supervision and responsibility of the client.

With a measure on 3rd February 2005, the Authority has ordered specific measures for the procession of data in relation to the case on interactive TV (doc. Web n. 110903).⁴⁰⁸

Q.5.6 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer?⁴⁰⁹ If so, please specify.

No provision requires a specific form.

- Distance contracts: the law only prescribes that the provider provides the information with any means adequate to the distance communication technique (art. 52, par. 2).
- As concerns the confirmation, it shall be in writing or on other durable means, at his request (art. 53, par. 1).

⁴⁰⁸ <http://www.garanteprivacy.it/garante/doc.jsp?ID=1116787>

⁴⁰⁹ E.g. before the signing of a contract, in clear and comprehensible language, in sufficiently large letters, etc.

- E-commerce (art. 7): the information shall be accessible in an easy, direct and permanent way.

The clauses and the general conditions of the contract proposed to the recipient shall also be available to him in order to allow the access at any time without the use of particular technologies that make the reading difficult (plug in, too big files for an average computer)

Information must be displayed in the website of the provider and not elsewhere and must be accessible 24h/7days.

An updating system shall also be guaranteed (par. 2).

Q.5.7 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?⁴¹⁰

For the case of failure to comply with such provisions, the Consumers' Code, as well as the d. lgs. 70/2003, provide for an administrative pecuniary penalty.

On the contrary, there is no mention of the consequences on the civil field.

The most evident solution, hence, is clearly to assert a pre-contractual liability on the professional for violation of the general clause of good faith under art. 1337 of the Civil code, as the activity of implementation of the contents of such clause by the scholars and the courts had led to affirm a punishable behaviour, not only in the unjustified withdrawal from negotiations or in their malicious beginning, albeit in the absence of any real intention to come to an agreement, but also in the violation of the legitimate expectation of the counterparty in relation to the conclusion of the contract.

In this perspective, the lack or incompleteness of information result in a duty, for their author, to compensate the loss, as a consequence of the recognition of a liability for the violation of the pre-contractual duty of good faith.

Nevertheless, the prohibition to waive the information duties leads to believe that the ratio for the regulation lies, besides on the intention to allow the consumer to express a conscious and thought-out consent, also on the protection of an interest to transparency, fairness and equity in the commercial transactions; such interest does not pertain only to consumers, although they occupy a privileged position of protection within the legal system, but in general to purchasers, also where the latter are enterprises or professionals.

On this ground, which also leads to recognise the nature of binding rules to those pertaining to the compulsory information duties, it is necessary to verify the possibility, in case of their violation, of the invalidity of the contract, under the profile of the so-called virtual (or implied) nullity.

Accordingly, whether the statutory text lacks a specific provision of nullity, the recognition of a public policy purpose to the rule, in any case, allows to invoke the nullity of the contract, as the first paragraph of art. 1418 c.c. constitutes a general principle, whose ratio is to regulate those cases where the violation of binding rules is not assisted by a textual provision of nullity, leaving to the judge the task to determine, for the purpose of the declaratory of nullity, whether the infringed rule has actually such binding nature.

⁴¹⁰ E.g. voidability or termination of the contract, damages, prolongation of the period for the exercise of a right of withdrawal.

This being the situation, the rules pertaining to the information duties can be considered as binding, due to the evident willingness to assure, through them, the transparency of negotiations. The information acquires “a scope that goes well beyond the code limitations provided by art. 1338 c.c. and the same regulation on the defects of intention”.

The information becomes the necessary content of all the contracts regulated by the aforementioned regulation, which is “the basis for the same regular and valid coming into existence of the contractual operation”, in the sense of minimum necessary content, from which derives the nullity of dissimilar and contrary agreements: this is for the protection of the interest, public and social, intended to protect a higher principle of transparency, fairness and balance in the negotiation.

In relation to the contract concluded through an on-line form, it will be only for the consumer to decide whether to keep alive the contract concluded in the absence of the prescribed information; in other words, the defected contract can be kept alive or nullified to the discretion of the consumer, who is the only subject entitled to make the claim. As a practical result, the standard of proof for the nullification of the contract is less rigid: it will be sufficient to allege the absence, in the on-line form, of the prescribed information; and in such task the consumer will also be facilitated by the duty, imposed on the professional, to make such information easily storable.

6 Right of withdrawal

Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

There is no other provision on withdrawal. Courts have affirmed the consumer’s right of withdrawal from a licence contract for software that was already installed in the computer he had bought and he didn’t meant to use.

The consumer can return the software to the computer’s producer and get refunded of a sum corresponding to the price of the software⁴¹¹.

Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

⁴¹¹ Giudice di pace Firenze, 28 September 2007, n. 5384, in *Il civilist*, 2008, 4, p. 17 nota Perri; in *Il merito* 2008, 1-2, p. 11 nota O. Atzeni; in *Dir. informatica*, 2008, 1, p. 68 nota Sammarco.

When the digital service is incorporated in a material good, like a CD, parties shall be released from their respective obligations arising out of any contract or contract proposal according to art. 66 of the Consumer Code. If, in the meantime, any requirements have been met out in full or in part art. 67 provides further obligations of the parties to be respected.

In this rule, paragraph 4 states explicitly that if the right of withdrawal is exercised by the consumer, professionals shall be required to refund any monies paid by consumers, including any deposits. Refund must be made free of charge, in the shortest possible time, and never any later than thirty days after the date upon which the professional was informed of the consumer's intention to withdraw. These sums shall be understood to have been refunded if they are effectively returned, sent or credited with an effective date of no later than the termination of the period previously indicated.

It seems thus that this hypothesis covers also the great part of cases of direct e-commerce. In fact, in these type contracts, the delivery of the good occurs right after (quite simultaneously) the conclusion of the contract and it corresponds to the moment in which consumer can access to the web page for the downloading. Though, it seems that legislator was more thinking about indirect e-commerce contract providing that “any goods have to returned when they are delivered to the post office accepting the delivery or to the forwarding agent” (par. 4).

The conditions of delivery foresee that the consumer must return the substantial integrity of the delivered good and this circumstance constitutes an essential prerequisite for the exercise of the right of withdrawal. However the goods need only be returned in a normal state of repair, to the extent that they have been kept and preferably used with all due care and attention.

Owing to par. 3, the only expenses due from a consumer when exercising his right of withdrawal must be the direct expenses of returning any such goods to the sender, where expressly provided for in the contract. Consumers are be required to return goods or to make them available to the professional or the person appointed thereby, according to the procedures and timeframes provided for in the contract.

On the other side, the professional is required to refund any monies paid by consumers, including any deposits. Refund must be made free of charge, in the shortest possible time, and never any later than thirty days after the date upon which the professional was informed of the consumer's intention to withdraw.

The term for returning the goods cannot be less than ten business days after the day the goods were received.

Concerning the moment in which professional has to grant the refund, par. 4 provides that sums have to have been refunded, sent or credited with an effective date of no later than the termination of the indicated period. However, the list indicating the possible ways of refund does not have be considered exhaustive.

According to art. 143 of the consumer code, the right of withdrawal is an inalienable rights so that any covenant in conflict with this provision is void.

If the digital content is supplied as a service, art. 55, par. 2 of the Consumer code provides that right of withdrawal cannot be awarded if the provision of services has already begun, with the consumer's agreement. Parties remain free overcome this rule agreeing otherwise.

Moreover, letter d) states that consumers are not entitled to any right of withdrawal in case of supply of audio or video recordings or computer software which were sealed and which have been opened by a consumer.

This kind of products is, notwithstanding, the most widespread indirect e-commerce and their exclusion constitutes a serious leak in seeking cyberconsumer's protection that can only be overcome by parties.

Even if it seems that the legislator has not explicitly considered direct e-commerce contract, the same rules could be applied by analogy. Thus, as the downloading corresponds to opening of the software, withdrawal could be hardly awarded to consumer.

Finally, if a professional has failed to meet his information requirements, the period for exercising the right of withdrawal shall ninety days respectively, and in the case of goods, shall commence on the day of receipt by the consumer, for services, from the day the distance contract is concluded (art. 65, par.3). The following paragraph extends this measure if a professional supplies incomplete or incorrect information that does not permit the right of withdrawal to be exercised correctly.

In any case, parties are always entitled to agree upon broader guarantees for consumers

Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

There is no specific rule on this point.

Nevertheless, it should be possible to find an answer according to internal law having regard to the analogous case regulated on distance contracts financial services.

If the consumer exercises the right of withdrawal after having already agreed to partial performance of the service, he may be required to pay the service provider for the service rendered.

If the service has been rendered in its entirety before the right of withdrawal is exercised, that right can no longer be exercised and the consumer will have to pay for the service (art. 67*ter decies* c.cons).

Otherwise, a consumer that uses the right of withdrawal foreseen by art. 67*duodecies*, par. 1, must pay only the amount of money corresponding to the financial service already provided by supplier. In insurance contracts, the business can withhold a sum corresponding to the part of premium rates related to period of time during which the service has been rendered.

Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

There is on this point a long lasting doctrinal debate concerning the need to invoke the notion of “interdependent contracts” (*collegamento negoziale*). This notion expresses the economic interconnection between independent contracts aiming to a common purpose.

The connection can be unilateral or reciprocal, depending on the fact that only one is connected to the other or, on the other case, that all contracts are mutually interdependent.

According to case law, this form of contractual connection has to be distinguished from a mixed contract. In the former case several are documents simultaneously existing, whilst in the latter case only. Moreover, while a mixed contract is characterised by a unique complex “causa”. Every interdependent contracts has a proper cause but is pursuing to the same interest. As a result, the validity of each contract affects the others according to the general rule *simul stabunt simul cadent*.

7 Unfair contractual terms

Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a ‘main obligation’ under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

Legitimate users of a protected right can make any acts necessary for the correct functioning of the program without asking for the authorisation of the copyright owner (art. 64^{ter} and *quarter*).

Therefore, contractual clauses violating the legitimate right to use are void (art. 64^{quarter}, par. 3).

Moreover, according to consumer law, a contract clause preventing a user from benefitting from the provisions of Sezione II - Riproduzione privata ad uso personale, Art. 71-sexies et seq. Decreto legislativo "Attuazione della direttiva 2001/29/CE del Parlamento Europeo e del Consiglio del 22 maggio 2001 sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella società dell'informazione" could be considered unfair.

For the moment, producers of such products seem to be free to decide on the playability only into a certain region. However, no case law is available on the specific case.

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

The Personal data Code contains general rules on data protection. Specific provisions are devoted to electronic communication (Title X, Electronic Communications, from art. 121 to 134).

Therefore, rules here provided apply to the processing of personal data in connection with the provision of publicly accessible electronic communication services on public communications networks. Contracts concluded through electronic means must be consistent with these rules, otherwise any contrasting clause is void.

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

No case law is available on this specific issue.

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

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

There is no debate on this issue.

8 Failure to function properly

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

There is no case law on this point at the moment.

Even though, it can be said that concerning goods, such a CD, legitimate expectations of consumer could be related to existing criteria on conformity with the contract.

If the transfer of a software is defined a licence or as a service contract, the consumer's expectations could be relevant at the moment of the verification of results.

Moreover, the courts must always take into consideration relevant contractual interests related to constitutional rights.

“Electronic freedom” has been defined as “freedom to use electronic tools in order to inform and to get informed. The constitutional ground of this freedom can be found in the freedom of information: any individual has the right to receive, publish and express his own opinion.

A specific form of “electronic freedom” has been defined as “telematic freedom”, that is freedom of making distance telecommunication through Internet means, of electronic information.

In the Italian legal system, these principles have been affirmed by the Code of digital administration (d. lgs. 159/2006). The Legislators has thus, even if expressly, underlined the importance of the process “digitalisation” of the society. Art. 9 states the right to a “democratic participation” to technologies, reinforced by the “electronic alphabetisation” required by art. 8.

Limits to freedom of expression, and consequently of freedom of information in every kind of form, are imposed by art. 21 of the Constitution on “principle of morality” (*buon costume*). This notion expresses rules that have to be acquainted in relation to a given historical period and in a given civil society. In addition, freedom of expression must be balanced with public order and human fundamental rights (privacy, identity, honour, etc.)

**Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what ‘normal use’ of a service is, e.g. - the ability to make private copies according to copyright law,
- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),
- the suitability of certain contents for minors as stipulated under audiovisual media law,
- journalistic codes of conducts, etc.**

There is no case law on this point. Therefore these aspects can be regarded only in a doctrinal perspective.

The definition of the “normal use” is left up to the judge. Despite no specific standard is provided for digital content service, they could be defined according to existing legislation. The ability to make private copies is defined by to the law on copyright. This set of rules outlines the standards on the legitimate use of digital tools, determining the balance of exploitation rights on contractual parties.⁴¹²

Art. 71*sexies* of the law on copyright establishes cases in which private use is legitimate. Information related to personal data must be protected, according to the existing mandatory law, in relation to any kind of data flow (art. 4 Code on privacy).

Moreover some codes of conducts have been annexed to legislative provisions, like the Code on privacy, and could represent an important reference⁴¹³.

⁴¹² DRM are allowed, according to art. 102*quater* of the Law on copyright (legge su diritti d'autore), introduced by art. 23 on the d. lgs. 68/2003 transposing Directive 29/2001. Art. 102*quinquies* provides that copyright owners can give electronic information on DRM, as they concern the use of rights characterizing the protected immaterial product. Thus, this information, related to the main object of the contract, must be compulsory under the Consumer Code in case of distance and e-commerce contracts. However, no case law is available.

⁴¹³ The Personal data code has the following annexes: Codice di deontologia - Trattamento dei dati personalia nell'esercizio dell'attività giornalistica; codici di deontologia - Trattamento dei dati personali per scopi storici ; Codice di deontologia - Trattamento dei dati personali a scopi statistici in ambito Sistan; Codice di deontologia e di buona condotta per i trattamenti di dati personali per scopi statistici e scientifici; Codice di deontologia e di buona condotta per i sistemi informativi gestiti da soggetti privati in tema di crediti al consumo, affidabilità e puntualità nei pagamenti; Codice di deontologia e di buona condotta per i trattamenti di dati personali effettuati per svolgere investigazioni difensive

Digital content services, particularly when they are protected by DRM (Digital Rights Management) can only be used with compatible consumer equipment. Furthermore, they may require a certain software environment.⁴¹⁴ What thus ‘normal use’ is depends on the technical standards that are used. In some European countries there has already been case law saying that CDs that fail to play on different devices (car radio, computers, etc.) can be considered as defective products. The question is whether the judges in your country could come to a similar conclusion regarding digital content services, such as downloadable eBooks or music files.

Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?⁴¹⁵ If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer’s hardware and middleware?

The software distribution licence contract regulates technical aspects related to the definition of services, conditions and procedures of the supply and the relation between recipient and supplier.

The main clauses of the contract concern the product and the nature of the licence.

The contract has to provide information about: the description of the program; the identification number; technical features; hardware compatibility; user instructions.

The general principle of good faith constitutes the criterion to evaluate the relevance of information provided in relation to the “normal use” expected (artt. 1337, 1375 c.c.).

The compatibility information should be given before the conclusion of the contract, according to the general rule of good faith.

Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

No specific case law on digital content services is available.

As it has been recalled in the first answer, consumer can invoke sale of good guarantees if the service concerns standardised software.

Art. 130 prescribes that the consumer, at his discretion, may request the vendor to repair or replace the goods, free of charge in either case, unless the remedy requested is impossible or disproportionate.

The repairs or replacements shall be completed by a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer purchased the goods.

At his discretion, the consumer may require an appropriate reduction of the price or have the contract cancelled in one of the following situations: a) repair or replacement are impossible or disproportionate; b) if the vendor has not repaired or replaced the goods by a reasonable

⁴¹⁴ E.g. the latest version of Windows, Media Player or Adobe Acrobat Reader.

⁴¹⁵ Idem.

time pursuant to paragraph 6; c) the replacement or repair carried out previously caused significant inconvenience to the consumer.

These rules cannot be applied if the digital content is a particular software specifically provided so that it can be considered as a “tailored” item, therefore excluded from consumer law rules.

In this case, the consumer could invoke general law on defective goods regulated in the civil code.

The seller has to grant that the good does not have defects able to make it unfit for its purpose or that can lower its value (art. 1490 c.c.).

The customer can ask, at his choice, for termination of contract or for the reduction of the price (art. 1492 c.c.). The term indicated for the action is eight days from the discovery of the defect, except if parties agreed otherwise (art. 1495 c.c.).

The seller must also compensate for damages if he cannot prove that he was not aware of defects (art. 1494 c.c.).

If the defects revealed do not compromise the normal destination agreed by parties, the customer can invoke it can be the lack of required qualities (art. 1497 c.c.) and ask for termination of the contract.

Finally, according to those scholars considering that it has to be applied to digital content service special provisions on “service contract” (*appalto*), the set of rules that could be invoked is different. The supplier has to grant for defective services according to art. 1668 c.c.

The recipient has to report the defect within sixty days from its discovery and ask for the supplier to eliminate, at his own charge, any defect or for a price reduction. If the service is unfit for its purpose, he can ask for termination.

Analogous measures can be adopted also if the digital service contract is qualified as a rental agreement (art. 1758 c.c.). The supplier must compensate for damages caused to the customer.

No case law is available.

Q.8.5 For how long after delivery of the digital content service (weeks, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)⁴¹⁶? If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

The consumer shall lose the rights provided for by Article 130 (2) c. cons. if he does not report to the vendor the lack of conformity by no later than two months after the date on which he discovered it (art. 132 of the Consumer code)⁴¹⁷.

Except where proven otherwise, it shall be assumed that the defects arising by six months after the delivery of goods already existed on that date, unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity.

⁴¹⁶ Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

⁴¹⁷ Trib. Monza Sez. IV, 01-03-2005, D.A. c. S. s.r.l., Massima redazionale in Banca dati De Agostini, 2005

Proceedings intended to enforce the lack of conformity not fraudulently hidden by the vendor shall in any event expiry after twenty-six months from delivery of the goods.

If digital content service is defined as a service contract, the defect must be declared within 60 days from the discovery.

The term of prescription is two years.

Both hardware and software are subject to technological development. At a certain moment, a digital content service will no longer be compatible with new hardware and software unless it is updated.

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

For the moment it is not requested.
No case law is available.

Digital content services are increasingly being offered by resellers. For example, producers of mobile phones often operate so-called m-commerce platforms where consumers can download applications ('Apps') for their mobile phones for free or against a fee. These applications are often written by third party application writers that are not necessarily affiliated with the mobile phone company. In such situations it is not always clear to consumers who is the contractual counterpart of the consumer receiving such services. This can cause problems for consumers for example to seek redress when the software fails to function, or in obtaining after-sales software support.

Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identify, geographical address or further details?
a) the operator of that platform, or
b) the third party application service himself?
Should this be done before or after the contract is concluded?

In this case the third party application service is liable.
Information must be provided according to art. 7 and art. 12 of the d.lgs. 70/2003.

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

Contractual liability:

According to general contract law on sales, the platform provider is liable towards his client (the consumer) if the hardware providing the software is defective.

If the defect depend on the digital content, both, the third party and the platform are liable.

If the defect is caused by the platform the provider is the only liable.

If the device causes the defect: it must be verified if digital content supplier had previously pointed out the existence of restrictions to the normal use of the application.

The Internet provider is liable only if he interferes with the transmission of data. The rules concerning the liability of intermediary service providers are provided by d. lgs. 70/2003.

As it constitutes an exception to the general rules on tort law, the cases indicated in this special legislation are exhaustive.

No general obligation on is imposed to providers, when providing the services, to monitor the information⁴¹⁸ which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity so that the application of art. 40, par. 2 c.p. is excluded.

9 Remedies for non-performance and termination of a long term contract

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

Apart from what stated in question 3.2., no specific remedies have been developed
No case law is available.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

The consumer can invoke the execution or the termination of the contract, as well as claim for damages (art. 1453 c.c.).

If the professional fails to fulfil his own obligations arising from the contract, the consumer can always refuse the fulfilment of his obligation. According to art. 33, par. 2r) a clause limiting or excluding this consumer's right is presumed to be unfair, unless proved otherwise. Therefore, in case

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

According to general contract law, previous notification is not requested as a condition for a claim of termination of contract for non performance or damages.

⁴¹⁸ Tribunale Milano, 24 February 2010, in *Foro it.* 2010, 5, 279.

A specific rule is provided by art. 1454 of the Civil code. This rule states that the consumer can intimate to the other party to perform the contract within an adequate term. This notification must be written and the term given for the execution cannot be inferior to 15 days. If non-performance persists, the contract is terminated at the end of the lapse of time indicated in the notification.

If the contract is a long-term contract, either with or without a date fixed for its ending (i.e. a contract for a fixed period or a contract for an undetermined period), the question may arise whether the consumer may end the contract even if the provider of the digital content service has not breached his obligations towards the consumer. In certain areas, for instance in the case of telecommunication services, sector-specific rules may have been developed allowing a consumer to terminate the contract, provided that he observes a notice period of reasonable length.

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?⁴¹⁹

Beside the withdrawal introduced by the consumer code at the end of the cooling off period or in case of violation of the obligation of information, the civil code provides the possibility to terminate unilaterally the contract if it has not already been executed (art. 1373 c.c.).

This specific measure for termination is possible only if it is foreseen by the contract in which parties agree a fixed term.

The declaration of unilateral termination must be acknowledged by the other party and must have the same form as the main contract that has to be terminated.

Parties can agree otherwise (art. 1373, par. 4).

In any case, it is always possible to terminate unilaterally an undetermined period contract, within a reasonable notice period, owing to the general principle that contractual relations must be temporary.

In case of relational contracts, the recipient can ask termination even after the contract has already been partly executed. He thus has to refund for services already delivered. Termination operates *ex nunc*.

According to a general principle of contract law consumer should act in good faith (art. 1375 c.c.): therefore, if the consumer terminates the contract in a way that does not respect this principle, he can be held liable for damages.

In order to evaluate the legitimacy of the unilateral termination invoked by one party the *Corte di Cassazione* has recently recalled the notion of “abuse of right”⁴²⁰. Two criteria have been indicated. Firstly, termination has been correctly invoked, but in a way that does not respect good faith standards. Secondly, this circumstance must have caused an “unjustified imbalance” between the benefit of the party who asked for termination and the other one.

⁴¹⁹ For instance: is the notice of termination invalid or must the consumer pay damages?

⁴²⁰ Cass. sez. III, 18 September 2009, n. 20106, in *Guida al diritto*, 2009, p. 38.

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

Yes it is (see above interdependent contracts).

10 After sales services

Q.10.1 and Q.10.2 are meant to clarify to what extent your legal system *has already developed* legal rules that require service providers to provide ‘after sales services’.

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

The lack of any after-sale service would not constitute non performance, except for the case of contract clause obliging the software producer to make available this updates.

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

The consumer’s expectations of using the digital content are not protected by the law.

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service⁴²¹ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

There are no legal obligations on the provider to keep or give the consumer alternative means to access the digital content from different platforms. This is a very serious issue which should be taken into account by the law. Parties can make special arrangements to prevent the digital content to become unavailable for technical development reasons. Besides, they rarely agree because costs of the conversion could be unpredictable at the time in which the contract is concluded.’

⁴²¹ E.g. to play the obtained music or video content.

11 Unfair commercial practices

Q.11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

D.lgs. 2 August 2007, n. 146 has implemented Dir. 2005/29 concerning the Unfair Contract Practices. Therefore, the abovementioned decree has modified the Cod. Cons. substituting arts. 18-27 of the Cod. Cons. with new provisions. As a general rule, a commercial practice is defined as unfair if it does not comply with the general standard of professional duties of care. Art. 22 Cod. Cons. (as modified by d.lgs. n. 146/2007) in particular gives details concerning the omission of relevant information leading a consumer to the purchase of the good or service. More deeply: art. 22, par. 3, states that in deciding whether there have been relevant omissions of information, due to the characteristic of the means of communication used by the professional, these omissions shall be judged as relevant or not depending on the existence of any other measure adopted by the professional in order to properly inform consumers in other ways.

These provisions would cover *any* commercial behaviour, though no special rule is provided for digital services .

Moreover, art. 2, *c-bis*) consumer code: the exercise of the commercial practices should be evaluated according to principles of good faith, correctness and loyalty.

Case law on the use of incompatible standards to prevent users from switching to other services or hardware: see Justice of Peace, Firenze on a case involving the purchase of a personal computer. The consumer claimed that he shouldn't pay for the windows operative system bundled. He proved that he would have installed a different free operative system such as Linux.

b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);

Provision 12 March 2009 of the guarantor has authorized the use of public addresses, until the enforcement of the public register of the oppositions,

Article 129 of the Code on privacy establishes that the inclusion of the personal addresses is allowed only "to mere search of the subscriber for interpersonal communications" pointing out the necessity of the express consent and to specify if the contained information in you list him is different from the suitable goal. The unsolicited communications are regulated instead by the art. 130 of the same code. This norm however changed last February. According to the new reading, "personal data contained in the data banks constituted on the base of telephone directories combined before August 1st 2005 are permissibly usable for promotional actually to December 31st 2009". Consequently, the new rule derogates to the right to the informative and to the express consent of the party. Subsequently, further changed allowed the treatment of the data or the use of information contained in the public phone directories of 2005, violating of the right protected by article 7 of the Code "to have the right to object, in whole or in part, to the processing of personal data concerning him/her, where it is carried out for the purpose of sending advertising materials or direct selling or else for the performance of market or commercial communication surveys".

c. the use of Digital Rights Management to prevent unauthorised use;

The DRM use should be considered legitimate if the customer is informed and aware of the DRM and such a tool doesn't interfere with his rights of privacy, safety.

d. the use of Digital Rights Management to restrict use to a certain region or country;

Such regional restrictions, usually on dvd, blue rays disc, should be clearly stated in the cover and the customer should be informed before the purchase.

e. the collection of personal data for marketing purposes or through spyware;⁴²²

Data collection should be made after the collection of consumer's consent.

f. the collection of sensitive personal data for marketing purposes or through spyware;

The collection of sensitive personal data should be authorized by the privacy guarantor. Some professionals (lawyers, medical practitioners) are authorized by general provisions from year to year.

g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;

If the consent had been given only for use during the contract cannot subsequently be sent to third parties. This can happen only after an express, free and informed consent.

h. the use of default options to entice consumers to the purchase of additional services;⁴²³

Nothing relevant on law in the books.. The subject is much debated and it should be defined how to use these tools without limiting the private expression of will of the consumer.

i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors;

Here again no provisions, so it's unclear whether these practices could be considered unfair.

j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers.

If there is case law, please provide references and a brief description.

It's surely an unfair practice even if there's no case law at present.

Q.11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

We are not aware of any other instances on this point.

Q.11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result?

One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;

⁴²² E.g. in order to enable the provider of the digital content service or third parties to adjust advertisement to the specific circumstances of the consumer.

⁴²³ See also Art. 31 of the Proposal for A Consumer Rights Directive.

- **the consumer may apply general contract law remedies such as voidance or adaptation of the contract for mistake or abuse of circumstances;**
- **the consumer may terminate the contract without having to compensate the trader for the loss of profit; and**
- **the consumer may claim reduction of the contract price?**

Furthermore, certain commercial practices are prohibited by public law. One example is surreptitious audiovisual advertising because of its negative effect on consumers. Other examples are spam, which has been extensively regulated by the e-commerce directive, and behavioural marketing strategies that are not in line with data protection law. In some Member States, the use of harmful or offensive (digital) content may be prohibited.

Q.11.4 To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

At present there is no case law.

They could be relevant as long as they belong to a general duty of good faith.

12 Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

According to general law, the contract with a minor can be voided (see Q.12.4).

Therefore, providers of digital content services are not allowed, in any case, to sell or market their product to minors.

In any case, this rule is hardly applicable to e-contract.

To answer to the specific need of Internet contracting activities the Legislator has enhanced the role of Codes of Conduct.

Both the directive 2000/31/CE on e-commerce and the legislative decree 70/2003 promote, respectively in art. 16 and 18, the elaboration of codes of conduct aiming to guarantee the protection of minors when involved in a bargaining practice.

The enforcement of these codes, more and more in compliance of the dispositions arranged because of the lack of legislative regulation and the pressing rhythms of the technological evolution, represents the most consistent solution, on the plan of the so-called soft legislation, to reach a fair form of regulation of the market.

Art. 67^{quater} cod. cons. concerns consumer's information that have to be granted before the conclusion of the distance contract. The information mentioned in paragraph 1, whose commercial end must result in unequivocal way, are furnished in clear and comprehensible way with whatever mean suitable to the technique of distance used in communication. Nevertheless, the principle of good faith has always to be respected (art. 1337) as well as rules on protection of minors and incapable persons.

Also the Code on privacy promotes the enforcement of special codes of conduct for the providers of services of communication and information on line. The intent of the provision is to assure and to conform the consumer's information in nets of communication in comparison to the formalities of treatment of the personal data. On the purpose to enact the self-discipline codes with a specific prescriptive strength and to guarantee the transparency, the reservation and the correct use of the data that 'they travel' in the net, the Code on privacy allows the publication of the codes on the Official Gazette.

Among the existing various codes of conduct, particular relief assumes the code undersigned by ANFOV and AIIP, two major associations of providers and e-merchants. The adherent accepts the sanctions prescribed and obliges himself to adapt the contractual conditions of performance of the services pointed out.

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

According to general contract law the service provider cannot be held liable for damages. The remedy is the avoidance of the contract. In case of violation of good faith standard in precontractual negotiation or during the execution of the contract, the provider is, instead, liable to pay damages.

Art. 4 of the Code of Conduct "Internet and Minors" establishes the following liability rules:

- Access provider: the adherent which offers services of Internet access must directly verify (p.e. through the signature of a contract) or indirectly (at least through CLI - Calling Line Identifier - or similar methods) the access to the net.

In the contracts of Internet access the adherent also inserts clauses that make the Client aware of the use of the services by third parties.

- Housing / hosting provider: The adherent which offers services of housing and devoted hosting must identify with reasonable certainty the Client that has the control of the devices of such services. In the case of services of shared hosting, the adherent is kept to keep the data of which to the letter b) of the point 3.10.

- Content Provider: The adherent one that directly offers contained through any method or protocol of communication, is obliged to identify in clear way, eventually resorting to the suitable methodologies to the point 3.3, the nature and the contents of the same communication, and to adjust or to remove the content on signaling of the Committee of Guarantee, of which to the following art. 6, and however of the competent Authorities.

Whoever rightly holds that has intervened from the adherent one a violation of the obligations defined by the code, can signal to the Committee of Guarantee which can adopt the following provisions sanctions:

- Call

- Censorship

- Revocation, temporary or prolonged, of the authorization to the use of the trust mark "Internet e Minori"

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

There are no specific rules except art. 31 of the Cod.Cons. on teleshopping (art. 31)⁴²⁴; arts.21, par. 4 (misleading commercial practices that may threaten the minor's security) and art. 26, lett. e) (aggressive commercial practices exhorting minors or their parents to purchase the advertised products). Special and detailed rules are provided by d.lgs. 31 July 2005, n. 177 (unified text on TV programmes), but there are no reasonable reasons to believe that these provisions may apply to digital services.

Thus, it has to be underlined that article 31 of the Cod.Cons provides that Teleshopping "shall not exhort minors to enter into contracts for the sale or hire of goods or services".

According to general contract law, minors are not allowed to enter a contract and that this contract is avoided (art. 1425). This rule proceeds by the general provision stating that capacity to act is recognized from the 18th year of age (art. 2 Civil code). Some exceptions are provided in some specific circumstances (see for ex. for marriage, art. 84 of the Civil code).

The age, as well as disabilities or vulnerabilities, must be considered in the light of the principle of good faith that informs the whole contractual relationship, from the precontractual phase up to the execution of the same contract.

More precisely, having regard to the condition of age, good faith makes the behavior of the professional to be appreciated on the basis of the specific circumstances given by age of the minor. On the other side, it protects service providers from circumventions of minors hiding or cheating on their real age in contracting. Art. 1426 c.c. provides that, in this case, the contract cannot be avoided.

Q.12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?⁴²⁵

Yes, the contract can be voided. The minor without the capacity to act cannot perform any acts except those for which a different age is prescribed (i.e.: a minor can stipulate a labor contract of service: art. 2, par. 2, c.c.). The contract with the provider of a digital content has to be considered voidable, without any evidence of damage (Art 1425 cons. c.), unless the minor has deceptively induced the other party to believe that he/she was not minor: art. 1426 c.c.)

The annulment of the contract can be on demand: 1. from who practices the parental authority on the minor; 2. the minor itself attained majority; 3. from the heirs or successors of the minor (artt. 322, 377, 396, 427 c.cs.)

⁴²⁴ "Teleshopping shall not exhort minors to enter into contracts for the sale or hire of goods or services. Teleshopping shall not cause moral or physical detriment to minors and shall comply with the following criteria for their protection: a) it shall not exhort minors to purchase a product or service by exploiting their inexperience or credulity; b) it shall not exhort minors to persuade their parents or others to purchase the goods or services being advertised; c) it shall not exploit the special trust that minors place in their parents, teachers or other persons; d) it shall not show minors in dangerous situations".

⁴²⁵ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as 'normal' for a child of a certain age.

Then in the contract concluded by the minor, the agreement as expression of free will, as fundamental requisite of the contract (art. 1325) will lead to nullity of the contract 1418 paragraphs 2 c.cs

Since the annulment is performed for the protection of the incapable, and of its successor the voidability of the contract can be invoked by the counterpart that wouldn't have any specific interest.

The action for annulment is prescribed in five years from the date of the contract or, if asked by the minor, starting from the date he acquired the capacity to act.

If the contract is annulled for incapacity of one of the parties, such party is not bound to restore what he has received as performance to the other except to the extent to which it has benefited him (art. 1443)

The only case in which the contract of the minor cannot be annulled is that in which the child has "by subterfuge, has concealed his minority, but a simple declaration by him that he has reached majority does not prevent attack on the contract" (art. 1426 c.cs.).

Hardly enforceable in the context of internet in which there is no simultaneous physical presence of the parties, should be taken into account the good faith of the counterpart that, without guilt, trusted the online declaration of the minor.

This way, the use 'fraudulent' of the credit card from a minor must be framed in the anticipated case explained by art. 1426 cods. civ., with consequent impossibility for the representative of the minor to demand the annulment of the contract. Besides, for that that it pertains to the parental liability, this can be prevented "only if they [the parents] they were unable to prevent the act" (art. 2048, last paragraph, c.c.).

The same principle has to be applied for the hypothesis in which the minor uses the digital signature of an adult to conclude a contract. You look out upon, in this case, a test 'diabolic' in head to the holder of the 'key' for the digital signature. Only this last, in fact, must furnish not the test 'negative' not to have used the key of which it is titular, but it will also have to compare him with the conceitedness of good faith of the contractor (art. 1147 cods. civ.), which would not have been able to know the difference between holder and user of the signature, being worth as enough guarantee the identification of the subject effected by the digital device (art. 10 d.p.rs. n. 513 of 1997).

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

According to general law, the incapable contractor is not kept to return the received performance but within the limits in which it has been turned to really advantage he/she (art. 1443 c.cs.), parallel to how much anticipated from the art. 2039 (undue received by the incapable person).

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

In order assume duties or to purchase rights through complete juridical acts the ability is necessary to act, Italian Law provides that who is making the bargain must be able to handle his/her own affairs. According to art. 2 c.c., ability to act is achieved at the eighteenth year of age.

If this subjective characteristic lacks in one of the contractors, the contract can be voided.

Incapacity can be referred to natural or legal causes. The first hypothesis concerns minors.

The second one includes persons who have been interdicted (art. 114 cods. civ.) and convicts that have been condemned to detention punishments superior to five years, in state of legal interdiction (art. 32 cods. pen.).

In the online environment it is difficult if not impossible for service providers to assert the real age of their potential contracting partner. From the perspective of service providers the failure to know whether a contract may be voided is the source of considerable legal uncertainty. This triggers the question concerns who bears the risk for verifying the ability to conclude legally binding contracts and if there are solutions to alleviate some of the risks for service providers.

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?⁴²⁶

The conduct code on Internet and Minors prescribes some technological systems to be adopted by provider such as “services of diversified navigation, the classification of contents, the identifiers of age, identification of the consumer as well as particular formalities for the useful data management to the minors' protections” (art. 3, tools for the protection of minors). As a soft law instrument, these rules shall be enforced only in regard of the providers who declares to adopt the code.

More in detail:

- Information to the Families and the Educators: The adherent displays on the Internet home page of his own services a reference "Protection of Minors", clearly visible, that refers to special pages web containing information on the correct ways for a safe Internet navigation, explaining which tools more widely used to protect children and providing the procedure to report violations of the Code to the Committee of Guarantee (art. 6).
- Services of diversified navigation: The adherent one will offer, according to the available technologies, to the Families, to the Educators, to the Schools, to the Libraries and the juvenile Aggregations, Services of diversified navigation that must clearly be identifiable as such, or it will address the Client and the Consumers toward other suppliers of Services of diversified navigation. In the respect of the principle of not discrimination, such services cannot prevent the access the sure contents offered by the Content adherent provider.
- Classification of the contents: The Content provider who adopts the code can apply the systems of classification to the contents that should be under conditioned Access.
- Identifiers of age: The adherent one can use Systems of individualization of the age of the consumer, to condition that, in the respect of the norms on the treatment of the personal data, is protected from there and guaranteed the maximum reservation, safety and dignity. Particularly, such systems must not allow to retrieve the identity, the domicile, the address of e-mail, to the possible pseudonym ("alias" or "nick name"), the address Internet (IP number) of the child and they won't have to allow third to directly reach him/it in any way even indirectly.

⁴²⁶ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

- Profiling and hidden treatments: In the respect of the Code on privacy, the adherent should not gather a profile of the minor nor any treatment of his/her personal data without the previous express consent of the parents or the people in charge, following clear and transparent informative on the typology of the profiling that the adherent same intends to put into effect and on the intended use of such information.
- Custody of password: The adherent one guards the passwords of access to the services assigned to the Consumers with suitable safety measures. The adherent provider should allow the consumer to change the password.
- Protected anonymity: The adherent one can allow the Consumers to use his services in an anonymous way. In any case, the adherent must be indeed informed of the real personal identity of the subject which is granted to enjoy anonymity. Between the information mentioned at point 3.1 the adherent one will also have to preventively warn the Consumers of the possibility that non authorized elaborations, done illegally from third parts without the adherent's awareness, can anyway allow to discover their identity.
- The consumer's identification: The adherent provides his services only and exclusively to Consumers directly identified or identifiable through univocal, although even indirect, elements.
- Performance of fiduciary services: The adherent that offers services in by fiduciary (for instance registering of a dominion name on behalf of a Client that wants to remain unknown) is forced to identify in certain way the Client that asks for such services putting aside the maximum reservation.

13 Towards a model 'digital consumer law'

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

"Commissione Vigevano" 2004 (commissione interministeriale sui contenuti nell'era digitale)
The use of digital content is growing in Italy. The Government made studies (see March 2005's study on Digital Content in the Internet Era presented by a governmental commission, available on www.interlex.it/testi/pdf/cdei_full.pdf) and the consumers associations are taking into account the issues.

Principal aims of this were the analysis of the digital content market and the elaboration of proposals in order to promote the offer/use of digital content, on the one side, and the protection of intellectual property on the other one.

In March 2005, the Ministero per i beni e le attività culturali, the Ministry for innovation and technologies and the Presidency of council signed the so called "Patto di San Remo". This document contains "guide lines for the adoption of codes of conduct and actions for the diffusion of digital content in the Internet era".

The Law of 31 March 2005 n.43 has integrated the deontological code proposed by the Pacte of San Remo.

Finally, a working group has been constituted the 22 of December 2005 in order to realised the objectives at stakes in the previous declarations.

In October 2007 two Commissions have been created

- on the relation between technologies and intellectual property
- for the revision of the Law of intellectual copyright

They presented a document containing “proposals for a reform of copy right”, but no legislative initiatives has been undertaken (http://isotype.org/wp-content/uploads/2007/12/2007_12_18-proposte_riforma_da.pdf).

More recently, a decree of the Presidency of the council has created a new committee on digital piracy coordinated by Prof. Mauro Masi.

On the 10th of July 2010 this committee has decided the constitution of an internal task force for the elaboration of a proposal for a code of conduct for digital operators in order to combat piracy (<http://www.governo.it/Presidenza/Comunicati/dettaglio.asp?d=58867>).

This proceeding associates the consultation of stakeholders (digital content providers, consumer associations, etc.).

Beside governmental initiatives, the grass-roots “Digital Media in Italia” dmin.it group, directed by Prof. Leonardo Chiariglione, proposes innovative actions in the areas of DRM, broadband networks and payment systems to unleash the potential of digital media (www.dmin.it).

According to this proposal services providers should retain the freedom to adopt the technological solutions they consider best suited to their business while service users should be given a minimum level of service interoperability if they so request.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

As mentioned before, the code of conduct "internet e i minori" (12.7) is the result of a combined action of the Government, the ISP's and consumer association that shows a responsiveness towards these issues.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

The Personal Data Code and the agency which supervises his application.

The technical issue for the consumer lies in the difficulty of being aware the data surreptitiously spread over the Net. Furthermore, the consent should be in written form, which means at least an electronic signature or by access to a personal account with username and password. To prevent third parties to illegally gather personal data the sites should adopt high level encryption on the pages which hosts form to be filled in by the consumer.

The digital information economy is moving from tangible to intangible services and products. A question related to this is whether consumers can expect the same or similar level of functioning and safety irrespective of the format in which digital content is provided for. For instance, a digital film can be sold to consumers in the form of a tangible carrier such as a DVD, as a download on their iPhone, or in the form of a streaming service. Question Q.13.4 and table 1 are meant to explore whether the form in which the content is delivered influences the level of legal protection consumers can expect (e.g. because certain laws only apply to tangible products or because case law has determined that reasonable consumer expectations differ depending on the form in which digital content is being delivered).

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	13. ... 14. ...	<input type="checkbox"/>
Film or music on a website (streaming)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	15. ...	<input type="checkbox"/>
Downloaded films or music	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Games on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Games on the Internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded games	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
User created content (UCC) ⁴²⁷ on a CD or DVD*	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
UCC on a website	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded UCC	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Personalisation services ⁴²⁸ on the Internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁴²⁷ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

Downloaded personalisation services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Software-as-a-Service on a website ⁴²⁹	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded software ⁴³⁰	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Software on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Communication through a website ⁴³¹	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
E-learning services on the internet ⁴³²	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded e-learning services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
E-learning service on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>

⁴²⁸ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

⁴²⁹ E.g. image editing, photoshopping, automatic translation services.

⁴³⁰ E.g. anti-virus programs.

⁴³¹ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

⁴³² E.g. an online language course.

**Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?
Please indicate this in the table below.**

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	16. ... 17. ...
'Free' film or music on a website (streaming)	..	..	.. See last column	..	x	x	..	18. It depends on the licence related: streaming on demand, streaming download, webcasting. Only the streaming download allows a private copy for non commercial purposes 19. ...
Paid film or music on a website (streaming) 433	x	..	.. See last column	..	x	x	x except for problems related to the network	20. It depends on the licence related: streaming on demand, streaming download, webcasting. Only the streaming download allows a private copy for non commercial purposes
'Free' downloaded films or music	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

*
433 Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.
E.g. video on demand services.

Paid downloaded film or music	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid games on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' games on a website	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid games on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded games	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded games	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid User created content (UCC) ⁴³⁴ on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/> <input checked="" type="checkbox"/>	
'Free' UCC ⁴³⁵	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

⁴³⁴ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁴³⁵ E.g. video sharing websites, such as YouTube.

Paid UCC	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' personalisation services ⁴³⁶	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Paid personalisation services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid software on a CD or DVD* ⁴³⁷	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded software ⁴³⁸	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded software	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' software-as-a-service on a website ⁴³⁹	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid software-as-a-service on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	

⁴³⁶ E.g. ringtones and Apps for mobile phones.

⁴³⁷ E.g. anti-virus programmes, Office, etc.

⁴³⁸ E.g. anti-virus programmes.

⁴³⁹ E.g. image editing, photoshopping etc..

'Free' communication services ⁴⁴⁰	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid communication	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid e-learning service on a CD or DVD ⁴⁴¹	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded e-learning services	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' e-learning service on a the internet	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid e-learning service on a the internet	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

⁴⁴⁰ E.g. social networking, such as Facebook, and e-mail services.

⁴⁴¹ E.g. an online language course.

THE NETHERLANDS

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2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

No specific consumer or contract law has been developed pertaining to digital content services. Nevertheless, some consumer and contract law is applied directly or by analogy to digital content services. In particular, Title 7.1 of the Dutch Civil Code, the *Burgerlijk Wetboek* (hereafter: *BW*), covers contracts for the sale of goods, including distance selling.⁴⁴² Title 7.1 *BW* is sometimes used by analogy in situations where purchased software is defective, mostly on the basis of Article 7:47 *BW* (see Q.2.2).

Recent case law has shown that in the Dutch legal order there is as yet no specific definition of products or services that can be classified as *digital content services*. However, case law is developing on this topic. For example, the Dutch Supreme Court, the *Hoge Raad*, has referred several preliminary questions to the Court of Justice of the European Union (hereafter: CJEU) as to how to define ‘software’ in a tax case.⁴⁴³

The facts of this case were as follows. Levob Verzekeringen B.V. (‘Levob’) provided insurance. In 1995 Levob looked whether it could purchase software systems that met its specific needs. Levob then came in contact with a supplier of a system that was used by several insurance companies in the US. The supplier agreed to make specific adjustments for the system to work under the specific conditions in which Levob had to operate the system.

Levob then applied for an amendment to its tax declaration over the years 1997-1999, claiming that as a purchaser of consultancy services it had had to pay VAT with regard to these services, which were necessary to adapt the standard software to the Dutch circumstances. The amended tax declaration did not relate to the standard software itself. In the tax procedure the relevant question was whether the supplier had delivered two separately taxable performances, i.e. the delivery of a standard software system and a service to adapt the system to the specific needs of Levob (as Levob argued) or just one service (as the tax office argued). The Court of Appeal of Amsterdam, on the facts of the case, ruled that the standard software system was of no use to Levob, that a license was obtained to make use of the adapted software system and that the adaptations consisted of modifications to a large number of modules, which cost a considerable amount of time and money (both in relation to

⁴⁴² This title also comprehends the implementation of the European Directive on Distance Selling.

⁴⁴³ HR 30 January 2004, *FED* 2005/98, no. 37 859, *BNB* 2004/164 c. Although this is a tax related matter, defining software in European tax law may have consequences for other areas of law (e.g. consumer law) as well.

the price paid and in absolute terms). Given these facts and circumstances and the wording of the contract between Levob and the supplier, the Court of Appeal concluded that Levob was provided with specific software (rather than standard software), which performance could only be classified as a service.⁴⁴⁴ The question was where the service should be taxed?

The *Hoge Raad* referred a preliminary question to the CJEU in order to clarify whether the provision of software could be qualified as a ‘service’ and, if so, where the service had been provided and should be taxed. The CJEU held:⁴⁴⁵

- ‘1. Article 2(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment must be interpreted as meaning that where two or more elements or acts supplied by a taxable person to a customer, being a typical consumer, are so closely linked that they form objectively, from an economic point of view, a whole transaction, which it would be artificial to split, all those elements or acts constitute a single supply for purposes of the application of VAT;
2. This is true of a transaction by which a taxable person supplies to a consumer standard software previously developed, put on the market and recorded on a carrier and subsequently customises that software to that purchaser’s specific requirements, even where separate prices are paid;
3. Article 6(1) of Sixth Directive 77/388 must be interpreted as meaning that a single supply such as that referred to in paragraph 2 of this operative part is to be classified as a ‘supply of services’ where it is apparent that the customisation in question is neither minor nor ancillary but, on the contrary, predominates; such is the case in particular where in the light of factors such as its extent, cost or duration the customisation is of decisive importance in enabling the purchaser to use the customised software;
4. Article 9(2)(e), third indent, of Sixth Directive 77/388 must be interpreted as meaning that it applies to a single supply of services such as that referred to in paragraph 3 of this operative part performed for a taxable person established in the Community but not in the same country as the supplier.’

Eventually, therefore, the *Hoge Raad* reached the conclusion that the Court of Appeal’s judgment that in the present case the supply of software qualified as a ‘service’ could be upheld.⁴⁴⁶

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the *software on the CD/DVD*, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

⁴⁴⁴ Court of Appeal 31 December 2001, as indicated in the Conclusion of the Advocate-General to the Supreme Court, published together with the decision of the Supreme Court to put preliminary questions to the Court of Justice.

⁴⁴⁵ Case C-41/04, *Levob Verzekeringen BV v. Staatssecretaris van Financiën*, CJEU 27 October 2005, ECR [2005] I-09433.

⁴⁴⁶ HR 2 June 2006, *LJN AX6436, BNB 2006, 279* (*Levob Verzekeringen B.V et al.*).

In the case of standard software on a CD or DVD that is offered for sale in retail shops, consumer sales law is applicable, irrespective whether the failure to function is caused by a defect in the CD/DVD itself or by a defect in the software.⁴⁴⁷ This seems to be the prevailing opinion in legal doctrine.⁴⁴⁸ In a recent judgment,⁴⁴⁹ which turned on the question whether the producer of software could still invoke its copy right against the (professional) buyer of software, the District Court of Dordrecht confirmed this view by indicating that sales law applies to the contract whereby not only computers but (also) the (much more valuable) installed software were transferred.

Others regard standard software contained on a CD or DVD as ‘rights’ in the sense of Article 3:6 *BW*. This implies that to such contracts, by virtue of Article 7:47 *BW*, sales law is applied ‘to the extent that this conforms to the nature of the right’.⁴⁵⁰ There is no established authority indicating whether, if this view were followed, this would mean that the specific provisions on *consumer* sales law would or would not apply as mandatory law.⁴⁵¹ However, according to a minority view in legal doctrine, (even) contracts where standard software is contained on a CD or DVD cannot be considered as sales contracts because of the applicability of copy right law. Such authors come to very differing qualifications of the contract.⁴⁵²

In a recent judgment,⁴⁵³ the Court of Appeal of Amsterdam, in a case in which the software failed to function properly as a consequence of a flaw in the software, not in the CD/DVD itself, underlined – in accordance with the common opinion in the Netherlands⁴⁵⁴ – the fact that the software was not a good in the sense of Article 3:2 *BW*. The Court continued that sales law nevertheless applied by virtue of the provision of Article 7:47 *BW*. However, as the case concerned two professional parties, the Court was not asked whether or not also the specific protective provisions of consumer sales law would apply.

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer’s computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

⁴⁴⁷ See the leading commentary on sales law: Asser-Hijma 2007, no. 203, with references.

⁴⁴⁸ See also M.Y. Schaub, *Digitale muziek, DRM en de thuiskopie: biedt het consumentenrecht uitkomst?*, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2006/2, p. 42.

⁴⁴⁹ District Court Dordrecht 11 August 2010, *LJN* BN3863

⁴⁵⁰ In this sense E.D.C. Neppelenbroek, ‘De aanschaf van standaardsoftware en de toepasselijkheid van het kooprecht’, *Vermogensrechtelijke Analyses* 2005/2, p. 24-25, with references.

⁴⁵¹ T.H.M. van Wechem, ‘Downloaden van muziek, enkele consumentenrechtelijke verstrooiingen...’, *Tijdschrift voor Consumentenrecht* 2006/4, p. 106, argues that the contract to download music over the Internet is to be considered as a consumer sales contract.

⁴⁵² See Neppelenbroek 2005, p. 14-17, who in this sense follows the majority view as expressed by Asser-Hijma, see Neppelenbroek 2005, p. 22-23.

⁴⁵³ Court of Appeal Amsterdam, location Arnhem, 1 June 2010, *LJN* BM6320.

⁴⁵⁴ Asser-Hijma 2007, no. 196.

Where the software would be downloaded over the Internet, sales law may only be applied by way of analogy,⁴⁵⁵ or by qualifying the standard software as rights in the sense of Article 3:6 *BW*, to which by virtue of Article 7:47 *BW* sales law applies as well.⁴⁵⁶ In both these views, contracts concluded through distance selling would be qualified as sales contracts. However, as indicated above, a minority view in Dutch literature rejects the qualification of the purchase of standard software as a sales contract, which would imply that the contract would be qualified as a (specific type of) a service contract, to which consumer sales law would not apply.

If the contract could not be qualified as a sales contract, the question arises which type of service it is. It would seem that qualification as a *contract for work* (Article 7:750 *BW*) is not possible, as that would require the creation of a tangible work. However, if the digital content could be considered as a tangible work, the contract would have been qualified as a sales contract. This implies that if sales law is not applicable to the contract, the contract for the supply of digital content would have to be qualified as a service contract in the sense of Article 7:400 *BW*. The provisions that apply to such contracts, however, are largely of a default nature.

3 Defining consumers and producers

Q.3.1 Are individuals who offer digital content services to consumers considered to be ‘consumers’ or ‘traders’? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

Article 7:5(1) *BW* defines a consumer as a natural person who does not act for purposes that are related to his trade, business or profession. A seller is a natural or legal person who is selling goods in the course of his trade, business or profession. This definition is the same as the one that is used in several European Directives.⁴⁵⁷ Where the seller does not act in the course of his trade, business or profession, the contract is therefore not a consumer sales contract, even if it would qualify as a sales contract. The mere fact that a person has concluded several contracts with a similar content does not automatically mean that the seller is considered to be a professional party. From the scarce case law on this point, it is clear that the way the seller has presented himself (here: on the Internet), and the number of contracts concluded per year are relevant.⁴⁵⁸

⁴⁵⁵ Asser-Hijma 2007, no. 203, with references

⁴⁵⁶ In this sense E.D.C. Neppelenbroek, ‘De aanschaf van standaardsoftware en de toepasselijkheid van het kooprecht’, *Vermogensrechtelijke Analyses* 2005/2, p. 24-25, with references.

⁴⁵⁷ For example, Article 2(b) Directive unfair commercial practices (directive 93/13/EC, *OJ* 1993, L 095/29); Article 1(2)(a) Directive on certain aspects of the sale of consumer goods and associated guarantees (directive 1999/44/EG, *OJ* 1999, L 171/12); Article 2 Directive on distance selling (directive 97/7/EG, *OJ* 1997 L 144/19)

⁴⁵⁸ Cf. Court of Appeal Arnhem 6 November 2007, *LJN* BC2967 (irregular sale of puppy dogs, use of a kennel name and advertisements in a clubmagazine with 2,000 copies insufficient to qualify as a professional party); Court of Appeal 's-Hertogenbosch 13 May 2008, *LJN* BD5810 (yearly sale of several young horses suffice to qualify as a professional party, even if the sale of horses does not constitute the core business of the seller); District Court Groningen 19 August 2009, *LJN* BJ6974 (sale of 4 young horses within a timespan of 10 years, originally used by the seller's daughter, insufficient to qualify seller as a professional party).

Where the digital content services are offered for free, the contract can't be qualified as a sales contract, as Article 7:1 *BW* requires a counterperformance in the form of a payment in money for such qualification.

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and 'prosumers' (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

Where the seller is a professional party, he may be expected to inform the consumer-purchaser better, and the consumer's (already limited) duty to investigate the goods under Article 7:17(5) *BW* is even more limited. Moreover, where the seller can't be considered as a professional party, the rules on liability and remedies are largely of a default nature, allowing the parties to derogate from these provisions to the detriment of the buyer. This is not possible in the case of a consumer sales contract, i.e. where the seller is a professional party, Article 7:6(1) *BW* provides.

Similarly, when the contract is qualified as a contract for services, the amount of care that may be expected from the service provider under Article 7:401 *BW* is higher when the service provider was acting in the exercise of his profession (or purported to do so). In both cases, this implies that the seller or service provider would be liable more easily if he was a professional party than in the case where he can't be considered to have acted as a professional party. It should, however, be noted that the provisions on service contracts are largely default rules, allowing the parties to derogate from them even in the case where the service provider is a professional party and the other party is a consumer.

4 Sector-specific consumer law

Q.4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to

- **the conclusion of the contract for digital content services;**
- **the pre-contractual information consumers need to be given**⁴⁵⁹;
- **the termination of the contract (for non-performance or termination for other reasons) for digital content services?**

The Data protection act (Wet bescherming persoonsgegevens)

There is no specific regulation pertaining to the above mentioned points. However, according to article 8 (a) of the *Wet bescherming persoonsgegevens* (Wbp; Data protection Act) one of the grounds for legitimate data processing is when the data subject has given consent. Consent is described in article 1 (i) as the free, specific and informed consent. This requirement mainly lies in the sphere of privacy regulation.

⁴⁵⁹ For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

Helberger argues that if, for example, DRM operates on the basis of personal information, such as personalised usage entitlements general information duties (according to Article 3:15d BW) may apply. Moreover, if the DRM collect personal data and engage in marketing techniques, DRM operators would have to inform users according to 33 and 34 Wbp. The information should entail the specific purpose for which the data is used, including who is processing that data (art. 33 and 34 Wbp). She therefore argues that one could state that this is a pre-contractual information duty as well, even if there is no conclusion of a contract.

Telecommunication (Telecommunicatiewet)

According to Article 7(1) of the Telecommunicatiewet⁴⁶⁰ the service provider of electronic communication is obliged to inform the consumer about:

- (a) the identity and address of the supplier;
- (b) services provided, as well as the time for the initial connection to a public communication service;
- (c) the service quality levels offered;
- (d) the types of maintenance service offered;
- (e) particulars of prices and tariffs and the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;
- (f) the duration of the contract, the conditions for renewal and termination of services and of the contract;
- (g) any compensation and the refund arrangements which apply if contracted service quality levels are not met; and
- (h) the method of initiating procedures for settlement of disputes.

Ad a This requirement corresponds with Article 3:15d BW.⁴⁶¹

Ad c The quality of the provision of services. This term is not explained or motivated by Dutch law, or the directive. Most probably the term refers to so-called 'service levels': According to accurate percentages the availability and reliability of services are verifiably laid down. According to accepted contractual practice in Dutch law, the service provider has to stipulate whether and in which circumstances the consumer can expect a limited availability and reliability of the communication service.⁴⁶²

E-commerce law

See Q.5

According to article 6:227b⁴⁶³ the person who provides a service for the information society must inform the opposite party in a clear, comprehensible and unambiguous way about at least:

- a. the way in which the agreement will be concluded and, in particular, which operations are necessary to come to this result.

⁴⁶⁰ Implementation of Article 20 paragraph 2 of the Directive 2000/22 of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and Services (Universal Service Directive).

⁴⁶¹ Implementation of article 5 of the directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

⁴⁶² P.C Knol e.a., Telecommunicatierecht Tekst en Commentaar, Kluwer: Deventer 2005, p. 201.

⁴⁶³ Implementation of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

Before or at the conclusion of the agreement the terms and conditions of the agreement, not being standard terms and conditions as meant in Article 6:231, must be made available to the opposite party in such a way that he is able to store them and read (examine) or reproduce them afterwards.

Q.4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

Media law has extensive rules on advertisement, many of which are inspired by European law. A strict prohibition exists for advertisement and teleshopping messages for medical treatments and alcoholic beverages between 06.00 and 21.00 (Art. 3.7 Mw). There are, moreover, quantitative and presentational restrictions on advertisement and teleshopping (Arts. 3.8 – 3.14).

Specific advertisement restrictions apply to programs that are aimed at children younger than 12 years (e.g. Art. 3.11 and 3.19a Mw). For example, according to Art. 3.19a, product placement is prohibited in children's programs.⁴⁶⁴ More generally, Article 4.1 of the Media Law stipulates that media services of commercial as well as public services need to ensure that their content is not harmful, or immoral for the development of the minor under the age of sixteen. According to Art. 4.6, interactive services that could have a serious harmful effect on minors younger than 16 years old may only be offered in a way that minors cannot see or hear that program.

The aforementioned (Q. 4.1) rules on the separation of advertisement and editorial content, as well as the rules on product placement and sponsoring must prevent that consumers are confused about the origin and meaning of audiovisual content (Arts. 3.15-3.19c). To this end, news programs and political information, for example, may not be sponsored at all (Art. 3.15 (2)). Though the primary goal of these rules is to protect the editorial independence of the media and the ability of users to judge for himself whether external influences have shaped a program, they entail also an element of consumer protection,⁴⁶⁵ namely to avoid consumer being misled by "editorially camouflaged advertisement."⁴⁶⁶

It is interesting to note that the restrictions on advertisement in so-called non-linear, interactive audiovisual services (such as video on demand) are less stringent. The reason for this is the alleged greater influence that consumers can exercise over their choice for and consumption of interactive offers.⁴⁶⁷

⁴⁶⁴ This only applies to programs produced after 19 December 2009, i.e. the date at which the Netherlands implemented the European Audiovisual Media Service Directive into Dutch law).

⁴⁶⁵ J. Kabel, Art. 17 TWFD, in: Castendyk, Dommering and Scheuer, *European Media Law*, Kluwer Law International, Den Haag, 2008, p. 621-640, 622.

⁴⁶⁶ O. Schaar, *Television Advertising, Sponsorship and Teleshopping*, in: Castendyk, Dommering and Scheuer, *European Media Law*, Kluwer Law International, Den Haag, 2008, p. 489-540, 492 and 500.

⁴⁶⁷ For a more detailed discussion, see N. Helberger, *The Media Literate Viewer*, in: N.A.N.M. van Eijk & P.B. Hugenholtz (red.) *Dommering-bundel: Opstellen over informatierecht aangeboden aan prof. mr. E.J. Dommering*, Amsterdam: Otto Cramwinckel Uitgever 2008, p. 135-148.

Another form of sector-specific prohibition on unfair commercial practices in media law is the prohibition of subliminal advertisement techniques. i.e. advertisement that consumers cannot consciously perceive but that targets consumers' subconscious, as well as surreptitious advertising (disguised commercial messages in an editorial program) (Arts. 3.51 (2) and (3) Mw).

Outside media law, Article 11.7(1)⁴⁶⁸ of the Dutch Telecommunication Act is especially written for the protection of consumers in relation to unrequested e-mails (spam). According to this provision, the consumer has the possibility to opt-in or opt-out of mailing lists. Opt-in means that consumer have to give their explicit permission for sending advertisements and spam for marketing purposes.⁴⁶⁹

As regards so-called targeted or behavioural advertising, such advertising would have to make sure to conform to the rules in Dutch data protection law, including the obligation to inform consumers on the specific means and purpose of processing their personal data for this kind of advertisement **before** the data is being processed, special care with regards to sensitive data, deletion of information that is no longer needed, enabling users to exercise their rights of access, rectification, erasure under the Wbp, as well as the obligation to safeguard data security.⁴⁷⁰

Pending in Europe is the implementation of the recently adopted EU "Citizen Rights Directive".⁴⁷¹ The Directive amended articles 5.3, 6.3 and 11.3 of the e-Privacy Directive,⁴⁷² regarding cookies, direct marketing and value added content services and the prior information and consent of the consumer.⁴⁷³ There is a very heated debate in the Netherlands with regard to the implementation of the Cookie-amendment. The debate regards the opt-in procedure, required by the amended article 5.3, by which cookies may be placed only with the informed consent of the user. Originally article 5.3 only required an opt-out procedure. The "Citizen Rights Directive" changing the opt-out procedure into an opt-in procedure however mentions in a recital that consent may also be given by browser settings. Whether or not consent may be given by browser settings and whether or not an opt-in procedure should be required are the topic of debate.⁴⁷⁴

Q.4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- **does sector-specific law determine any remedies?**
- **could a consumer invoke general consumer and contract law remedies⁴⁷⁵?**

⁴⁶⁸ Article 11.7 implements Article 13 of the Directive on Privacy and Electronic Communications.

⁴⁶⁹ http://www.cbppweb.nl/downloads_adv/z2003-1526.pdf

⁴⁷⁰ See Art. 29 Data Protection Working Party, Opinion 2/2010 on online behavioural advertising, 22 June 2010. For the Netherlands, see http://www.cbppweb.nl/downloads.../pb_20090324_definitieve_bevindingen_zikle.pdf and J. van Geijn, Persoonlijke marketing en de persoonlijke levenssfeer, Privacy en Registratie 1992(17), p. 6-15.

⁴⁷¹ 2009/136/EC.

⁴⁷² 2002/58/EC.

⁴⁷³ Sloot & Zuiderveen Borgesius, 'De amendementen van de Richtlijn Burgerrechten op de e-Privacyrichtlijn', P&I 2010-4.

⁴⁷⁴ <http://www.internetconsultatie.nl/nrfimplementatie>

⁴⁷⁵ E.g. unfair commercial practices, unfair contract terms, avoidance/voidability of the contract, termination or damages.

Please indicate if there is case law on any of the points mentioned. If so, please provide a reference, a short summary of the facts and of the decisions of the courts.

In the sphere of ecommerce law the consumer may rescind the contract as long as the service provider has not yet supplied all the information required by law before or at the time of conclusion of the contract (Article 6:227b).

5 Formation of contract and pre-contractual information

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

Standard form contracts must comply with the specific information duties laid down in article 6:227b(1) sub a-e *BW*. These provisions state that the service provider has to inform the consumer in a clear, comprehensible and unambiguous way about the terms of the contract before the conclusion of the contract.⁴⁷⁶ The regulation regarding transparency and comprehensibility of contract terms in relation to the channel is primarily directed to websites.⁴⁷⁷ Although the Dutch legislator has not specifically regulated other channels, the legislator has acknowledged the fact that transparency and comprehensibility of contract terms can be at stake when the nature of the channel does not make transmission of contract terms possible. As an example of transparency being at stake, the legislator mentioned a mobile phone that cannot download contractual terms, because it has limited download and saving possibilities to store the terms. Given this problem, the legislator has determined in Article 6:234(2) *BW*⁴⁷⁸ that if the channel does not allow for the transmission of contractual terms, the seller or service provider has to inform the consumer before the conclusion of the contract where the terms can be consulted, and on request send the terms by electronic means or in a different way. An example of a different way, according to legislator, is sending a text message to the mobile phone, in which reference is made to the website that lists the terms of the contract.⁴⁷⁹

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

In so far as the contract terms may be seen as standard contract terms in the sense of Article 6:231 sub a *BW* – i.e. terms that are meant to be used in a number of contracts, except for clear and intelligible core terms – Article 6:234 *BW* requires the seller or service provider to give the consumer a reasonable opportunity to consult the terms before the conclusion of the contract. A reasonable possibility is given if the seller or service provider has made these

⁴⁷⁶ *Bijl. H.EK.* 2003/04, 28 197, C, p.11

⁴⁷⁷ *Bijl. H.TK.* 2001/02, 28 197, nr. 3, p.7. See also: H. van der Werff, *Mobiel op juridisch golflengte*, Amsterdam, Otto Cramwinkel, 2004, p. 76.

⁴⁷⁸ This article has been written for standard terms, not being core terms, and not specifically for information duties about the main characterises of the contract and pre-contractual information. According to the legislator this article can, however, be used in the context of providing information if electronically delivering information is not possible on the basis of article 6:227b(2) *BW*.

⁴⁷⁹ *Bijl. H.EK.* 2003/04, 28 197, C, p. 12.

standard terms and conditions available to the other party before or at the conclusion of the contract. The standard contract terms may be provided in writing (para. 1), but they may also be provided by electronic means (para. 2), provided that the other party is enabled to store them and examine or reproduce them afterwards. If this is not reasonably possible, it also suffices to notify the other party before the conclusion of the contract where the standard terms and conditions can be read by electronic means, and that they will be sent to the other party by electronic means or in another way upon first request. He must then do so ‘without delay’, i.e. directly after having been asked to do so. This should enable the consumer to make a right assessment of the terms of the contract.⁴⁸⁰ Yet, where the contract was not concluded by electronic means, the standard terms may be provided by electronic means only if the other party has explicitly agreed to that (para. 3). The District Court of Roermond ruled that when the contract is concluded by telephone and therefore not electronically, a mere reference to the publication of the standard terms at a website (including a download option) is not to be regarded as a reasonable opportunity to consult them.⁴⁸¹ Where the seller or service provider had not provided the consumer with a reasonable opportunity to consult the content of the applicable standard terms and conditions, these standard terms may be nullified (Article 6:233 sub b *BW*).

However, it is uncertain how these provisions relate to the specific provisions included in the Civil Code as implementation of the Services directive (art. 6:230a-230f *BW*). Under Article 6:230b *BW*, a service provider – i.e. a party who provides a service within the meaning of Article 48 TFEU (art. 6:239a *BW*) – is required to provide the other party with, i.a., the applicable standard contract terms. Article 6:230c *BW* then indicates that the information to be provided under Article 6:230b *BW* are either (a) to be provided on the initiative of the service provider, (b) made available to the other party at the place where the service is performed or the contract concluded, (c) made available electronically at an address made known by the service provider, or (d) included in the contract documents provided by the service provider. This information must be provided in due time before the conclusion of the contract if the contract is concluded in writing, or before the performance of the service if no written contract is available (art. 6:230e *BW*). This would imply that the information may also be provided when the contract is being performed, which would mean that the other party would not be able to access the standard terms before the conclusion of the contract. From 29 December 2009 (implementation date of the Services directive) until 30 June 2010, Article 6:234 *BW* indicated that if the service provider had provided the standard terms in one of these ways, the information duty of Article 6:234 *BW* is performed correctly. However, after the latest amendment of Article 6:234 *BW*, which has come into force on 1 July 2010, the explicit provision in Article 6:234 *BW* referring to Article 6:230e *BW* has been deleted. It is argued in legal doctrine that the legislator has simply ‘forgotten’ to note the amendment which was made to Article 6:234 *BW* due to the Services directive and that the present draft of Article 6:234 and 233(b) *BW* is to be interpreted in conformity with the Services directive,⁴⁸² implying that when the requirements of Article 6:230b and 230c *BW* are met, the service provider has complied with the duties under Article 6:234 *BW*. In that case, if the contract is not concluded in writing but, for instance, electronically or by mobile phone, a service provider need not provide the standard terms at the latest at the moment of the conclusion of the contract, but only when the service is performed if the contract is not concluded in writing but, for instance, electronically or by mobile phone. This implies that it would be much easier

⁴⁸⁰ District Court Utrecht, 2 September 2009, LJN BJ7081, where the court declared the nullity of a standard form contract that was not presented to the other party before or during the conclusion of the transaction.

⁴⁸¹ District Court Roermond, 11 August 2009, LJN BJ5160.

⁴⁸² C.E. Drion, ‘Dwaallicht’, *Nederlands Juristenblad* 2010/36, p. 2339.

for a service provider to perform its duty to provide the standard terms than it is for a seller – who must comply with the ordinary rules of Article 6:234 *BW*. This, in turn, implies that the classification of the contract as a sales contract or a service contract becomes relevant again through the backdoor.

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license⁴⁸³, considered to be validly concluded contracts?

The validity of browse-wrap and click-wrap agreements must be assessed according to the main principles of contract law concerning the formation of contract (will/reliance theory).⁴⁸⁴ Where the consumer has accepted the applicability of standard terms by assenting to the license, the contract is considered to be concluded validly.

The Court of Appeal of The Hague took most uncertainty away regarding the validity of electronic contracts under Dutch law, in a case opposing Dell Computer B.V. to the consumer group HCC in a collective action procedure on the validity of some of the standard contract terms used by Dell.⁴⁸⁵ Although the parties did not dispute that the conditions in question fell within the definition of terms in the sense of Article 6:231(a) *BW*, the court nevertheless explicitly considered that standard terms used in an electronic environment fall within the scope of the unfair terms legislation. In its decision, the Court of Appeal relied on the rules deriving from the E-Commerce Directive. The proceedings in this case were initiated in October 2003, while the Dutch act implementing the e-commerce directive, by which the word "writing" in Article 6:231(a) *BW* was deleted, took effect on 30 June 2004. The court decided that the definition of 'standard terms' was to be interpreted in conformity with the Unfair terms directive, which did not restrict the scope of the unfairness test to standard terms. Moreover, as the common opinion in literature also considered electronic standard terms as falling within the definition, legal certainty did not oppose the interpretation of Article 6:231 *BW* as being applicable also to electronic standard terms.

Q.5.4 Under what conditions are the terms of a standard form agreement⁴⁸⁶ binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms⁴⁸⁷ necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?⁴⁸⁸

Consent is presumed to have been given if two conditions are met: first, the service provider has to indicate to the consumer that license terms are applied; and second, the consumer has to be offered a reasonable possibility to examine the terms before or at the time of concluding

⁴⁸³ 'Browse-wrap' means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

⁴⁸⁴ See for example: P.H. Blok, T.J.M. de Weerd, 'Shrink-wrap licenties en click-wrap licenties zijn aanvaardbaar', *Computerrecht* 2004/3 and M.W. Scheltema, T.F.E. Tjong Tjin Tai, 'Overeenkomsten sluiten door openen en klikken?', *Computerrecht* 2003/4.

⁴⁸⁵ Court of Appeal The Hague 22 March 2005, *Computerrecht* 2005, 43, *Tijdschrift voor Consumentenrecht* 2005/4, p. 150 with case notes by M.Y. Schaub and M.B.M. Loos.

⁴⁸⁶ For instance those included in the click-wrap or a browse-wrap license.

⁴⁸⁷ E.g. by clicking 'I agree' in a dialog box.

⁴⁸⁸ E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

the transaction. If the service provider meets these requirements, the end-user (the consumer) knows that he is accepting to be bound by the agreement. According to article 6:231(c) *BW* an express manifestation of assent to standard terms is not required for a binding contract to be concluded nor for the applicability of the standard terms. With regard to the latter, it suffices that the consumer knew or ought to know that the other party made use of standard terms and did not oppose their application.⁴⁸⁹ Whether or not the consumer had read the standard terms prior to the conclusion of the contract, is irrelevant, Article 6:232 *BW* indicates. The validity of the acceptance of the general conditions by the other party must be assessed on the basis of the provisions on offer and acceptance (art. 6:217 ff *BW*) and the formation of contracts in general (art. 3:33 ff *BW*). The party must have accepted the terms and conditions as a whole - the complex of terms – for these to be valid.⁴⁹⁰ Article 6:232 *BW* read in conjunction with Article 6:246 *BW* indicates without a doubt that the person who has accepted the general terms as a whole cannot say that one or more clauses of these conditions do not apply between the parties because she did not know contents of those terms, or that those terms are unusual or are otherwise such that she did not have to expect that content. Such defects in consent are remedied under article 6:233 et seq. *BW*.

However, it should be noted that consent to the applicability of the standard terms must be given at the latest at the moment of the conclusion of the contract.⁴⁹¹ After that, standard terms may be considered applicable to the contract only if the consumer has consented to a change of the contract. This requires, in particular, that the consumer is aware (or has given the impression that he is aware) of the fact that by clicking on the ‘I agree’-button he actually agrees to a change of the contract and the party making use of the standard terms is justified in relying thereon. Where the consumer may only make use of the already purchased goods or services if he accepts such a change of the contract – or is required to conclude a contract with the provider of digital content after having already concluded a contract with a legitimate distributor of that content – one may argue that this constitutes an aggressive and therefore unfair commercial practice under Article 6:193h *BW*. This then constitutes a wrongful act (art. 6:193b *BW*). If the consumer under such conditions agrees to the amendment of the contract or to the conclusion of a separate contract with the service provider, such (change of the) contract is likely to be voidable under Article 3:44(1) and (4) *BW* (abuse of circumstances). Moreover, where the consent has led to a change of the contract, the resulting damage for the consumer may also be repaired by claiming damages *in natura* under Article 6:103 *BW*, implying that the change is made undone.

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy⁴⁹², or may the information also be given via electronic means?⁴⁹³

⁴⁸⁹ Cf. Hoge Raad 21 September 2007, *NJ* 2007, 565 (Kwekerij De Engel/Enthoven Electra).

⁴⁹⁰ Valk, T&C Vermogensrecht, comment on Burgerlijk Wetboek Boek 6, Artikel 232.

⁴⁹¹ Cf. Hoge Raad 21 September 2007, *NJ* 2007, 565 (Kwekerij De Engel/Enthoven Electra).

⁴⁹² E.g. on paper or on CD/DVD.

⁴⁹³ E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer's computer.

(1) The conclusion of the contract itself

According to Article 6:227c(2) and (3) *BW* the service provider is required to confirm the receipt of the consumer's acceptance as soon as possible by electronic means. As long as the acceptance has not been confirmed, the other party can dissolve the contract. Furthermore, not confirming the acceptance within a reasonable time is considered as a rejection of the acceptance. The declaration of acceptance and the confirmation are considered to have been received when they are *accessible* to the parties to which they are addressed.⁴⁹⁴ The fact that the legislator does not specify whether confirmation should be given in hardcopy seems to imply that there are no formal requirements regarding the accessibility of the declarations.

(2a) The terms of the contract (not standard terms)

According to Article 6:227b(2) *BW*, the core terms and conditions of the contract offered by the service provider⁴⁹⁵ must be made available to the other party before or at the time of conclusion of the contract in a way that enables him to store them and read (examine) or reproduce them afterwards. Non-compliance with this provision gives the consumer the right to withdraw from the agreement during the time the service provider has not yet supplied all of the information mentioned in Article 6:227b(2) *BW*, Article 6:227b(5) *BW* provides.

(2b) Standard terms

With regard to standard terms, see the answer to Q.5.2.

(3) Other information

There are three sets of information to be provided, which to a large extent overlap. The first is general information, as laid down in Article 3:15d *BW*. This provision primarily regards the identity of the service provider.

The second is specific information about the requirements of the conclusion of the contract, as laid down in Article 6:227b *BW*. According to Article 3:15d *BW*, the information has to be made easily, directly and permanently accessible to the end-user. According to Siemerink, the requirement of 'easily, directly and permanently accessible' is met if the service provider makes available the information in a clear and recognizable way, for example on a portal site, which is updated in case of changes.⁴⁹⁶ She notes that this requirement is not met if the identity of the service provider has to be 'searched for' through deeplinks.⁴⁹⁷ The requirements of Article 6:227b *BW* are met if the service provider explains on his website which acts entail the conclusion of a contract. The service provider can for example mention above the 'I agree' button that clicking on this button is considered as the acceptance of an offer and thus entails the conclusion of the contract.⁴⁹⁸

⁴⁹⁴ See also L.A.R Siemerink, *De overeenkomst van Internet Service Providers met consumenten*, Deventer, Kluwer 2007, p. 67. According to Siemerink 'accessible' means available. For example a message/notice is considered as received as soon as it is in the mailbox of the recipient. The recipient does not have to actually open his mailbox.

⁴⁹⁵ See for the definition of core terms in the sphere of digital content Siemerink (2007), p. 100.

⁴⁹⁶ Siemerink (2007), p. 54.

⁴⁹⁷ Siemerink (2007), p. 54.

⁴⁹⁸ Siemerink (2007), p. 56.

Thirdly, Article 6:230b *BW* (implementing the Services directive) requires the providers of a service within the meaning of Article 48 TFEU to provide information as to, i.a., the identity and address of the service provider, the terms of the contract (including standard terms, see also Q.5.2, and terms as to the applicable law and the competent court), the existence or absence of after sales services, the price, the most important characteristics of the service in so far as this is not apparent from the context, and information as to the applicability of a code of conduct or the competence of alternative dispute resolution schemes. This information must (a) be provided on the initiative of the service provider, (b) made available to the other party at the place where the service is performed or the contract concluded, (c) made available electronically at an address made known by the service provider, or (d) included in the contract documents provided by the service provider (art. 6:230c *BW*). This information must be provided in due time before the conclusion of the contract if the contract is concluded in writing, or before the performance of the service if no written contract is available (art. 6:230e *BW*).

Q.5.6 Are you aware of any specific information duties for providers of digital content services? If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

As mentioned before (Q.5.5 under 3), information duties are divided in those concerning general information and those concerning specific information. General information duties comprise the duty of the service provider to make known his identity.⁴⁹⁹ Specific information primarily includes the information on how a contract is concluded.

The general information duty obliges the service provider to make known his identity, as well as certain other information, and make this information easily, directly and permanently accessible. The information requested comprises, according to Article 3:15d *BW*:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established;
- (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
- (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
- (e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- (f) as concerns the regulated professions:
 - any professional body or similar institution with which the service provider is registered,
 - the professional title and the Member State where it has been granted,
 - a reference to the applicable professional rules in the Member State of establishment and the means to access them;
- (g) where the service provider undertakes an activity that is subject to VAT, the identification number.

⁴⁹⁹ F.W. Grosheide, E-Commerce, p. 344, in: E.H. Hondius, G.J. Rijkern, *Handboek Consumentenrecht*, Zutphen, Uitgeverij Paris, 2006.

Specific information duties are laid down in Article 6:227b(1) *BW*. These primarily regard the requirements for the conclusion of a contract. According to Article 6:227b(4), an agreement that has been formed under the influence of a violation by the service provider of one of his obligations under paragraph (1)(a), (c) and (d) may be nullified. These obligations comprise: (a) the way in which the agreement will be concluded and, in particular, which operations are necessary to come to this result; (c) the way in which the opposite party will be able to identify actions which he did not want to perform and the way in which he may correct input errors, prior to the conclusion of the agreement; and (d), the languages offered for the conclusion of the contract. If the service provider has not met one of his obligations under paragraph (1)(a) or (c), then it is presumed that the contract has been formed under the influence of a violation of these obligations, paragraph (4) indicates.⁵⁰⁰

Finally, similar provisions as the ones included in Article 3:15d and 6:227b *BW* apply for the providers of services within the meaning of Article 48 TFEU (see also Q.5.2 and Q.5.3).

Q.5.6 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer? If so, please specify.

See Q.5.5 under 3.

Q.5.7 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?⁵⁰¹

The remedy for non-compliance with the information duties of Article 6:227b *BW* is voidability (Article 6:227(4) *BW*), i.e. the contract may be nullified (with retroactive effect). The information obligations of Article 3:15d and 6:230a ff. *BW* do not provide for an explicit remedy, which implies that the general remedies for breach of an obligation (e.g. termination, damages and specific performance) and, depending on the circumstances, voidability of the contract for mistake (Article 6:228 *BW*) apply. Moreover, with regard to the obligation to provide the standard terms on time under Article 6:230b, 230c and 230e *BW*, the remedy of voidability of (only) these terms under Article 6:233(b) *BW* applies, leaving the rest of the contract in force.

⁵⁰⁰ See: District Court Rotterdam (sector kanton) 19 January 2006 , LJN AU9939

⁵⁰¹ E.g. voidability or termination of the contract, damages, prolongation of the period for the exercise of a right of withdrawal.

6 Right of withdrawal

Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

With regard to standard software, the question is whether the contract may be qualified as a sales contract or as service contract (see above, Q.2). Similarly, Schaub⁵⁰² and Van Wechem⁵⁰³ argue that a contract to download music over the Internet is to be considered as a sale of rights, to which the rules on consumer sales law (mandatorily) applies.

If the contract is qualified as a sales contract, Article 7:46d *BW* indicates that the withdrawal period only starts once the standard software is delivered. This right is not applicable in every situation. Exclusions are mentioned in 7:46d(4) *BW* and include, under (c), audio content, video content and computer programs in the case where the consumer has broken the seal of the package.

For all other digital content services, Articles 7:46i jo. 7:46d *BW* regulate the right of withdrawal. In accordance with the Distance Selling Directive, Article 7:46i(5)(a) *BW* excludes the right of withdrawal in situations where the service provider started performing the service with the consent of the consumer.

Looking at the current law that regulates distance selling agreements, it seems that if a digital content service is delivered (through downloading or physical means), the consumer only has a right of withdrawal if the content has not been opened/used. However, as will be discussed under Q.6.2 below, an exemption exists that is in derogation of the Distance Selling Directive. Article 6:227b *BW* regulates the situations where a service contract is concluded electronically. The services that fall under this provision are defined in Article 3:15d(3) *BW*. Additional grounds on which a right of withdrawal exists are given in that provision. This means that if one of the circumstances given in Article 6:227b(5) occurs, the consumer will have an additional ground to withdraw from the contract in respect to the one given in the distance selling agreement.

Unless indicated otherwise, below we will assume that the digital content service can not be qualified as a sales contract.

Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

⁵⁰² M.Y.Schaub, Digitale muziek, DRM en de thuiskopie: biedt het consumentenrecht uitkomst?, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2006/2, p. 42.

⁵⁰³ T.H.M. van Wechem, 'Downloaden van muziek, enkele consumentenrechtelijke verstrooiingen...', *Tijdschrift voor Consumentenrecht* 2006/4, p. 106-107.

In pursuance of Article 7:46i(5)(a) jo. 7:46d *BW*, if the service is rendered with permission of the consumer, his right of withdrawal ends. If the consumer gave permission for rendering the service, it will not make a difference if he was not informed about the right of withdrawal. Article 7:46i(5)(a) describes the situation in which the permission was given before the 'cooling off' period ends. This means that as soon as the permission is given, the right of withdrawal ends. However, an exception is given if the contract is concluded electronically and the service is in compliance with the definition of Article 3:15d(3) *BW*. Digital content services will most likely fall under this definition. In pursuance of Article 6:227b(5) *BW*, a consumer can withdraw from a contract that is concluded electronically if the provider did not provide the information stipulated in Article 6:227b(1)(b) and (e). This means that if the provider did not inform the consumer about the means through which he can access the contract (digitally) and/or about the behavioural codes he subjected himself to, the consumer can withdraw from the contract. From the moment that the provider informs the consumer about these two matters, the right of withdrawal ends.

Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

The situation where the service has been rendered and the consumer is still entitled to withdraw from the contract and indeed does so, has not been regulated explicitly in Dutch law. The rules on the consequences of termination for non-performance may be applied by way of analogy. In the case of termination, Article 6:271 *BW* stipulates that the Article 6:271 *BW* stipulates that the termination of the contract entails an obligation for the parties to reverse the performance of the obligations that they have already received. This is likely to be the case where standard software is adapted to accommodate the purchaser's specific needs and that performance has already taken place. In such case, the obligation to reverse the performance of the obligations already received is transformed into an obligation to pay a compensation for the value of the performance under Article 6:272 *BW*.⁵⁰⁴

Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

⁵⁰⁴ Rb Rotterdam 29 juli 2009, LJN BJ5602 (X/dVision Automatiseringsbureau B.V.).

In this context, there is as yet no specific regulation in the sphere of digital content services. However, in general contract law the termination or avoidance of a contract may have consequences for a linked contract. This has been affirmed in a judgment of the Dutch Supreme Court.⁵⁰⁵ Although, the case is not in the sphere of digital content services this case may be applied in analogy. The facts are as follows. A consumer bought a car from a car company. In order to buy this car, the consumer entered into a finance contract with a third party. After a certain time the consumer rescinded from the contract with the car company on the basis of (non-contested) non-conformity. The court held that in case of rescission of a contract on the basis of non-conformity this might affect an interdependent contract, since there is an intrinsic correlation between the underlying contracts. Important to note, according to the Dutch Supreme Court, this only applies if the contracts were concluded at the same time and the seller was aware of the other contract(s).

7 Unfair contractual terms

Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a ‘main obligation’ under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

There is no conclusive legislation or case law on this matter. For this reason, this answer is based on the analysis made by Schaub⁵⁰⁶ on the basis of the main principles of Dutch law. According to Schaub, a contractual term that prevents a piece of music from being copied, or that restricts its playability, can in some cases be considered to be a core term.⁵⁰⁷ Core terms (*‘kernbedingen’*) concern the essential parts of the agreement. A digital rights management (DRM) clause can be considered as a core term that defines the scope of use of the product and, thus, the kind of service that has to be delivered. In other words, DRM sometimes is part of the content elements that represent the essential duty under the contract. In absence of the DRM term there would be no consensus, because of the lack of specificity of the agreement.

Schaub submits that the qualification of the DRM clause as a main obligation depends on the kind of agreement. In the context of the purchase of digital content services, for example downloading music, the user possibilities will play a greater role than with physical media, such as CDs. If DRM is considered as a core term it will be quite difficult for the consumer to invoke any rights.

⁵⁰⁵ HR 23 January 1998, NJ 1999, 97 (Jans/Fiat Krediet Nederland).

⁵⁰⁶ M.Y. Schaub, ‘Digitale muziek, DRM en de thuiskopie: biedt het consumentenrecht uitkomst?’, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2006/2, p. 43-44.

⁵⁰⁷ Ibid idem.

It should be noted, however, that according to both the legislator⁵⁰⁸ as the Dutch Supreme Court, the *Hoge Raad*,⁵⁰⁹ the term ‘core term’ is to be interpreted restrictively: the fact that the term deals with a subject which is of great importance to the party that has introduced the term into the contract (or to both parties) is not decisive. To the contrary, the only relevant factor is whether, objectively, the contract could not be concluded without the inclusion of the term because otherwise the obligations of the parties could not be determined. This implies that in most situations, the term would not be considered as a core term.

If a DRM clause is not seen as a core term, the provisions on unfair terms (Title 6.5.3 *BW*) may apply. According to Schaub, DRM may under certain circumstances conflict with the grey list of Article 6:237 *BW*.⁵¹⁰ Such terms are presumed to be unfair (unreasonably burdensome) for the other party, but the party who has introduced the term into the contract may provide adequate evidence of the contrary. If that proof is not rendered, the term is indeed unfair and maybe avoided on the basis of Article 6:233 *BW*. Article 6:237(b) names the following as a presumably unfair term:

“A stipulation that materially limits the scope of the obligations of the user with respect to what the other party could reasonably expect without such stipulation, taking into account the rules of law that pertain to the contract.”

The application of this article depends on the reasonable expectations of the consumer may have of the service on the basis of the rules of copyright. In the light of contemporary law this should be investigated in the light of Copyright law (*Auteurswet*) and (the principles of) contract law. According to Dutch Copyright law a copyright holder is entitled to use protection measures, such as DRM.⁵¹¹ This ‘entitlement’ can impede the right of the user to private copying. According to the Dutch Minister of Justice, in principle there is no right of private-copying.⁵¹² Digital rights management is thus lawful. However, on the other hand, consumers can invoke rights on the basis of reasonable expectations to make private copies.⁵¹³

If DRM is (hypothetically) considered as a standard term, it is voidable may be nullified if, according to Article 6:233(a) *BW*, it is unreasonably burdensome for the other party, having regard to the nature and content of the contract, the way in which the standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case.

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

According to Article 6:233 *BW* a standard term is voidable:

⁵⁰⁸ Parl. Gesch. Inv. Boek 6, p. 1521, p. 1527

⁵⁰⁹ Hoge Raad 19 September 1997, *NJ* 1998, 6 (Assoud/Nationale Sporttotalisator); Hoge Raad 21 February 2003, *NJ* 2004, 567 (Stous/Stichting Parkwoningen Hoge Weide).

⁵¹⁰ M.Y. Schaub, ‘Digitale muziek, DRM en de thuiskopie: biedt het consumentenrecht uitkomst?’, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2006/2, p. 44.

⁵¹¹ Although the Dutch legislator does not explicitly state in its laws that technical protection is permissible, one can derive from explicit from article 28 that copyright holders have the right to use technical protection measures. This article namely states that removing technical protection measures is seen as an unlawful act.

⁵¹² Kamerstukken I, 2003/04, 28 482, C, p. 7.

⁵¹³ Kamerstukken I, 2003/04, 28 482, C, p. 7.

- a. if it is unreasonably burdensome for the counterparty, having regard to the nature and content of the agreement, the way in which these standard terms and conditions have been formed, the interests of each party, as evident to the other, and the other circumstances of the case.

In the case of a contractual term pertaining to the privacy of the consumer the judge would presumably consider the contractual term unfair in case the consumer has not explicitly authorised the processing of his/her personal data, even if he or she has accepted the contractual term.

In accordance with Article 8 of the Dutch privacy regulation, (*Wet bescherming persoonsgegevens, Wbp*), one of the grounds for the legitimate processing of personal data is the unambiguous consent of the data subject. According to Siemerink, the acceptance of standard terms in which the provision is listed that the consumer gives his/her permission that their personal data will be used for marketing purposes by the service provider is not to be considered as expressing his or her unambiguous permission. Permission can simply be given by giving the consumer the possibility to tick a box indicating that he or she gives permission for the processing of personal data.⁵¹⁴

In this context, a decision of the Council for the Protection of Personal Data (*College Bescherming Persoonsgegevens*) is of relevance. The facts were as follows. A mobile operator distributed name and address information of its subscribers to a large telecommunication company, KPN. KPN then published this information in a universal phone directory. The *College Bescherming Persoonsgegevens* held that this act infringed upon Article 33 of the *Wet bescherming persoonsgegevens*. This provision determined that a mobile phone operator had to instruct and inform end-users about the way their personal information was used. Under no circumstance is reference made to standard terms sufficient to reach this goal. The consumer had to be well informed and referring to general terms was not considered as adequate information.⁵¹⁵

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

In the sphere of DCSC there is as yet no case law. However, authors, such as Siemerink, Van den Hoven en Van Genderen have discussed this topic summarily in the context of social network sites. According to Siemerink most service providers use certain standard terms.⁵¹⁶

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

We are not aware of a debate on this issue in Dutch law.

⁵¹⁴ Zie Kamerstukken II 1997/1998, 25 892, nr. 1-3, p. 10 en 65-68. Cited in: L.A.R. Siemerink, de overeenkomst van internet service providers met consumenten, p. 66.

⁵¹⁵ http://www.cbpreweb.nl/Pages/uit_z2003-0163.aspx (last consulted on 27 August 2010).

⁵¹⁶ Siemerink (2007).

8 Failure to function properly

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

The buyer may expect the purchased good to function in accordance with his reasonable expectations, Article 7:17 *BW* stipulates. In essence, the same criterion applies if the contract is qualified as a service contract.

The judicial assessment of the quality of a digital content service will depend on the 'sort of failure' the service shows. A judgement of the District Court of Den Bosch⁵¹⁷ shows that when looking at the reasonable expectations one may have from software, this will also depend on the hardware (and operating system) it runs on. This shows that judges adopt a functional perspective, but broader than described in the question. The judge will not only look at the question whether the software functions properly, but will also take into consideration the hardware and operating system the software is connected to. A judgment on the matter of functionality will take all the technical aspects that are relevant into account.

In another case, which was brought before the District Court of Arnhem, the judge decided that a flaw in the software gives the party the right to withdraw from the contract.⁵¹⁸ In this context, the court stipulated some interesting criteria regarding the *normal functioning* of software. People may expect the software to function properly on the hardware that is specified in the manual (or in the software purchase agreement). It is also reasonable to expect that the purchased software runs properly on the operating system (OS) that is mentioned in the 'Minimum Specifications' on the package.

Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what 'normal use' of a service is, e.g.

- the ability to make private copies according to copyright law,
- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),
- the suitability of certain contents for minors as stipulated under audiovisual media law,
- journalistic codes of conducts, etc.

The court may take this into account.

⁵¹⁷ District Court 's-Hertogenbosch 13 October 2004, *Computerrecht* 2005, 13.

⁵¹⁸ District Court Arnhem 28 June 2006, *LJN* AY4962.

Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?⁵¹⁹

If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and middleware?

Unless informed otherwise by the seller, the buyer may expect a purchased good (or right) to function in accordance with the buyer's legitimate expectations, in particular that the good is fit for use in accordance with its normal purpose and with any particular purpose made known to the seller prior to the conclusion of the contract, Article 7:17(2) *BW* provides. This implies that unless the buyer is informed otherwise or if the buyer had reason to think otherwise, the buyer may expect the purchased good to be used in accordance with hardware and software, which is commonly used at the time of the purchase. In essence, the same rules would apply if the contract would be considered a sales contract. In practice, sellers and service providers often explicitly indicate which system requirements apply for the use of the purchased digital content, thus setting out what the consumer may reasonably expect of the digital content.

Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

Article 7:17(1) *BW* stipulates that a product must be in conformity with the contract. The qualification of a product when downloading a digital content service may be difficult. In particular where the purchase of standard software is concerned, courts are inclined to apply sales law either directly, by qualifying the software as 'rights' in the sense of Article 3:6 *BW* and applying sales law by virtue of the operation of Article 7:47 *BW*, or by way of analogy. This implies that whenever possible, sales rules will be applied, as will the remedies for breach of the sales contract, i.e. repair and replacement, termination, price reduction, and damages.

However, according to Schaub,⁵²⁰ the more the purchase of the digital content is done through the Internet, the less similar it is to a good and the more it begins to look like a service. If this is the case, the contract would have to be qualified as a contract within the sense of Article 7:400 *BW*. The remedies for breach of a service contract are similar, yet the specific rules on repair and replacement do not apply. In stead, the general provision on the right to specific performance (Article 3:296 *BW*) applies, which does not specify the manner in which specific performance is to be rendered. Moreover, price reduction is not explicitly regulated, but this remedy is considered to be equal to partial termination, which is available as a remedy under the same conditions.

Where the purchaser is a consumer, the rules on non-conformity and the remedies are mandatory where the contract is qualified as a sales contract, but – as explained above - it is uncertain whether this is also true if sales law is applied by virtue of the operation of Article 7:47 *BW*, or by way of analogy. Where the sales remedies apply, the consumer is required to first choose repair or replacement and only as a subsidiary remedy may invoke the right to termination or price reduction; the right to claim damages is not included in the hierarchy of

⁵¹⁹ Idem.

⁵²⁰ Schaub, p. 43

remedies. Whereas the hierarchy of remedies only applies in the case of consumer sales contract, if the contract is qualified as the sale of rights and the sales rules are applied only by virtue of the operation of Article 7:47 *BW*, or by way of analogy, the hierarchy would not apply either, leaving the consumer the free choice between all remedies. The same would apply if the contract would have to be qualified as a contract within the sense of Article 7:400 *BW*. In that case, both the rules on non-conformity and the rules on the applicable remedies constitute default rules, but standard terms limiting or excluding the normal remedies may be considered unfair and thus be nullified.

Q.8.5 For how long after delivery of the digital content service (weeks, months, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)?⁵²¹ If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

In Dutch law, in principle the period during which a consumer may invoke a remedy for non-conformity is determined by the expected life span of a product. For example, a consumer may expect a washing machine to function properly for about 10 to 15 years. The period of prescription is therefore determined according to the moment the consumer discovers the non-conformity: Article 7:23 *BW* stipulates that a consumer can no longer invoke a remedy if he or she has not informed the seller of the non-conformity within due course of time after having discovered the defect. According to this provision, a notice of non-conformity given within two months after discovery of the non-conformity is still on time.

Article 7:18(2) *BW*, furthermore, prescribes a term of six months in which, if the good does not answer to the agreement and it reveals itself within this period, the (judicial) presumption will be that the good has failed to function properly. The seller may provide evidence of the contrary. Two problems arise when trying to apply this provision to digital content services. First, will a digital content service be defined as a good? If not, this article can not be applied to digital content services. Another important factor is that Article 7:18(2) says that this provision applies, unless the nature of the good objects to this term. Looking at the nature of a digital content service, a term of six months may be disputable.

As mentioned earlier (Q.2.1), it is not yet clear how judges will define digital content services, as ‘goods’ or as ‘services’. As mentioned earlier (Q.2.1), it is not yet clear how judges will define a contract for the supply of digital content services, as a sales contract or as a service contract. The qualification determines which rules apply to the products and, accordingly, which remedies are available to the consumer:

⁵²¹ Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

Digital content service as a 'good'

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According to article 7:21(1)(b) *BW* the consumer may claim that the digital content services must be repaired or according to article 7:21(1)(c) *BW* that the digital content service must be replaced. These claims only apply if the digital content service did not perform as it should have (in accordance with Article 7:18 *BW*). Another option is dissolution of the contract in pursuance of Article 7:22(1)(a) *BW* in situations in which the good is not in compliance with the contract. The ability to dissolve the contract only exists if repair or replacement is impossible (7:22(2) *BW*) and if dissolution of the contract is not disproportional (7:22(1)(a) *BW*).

If the contract is not qualified as a sale of goods, but as a sale of rights under Article 7:47 *BW*, it is not certain that the consumer sales provisions would be applicable. If this is not the case, then the consumer is required to notify the non-conformity within a reasonable time after the moment when the consumer should have discovered the non-conformity, and the two months-minimum period does not apply (cf. Article 7:23 *BW*). Moreover, Article 7:18(2) *BW* does not apply either. However, the hierarchy of remedies, embodied in Article 7:22(2) *BW* would not apply, which means that the consumer could resort to termination for non-conformity without first having to accept the seller attempting to cure the non-conformity through repair or replacement, provided that the seller is in default.

Digital content service as a 'service'

As regards to services, not specific regulation has been made for consumer purchases. One possibility would be to apply This implies that the consumer sales regimeremedies are determined by analogy (possibly on the basis of Article 7:47 BW).⁵²² Articles 7:21 and 7:22 BW would then apply. Otherwise, we should look at general contract law (Book 6 BW). According to Article 6:74, a consumer has the right to compensation for damages that was caused by the non-performance of the service, unless the failure in performance can not be attributed to the service provider (Article 6:75 BW). Moreover, the consumer may terminate if the failure of the digital content justifies such termination (Article 6:265 BW). Yet, the consumer would have to notify the supplier of the digital content within a reasonable time after he should have discovered the non-conformity, and the two months-minimum period does not apply (cf. Article 6:89 BW).

Both hardware and software are subject to technological development. At a certain moment, a digital content service will no longer be compatible with new hardware and software unless it is updated.

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

The durability of the software has been discussed by Rott:⁵²³

'One aspect of conformity with the contract is the durability of the purchased product. This may be a problem in cases of lack of interoperability. For example, Microsoft has abandoned its system "Playsforsure" (on which see Patalong 2008). If the successor system is not compatible with the previous system, the purchased content can only be used with the old software or hardware, and it may be lost completely if the old hardware cannot be used any longer. This clearly goes against the reasonable expectations of consumers who expect that a purchased product remains useable until it is destroyed. Although nothing lasts forever, the durability of the product cannot, under the general rules of sales law, depend on the discretion of the content and hardware provider.'

According to this view, the durability may not depend on the discretion of the provider. This seems to imply that, in principle, the durability of digital content services will have to be measured from the perspective of the consumer (i.e. how long does the consumer expect to use the content) instead of being dictated by technological developments. Technological improvements (e.g. new hardware) will eventually cause old digital content service to not function properly. But as mentioned above, according to Rott this will not influence the expected durability that a consumer may have of the content.

Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identify, geographical address or further details?

⁵²² See also Q.2.1 above.

⁵²³ P. Rott, 'Download of Copyright-Protected Internet Content and the Role of (Consumer) Contract Law' in Journal on Consumer Policy (2008) 31:441–457, Published online: 30 October 2008

- a) the operator of that platform, or
b) the third party application service himself?
Should this be done before or after the contract is concluded?**

If we look at the recent situation in regards to platforms, we see that for example Windows functions as a Operating System (hereafter: “OS”). Through the OS it is possible for a consumer to install and download other applications that are not distributed by Microsoft, but that can run on Windows. This means that the current technical and factual situation makes a distinction between a so called OS and additional applications that are being run on the OS but that are not linked to the seller/distributor of the OS.

Looking at the description given in Q.8.7, that situation does not seem to fundamentally differ from the example given above. This means that the third party who distributes the application is responsible for giving the information prior to the conclusion of the contract. The rules that apply to distance selling agreements can be used in case a third party offers an application, because the consumer can make a distinction between the operator of the platform and the third party who offers the application.

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

If we take the answer given in Q.8.7 into consideration, a distinction can be made between three parties:

- the distributor of the platform;
- the distributor of the device;
- the distributor of the digital content service (application).

Usually, the first two in practice are one and the same party. However, for the sake of argument, we will treat them as different parties here.

The consumer usually can see the difference between the party who offers the platform and the party who offers the application. This means that in case of a defective service, which can be traced back to one of the three possible distributors (on the level of the platform, device or application), the corresponding party can be held liable for the damages caused by the defect (on the basis of Article 6:74 jo 6:75 BW), since the contract for supply of the service regards the consumer and this distributor.

If the distributor did not render the service (i.e. the platform distributor did not provide the application), the question is whether the contract between the consumer and the distributor of the platform or device covers defects in applications that run on this platform or device.

9 Remedies for non-performance and termination of a long term contract

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

No specific remedies have been developed pertaining to digital content services.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

If consumer sales law is applied by analogy to digital content services, Article 7:21 and 7:22 *BW* establish a hierarchy of remedies. Otherwise, the rules of general contract law apply, which in principle do not indicate a hierarchy of remedies (see also the answer to Q.8.5 above).

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

The answer to this question depends on the qualification of the contract as a consumer sales contract or: (a) as a contract for services under Article 7:400 *BW* or (b) as a contract for the sale of rights under Article 7:47 *BW*, in both cases if consumer sales law does not apply to such contracts.

In the case where consumer sales law applies, no prior notice of default is required for termination, but the consumer is required to notify the seller of the non-conformity under Article 7:23(1) *BW*. Such notification must be sent within a reasonable period after discovery of the defect, but a notice that is sent within two months after discovery is considered to have been sent on time. The notification is not bound to any formalities (e.g. on paper or electronic format); the Article speaks of a ‘notification’. Article 7:21(3) *BW* refers to a ‘reasonable period’ in which the provider must repair/replace the damaged good. If this reasonable period is not met, the consumer has the right to terminate the contract (Article 7:22(2) *BW*). This also is the case in situations in which repair/replacement is impossible, see Article 7:22(2) *BW*.

However, if the digital content services are classified as falling outside the scope of Title 7.1 *BW*, the general rules of contract law will apply. According to Article 6:265(1) *BW*, any failure in the performance of an obligation allows the creditor, in this case the consumer, to set aside the contract, unless this would be disproportionate. In principle, a written notice is required for setting aside the contract, but in case of a contract that In principle, the consumer would be required to send a notice of default prior to termination, allowing the supplier of the digital content to rectify the non-conformity within a reasonable period (Article 6:265(2) and 6:82 *BW*). This notice must be provided in writing and can, therefore, not be given through electronic means, not even when the contract was concluded through electronic means, since the legislator has refrained from providing an alternative means, as it has done in case of the notice of termination. No such notice is required, on the other hand, however, where the non-conformity can not be remedied (Article 6:265(2) *BW*), or where the supplier refuses to remedy the defect, or where the original contract provided a deadline for proper performance of the contract (see Article 6:83 *BW*). Again, a duty to notify applies (Article 6:89 *BW*). This notification is not bound to any formalities. It may be combined with the notice of default, which, however, has to be in writing.

In any case, either a court order or a written notice is required for setting aside the contract. Only where the contract has been concluded by electronic means, the notice of termination may also be sent through electronic means (Article 6:267(1) *BW*).

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?⁵²⁴

If the digital content service answers to the reasonable expectations one may have of it, then no specific rules have been developed in title 7.1 *BW* (regarding sales contracts) other than the right of withdrawal in article 7:46d *BW*. Insofar as the contract can be qualified as a consumer sales contract (or as a contract for the sale of rights to which consumer sales rules are applicable), there are no other rules on termination for other reasons than non-conformity, apart from the right of withdrawal in Article 7:46d *BW*. This right of withdrawal is only applicable to distance selling agreements. The right of withdrawal can be exercised even if the supplier of the digital content has not breached his obligations towards the consumer. The consumer can invoke this right within seven working days (so called ‘cooling off period’) after the delivery of the digital content service. If however the service provider did not fulfil all the requirements of article 7:46c(2) *BW*, the period to invoke the right of withdrawal is extended to three months⁵²⁵. Notice must be taken of Article 7:46d(4)(c) *BW*. This article creates an exception on the ‘cooling off period’. This exception applies to audio-, video-recordings and software if the sealing of the package (e.g. CD or DVD) is broken. The complication arises in situations that a digital content service, which most likely will fall

⁵²⁴ For instance: is the notice of termination invalid or must the consumer pay damages?

⁵²⁵ If the service provider later on fulfils all the requirements that are set forth in article 7:46c(2) by (digitally) sending the missing information, the original period of seven working days applies from the moment the information has been provided to the consumer

under any of the three categories mentioned in article 7:46d(4)(c), is downloaded – i.e. no sealing can be broken. It is uncertain whether the exception would apply in the case of a browse-wrap licenses. It could be argued that the nature of the digital content implies that it cannot be returned. If that is the case, the right of withdrawal is excluded as well (Article 7:46d(4)(b)(3) *BW*). No case law is available regarding this topic.

In so far as the right of withdrawal is not excluded, Article 7:46c(2)(e) *BW* obliges the supplier of the digital content to inform the consumer about the means through which he can terminate the contract if the contract is made for a fixed period of a year or longer or for an undetermined period. This implies that the consumer is allowed to terminate the contract, but that the terms are made by the seller.

In the situation in which the digital content service is looked upon as a service, there will be no right of withdrawal if the provider started rendering the service with permission of the consumer – article 7:46i(5)(a) *BW* (also see Q.8.4).

However, in that case the consumer may terminate the contract under Article 7:408 *BW* even in cases where there is no non-performance on the part of the supplier of the digital content; this right is then mandatory (Articles 7:408(1) and 7:413 *BW*). No form requirement applies.⁵²⁶ If the consumer terminates in the case of a contract for a fixed period, he will be required to pay a reasonable part of the contract price if payment was based on the passing of time; in determining the amount, the reason for the termination of the contract, the use the service has had for the consumer and the services already rendered by the supplier of the digital content are to be taken into account (Article 7:411 *BW*). In other cases, where the contract was for a fixed period, the consumer would have to pay the full price. Where the contract was concluded for an undetermined period, the supplier's right to payment would end upon termination of the contract. The consumer need not observe a notice period of reasonable length and is not required to pay damages if the notice period were absent or unreasonably short (Articles 7:408(3) and 7:413 *BW*).

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

If the digital content service is part of a bigger package of services, then the entire package must be in conformity with the agreement (Article 7:17(1) *BW*). Dissolution of the contract in pursuance of Article 7:22(1)(a) *BW* is possible in situations in which the good is not in compliance with the contract. The ability to dissolve the contract only exists if repair or replacement is impossible (7:22(2) *BW*) and if dissolution of the contract is not disproportional (7:22(1)(a) *BW*). If the service is only a small proportion of the entire package, one may argue that dissolution of the contract would be disproportional. This however, is a vague standard and will depend a lot on the circumstances of the case.

⁵²⁶ Asser-Tjon Tjin Tai, *Bijzondere overeenkomsten IV, Opdracht incl. geneeskundige behandelingsovereenkomst en de reisovereenkomst*, Deventer: Kluwer, 2009, no. 169.

Where the termination is based on non-conformity (i.e. on non-performance), the consumer may terminate the part of the contract that relates to the defective content only, or the whole contract, provided that the non-performance justifies the termination of the whole contract (see Articles 6:265 and 6:270 *BW*). Where the contract is qualified as a contract for services and termination is based on Article 7:408 *BW*, the question whether partial termination would be allowed is not regulated. Analogous interpretation of Articles 3:41 and 6:270 *BW* would seem to allow for such partial termination, provided that the rest of the contract could remain unaffected by the partial termination.

10 After sales services

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

No specific legal rules have been developed regarding this matter. However, Article 7:46c(2)(d) *BW* also comprehends after sales services⁵²⁷. But again, this is a provision that obliges the seller to inform the consumer about the after sales services. It does not oblige the seller to actually provide after sales services. In the parliamentary history we can see that the legislator chose not to regulate the after sales services in title 7.1 *BW*⁵²⁸.

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

No legal rules have been developed in this matter, but see previous answer.

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service⁵²⁹ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

A parallel can be drawn between this question and the topic discussed in Q.8 ‘failure to function properly’. The moment the digital content service does not work adequately due to technological developments (i.e. the device on which it is used has become obsolete or discontinued), the responsibility to supply additional service lies with the service provider. The topic of durability also has been discussed in Q.8.6.

⁵²⁷ Siemerink, ‘ISP’s en de Wet overeenkomsten op afstand’ in Tijdschrift voor Consumentenrecht 2002 – Nr. 3, pp. 178 – 191. p. 184

⁵²⁸ Loos, ‘Consumentenkoop en garanties volgens het herziene consumentenkooprecht’ in NTER, nr. 6, juni 2003 – pp. 155 – 161. p. 160

⁵²⁹ E.g. to play the obtained music or video content.

Q.8.6. - According to this view, the durability may not depend on the discretion of the provider. This seems to imply that, in principle, the durability of digital content services will have to be measured from the perspective of the consumer (i.e. how long does the consumer expect to use the content) instead of being dictated by technological developments.

11 Unfair commercial practices

Q.11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

a. the use of incompatible standards to prevent users from switching to other services or hardware;

According to article 6:193b(2) *BW*⁵³⁰ a trader acts tortiously (unlawfully) towards a consumer if he conducts a commercial practice that is unfair. A commercial practice is unfair if a trader acts against the requirements of professional diligence and the ability of the average consumer to take a well-informed decision is noticeably limited or may be noticeably limited, as a result of which the average consumer takes or may take a transactional decision which he otherwise would not have taken (Article 6:193b *BW*).

Ad a: According to Article 6:193c *BW*, the use of incompatible standards to prevent users from switching to other services or hardware can be an unfair commercial practice if the trader mentions, for example on his website, that content *can* be switched to other services, whilst this is not the case. This can probably be considered as information that deceives the consumer with respect to the main characteristics of the product, more specifically the usage of the content. Also omitting material information about this incompatible standard can be seen as misleading, in particular if the average consumer would have reason to expect that there would not be any problems with comparability. When deciding whether or not the (absence of) information on the compatibility of the product with certain devices is misleading, the price of the product may be considered relevant as well. In particular where the price is relatively low and the consumer should be aware thereof, it may be that the average consumer can be expected to anticipate compatibility problems. The same is true, in particular, when the name of the provider of the digital content or of the digital product itself appears to point in the direction of compatibility with a specific device only. For instance, it may be considered public knowledge that the product can only be used in combination with a certain device, e.g. the use of music downloaded from the Apple music store, which can only be used in combination with an Apple device. When the trader informed the consumer, prior to the conclusion of the contract, about the incompatible standard, the practice would most likely not be considered unfair. Nevertheless, occasionally a practice can be considered

⁵³⁰ Implementation of article 5 of the Unfair Commercial directive Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

unfair even though prior information about the incompatible standard has been provided. This is the case if the information is supplied in an unclear, unintelligible, ambiguous or untimely way to cause the average consumer to take a transactional decision that he would not have taken otherwise.

b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);

Ad b: A case that came before the Central Appeals Tribunal (*Centrale Raad van Beroep*, the highest administrative court in this area) may be of relevance for this question. The facts were as follows: An advertiser placed a Google add with the text ‘free ringtones’ on a website. By clicking on the add a consumer would enter into the website: “www.freeringtones.nl. This website was primarily aimed at minors. After the consumer ordered a ringtone he did not just get one ringtone for free, but was also immediately bound to a subscription. This element was mentioned during the online ordering process, but only in small print. The Central Appeals Tribunal held that the service provider had acted against the Child Advertisement Code and the Advertisement Code, since the provider had used the wording ‘for free’ while the service was only partially free. This incorrect information could influence the unknowing minor, who might be persuaded to conclude a contract that he or she would otherwise not have concluded. Even if the correct information was mentioned in the ordering process, the wording needed to be clear.

**c. the use of Digital Rights Management to prevent unauthorised use;
d. the use of Digital Rights Management to restrict use to a certain region or country;**

Ad c and d: The use of DRM as such is not considered to be an unfair commercial practice, but as the consumer need not be aware of such restrictions, he would have to be informed about the DRM as the possibilities for using the product can be considered as a main characteristic of the product. The omission of such information could then be considered an unfair commercial practice if the use of the DRM significantly impedes the consumer from using the product and therefore be deemed relevant with regard to the consumer’s decision whether or not to conclude the contract.

e. the collection of personal data for marketing purposes or through spyware;⁵³¹

Ad e: The use of spyware or cookies is permissible only if the consumer has given his/her unambiguous permission for the use of personal data.⁵³²

f. the collection of sensitive personal data for marketing purposes or through spyware;

⁵³¹ E.g. in order to enable the provider of the digital content service or third parties to adjust advertisement to the specific circumstances of the consumer.

⁵³² See article 4.1 Besluit universele dienstenrichtlijn.

Ad f: It is questionable whether this can be solved in the sphere of unfair commercial practices. Article 6:193c(1)(b) *BW* determines that the following information is essential: the main characteristics of the product, such as availability, advantages, risks, performance, composition, accessories, after sales services and complaints management, manner and date of production or performance, delivery, fitness for use, performance capabilities, amount, specifications, geographical or commercial origin, the results the consumer may expect from the use of the product, or the results and essential characteristics of the test executed with regard to the product. According to article 6:193d(2), the omission of that information is deemed to be misleading. Where the product is accompanied by spyware, this may be qualified as a risk of the service, which therefore has to be communicated to the consumer before the conclusion of the contract. A failure to do so then amounts to an unfair commercial practice through omission if it can be established that the consumer had known about the spyware he/she would have not taken the transactional decision by omission of information about the main characteristics, risk, the result from its use, of the service or content.

This question can probably be solved in the sphere of the Data protection law, the *Wet bescherming persoonsgegevens*. According to Article 33 of this Act, a service provider needs the explicit permission of the end-user to use cookies or spyware. Therefore the consumer needs to inform the consumer.⁵³³ In no way is referring to standard terms considered as fulfilling the requirement of giving adequate information (see Siemerink 2006).

g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;

Ad g: See ‘ad f’. The problem here is, however, that the service is no longer being provided after the termination of the contract. Possibly, the use of personal data after the termination of the contract can be considered as a ‘result to be expected from its use’. If the consumer is not informed about this use of data, however, this might be deemed to be misleading.

h. the use of default options to entice consumers to the purchase of additional services;⁵³⁴

Ad h: See ‘ad a’.

i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors;

Ad i: See the answer to Q.12.1.

j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers.

⁵³³ R.C. Winkelhorst, *elektronische communicatie & privacy*, Zutphen: Paris 2006, p. 89

⁵³⁴ See also Art. 31 of the Proposal for A Consumer Rights Directive.

Ad j: sponsorship or commission arrangements on price comparison websites *as such* are not to be considered unfair, with or without notification to consumers. However, the information provided must be true, complete and not misleading, otherwise the practice would be unfair. Moreover, when the website purports to be independent, e.g. indicating which service provider or seller offers the best prices or contract terms in a given situation, sponsorship or commission arrangements must be made public, as the consumer would need to be able to ascertain whether or not the information provided is actually trustworthy.

Q.11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

We are not aware of any other examples in Dutch law.

Q.11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;
- the consumer may apply general contract law remedies such as voidance or adaptation of the contract for mistake or abuse of circumstances;
- the consumer may terminate the contract without having to compensate the trader for the loss of profit; and
- the consumer may claim reduction of the contract price?

The following remedies are available to a consumer if he has concluded a contract as a result of an unfair commercial practice:

- 1) damages on the basis of tort law;
- 2) annulment/nullification of the agreement on the basis of defect of consent;
- 3) specific performance or dissolution of the contract on the basis of breach of contract.⁵³⁵

Another approach is the enforcement by administrative authorities of the unfair commercial act.

1) Damages on the basis of tort law

Article 6:193b(1) *BW* determines that a trader acts tortiously towards a consumer if he conducts a commercial practice that is unfair. The term ‘tortiously’ refers to the wrongful act in the sense of Article 6:162 *BW*.⁵³⁶ According to this provision, the tortfeasor is liable for the damage that the wrongful act has caused the other person. The consumer can thus claim damages on the basis of article 6:193 in conjunction with 6:162 *BW*.

⁵³⁵ D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten*, Kluwer: Deventer 2009.

⁵³⁶ D.W.F. Verkade, *Oneerlijke handelspraktijken jegens consumenten*, Kluwer: Deventer 2009 p., 76.

In the context of digital content services a consumer may, for instance claim damages on the basis of tort law if a person enters into a binding contract on the basis of misleading information and he would not have entered into this contract if the information had been correct, or if a person does not enter into a contract on the basis of the misleading information. In the former case, the consumer may claim damages for the detriment caused by the unfair commercial practice, in the latter case the consumer may for instance claim compensation for the loss of opportunities if he can demonstrate that he would have entered into the contract if he had been correctly informed and as a result would have obtained advantages he now has missed.

2) Annulment/nullification of the agreement on the basis of defect of consent

So far, not much attention has been paid to the question whether the fact that the contract was concluded under the influence of an unfair commercial practice should give the consumer with a possibility to annul the contract on the basis of a defect of consent. However, recently the District Court of Haarlem, location Zaandam, has rendered a ruling that, under the circumstances of that case, the contract could be annulled on the basis of abuse of circumstances (*misbruik van omstandigheden*, art. 3:44 *BW*) and on the basis of mistake (*dwalings*, art. 6:228 *BW*). In that case, a seller was found to have made use of an aggressive commercial practice by the conclusion of a sales contract for the purchase of a (pseudo) medical product. The contract was concluded after a sales presentation during a daytrip, where the lady was required to attend a three hour presentation in a room without toilet facilities, eating or drinking and without being allowed to talk, after which she was enticed in a personal meeting to conclude the contract by claiming that the medicine was an effective cure for an ailment from which the consumer suffered.⁵³⁷ It seems that the reasoning used by the Court could also be used in the case of digital content services, in particular with regard to the remedy of mistake, as the court argued that where the consumer is (willingly) led to believe by the information given that the product has certain qualities where in fact this is not the case, this constitutes a ground for annulment of the contract on that basis.

3) Specific performance or dissolution of the contract on the basis of breach of contract

The consumer might also claim performance of the contract. For example, if a standard software-provider has promised that his software could run on certain machines and/or certain systems, he may be held liable for breach of contract.

Q.11.4 To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

The Articles 6:193a-193j *BW* (which implement the 2005 Unfair Commercial Practices Directive in Dutch law) prohibit practices contrary to the requirements of professional diligence that are (likely to) materially distort the consumer's economic behaviour (Art. 193b(2) *BW*).

⁵³⁷ District Court Haarlem, *sector kanton*, location Zaandam, 2 April 2009, LJN BI1561, *Tijdschrift voor Consumentenrecht en handelspraktijken* 2009/5, p. 208-210 with case note R. Damsma (Creditline/X).

Professional diligence is defined in article 6:193a(f). This provision states that professional diligence is the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity. In applying this standard, courts will have to take into account (public) laws protecting consumers.

12 Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

Digital content services may be marketed to minors, but some restrictions apply. The articles 6:193a-193j *BW* (which implement the 2005 Unfair Commercial Practices Directive) outlaw practices contrary to the requirements of professional diligence that are (likely to) materially distort the consumer's economic behaviour (art. 193b(2) *BW*). In particular misleading or aggressive practices qualify as such (art. 6:193b(3) *BW*). In the case of children any commercial practice addressed to them is deemed aggressive when it contains a direct exhortation to buy advertised products or persuade their parents or other adults to buy advertised products for them (art. 6:193i(e) in conjunction with art. 6:193b(3)(b) *BW*). In addition to that, no advertisements may appear in television programs especially aimed at children under the age of twelve according to article 2.97 of the Dutch Media Law.

If the content of the service is potentially harmful or offensive to minors, it could run counter to article 4.1 of the Dutch Media Law. According to this article media services, unless the provider is exempted by the Minister of Education, Culture and Science, may not contain content that might impair the physical, mental or moral development of minors. Marketing such services to minors will likely not meet the aforementioned duty of professional diligence and therefore be unfair (and unlawful) under art. 6:193b *BW*.

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

According to Article 1:234 *BW* minors under the age of eighteen are not competent to perform juristic acts without the permission of their legal representatives. However, section 3 of this provision states that a minor is deemed to act with permission of his legal representative if he performs a juridical act with regard to which it is common practice that is performed independently by minors of *his* age (objective test, focusing on the normal actions of minors of the same age). In the context of digital content services, neither the legislator nor the courts have specifically addressed the question whether the conclusion of certain contract is seen as a normal practice. There can be certain factors that can be decisive for the judge when assessing whether the permission of the legal representative is given: 1) the amount of money concerned, 2) the terms of the contract, and 3) the category of the age; a minor who is two months removed from adolescence (eighteen) and a child of twelve are two different types of

minors. The judge therefore needs to decide on the merits of each individual case.⁵³⁸ In the case of contracts pertaining to downloading of for instance games or film, age restrictions imposed on sellers and distributors of these games and films (either by administrative act or, more commonly, on the basis self-regulation in the form of codes of conduct) will be taken into account when deciding whether the conclusion of such contracts by minors of a specific age can be considered to be common practice. Where it is established that the minor did not have the permission of his legal representative to conclude the contract and the conclusion of such a contract can not be considered to be common practice for a minor of that age, the legal representatives of the minor may avoid the contract on the basis of the incompetence of the minor. As a reaction to (among other things) this regulation (applicable to all contracts), nowadays subscriptions to the network of a mobile telephone company are no longer offered without the provision of documentation of the identity of the consumer and, if the consumer is a minor, of the (in practice written) permission of the legal representatives of the minor to conclude that contract.

Moreover the problem with content services mainly lies in the sphere of misleading commercials.⁵³⁹ In this context, minors for instance often have no clue that they are concluding an agreement for a (paid) subscription when making use of services advertised on the internet. Certain *mala fide* content providers namely target the younger minor audience through popular content under these groups. For that reason, in accordance with the Unfair commercial practices directive, minors are granted extra protection. On the basis of Article 6:193i(e) jo. 6:193b *BW* every commercial practice that entices minors to buy advertised products is under all circumstances aggressive and therefore unlawful. The Dutch Consumer Authority has administrative enforcement possibilities with regard to companies that do not comply with the aforementioned rules. Among the Consumer Authority's powers is the possibility to impose an administrative fine upon the trader, with a maximum of €450,000.⁵⁴⁰ Remedies, however, are not restricted to administrative fines and annulment of the contract in the case the minor did not have and cannot be deemed to have had the permission of his legal representatives to conclude the contract. Since Articles 6:193a-j *BW* are a part of tort law, the aggrieved consumer (or the parents/legal guardians) can also bring a tort claim for damages, an injunction or a rectification. Besides that, there are also contractual remedies available, such as annulment of the contract, see the answer to Q.11.3. As indicated, not much attention has so far been paid to that possibility.

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

In as far as age, disability or other vulnerabilities result in legal incapacity (i.e. when someone is under the age of 18 or under guardianship) or result in an absence of consensus ad idem, a contract may be voided. See for underage consumers art. 1:234 *BW* and for guardianship 1:378 *BW*, both in conjunction with 3:32 *BW*, and for absence of consensus ad idem see 3:34, 3:44 and 6:228 *BW*. In particular old age is sometimes taken into account explicitly with regard to the situation of abuse of circumstances.

⁵³⁸ Aanhangsel II 2008/09, nr.365, p.766.

⁵³⁹ Tweede Kamer, vergaderjaar 2009–2010, 31 412, nr. 18, p. 4.

⁵⁴⁰ Tweede Kamer, vergaderjaar 2009–2010, 31 412, nr. 18, p. 4.

With regard to the comprehensibility of pre-contractual information, the main problem with content services lies in the sphere of misleading practices. (See also Q 12.2) Minors may be enticed to enter into binding agreements on the basis of misleading information through advertisements.⁵⁴¹

The Dutch government has opted for a self-regulatory⁵⁴² model regarding additional requirements for advertisements. This self-regulatory model is the so-called Advertisement Code. The Advertisements Standards Committee sees to it whether companies stick to the advertisements code. The Advertisement Code prohibits untrue, incomplete and misleading advertisements.

For minors there is the Children Advertisement Code. For our question, Articles 1, 2 and 5 of this Code are of relevance. According to these provisions, a content provider who addresses his advertisements to minors under the age of twelve is obliged to disclose extra information, since minors have different reasoning possibilities than a adolescence or a minor above the age of twelve.

Provisions as to the proper functioning of the digital content are governed by the doctrine of conformity (see art. 7:17 BW for the case where the contract may be qualified as a sales contract, but the reasoning behind this applies also under general rules of interpretation of the contract to the situation where the contract is deemed to be a service contract). In order to determine whether a service is in conformity with the agreement, the particular circumstances tend to play an increasingly important role.⁵⁴³ This means that a higher level of care is likely to be required in the case of services delivered to underage consumers.

In most legal systems, specific rules to protect minors have been developed in general contract law. Most often, contracts concluded by minors may be voided (made null with retrospective effect) if they were not concluded with the consent of the parents or legal guardians. The prospected effect of such rules is to protect the patrimony of the minor (the total value of his assets, incl. rights and obligations) by preventing the conclusion of (financially detrimental or burdensome) contracts without the consent of the parents or legal guardians. Similarly, such protective rules may have been developed to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens.

Q.12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?⁵⁴⁴

See Q. 12.2 and 12.3. The provisions equally apply to digital content services.

⁵⁴¹ Tweede Kamer, vergaderjaar 2009–2010, 31 412, nr. 18, p. 4

⁵⁴² The self regulatory model is a arrangement between organised media, advertising agency, advertisers and consumers. This model is line with the directive of 1997, more specifically article 1 square 7 that Member States can stimulate self regulatory model, only if there is the possibility of legal administrative or legal proceedings besides this model.

⁵⁴³ See article 7:18 BW, but also P. Klik, *Conformiteit bij koop*, Kluwer: Deventer 2009, p.19

⁵⁴⁴ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as 'normal' for a child of a certain age.

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

If a contract is voided (annulled) according to 1:234 BW (in conjunction with 3:32 BW) because the minor did not have the permission of his legal representative and the conclusion of the contract cannot be seen as common practice for a child his age, the contract will be deemed null with retroactive effect. Obligations already fulfilled can subsequently be reclaimed as undue performances. Because a digital content service can hardly be returned, art. 6:210(2) BW comes into play as well. This article obliges the recipient to compensate the value of the performance, as far as this is reasonable, but only if the service has enriched him, if a counter-obligation has been agreed upon, or when it is attributable to him that the performance has taken place. However, art. 6:209 BW provides that if the recipient of a performance had no legal capacity (which was the ground for annulment here), the said provisions only apply as far as the performance has really been beneficial to the minor or has come under control of his legal representative (art. 6:209 BW). With regard to most digital content services, this requirement will not have been met: the mere fact that, for instance, the downloading of music will be considered ‘pleasant’ or ‘fun’ by the minor, is not considered sufficient. Only if the minor can objectively be seen as being better off – for instance where he has learned a language using e-learning services – this can be considered different.

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

As pointed out in Q 12.3 enhanced protection is not only granted to minors (art. 1:234 BW), but also to other vulnerable contractors, such as persons under guardianship (art. 1:378 BW), persons with a mental disturbance (art. 3:34 BW) or those whose will was held defective at the moment of concluding a contract (art. 3:44 BW). Of course, a consumer who might be considered (more) vulnerable, does not necessarily fall within one of these legally protected groups. Moreover, it should be noted that the protection of art. 3:34 BW, aimed at protecting mentally disturbed persons who, however, have not been subjected to legal guardianship, is in practice easily overtaken by the protection of the other party if that other party is in good faith.

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?⁵⁴⁵

⁵⁴⁵ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

In the Netherlands no such requirement of age verification exists, as far as the ascertainment one's legal capacity is concerned. (There is an obligation to verify a consumer's age, however, when the sale of alcohol or tobacco is concerned, see art. 20 of the Law on beverages and cafes, hotels and restaurants and art. 8 of the Tobacco Law.) Since the seller runs the risk that a contract concluded with a minor will subsequently be voided, there might be a practical (but no legal) need for age verification. This inconvenience is alleviated somewhat by the rule, mentioned in Q. 12.2, that a legal fiction of parental consent applies in the case of acts commonly performed by children of a certain age (art. 1:234(3) *BW*).

13 Towards a model 'digital consumer law'

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

No.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

No.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

Personal data can be seen as an economic commodity. Internet services offer free services, for example Google and Facebook, in return for personal data. The personal data is then used or sold for the purpose of behavioural targeting, personal advertisements connected to the interests of a specific person. Personal data has been rightly described as the oil of the 21st century. Without the transaction of personal data for services, the internet would be a much less important and booming environment, since people would need to pay for the services they receive.

Personal data is personal. It is related to one's body or to one's identity. As an economic commodity, personal data could be transferred to third parties, however the data subject should be informed in what ways his data is used and to whom it is diffused. With regard to sensitive data, one could argue that this is an inalienable commodity. Just as there are limitations on giving away one's body in either slavery, prostitution or other inhuman purposes, one could argue that sensitive data may only be used for matters like age-verification, but may not be sold to third parties or used for behavioural targeting.⁵⁴⁶

⁵⁴⁶ B. van der Sloot, 'De privacyverklaring als onderdeel van een wederkerige overeenkomst', P&I 2010-3.

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	X	<ul style="list-style-type: none"> • ... • ... 	<input type="checkbox"/>
Film or music on a website (streaming)	<input type="checkbox"/>	X	<input type="checkbox"/>	<ul style="list-style-type: none"> • ... • 	<input type="checkbox"/>
Downloaded films or music	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Games on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	X		<input type="checkbox"/>
Games on the Internet	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded games	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
User created content (UCC) ⁵⁴⁷ on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	X		<input type="checkbox"/>
UCC on a website	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded UCC	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Personalisation services ⁵⁴⁸	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁵⁴⁷ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

on the Internet					
Downloaded personalisation services	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Software-as-a-Service on a website ⁵⁴⁹	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded software ⁵⁵⁰	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Software on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	X		<input type="checkbox"/>
Communication through a website ⁵⁵¹	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
E-learning services on the internet ⁵⁵²	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded e-learning services	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>
E-learning service on a CD or DVD*	<input type="checkbox"/>	X	<input type="checkbox"/>		<input type="checkbox"/>

Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made? Please indicate this in the table below.

⁵⁴⁸ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

⁵⁴⁹ E.g. image editing, photoshopping, automatic translation services.

⁵⁵⁰ E.g. anti-virus programs.

⁵⁵¹ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

⁵⁵² E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	X	<input type="checkbox"/>	X	<input type="checkbox"/>	X	X	X	• ... • ...
'Free' film or music on a website (streaming)	X	<input type="checkbox"/>	X	X	X	X	X	• ... • ...
Paid film or music on a website (streaming) <small>553</small>	X	<input type="checkbox"/>	X	X	X	X	X	
'Free' downloaded films or music	X	<input type="checkbox"/>	X	X	X	X	X	
Paid downloaded film or	X	<input type="checkbox"/>	X	X	X	X	X	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

553 E.g. video on demand services.

music								
Paid games on a CD or DVD*	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	
'Free' games on a website	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
Paid games on a website	X	X	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
'Free' downloaded games	X	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	X	
Paid downloaded games	X	X	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
Paid User created content (UCC) ⁵⁵⁴ on a CD or DVD*	X	<input type="checkbox"/>	X	X	X	X	X	
'Free' UCC ⁵⁵⁵	X	<input type="checkbox"/>	X	X	X	X	X	
Paid UCC	X	<input type="checkbox"/>	X	X	X	X	X	
'Free' personalisation	X	X	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	

⁵⁵⁴ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁵⁵⁵ E.g. video sharing websites, such as YouTube.

services ⁵⁵⁶								
Paid personalisation services	X	X	<input type="checkbox"/>	X	X	X	X	
Paid software on a CD or DVD* ⁵⁵⁷	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
'Free' downloaded software ⁵⁵⁸	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
Paid downloaded software	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
'Free' software-as-a-service on a website ⁵⁵⁹	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
Paid software-as-a-service on a website	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
'Free' communication	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	

⁵⁵⁶ E.g. ringtones and Apps for mobile phones.

⁵⁵⁷ E.g., anti-virus programmes, Office, etc.

⁵⁵⁸ E.g. anti-virus programmes.

⁵⁵⁹ E.g. image editing, photoshopping etc..

on services ⁵⁶⁰								
Paid communication	X	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	X	
Paid e-learning service on a CD or DVD* ⁵⁶¹	X	<input type="checkbox"/>	X	X	X	X	X	
'Free' downloaded e-learning services	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
Paid downloaded e-learning services	X	X	<input type="checkbox"/>	X	X	X	X	
'Free' e-learning service on the internet	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X	X	X	
Paid e-learning service on the internet	X	X	<input type="checkbox"/>	X	X	X	X	

⁵⁶⁰ E.g. social networking, such as Facebook, and e-mail services.

⁵⁶¹ E.g. an online language course.

NORWAY

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2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

A.2.1. No *specific* rules of consumer law or contract law (including co- or self-regulation) have been developed in Norway pertaining to *digital content services*. The Norwegian Consumer Act's⁵⁶² scope is 'sale of *goods* to consumers'. The concept of 'goods' is interpreted to include more than what is required by a natural understanding of the wording. Thus, digital content services that are stored on CDs or DVDs will be considered as 'goods' in this respect. By purchase of digital content services stored on CDs or DVDs the consumers are therefore guaranteed the same basic rights as when purchasing other types of goods. However, digital content services that are *not* stored a durable medium, e.g. downloaded from the Internet, is not considered as purchase of goods. Consequently, the Consumer Act is not directly applicable.⁵⁶³ A similar conclusion apply with regard to the Norwegian Sale of Goods Act of 1988.⁵⁶⁴ However, it is reasonable to argue that the rules laid down in these acts to some extent may be applied analogical, at least insofar the rules in question may be regarded as codification of general principles of contract law. No relevant case law to this extent has been identified. It should be mentioned that the Consumer Ombudsman has issued informal Guidelines on Mobile Content Services, however based on general rules set out in the Marketing Control Act⁵⁶⁵, the Guardianship Act,⁵⁶⁶ the Cooling-Off Period Act,⁵⁶⁷ the the E-commerce Act⁵⁶⁸, the Lottery Act⁵⁶⁹, the Personal Data Act⁵⁷⁰ and the E-com regulation⁵⁷¹.

⁵⁶² Forbrukerkjøpsloven, LOV 2002-06-21 nr 34: Lov om forbrukerkjøp.

⁵⁶³ "Application of the Consumer Act on delivery of digital services." Legal Opinion to the Ministry of Justice, by professor dr. juris Olav Torvund, Oslo 2004.

⁵⁶⁴ Kjøpsloven, LOV-1988-05-13 nr 27: Lov om kjøp.

⁵⁶⁵ Markedsføringsloven, LOV 2009-01-09 nr 02: Lov om kontroll med markedsføring og avtalevilkår mv.

⁵⁶⁶ Vergemålsloven, LOV 1927-04-22 nr 03: Lov om vergemål for umyndige (cf. LOV 2010-03-26 nr 09: Lov om vergemål, not yet in force).

⁵⁶⁷ Angrerettsloven; Act relating to information requirements and a cooling-off period for distance and off-premises contracts, Lov 2000-12-21 nr 105: Lov om opplysningsplikt og angrevert m.v. ved fjernsalg og salg utenfor fast utsalgssted.

⁵⁶⁸ Ehandelsloven, LOV 2003-05-23 nr 35: Lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester.

⁵⁶⁹ Lotteriloven, LOV 1995-02-24 nr 11: Lov om lotterier m.v.

⁵⁷⁰ Personopplysningsloven, LOV 2000-04-14 nr 31: Lov om behandling av personopplysninger (personopplysningsloven).

⁵⁷¹ FOR 2004-02-16 nr 401: Forskrift om elektronisk kommunikasjonsnett og elektronisk kommunikasjonstjeneste.

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the *software on the CD/DVD*, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

A.2.2 The purchase will be treated as a contract for the sale of goods, cf. A.2.1. The second question must be answered in the affirmative.

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer's computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

A.2.3 The purchase will be treated as a service contract. The consumer can not in this situation take recourse to consumer sales law. Whether the Norwegian Consumer Act can be applied by analogy in such a case must be regarded as a fairly open question.

3 Defining consumers and producers

Q.3.1 Are individuals who offer digital content services to consumers considered to be 'consumers' or 'traders'? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

A.3.1 Individuals who offer digital content services will most likely be considered to be 'traders'. It will probably not make any difference whether they appear from the perspective of consumers as sellers, or more according to objective criteria? However, it is necessary to distinguish between offers from 'traders' and offers from individuals that appear to be of a more 'private' nature. In this respect, it might play a role whether or not the services is offered for free or against payment. It is also relevant, but not decisive, whether such services are offered continuously or for a certain period of time, of with the intention of making profit. It is necessary to distinguish because if the offer is considered as an offer from a trader, the purchaser may rely on mandatory rules on consumer protection. In case the offer appears to be of a more 'private' nature, the mandatory rules will not apply.

The Consumer Act § 1, third paragraph, and the Marketing Act § 5 a defines "consumer" as "an individual who is not primarily acting as part of business", (in Norwegian: "en fysisk person som ikke hovedsakelig handler som ledd i næringsvirksomhet").

The Marketing Act § 5 b) defines trader ("næringsdrivende") as a natural or legal person who carries on business, and anyone acting in the name of or on his behalf, (in Norwegian: "en fysisk eller juridisk person som utøver næringsvirksomhet, og enhver som handler i vedkommendes navn eller på vedkommendes vegne")

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

A.3.2 The relevant legal frameworks do not operate with such a distinction between professionals and ‘prosumers’. However, the Norwegian laws and legal tradition leave room to differentiate between the activities of professionals and ‘prosumers’ when considering professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc. Courts generally will take a more strict approach to professionals when considering the standards of professional diligence compared to others.

4 Sector-specific consumer law

Q.4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to:

- **the conclusion of the contract for digital content services;**
- **the pre-contractual information consumers need to be given⁵⁷²;**
- **the termination of the contract (for non-performance or termination for other reasons) for digital content services?**

A.4.1

- No *specific* rules apply pertaining to the conclusion of the contract for digital content services. However, general rules on distance selling apply cf. the Cooling-Off Period Act.
- No specific rules apply pertaining to the pre-contractual information consumers need to be given. The new transparency obligation introduced in the Audiovisual Media Service Directive Article 5, requiring providers of audiovisual media to provide viewers with information about name, electronic and geographical address, etc, has not yet been implemented. However, a draft bill has been launched July 2009, in which a new Section 2-13 suggest to implement Article 5 by transformation/translation to Norwegian language. Norwegian Copyright law does not contain any specific obligation to inform consumers that DRM are employed. However, it should be taken into consideration that an obligation to inform may be relied on other legal basis, i.e. the Marketing Act or the Consumer Act. It should also be noted that the Norwegian Electronic Commerce Act (Act relating to certain aspects of electronic commerce and other information society services) contains some general rules regarding *pre-contractual information* consumers need to be given that also will apply before entering into contracts for digital content services. According to *Section 9* the service provider has a duty to provide information in connection with electronic marketing as follows:

⁵⁷² For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

- In connection with electronic marketing, the person on whose behalf the marketing is carried out shall be clearly stated. If unsolicited marketing is sent by means of electronic post, it shall be stated that the messages contain marketing when the messages are received.
- If prices are stated in connection with an information society service, information shall be provided concerning taxes and delivery charges. In relation to consumers, the total costs to be paid by the consumer shall be stated including all taxes and delivery charges unless information concerning the price of the service is regulated by other legislation.
- Advertising offers, such as discounts, prizes and gifts shall be easily identifiable. Information concerning conditions for taking advantage of such offers shall be clear and easily accessible.
- Promotional competitions or games shall be easily identifiable. Information concerning conditions for participation in such competitions or games shall be clear and easily accessible.
- According to Section 11, the service provider shall provide the recipient of a service with clear, comprehensible and unambiguous information concerning:
 - a) relevant rules of conduct followed by the service provider and whether and where these can be obtained electronically,
 - b) the various technical stages associated with entry into agreements,
 - c) whether an agreement entered into will be filed by the service provider and whether it will be accessible,
 - d) the technical means of finding and correcting typing errors before orders are made,
 - e) the languages in which the agreement may be entered into.

Agreement terms, standard terms and general terms must be made available to the recipient of a service in such a way as to enable them to be stored and displayed.

- No specific rules apply pertaining to the termination of contract regarding digital content services.

The ratio behind Section 11 litra d cited above is to avoid that errors occur and to avoid that any parties should be committed without their own request. Moreover, when entering into the agreement technically arranged so that the receiver can detect and correct errors, the receiver will feel safer in the contract situation.

Q.4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

A.4.2 No specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights have been developed as

regards the way (digital) products and services are advertised and marketed to consumers. General marketing rules will apply, i.e. the Norwegian Marketing Control Act 2009 implementing the Unfair Commercial Directive. The Marketing Control Act contains a chapter regulating in general commercial practices addressed to minors that will apply also when marketing digital products and services. The Norwegian Broadcasting Regulation Section 3-6 contains a general provision regarding protection of minors when advertising in broadcasting, but it is not specifically directed to marketing of digital products and services. There is no rules in the telecom law requiring that the information needs to be comparable or searchable by electronic means. The E-commerce Act Section 2-2 contains rules on the quality of the service. Except from the general rule in the Marketing Act Section 15 regarding spam, no specific rules have been developed as regards the way digital products and services are advertised and marketed to consumers with respect to spam, viral or behavioural marketing. Further, no specific rules on privacy and data protection has been developed as regards the way (digital) products and services are advertised and marketed to consumers.

Q.4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- **does sector-specific law determine any remedies?**
- **could a consumer invoke general consumer and contract law remedies⁵⁷³?**

A.4.3 Not applicable, cf. A.4.2.

There is no relevant case law as to this issue. I am not aware of any scholarly discussion on this point in Norway.

5 Formation of contract and pre-contractual information

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

A.5.1 There is no specific regulation regarding the transparency and comprehensibility of contract terms beyond general contract and consumer law. The requirements of the E-Commerce Directive and the Distance Selling Directive been implemented in Norwegian law. With regard to details on the Act on Consumer Purchase of 1st July 2002 and whether it applies to contracts regarding digital content, see A.2.1.

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

A.5.2 No specific regulation has been adopted.

⁵⁷³ E.g. unfair commercial practices, unfair contract terms, voidance/voidability of the contract, termination or damages.

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license⁵⁷⁴, considered to be validly concluded contracts?

A.5.3 Yes.

Is the recognition of the validity of the click-wrap and the browse-wrap agreement specified in the law (Civil code or elsewhere) or is it the result of court decisions? Are there conditions to fulfil for the validity of such electronic contracts to be recognized?

Q.5.4 Under what conditions are the terms of a standard form agreement⁵⁷⁵ binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms⁵⁷⁶ necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?⁵⁷⁷

A.5.4 The terms of a standard form agreement is binding on the consumer provided that the supplier/seller has reasonable grounds to believe that the consumer has accepted the standard terms and conditions. Whether the standard form agreement is binding on the consumer must be assessed on a case by case basis. There is no general rule stating that an express manifestation of assent to these terms is necessary. In principle non-negotiated contracts may also be held to be binding upon the consumer following an implicit manifestation. In case the consumer is aware of the non-negotiated terms prior to conclusion of the contract, or the seller has taken reasonable steps to draw the consumer's attention to them, the standard form agreement will normally be considered as accepted and binding on the consumer. These principles has been developed over years by the courts.

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy⁵⁷⁸, or may the information also be given via electronic means?⁵⁷⁹

A.5.5 No such specific rules are adopted in Norway.

⁵⁷⁴ 'Browse-wrap' means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

⁵⁷⁵ For instance those included in the click-wrap or a browse-wrap license.

⁵⁷⁶ E.g. by clicking 'I agree' in a dialog box.

⁵⁷⁷ E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

⁵⁷⁸ E.g. on paper or on CD/DVD.

⁵⁷⁹ E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer's computer.

Q.5.6 Are you aware of any specific information duties for providers of digital content services?⁵⁸⁰ If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

A.5.6 No specific information duties have been identified. See however A.4.1.

Q.5.6 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer?⁵⁸¹ If so, please specify.

A.5.6(1) No.

Q.5.7 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?⁵⁸²

A.5.7 Not applicable/not relevant, cf A.5.6.(1).

6 Right of withdrawal

Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

A.6.1 This question is to some extent regulated in The Cooling-Off Period Act. According to section 21 paragraph 2, cooling-off with regard to agreements on other services than financial services states that in case any of the parties has fulfilled its obligations according to the contract when the right to withdraw is declared, a restitution shall take place in so far it is possible. However, if it has been agreed that the services should be rendered before the expiration of the right to withdraw, a withdrawal will result in an obligation to pay for the services rendered and for materials used, cf. section 21, third paragraph. The question on a right of withdrawal in addition to or in derogation of the Distance Selling Directive is not subject to debate in Norway. This answer should be interpreted as stating that the consumer is still entitled to withdraw, but must pay for the services rendered.

⁵⁸⁰ For example about the fact that a piece of music or video is subject to technical restrictions so that it cannot be copied or only played in a certain region; or that when using the service personal data will be collected (spyware); that a service is incompatible with certain software; about eventual sponsoring or other commercial influences.

⁵⁸¹ E.g. before the signing of a contract, in clear and comprehensible language, in sufficiently large letters, etc.

⁵⁸² E.g. voidability or termination of the contract, damages, prolongation of the period for the exercise of a right of withdrawal.

Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

A.6.2 No, according to the Cooling-Off Period Act Section 21, third paragraph, the consumer maintains his right of withdrawal if the services are rendered during the cooling-off period. However, the consumer has to pay for the services rendered during the cooling-off period. The second part of Q.6.2 is not relevant. However, it should be emphasized that this is an exception from the main rule, and is only applicable with regard to 1) agreements regarding other services than financial services, and 2) provided that it has been agreed between the parties that the service may be rendered before the expiration of the cooling-off period.

Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

A.6.3 See A.6.2; yes, the consumer is obliged to pay for the services rendered and any materials used. If not otherwise agreed, the value has to be determined according to normal market price. However, this is a limited exception from the main rule, cf. comments under A.2.

Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

A.6.4 It is likely that the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning such other services. Cf. A.9.5.

7 Unfair contractual terms

Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a 'main obligation' under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

A.7.1 Probably yes; however, it is not possible to give a general answer to this question. In case it is not considered as a main obligation, it is possible that it in certain circumstances could be declared unfair pursuant to the Marketing Acts rules on unfair contractual terms or the Contracts Act⁵⁸³ section 37 (or eventually the general clause in

⁵⁸³ LOV 1918-05-31 nr 04: Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer (Act relating to conclusion of contracts).

section 36). The Consumer Ombudsman filed a complaint against the terms of the iTunes contract, see <http://forbrukerportalen.no/Artikler/2006/1138119849.71> and http://www.afterdawn.com/news/article.cfm/2007/01/22/apple_received_demands_to_change_itunes_contract_terms. However, the case was settled amicably between iTunes and Apple before the case was presented to the Marketing Council. The main criteria that a court will take into consideration when assessing the fairness of a contractual term is the clarity of the contract term, and the balance between the parties' rights and obligations.

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

A.7.2 Yes, it is likely that a contractual term that diverges from the rules on the protection of privacy will be declared unfair. The legal basis for this is the so-called 'lovstridsprinsippet', that may be translated to the principle of illegality. The rationale is that contractual terms that violates other mandatory rules, normally will be considered as unfair. The Consumer Council of Norway has filed a complaint against Facebook and Zynga, see http://forbrukerportalen.no/Artikler/2010/Facebook_and_Zynga_reported_to_the_Data_Inspectorate, claiming that the two companies violates the Personal Data Act by its terms and conditions related to Facebook's and Zynga's collection, treatment and use of personal, sensitive information. The complaint is mainly concerned about the protection of privacy, however also questioning the unbalanced terms and conditions in favor of the digital service providers.

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

A.7.3 No.

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

A.7.4 I am not aware of (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of presumably unfair clauses (Annex III to the Proposed Directive on Consumer Protection). This issue has to my knowledge not been debated in Norway. However, both the Consumer Council of Norway and the Consumer Ombudsman has put focus on the need of better consumer protection with respect to digital services, see http://forbrukerportalen.no/filearchive/strategy_1_.pdf. The Consumer Ombudsman's Activity Plan for 2010 has listed as one of its main areas electronic communication services such as broadband, telephone, television, and different digital content services. Some of the main aspects relates to binding clauses, unbalanced clauses to the detriment of the consumers and DRM. However, there is not much discussions among legal scholars about these issues. It seems as the said councils are the actors that put these issues on the public agenda.

8 Failure to function properly

The Norwegian Consumer Act only apply in a B2C relationship. In case of a C2C relationship, the parties must rely on the Norwegian Sale of Goods Act of 1988. The purchaser may consequently not rely on mandatory rules for the purpose of consumer protection; however, the Sale of Goods Act and also general contract principles will to a large extent provide legal certainty, provided that the parties has not entered into agreements contrary to such rules and principles.

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

A.8.1 It is likely that judges will adopt a rather functional perspective. However, it may also be the case in certain circumstances that also more abstract interests will be considered in an overall assessment, but I have not identified any relevant case law or discussions in this regard.

**Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what 'normal use' of a service is, e.g. - the ability to make private copies according to copyright law,
- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),
- the suitability of certain contents for minors as stipulated under audiovisual media law,
- journalistic codes of conducts, etc.**

A.8.2 No relevant case law exists that can throw light upon this issue. However, as a general remark, Norwegian courts apply a rather dynamic and functional style of interpretation. Hence, it is likely that (legal) standards formulated elsewhere may play a role in defining what 'is normal use' of a service.

Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?⁵⁸⁴ If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and middleware?

⁵⁸⁴ Idem.

A.8.3 The provider of the digital content service is not subject to a specific information requirement prior to the conclusion of the contract of the required hardware or software. However, general principles of contract and consumer law will normally imply such information requirements according to general principles of loyalty requirements and principles of fairness. If the provider fails to inform properly, the consumer may reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and middleware. Cf. *Arnulf Tverberg, Forbrukerkjøpsloven med kommentarer*, Gyldendal (Oslo 2010), *John Egil Bergem, Berte-Elen Reinertsen Konow, Stein Rognlien, Kjøpsloven og FN-konvensjonen om internasjonale løsørekjøp med kommentarer*, Gyldendal (Oslo 2008).

Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

A.8.4 The remedies that may be applicable in case digital content services do not function properly may, based on the analogical application of the Consumer Act (if accepted), or non-statutory principles of contract law, be demands for rectification and replacement, price reduction, termination and/or compensation for damages. However, the fact that these rules are mandatory to the benefit of the consumers gives rise to uncertainty with respect to whether or not analogical application will be accepted by the courts. With this reservation, the demand for rectification or replacement is the principal remedy; the Consumer may choose between rectification and replacement. The demand for price reduction or termination (in case of substantial mal function) is only available in case rectification or replacement is unsuccessful. As a general rule, the seller is only granted two attempts to rectify the faults. The compensation claims for damages apply in addition to other remedies, without a hierarchy. There is no relevant case law to this extent. Cf. *Arnulf Tverberg, Forbrukerkjøpsloven med kommentarer*, Gyldendal (Oslo 2010), *John Egil Bergem, Berte-Elen Reinertsen Konow, Stein Rognlien, Kjøpsloven og FN-konvensjonen om internasjonale løsørekjøp med kommentarer*, Gyldendal (Oslo 2008).

Q.8.5 For how long after delivery of the digital content service (weeks, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)⁵⁸⁵? If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

A.8.5 Provided analogical application of the Consumer Act Section 27 is accepted by the courts, the consumer may invoke a remedy for non-performance if the service does not function properly within 2 years from delivery. In case the use is intended to last considerably longer, the deadline for complaints is five years. In case the period for invoking a remedy has elapsed, the consumer will probably not enjoy any right to oppose a claim for payment by claiming the non-performance of the service.

⁵⁸⁵ Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

A.8.6 Yes. The second question can hardly be given a clear answer under Norwegian law.

**Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identify, geographical address or further details?
a) the operator of that platform, or
b) the third party application service himself?
Should this be done before or after the contract is concluded?**

A.8.7 According to the Marketing Control Act Section 8 third paragraph, the provider of third party application himself will have an obligation to inform the consumers. Information on the provider of the third party application's identity, geographical address and further relevant details should be available and presented to the consumer before the contract is concluded.

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

A.8.8 There are no specific rules that provide clear answers to these questions.

9 Remedies for non-performance and termination of a long term contract

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

A.9.1 No specific remedies – in addition to or in derogation of the remedies in general contract law – have been developed in legislation on digital content services.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

A.9.2 The primary remedies based on analogical application of the Consumer Act (if accepted by the courts) are the demand for rectification or replacement. Cf. A.8.4.

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to

set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

A.9.3 Yes, the consumer must first send a notice of default. Such notices might be sent in electronic format. The question regarding what is a reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period can hardly be answered in a precise manner. In general, according to the legal tradition, it is likely that the consumer will be granted a rather long and flexible period of time to terminate the contract, especially in case the consumer has reserved his or hers rights to terminate the contract in case of no rectification or replacement. According to the Consumer Act, the period for a notice of default shall under no circumstances be less than two months after the consumer became aware of the fault. Beyond this it is not possible to give a precise answer to this question.

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?⁵⁸⁶

A.9.4 No, the consumer is not allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer, except from the right to withdraw during the cooling-off period as regulated in the Cooling-Off Period Act. However, in long-term contracts that are not entered into for a specific period of time, it is generally accepted that the contract may be terminated unilaterally by one of the parties, cf. *Kai Krüger*, Norsk Kontraktsrett page 581. This principle will most likely apply also to long-term contracts for digital services. However, the content of this principle is rather vague, and it is not clear what termination period that will be applied in consumer contracts. It may be useful to look into the principles that has developed with regard to binding clauses. As a general rule, binding clauses of longer duration than 12 months are normally not accepted, and in addition it is required that the negative binding effect to some extent is outweighed by positive values for the consumer. In there are no such positive values, such binding clauses will often be considered unfair. I think that this way of reason may be applied in questions on termination of long-term digital consumer contracts.

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

⁵⁸⁶ For instance: is the notice of termination invalid or must the consumer pay damages?

A.9.5 This question cannot be given a clear answer. One possible legal basis for the analysis could eventually be an analogical application of the Norwegian Sale of Goods Act of 13 May 1988 Section 44 (3), regarding delivery of goods by installments. According to Section 44, cancellation of a single delivery entitles the buyer to cancel the contract in respect of deliveries made or of future deliveries, if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract. However, it is questionable whether the analogy is appropriate.

10 After sales services

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

A.10.1 Provided that the Consumer Act may be applied analogical on contracts regarding sale of digital content services, the consumer is entitled to claim ‘after sales services’ in the form of rectification or replacement. Such remedies have to be provided free of charge.

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

A.10.2 Lack of functionality will generally be considered as non-performance, and the consumer should in principle be entitled to invoke any relevant remedies, such as the claim for rectification, withdrawal and compensation for damages and the like. In case the service provider goes bankrupt the consumers claims against the service provider is unsecured. Consequently, the consumer risks that any claims against the service providers bankruptcy estate will not be covered or only partly covered, in the form of dividend.

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service⁵⁸⁷ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

A.10.3 This question can hardly be given a clear answer under Norwegian law. No relevant case law exists on this matter.

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E.g. to play the obtained music or video content.

11 Unfair commercial practices

Q.11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

- a. the use of incompatible standards to prevent users from switching to other services or hardware;
- b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);
- c. the use of Digital Rights Management to prevent unauthorised use;
- d. the use of Digital Rights Management to restrict use to a certain region or country;
- e. the collection of personal data for marketing purposes or through spyware;⁵⁸⁸
- f. the collection of sensitive personal data for marketing purposes or through spyware;
- g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;
- h. the use of default options to entice consumers to the purchase of additional services;⁵⁸⁹
- i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors;
- j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers.

If there is case law, please provide references and a brief description.

It should be noted, first of all, that when interpreting the provisions on unfair commercial practices, Norwegian courts tend to take a very pro-consumer and holistic interpretation, also taking into account e.g. legal standards as laid down in copyright law, audiovisual law, data protection law etc.

a. It is likely that the use of incompatible standards to prevent users from switching to other services or hardware would be considered to be an unfair contract term, contrary to the Marketing Control Act Section 22. It will clearly play a role to which extent the consumer prior to the conclusion of the contract has been duly informed of the relevant restrictions as regards to the use of the service. There is no specific rules, case law or doctrine that actually can prevent that that this information requirement is abused to overload consumers with information and rid oneself from responsibility. However, it may be an interesting question whether or not cases of information overload itself may constitute an abuse of the duty to inform. In case important information is not presented sufficiently clear due to information overload, it may probably be argued that this represents a violation of the general clause or other related provisions in the Marketing Act, especially Section 22. According to Section 22, the clarity of the contract terms is an important factor in the assessment of unfairness. The more ambiguity, the more likely it is that the contract term will be held to be unfair. It is also likely that said practices will be considered unfair.

⁵⁸⁸ E.g. in order to enable the provider of the digital content service or third parties to adjust advertisement to the specific circumstances of the consumer.

⁵⁸⁹ See also Art. 31 of the Proposal for A Consumer Rights Directive.

b. Advertising via e-mail without the consumer's prior consent violates the Marketing Control Act Section 15. The other categories of advertising as referred to will probably not on a general basis be considered unfair. However, in certain circumstances it may be held to be unfair.

c. The use of Digital Rights Management to prevent unauthorised use could possibly be considered to be an unfair contract term, especially if the consumer has not received any information of the restrictions prior to the conclusion of contract. This could probably also be considered an unfair practice. In other words, it could be argued that under Norwegian law there is a duty to inform on the use of DRM, but no specific rules or case law in this matter has been developed so far.

d. The use of Digital Rights Management to restrict use to a certain region or country will probably be considered to be an unfair contract term, cf. A.11.2.a.

e. The collection of personal data for marketing purpose or through spyware may be held to be unfair. Electronic marketing on the basis of such collection of personal data is only allowed insofar the consumer has given an express, informed and voluntarily consent.

f. The collection of sensitive personal data for marketing purposes or through spyware will most likely be considered unfair, whether or not the consumer has been informed prior to the conclusion of the contract.

g. the gathering, processing or selling of (sensitive) personal data after termination of the contract is most likely considered to be unfair.

h. the use of default options to entice consumers to the purchase of additional services may violate the Marketing Control Act Section 11 in case there is no clear information or agreement prior to conclusion of the contract. It may also be held that such clauses are unfair contract terms, contrary to the Marketing Control Act Section 22.

i. The marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors would most likely be held to be a violation of the Norwegian Marketing Control Act of 9 January 2009 Section 19, 20 and/or 21, further depending on the specific circumstances.

j. Sponsorship or commission arrangements on price comparison websites without clear notification to consumers will violate the principle laid down in the Marketing Control Act Section 3, according to which marketing should be designed and presented so that it clearly stands out as marketing. This provision is a clarification of the principle that hidden advertising should be avoided.

No relevant case law has been identified as to the matters discussed above. The practice described above will most likely be considered unfair. For further reading, cf. *Tore Lunde, Ingvild Mestad, Terje Michaelsen, Markedsføringsloven med kommentarer*, Gyldendal (Oslo 2010).

Q.11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

A.11.2 No. No relevant case law exists.

Q.11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;
- the consumer may apply general contract law remedies such as voidance or adaptation of the contract for mistake or abuse of circumstances;
- the consumer may terminate the contract without having to compensate the trader for the loss of profit; and
- the consumer may claim reduction of the contract price?

A.11.3 All alternatives may be applicable under Norwegian law, depending on the circumstances and the consumer's choices and requests.

Q.11.4 To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

A.11.4 Such prohibitions are generally of high importance when interpreting consumer law rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence.

12 Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

A.12.1 Providers of digital content services must respect general rules on the legal capacity of minors. As a general principle, minors (i.e. persons under 18 years) do not have the legal capacity to enter into contracts without the parents' or other legal representatives' consent. However, minors between the age of 15 and 18 may dispose over means that the minor has earned himself, or otherwise have been given by the parents or others. In addition, the Marketing Control Act Chapter 4 restricts marketing towards minors. These rules may be of special importance in order to restrict marketing and sale to minors in case the content of the service may be considered harmful or offensive. The legal consequence if the minor was not competent to conclude the contract is that is void or voidable.

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

A.12.2 A service provider who acts in conflict with the specific rules to protect minors can be held liable to the consumer under general contract or consumer law. Damages that can be awarded must reflect actual economic loss, if any. Other consequences may be that the contracts entered into will be declared void, and that fines may be imposed upon the service provider by the Consumer Ombudsman or the Marketing Council according to the Marketing Control Act Section 43.

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

A.12.3 These three questions should all be answered in the affirmative.

Q.12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?⁵⁹⁰

A.12.4 Yes. See A.12.1.

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

A.12.5 The minor may under some circumstances still have to pay for the service or for parts of the service. In case the service has already been rendered and cannot be returned because of its nature, the minor is not obliged to replace what has been received, beyond what has come to his benefit, cf. the Guardianship Act.

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

A.12.6 Such rules do not apply to protect the patrimony of other vulnerable consumers unless it has been officially decided to put the natural person in question under guardianship.

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?⁵⁹¹

⁵⁹⁰ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as 'normal' for a child of a certain age.

⁵⁹¹ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

A.12.7 No. However, the usage of age verification or similar measures will not necessarily exclude the service provider from liability or other remedies.

13 Towards a model 'digital consumer law'

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

A.13.1 No.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

A.13.2 No.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

A.13.3 (Sensitive) personal data may be regarded as an economic commodity that service providers may find interesting to gather and sell. However, consumers are legally protected from being subject to marketing via electronic communication without prior express, informed and voluntarily consent, cf. the Marketing Control Act Section 15. Consequently, in practice such personal data may be of. In addition, other legislation such as the personal Data Act represents legal barriers for purchase and subsequent marketing.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ... 	<input type="checkbox"/>
Film or music on a website (streaming)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<ul style="list-style-type: none"> • ... • 	<input type="checkbox"/>
Downloaded films or music	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Games on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Games on the Internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded games	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
User created content (UCC) ⁵⁹² on a CD or DVD*	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
UCC on a website	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded UCC	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Personalisation services ⁵⁹³	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁵⁹² Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

on the Internet					
Downloaded personalisation services	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>		<input type="checkbox"/>
Software-as-a-Service on a website ⁵⁹⁴	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded software ⁵⁹⁵	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>		<input type="checkbox"/>
Software on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Communication through a website ⁵⁹⁶	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>		<input type="checkbox"/>
E-learning services on the internet ⁵⁹⁷	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>		<input type="checkbox"/>
E-learning service on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> ✘		<input type="checkbox"/>

⁵⁹³ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

⁵⁹⁴ E.g. image editing, photoshopping, automatic translation services.

⁵⁹⁵ E.g. anti-virus programs.

⁵⁹⁶ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

⁵⁹⁷ E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	<input type="checkbox"/> ✘	<input type="checkbox"/>	<input type="checkbox"/> ✘	✘ <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	• ... • ...
'Free' film or music on a website (streaming)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>	• ... • ...
Paid film or music on a website (streaming) <small>⁵⁹⁸</small>	<input type="checkbox"/> ✘	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/> ✘	<input type="checkbox"/> ✘	✘ <input type="checkbox"/>	
'Free' downloaded films or music	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/>	
Paid downloaded film or	<input type="checkbox"/> ✘	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> ✘	<input type="checkbox"/> ✘	<input type="checkbox"/> ✘	<input type="checkbox"/> ✘	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁵⁹⁸ E.g. video on demand services.

music								
Paid games on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' games on a website	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid games on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded games	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded games	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid User created content (UCC) ⁵⁹⁹ on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' UCC ⁶⁰⁰	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid UCC	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
'Free' personalisation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

⁵⁹⁹ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁶⁰⁰ E.g. video sharing websites, such as YouTube.

services ⁶⁰¹								
Paid personalisation services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid software on a CD or DVD* ⁶⁰²	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>					
'Free' downloaded software ⁶⁰³	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded software	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' software-as-a-service on a website ⁶⁰⁴	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid software-as-a-service on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' communication	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

⁶⁰¹ E.g. ringtones and Apps for mobile phones.

⁶⁰² E.g., anti-virus programmes, Office, etc.

⁶⁰³ E.g. anti-virus programmes.

⁶⁰⁴ E.g. image editing, photoshopping etc..

on services ⁶⁰⁵								
Paid communication	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid e-learning service on a CD or DVD* ⁶⁰⁶	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>					
'Free' downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded e-learning services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' e-learning service on the internet	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Paid e-learning service on the internet	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

⁶⁰⁵ E.g. social networking, such as Facebook, and e-mail services.

⁶⁰⁶ E.g. an online language course.

Annex with the relevant case law, legislation, codes of conduct and literature on digital content services to which it is referred to in this report

Acts

Forbrukerkjøpsloven, LOV 2002-06-21 nr 34: Lov om forbrukerkjøp. (The Consumer Act).

Kjøpsloven, LOV 1988-05-13 nr 27: Lov om kjøp. (The Sale of Goods Act).

Markedsføringsloven, LOV 2009-01-09 nr 02: Lov om kontroll med markedsføring og avtalevilkår mv. (The Marketing Act).

Avtaleloven, LOV 1918-05-31 nr 04: Lov om avslutning av avtaler, om fullmakt og om ugyldige viljeserklæringer. (Act relating to conclusion of contracts).

Vergemålsloven, LOV 1927-04-22 nr 03: Lov om vergemål for umyndige. (The Guardianship Act).

Angrerettsloven; Lov 2000-12-21 nr 105: Lov om opplysningsplikt og angrerett m.v. ved fjernsalg og salg utenfor fast utsalgssted. (The Cooling-Off Period Act).

Ehandelsloven, LOV 2003-05-23 nr 35: Lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester. (The E-Commerce Act).

Lotteriloven, LOV 1995-02-24 nr 11: Lov om lotterier m.v. (The Lottery Act).

Personopplysningsloven, LOV 2000-04-14 nr 31: Lov om behandling av personopplysninger (personopplysningsloven). The Personal Data Act.

FOR 2004-02-16 nr 401: Forskrift om elektronisk kommunikasjonsnett og elektronisk kommunikasjonstjeneste. (The E-com regulation).

POLAND

Prof. Dr. F. Zoll (Jagiellonian University Cracow), Mr. J.A. Luzak (University of Amsterdam, Amsterdam)

2. Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1. Have *specific* rules of consumer law or contract law been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

No, there are no specific rules of consumer law established that would target digital content services in Poland. As far as specific rules of contract law are concerned there is the Law of 18 July 2002 on Provision of Services through Electronic Means (*Ustawa o świadczeniu usług drogą elektroniczną, Dz.U.02.144.1204*) which implements the E-Commerce Directive 2000/31/EC of 8 June 2000 in Poland.

Consumer sales law application is limited by Art. 1 of the Law of 5 September 2002 on Special Conditions of the Consumer Sale (*Ustawa o szczególnych warunkach sprzedaży konsumenckiej, Dz.U.02.141.1176*) pursuant to which this law applies only to sale of a tangible good (movables) between a professional seller and a consumer buyer. In the Polish legal literature this provision has been interpreted strictly: the law should not be applied either to other (non-sale) contracts on the basis of which a consumer becomes an owner of a good (P. Drapala, *Świadczenie w miejsce wykonania (datio in solutum)*, PiP 2003/12/28) or to sale contracts of intangible good (which means it could be applicable only to digital content saved/stored on a tangible good, like CD/DVD but then it would apply to the sale of that CD/DVD and not to the sale of the digital content *per se*). There is no case law in this respect. General contract law regulation of sales contracts would be applicable: art. 535-581 of the Polish Civil Code (*Kodeks cywilny*) since it applies to the sale of either tangible or intangible goods as well as to the sale of rights. Moreover, Article 66¹ of the Polish Civil Code implements Art. 11 of the E-Commerce Directive and concerns the procedure of the conclusion of the contract by electronic means. The notion of consumer is not named therein but in case of a B2B-transaction, the rules are not mandatory. Art. 384 § 4 of the Polish Civil Code has been also developed to accommodate contracts concluded by electronic means. Although it is specific e-commerce legislation and not specifically aimed at consumer protection, pursuant to it if one contractual party uses standard contract terms in electronic form, it has to provide it to the other party before the conclusion of the contract in a way that makes storing and using it in a normal way possible.

Also, the distance selling provisions that have been implemented in the Chapter 2 of the Law of 2 March 2000 on protection of some consumer rights and liability for damage caused by dangerous products (*Ustawa o ochronie niektórych praw konsumentów oraz o odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny, Dz.U.00.22.271* - this law in its first sections regulates distance and doorstep selling – ‘some consumer rights’ – and then moves on to regulation of product liability) could be applicable to digital content services.

Q.2.2. In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the software on the CD/DVD, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

It has been questioned in practice whether intangible goods (such as software) could be the object of a consumer sales contract. In the end, most authors are in agreement that the purchase of software may be treated as a contract for the consumer sale of goods, in case the software is contained on a tangible good (CD/DVD) (Supreme Administrative Court (NSA) case of 24 November 2003 (FSA 2/03); E. Letowska, *Prawo umow konsumenckich*, p. 385; E. Habryn-Motawska, *Niezdolnosc towaru konsumpcyjnego z umowa sprzedazy konsumenckiej*, p. 23; M. Pecyna, *Ustawa o sprzedazy konsumenckiej*, p. 43-44) However, in such a case it is the CD/DVD that will be seen as a subject of the sale contract and not the software itself. This means that the recourse to consumer sales law is unavailable, in case there is a flaw in the software. Recourse may be made to general liability rules for faults in goods bought: Art. 556-576 of the Polish Civil Code, as well as to general rules on non-performance Art. 471 and sub. from the Polish Civil Code. In many cases, such a purchase of software will be combined with the purchase of license to exploit that software (service contract). The grounds for liability for faults in the software could then be found only in the contractual relationship between the parties (A. Struglik, *Odpowiedzialnosc licencjonodawcy za wady produktow informatycznych*, PPH 2004/9/43).

Q.2.3. In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer's computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

This sort of purchase will not fall under the definition of the consumer sale in Polish law which means that no recourses in consumer sales law will be available. The purchase of software may be treated as a contract for the sale of goods, however, in most cases, it will be combined with the purchase of license to exploit that software (service contract). The grounds for liability, in case the purchase of license is involved, could be found only in the contractual relationship between the parties (A. Struglik, *Odpowiedzialnosc licencjonodawcy za wady produktow informatycznych*, PPH 2004/9/43). The legal character of such a purchase has not yet been clearly defined in Poland. Aside the concept of it being a sale contract, it might be declared a purchase of license, or a contract transferring ownership of a copy, or a contract of access (E. Kacperek, P. Zawadzki, *Charakter umow o pobranie z sieci tresci chronionych prawem autorskim*, PPH 2009/10/29). Presently it is unclear which rules actually are applied to digital content not stored on a DVD/CD.

3. Defining consumers and producers.

Q.3.1. Are individuals who offer digital content services to consumers considered to be 'consumers' or 'traders'? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

The Law on Provision of Services through Electronic Means applies only to such individuals who provide digital content services within their profession or business (even if it is just a side business, which would apply also to micro-payment requirement). The intention of making profit is therefore of relevance, but not the length of time of provision of services. If an individual offers digital content services free of charge and without any connection to his business or profession, he could be seen as a ‘consumer’ (‘prosumer’).

This law applies to any ‘natural or legal person, or organization without legal capacity, who conducts, even if only as a side activity, commercial or professional activity providing services through electronic means’ (service provider) and ‘natural or legal person, or organization without legal capacity, who uses services provided through electronic means’ (service user). This law applies not only to consumer law since consumer has been defined in the Polish Civil Code in Art. 22¹ as: ‘natural person conducting legal activities not directly related to her commercial or professional activity’. Furthermore, pursuant to Art. 1 Sec. 1 of the Law of 5 September 2002 on Special Conditions of the Consumer Sale, provisions of consumer sales law are applicable in Poland only to consumers (‘natural persons who buy movable goods for a purpose not related to their commercial or professional activity’) buying movable goods from a professional seller (covers only B2C contracts).

4. Sector-specific consumer law.

Q.4.1. Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to: - the conclusion of the contract for digital content services;

The Law on Provision of Services through Electronic Means in Art. 8 states that the service provider prepares a set of rules on provision of services through electronic means. In such a set of rules conditions of conclusion of contracts for provision of services through electronic means are to be established.

The Law on protection of some consumer rights and liability for damage caused by dangerous products regulating the distance selling determines in Art. 6 Sec. 2 that an offer or the invitation to make an offer or to enter into negotiations should clearly give away the intention to enter into a contract by the person making it who uses distance selling means. Art. 6 Sec. 3 prior consent of the consumer is needed to make him an offer via electronic means. Art. 6 Sec. 4 communication via electronic means to make an offer to the consumer cannot put any costs on the consumer.

Art. 384 Sec. 4 of the Polish Civil Code has been also developed to accommodate contracts concluded by electronic means. Although it is specific e-commerce rule but not consumer rule, pursuant to it if one contractual party uses standard contract terms in electronic form, it has to provide it to the other party before the conclusion of the contract in a way that makes storing and using it in a normal way possible.

- the pre-contractual information consumers need to be given;

The Law on Provision of Services through Electronic Means in Art. 8 states that the service provider has to provide the consumer with the text of the set of rules on provision of services

through electronic means prior to conclusion of contract. The set of rules establishes the scope of the provided services, conditions of the provision of services (technical requirements, ban on transmitting illegal content), conditions of the conclusion and termination of contracts, complaint mechanisms.

The Law on protection of some consumer rights and liability for damage caused by dangerous products in Art. 9 establishes pre-contractual information duties in accordance with the Distance Selling Directive, broadening their scope with the following: information about complaint procedures, information about the right to terminate the agreement.

In case personal data needs to be taken from the consumer, the Law of 29 August 1997 on Protection of Personal Data may apply (*Ustawa o ochronie danych osobowych*, Dz.U.02.101.926). Pursuant to Art. 23 the consumer needs to consent to the professional party gathering its data. The data may be gathered when this is necessary either to perform the contract or from the legal perspective. The data may also be gathered when it is necessary for the performance of legally justified aims of the service provider and it would not infringe the freedom and rights of the consumer. Art. 24 specifies that the consumer needs to be notified then about the address and name of the individual collecting his data, aim of the data collection, known or possible receivers of the data, right to access his own data and correct it, voluntarily basis of giving away the data or the legal basis on which it is obligatory.

Article 66¹ of the Polish Civil Code implements Art. 11 of the E-Commerce Directive and concerns the procedure of the conclusion of the contract by electronic means. Pursuant to Sec. 2 if a professional party makes an offer in an electronic form he is obliged to inform the other party prior to the conclusion of the contract on: technical activities that will lead to conclusion of the contract; legal consequences of confirming the receipt of the offer by the other party; ways and means of storing, saving, protecting and making available by the professional party to the other party of the content of the contract; methods and technical means of discovering and correcting the mistakes in entering the data which the professional party is obliged to make available to the other party; languages in which the contract may be concluded; ethical codes that the professional party uses and their availability in electronic form. This provision is applied also when the professional party makes an invitation to the other party to open negotiations, make an offer or conclude a contract in another way (Sec. 3). This provision is not applicable, however, to contracts concluded by means of e-mail or other similar means of individual distance communication (Sec. 4).

Audiovisual Media Service Directive has not yet been implemented in Poland.

Art. 6 Sec. 1 Point 12 of the Copyright and Associated Rights Law of 4 February 1994 (*Ustawa o prawie autorskim i prawach pokrewnych*, Dz.U.06.90.631) states that information about rights management are such information that identify the work, its author, subject of copyright or information on conditions of exploitation of the work, provided this information was attached to the copy of the work or it is transferred in relation to making it public, including identification codes.

Pursuant to Art. 63 of the provider of the Telecommunication Law of 16 July 2004 (*Ustawa Prawo Telekomunikacyjne*, Dz.U.04.171.1800) public telecommunication services publishes recent information on the quality of these services. Moreover, pursuant to Art. 56 Sec. 3 Point 10 written contract for provision of public telecommunication services includes data on the quality of the service. Pursuant to Art. 56 Sec. 6a if the subscriber requests it the public

telecommunication services provider is obliged to deliver the text of any proposed change of contractual conditions that was made via distance communication measures by electronic means to the email address pointed for this purpose by the subscriber or by a similar distance communication measure. The same is possible as far as notification of the change of the name of the company, its address or seat of the service provider is in order, pursuant to Art. 60a Sec. 4. Pursuant to Art. 169 Sec. 1 the telecommunication service provider may publish limited personal data of its subscribers in a book or electronically. Pursuant to Sec. 2 of this article the subscribers prior to agreeing to being listed in such a publication, are informed, free of cost, about the purpose of the publication or phone information about numbers under which their personal data may be found, as well as about the possibility to use the publication via search functions available in its electronic form.

- the termination of the contract (for non-performance or termination for other reasons) for digital content services?

The Law on Provision of Services through Electronic Means in Art. 8 states that the service provider determines the rules on provision of services through electronic means (i.e. it is the service provider who decides under which conditions the service will be provided by setting these rules). In such a set of rules conditions of termination of contracts for provision of services through electronic means are to be set. Pursuant to Art. 7 the consumer has to be given a possibility to terminate using the services through electronic means at any chosen moment, free of charge.

The Law on protection of some consumer rights and liability for damage caused by dangerous products in Art. 7 gives a consumer a 10 day right of withdrawal (not only in case of digital service contracts but, more general, in case of all distance contracts). Art 8. Sec. 3 determines that if the contract is entered for an undetermined time, any party may terminate the contract without a reason with a one month notice (unless parties agreed on a shorter notice).

Q.4.2. Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

The Law on Provision of Services through Electronic Means in Art. 10 prohibits sending of commercial information to a specific consumer by using electronic means, especially e-mail, in case it has not been ordered by him. The consumer may give his consent to have such information delivered, especially by making his e-mail address public. In case such information will be sent without prior consent, it will be seen as an unfair competition act which has been clearly stated in Sec. 3 of this Article. Pursuant to Art. 9 such commercial information has to be clearly marked as commercial information, clearly mark the subject who ordered the commercial information to be distributed, clearly mark the promotional activity and conditions of making use thereof, all possible information that might influence liability of both parties. (This is further discussed in Q.11.1 b) It might be worth mentioning that the general rules prohibiting or limiting certain advertisement in media (these prohibitions and limitations are defined in various specific laws, e.g. concerning promotion of alcohol and tobacco) apply also to internet (Sobczak Jacek, *Komentarz do ustawy z dnia 26 stycznia 1984 r. Prawo prasowe (Dz.U.84.5.24)*, [w:] J. Sobczak, *Prawo prasowe. Komentarz*, LEX, 2008). Advertisement that will not mind these legal limitations and prohibitions will automatically constitute an unfair competition act, pursuant to Art. 16 Sec. 1 Point 1 of the

Law of 16 April 1993 on counteracting unfair competition (*Ustawa o zwalczaniu nieuczciwej konkurencji*, Dz.U.03.153.1503). I have not found any other examples of regulation (nor legal literature pointing out the need thereof) as far as other types of behavioural advertising etc. are concerned.

Q.4.3. In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- does sector-specific law determine any remedies?

The Law on Provision of Services through Electronic Means determines in Art. 24 that breach of Art. 10 results in fine for the service provider.

- could a consumer invoke general consumer and contract law remedies?

Yes. General contract law remedies have been further discussed in answers to questions: 5.8 and 8.4 and further and the consumer may always take recourse of these remedies in case of non-performance of any contractual obligation by the service provider. General consumer law remedies would most likely not be applicable as mentioned in the answers to the first questions.

5. Formation of contracts and pre-contractual information

Q.5.1. Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

The Law on protection of some consumer rights and liability for damage caused by dangerous products (this law in its first sections regulates distance and doorstep selling – ‘some consumer rights’ – and then moves on to regulation of product liability) regulating the distance selling determines in Art. 6 Sec. 2 that an offer or the invitation to make an offer or to enter into negotiations should in a clear and unambiguous way give away the intention to enter into a contract by the person making it who uses distance selling means. Art. 9 lists pre-contractual information that needs to be given to the consumer. Art. 9 Sec. 2 states that this information should be formulated in an unambiguous, clear and easily comprehensible way. In the legal literature it has been stated that unambiguousness of the information pertains to its: substance, accessibility, clarity of language, comprehensibility due to factual circumstances such as: letter type, exhaustiveness, possibility to read it with regard to its placement, having it shown for a sufficiently long period of time (e.g. on TV screen), etc. (E. Letowska, *Glosa do wyroku NSA z dnia 21 lutego 2000, II SA 1707/99*, OSP 2000/12/183)

The Law on Provision of Services through Electronic Means in Art. 5 states that all the information that the service provider is obliged to give to the consumer should be given in a clear, unambiguous and directly accessible way.

Art. 385 Sec. 2 of the Polish Civil Code states a general rule that standard contract terms have to be formulated in a clear and unambiguous manner. It introduces the ‘contra proferentem’ rule: unclear or ambiguous terms are to be interpreted favorably for the consumer. This rule is not to be used in proceedings for assessment of standard contract terms as unfair.

Q.5.2. Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

The Law on protection of some consumer rights and liability for damage caused by dangerous products in Art. 9 states that the consumer should receive pre-contractual information listed in this article (with such contract terms as: description and characteristics of the good, total price, conditions of payment, costs/date/method of delivery, right of withdrawal, costs of using distance means of communication, date of validity of the offer, minimum period of time for which the contract is to be concluded, complaint procedures, right to terminate the contract) at the latest at the moment of receiving an offer to conclude the contract.

Art. 384 Sec. 4 of the Polish Civil Code states that in case a standard form agreement has an electronic form, it has to be delivered to the other party prior to the conclusion of the contract in a way that it can be stored and easily accessed.

The Law on Provision of Services through Electronic Means in Art. 8 states that the service provider has to provide the consumer with the text of the set of rules on provision of services through electronic means prior to conclusion of contract. The set of rules establishes the scope of the provided services, conditions of the provision of services (technical requirements, ban on transmitting illegal content), conditions of the conclusion and termination of contracts, complaint mechanisms. Art. 8 is *lex specialis* to the provision of the Polish Civil Code. (T. Szczurowski, *Udostępnienie wzorca umowy w postaci elektronicznej*, PPH 2005/07/36)

Q.5.3. Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license, considered to be validly concluded contracts?

Art. 384 Sec. 4 of the Polish Civil Code states that in case a standard form agreement has an electronic form it has to be delivered to the other party prior to the conclusion of the contract in a way that it can be stored and easily accessed. There is a discussion in Polish legal literature how to interpret this provision. Whether it suffices to make the standard contract terms accessible at the internet site (then click-wrap contract would be validly concluded) or whether the consumer needs to have the standard contract terms delivered to him via electronic means, i.e. via e-mail. Most of the Polish authors choose for such an interpretation of this article that 'delivery' is necessary, thus click-wrap or browse-wrap contracts would not be validly concluded with consumers. (T. Szczurowski, *Udostępnienie wzorca umowy w postaci elektronicznej*, PPH 2005/07/36). Such contracts would be valid if concluded between professional parties. Although such interpretation leads to the result which cannot be reconciled with Art. 385³ Sec. 4 of the Polish Civil Code (in case of doubts contractual provisions which the consumer had no opportunity to get to know prior to conclusion of contract are considered to be unfair). Prior to this provision, there is only a presumption that terms not delivered to the consumer before the conclusion of the contract are unfair, which means that under certain reasonable circumstances such way of the inclusion of the terms into the contract may be allowed (when there is no doubt as to their fairness and effectiveness). But this is not properly reflected in writings of the doctrine. Unfortunately, there is no case law on this subject.

Q.5.4. Under what conditions are the terms of a standard form agreement binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?

The Law on protection of some consumer rights and liability for damage caused by dangerous products regulating the distance selling determines in Art. 6 Sec. 3 that prior consent of the consumer is needed to make him an offer via electronic means. The service provider might try to solicit this consent using the same electronic means which he would use to make an offer (e.g. he might call the consumer but prior to making an offer he would have to ask whether he may make an offer). The consumer may not be encumbered by any costs thereof.

The Law on Provision of Services through Electronic Means in Art. 4 states that in case the law asks for the consent of the service user that consent may not be implied from any other statement of the consumer. It is for the service provider to prove that this consent has been given. In the comments to this article it has been stated that e.g. in respect of unsolicited emails (spam) it does not seem possible that this consent could be deduced from the fact that the service user voluntarily placed his personal data on the server when he was opening an email account. Consent has to be clearly given and pertains only to the activities specified by the service provider (i.e. for which he asked to receive consent). Moreover, there is a possibility to withdraw consent previously given. (J. Gołaczyński, *Komentarz do art.4 ustawy z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną* (Dz.U.02.144.1204), [w:] J. Gołaczyński, K. Kowalik-Bańczyk, A. Majchrowska, M. Świerczyński, *Ustawa o świadczeniu usług drogą elektroniczną. Komentarz*, Oficyna, 2009)

Q.5.5. Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy, or may the information also be given via electronic means?

The Law on protection of some consumer rights and liability for damage caused by dangerous products in Art. 9 Sec. 3 states that the professional party has to confirm in writing all the pre-contractual information (mentioned in Q.5.2.) at the latest at the moment of performing the service. Requirement of confirmation 'in writing' will be fulfilled also when it is delivered in an electronic version with an electronic signature verified by appropriate certificates (pursuant to Art. 78 Sec. 2 of the Polish Civil Code). This does not encompass the obligation to confirm conclusion of the contract itself.

Q.5.6. Are you aware of any specific information duties for providers of digital content services? If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

The Law on protection of some consumer rights and liability for damage caused by dangerous products in Art. 9 states that the consumer should receive pre-contractual information listed in this article (as described previously). One of this information concerns the place the consumer may direct his complaints to as well as the description of the method of complaining.

The Law on Provision of Services through Electronic Means in Art. 20 states that in case personal data will be gathered by the service provider, the consumer has a right to information about: the possibility to use the service anonymously or under a nickname (unless it is not possible for the right functioning of the service); means used by the service provider that

protect consumer's personal data from being accessed by third persons; subjects who are given access to the personal data, their scope and dates of transfer to these subjects. This information should be easily accessible, on a permanent basis, by the consumer by using his regular electronic means.

Article 66¹ of the Polish Civil Code implements Art. 11 of the E-Commerce Directive and concerns the procedure of the conclusion of the contract by electronic means. Pursuant to Sec. 2 if a professional party makes an offer in an electronic form he is obliged to inform the other party prior to the conclusion of the contract on: technical activities that will lead to conclusion of the contract; legal consequences of confirming the receipt of the offer by the other party; ways and means of storing, saving, protecting and making available by the professional party to the other party of the content of the contract; methods and technical means of discovering and correcting the mistakes in entering the data which the professional party is obliged to make available to the other party; languages in which the contract may be concluded; ethical codes that the professional party uses and their availability in electronic form. This provision is applied also when the professional party makes an invitation to the other party to open negotiations, make an offer or conclude a contract in another way (Sec. 3). This provision is not applicable, however, to contracts concluded by means of e-mail or other similar means of individual distance communication (Sec. 4).

This subject has been also partially discussed in Q.4.1 and other questions on this form. However, I could not find any other specific information duties pertaining to the provision of digital content services. As far as the discussion in legal literature is concerned, it has been mentioned that providing a hyperlink on a website that directs the consumer to another website with standard contract terms makes them applicable to the consumer (M. Giaro, *Zawarcie umowy za pośrednictwem internetowych platform aukcyjnych*, PPH 2008/4/40).

Q.5.7. Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer? If so, please specify.

The Law on protection of some consumer rights and liability for damage caused by dangerous products in Art. 9 states that the consumer should receive pre-contractual information listed in this article at the latest at the moment of receiving an offer to conclude the contract. Art. 9 Sec. 2 states that this information should be formulated in an unambiguous, clear and easily comprehensible way.

Art. 384 Sec. 4 of the Polish Civil Code states that in case a standard form agreement has an electronic form it has to be delivered to the other party prior to the conclusion of the contract in a way that it can be stored and easily accessed. Art. 385 Sec. 2 of the Polish Civil Code states a general rule that standard contract terms have to be formulated in a clear and unambiguous manner. It introduces the 'contra proferentem' rule.

The Law on Provision of Services through Electronic Means in Art. 8 states that the service provider has to provide the consumer with the text of the set of rules on provision of services through electronic means prior to conclusion of contract. Art. 5 states that all the information that the service provider is obliged to give to the consumer should be given in a clear, unambiguous and directly accessible way.

Q.5.8. What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?

In case of non-compliance with the delivery of the written confirmation of information duties of the Law on protection of some consumer rights and liability for damage caused by dangerous products, the right of withdrawal of the consumer will be prolonged to three months (Art. 10).

There are no other sector-specific remedies given to digital consumers.

Pursuant to the general rule of Art. 384 of the Polish Civil Code the standard contract terms of one party bind the other party only in case they have been delivered to the other party prior to the conclusion of the contract. If the non-delivered information concerned standard contract terms, they will not bind the consumer.

Pursuant to the general rule of Art. 385³ Point 4 of the Polish Civil Code contractual terms which the consumer did not have a chance to get himself acquainted with prior to the conclusion of the contract are considered to be unfair.

Although it is not clearly specified it may cause the *culpa in contrahendo* liability based on torts.

6. Right of withdrawal.

Q.6.1. In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

The consumer has 10 days to withdraw from the contract as of the day of conclusion of contract to provide services - Art. 7 of the Law on protection of some consumer rights and liability for damage caused by dangerous products. However, if the service has been rendered to the consumer (upon the consumer's consent) within these 10 days, the consumer loses his right of withdrawal, unless the parties have agreed otherwise – Art. 10 Sec. 3 Point 1 of that Law. It does not seem to be of relevance whether the consumer has already accessed the service. There is no significant discussion on the need to change the right of withdrawal.

Q.6.2. Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

The consumer loses his right of withdrawal if he gave permission for the service to be rendered during the cooling-off period, unless the parties have agreed otherwise – Art. 10 Sec. 3 of the Law on protection of some consumer rights and liability for damage caused by dangerous products. There has not been any discussion in Polish legal literature nor case law

whether the consumer's consent would be invalid if the consumer has not been aware of his right of withdrawal (and therefore might lose his right of withdrawal without knowing he had such a right).

The Law on Provision of Services through Electronic Means in Art. 4 states that in case the law asks for the consent of the consumer that consent may not be implied from any other statement of the consumer. It is for the service provider to prove that this consent has been given.

Q.6.3. If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

The Law on protection of some consumer rights and liability for damage caused by dangerous products requires the consumer to return the performance in an 'unchanged' state, unless the 'change' was necessary within the limits of normal use of the service (Art. 7 Sec. 3). There is no case law nor literature thereon which makes it impossible to predict what exactly would the consumer have to return. However, if e.g. the file had already been downloaded, then the service had been rendered to the consumer and he has no right to withdraw from the contract (Art. 10 Sec. 3 Point 1, as discussed above).

Q.6.4. Does the exercise of a right of withdrawal regarding a service that is part of a package or jointly ordered or interdependent services affect the contracts concerning these other services?

Art. 13 Sec. 2 of the Law on protection of some consumer rights and liability for damage caused by dangerous products states that when the contract that the consumer is withdrawing from was to be performed with help of a credit or loan granted by the service provider or was to be financed by a consumer credit agreement (the service provider having arranged it with the bank), the right of withdrawal can be applied also that credit/loan agreement. There is no case law nor literature on withdrawing from otherwise interrelated services.

7. Unfair contractual terms.

Q.7.1. Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a 'main obligation' under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

The term 'main obligation' of art. 385¹ of the Polish Civil Code is to be interpreted narrowly in Polish law and is supposed to apply e.g. to price and quantity of the good, but not quality of the good. It does not seem likely that such a contractual term would be considered as a main obligation. (A. Rzetecka-Gil, *Komentarz do art. 385(1) kodeksu cywilnego*, LEX; A. Olejniczak, in: *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna.*, ed. A. Kidyba, LEX, 2010).

The Copyright and Associated Rights Law of 4 February 1994 (*Ustawa o prawie autorskim i prawach pokrewnych*, Dz.U.06.90.631) contains many provisions establishing what kind of copying of content protected by copyright is allowed (more on that in Q.8.4). Beside the exceptions mentioned in this Law, it is the author of the piece of music who has exclusive right to copy that piece or to allow other parties to copy this piece (Art. 17 of this Law). This means that a clause limiting consumer's possibility to make a copy cannot possibly be declared unfair, since the consumer does not have that right to begin with.

Q.7.2. Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

It seems so based on case of the Supreme Court (*SN*) 6 October 2004 (I CK 162/04), where a term used in a bank contract which allowed the bank to check the financial position of his clients, including gaining information from the client's employer, was deemed as unfair since it infringed *inter alia* rules on the protection of privacy. In another judgment of the Regional Administrative Court in Warsaw (*WSA*) of 31 March 2006 it states that courts have power to determine whether the transfer/use of personal data of the consumer could be considered as unfair (II SA/Wa 2395/04) as well as of the Supreme Administrative Court in Warsaw (*NSA*) 30 March 2006 (I OSK 628/05).

Q.7.3. Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

Case of 3 March 2010 adjudicated by Court of Protection of Competition and Consumers (*Sad Ochrony Konkurencji i Konsumentow*) (XVII Amc 715/09) – the court deemed as unfair a clause in the standard contract terms of the internet shop that 'this set of rules may be changed by the seller in the future'. By conclusion of the contract with the internet shop the consumer had an option to read and accept these rules of conduct prior to registration as a consumer of this internet shop, but in case these rules would be changed by the shop at a later date, the consumer did not have to be aware of it nor accept these changes (according to this term).

Case of 29 October 2009 adjudicated by Court of Protection of Competition and Consumers (XVII Amc 574/09) – the court deemed as unfair clauses in the standard contract terms of the internet shop that: 'all changes to this set of rules bind the consumer as of the moment of their publication online, which obliges the consumer to keep up to date with these rules' and another one: 'despite doing our best, we cannot guarantee that published online technical data are free of mistakes and errors, however, if such they cannot give rise to our liability'.

Case of 26 March 2008 adjudicated by Court of Protection of Competition and Consumers (XVII Amc 265/07) – the court deemed as unfair a clause in the standard contract terms of a company providing paid internet addresses to consumers that stated: 'price for the service has to be paid for the whole period of time and is not returnable in case the consumer cancels the services at an earlier date'.

Case of 28 December 2007 adjudicated by Court of Protection of Competition and Consumers (XVII Amc 99/07) – the court deemed as unfair two clauses used by a company 'Iplay' in its

‘Regulation of provision of services consisting of making available online music-word files’. The clauses were as follows: ‘in case a consumer takes actions which are in accordance with this regulation but would deem to be undesirable by Iplay, Iplay will notify the consumer about this via e-mail with a demand of immediate cease of undertaking these actions. If the consumer does not immediately follow the Iplay’s demands, Iplay will consider such a behavior of the consumer to constitute a violation of this regulation’; ‘termination of the contract for reasons on the consumer’s side does not result in return of the payments already made by the consumer at the iplay.pl website’.

Q.7.4. Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

No data.

8. Failure to function properly.

Q.8.1. When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer’s privacy, or the level of journalistic quality that consumers may expect, etc.?

Pursuant to Art. 556 of the Polish Civil Code the seller is responsible toward the buyer for any defaults in the sold goods that diminish the value or usability of the goods, determined according to the aim that was set in the sale contract or according to the circumstances of the case or the good’s purpose, he is also liable if the good does not have characteristics of which he assured the buyer that there are, or when the goods delivered were incomplete.

It seems that the test that the judges would apply would be more abstract one. In the judgment of the Supreme Court of 27 November 2003 (III CK 115/02) the court decided that the fact that the good is formally in accordance with all the technical requirements does not preclude it still being faulty. Discovery of the default follows the buyer finding out that the good is not fit for use according to its purpose or when it has defaults diminishing its value or usability defined in accordance with the purpose set in the contract.

Q.8.2. To what extent do (legal) standards formulated elsewhere play a role in defining what ‘normal use’ of a service is, e.g. – the ability to make private copies according to copyright law,

According to Art. 17¹ of the Copyright and Associated Rights Law of 4 February 1994 copying or editing of a database, which falls under copyright protection, done by an authorized user of this database (or its copy), is legal without permission of the author of the database in so far as it is necessary to access the content of the database and to normally use that content. Pursuant to Art. 23 of this law, without the author’s permission a consumer may free of charge use already distributed piece, which falls under copyright protection, for his personal use. In as far, as this piece is a digital database, the allowed personal use is limited to

own academic use unrelated to profit. The scope of the personal use is limited to use of single copies by a circle of people related or closely associated (Art. 23 Sec. 2). However, this permission is excluded with respect to computer programs by Art. 77 of this Law.

- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),

That does not influence the definition of the ‘normal use’ of a service.

- the suitability of certain contents for minors as stipulated under audiovisual media law, The Law of 29 December 1992 on radio and television services (*Ustawa o radiofonii i telewizji*, Dz.U.04.253.2531) in Art. 16b Sec. 3 Point 4 prohibits broadcasting of any advertisement that could endanger physical, psychological or moral development of children.

- journalistic codes of conducts, etc.

That does not influence the definition of the ‘normal use’ of a service.

Q.8.3. Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software? If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer’s hardware and middleware?

Pursuant to Art. 546 of the Polish Civil Code the seller is obliged to give the buyer all the necessary information on factual and legal characteristics of the good. Section 2 of this Article states that when it is necessary for the proper use of the good according to its purpose, the seller should attach to the good instruction on how to use it. This is a contractual duty, breach of which will lead to non-performance (or improper performance) of the contract and liability as of Art. 471 of the Polish Civil Code. There is no interpretation of this provision from this angle, but it seems reasonable to assume that such information would have to be given to fulfill the provisions’ aim and that in case it was not given, the consumer could make such an assumption. In the comments to this article it has been stated that information on factual characteristics of the good should include also information as to its functionality, e.g. rules on maintenance and exploitation (*Komentarz do art. 546 kodeksu cywilnego (Dz.U.64.16.93)*, [w:] Z. Gawlik, A. Janiak, A. Kidyba, K. Kopaczyńska-Pieczniak, G. Kozieł, E. Niezbecka, T. Sokołowski, *Kodeks cywilny. Komentarz. Tom III. Zobowiązania - część szczególna*, LEX, 2010).

Q.8.4. What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

The buyer may claim remedies based on the general provision of the Polish Civil Code since the consumer sales law is not applicable in this case. The buyer may demand: termination of the contract (Art. 560 Sec. 1); price reduction (Art. 560 Sec. 1), delivery of another good of the same type (if the goods are generic) together with claiming damages for any delay (Art. 561 Sec. 1); repair (if the goods are specific) together with setting the deadline for the seller within which the repair needs to take place under a threat of termination of the contract (Art. 561 Sec. 2). The buyer may also claim damages for loss resulted as a consequence of a faulty good next to using any other remedy listed above (Art. 566). The buyer may claim full damages if the default may be attributable to the seller. In other case the amount of the

damages will be limited to the loss the buyer suffered through concluding a contract without knowing of the default.

There is no hierarchy of the remedies, however, the seller may, once only (unless the default is irrelevant – Art. 560 Sec. 1), block the buyers right to terminate the contract. He may do so by immediately replacing or repairing the good.

There is no specific (within digital content services) case law in this respect.

Of course, also the general regime including Art. 471 (damages) of the Polish Civil Code applies.

Q.8.5. For how long after delivery of the digital content service (weeks, months, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)? If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

Pursuant to Art. 559 of the Polish Civil Code the seller is not responsible for the defaults of the goods that were caused after the responsibility for the good had passed to the buyer, unless the cause for these defaults had already existed in the goods. In principle, if the default existed at the moment of entering into the contract the consumer may revoke all remedies at a later date, up until the moment of the prescription period which is one year as of the moment of the delivery (Art. 568), unless the seller deceived the consumer as to the existence of that default. However, the consumer has a notification duty – within one month from the moment he had discovered the default (or within one month from the moment he should have discovered the default if he acted with due diligence, when it concerns a good/default that requires examination) – Art. 563. If the consumer does not perform his notification duty he loses all his rights based on the existence of this default. However, he still retains the claim for damages under the general regime of Art. 471 of the Polish Civil Code. These are general contractual remedies, which are applicable also to service contracts. Consumer sales remedies are not applicable, since as mentioned in the first part of this questionnaire provision of digital content services would not qualify as a consumer sale.

Q.8.6. May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

Answer to Q.8.3. applies here as well. It seems that otherwise the seller would have an information duty towards the buyer. There is no case law on this, however, which means it is impossible to estimate which consumers' expectations might be seen as reasonable.

Q.8.7. If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identity, geographical address or further details?

a) the operator of that platform, or

b) the third party application service himself?

Should this be done before or after the contract is concluded?

The Law on Provision of Services through Electronic Means in Art. 7 states that the operator of the platform would have to enable the consumer a possibility to clearly identify parties of the digital content service that will be provided. However, on the third party application lies a general duty to inform (just as on any other service provider – discussed in part 5).

Q.8.8. Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

The liability described above (Q.8.4.) is not based on fault and it is the seller who would be liable for the default in the good he had sold. It does, therefore, not seem to make a difference which part of the service malfunctions, the seller could be held liable. It matters with whom the consumer concludes a contract – does the operator of the platform (re)sell third party application or is he acting in the name of the third party application (or even just enables contact between these parties). Under certain circumstances even the tort liability may be considered.

9. Remedies for non-performance and termination of a long-term contract

Q.9.1. Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

No. There have been no specific remedies developed for non-performance as far as digital content services are concerned.

Q.9.2. Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

This question has been answered in Q.8.4. There is no hierarchy of the remedies, however, the seller may, once only (unless the default is irrelevant – Art. 560 Sec. 1 of the Polish Civil Code), block the buyers right to terminate the contract. He may do so by immediately replacing or repairing the good.

Q.9.3. In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

This question has been mostly answered in Q.8.4 and Q.8.5. The consumer has a notification duty – within one month from the moment he had discovered the default (or within one month from the moment he should have discovered the default if he acted with due diligence, when it concerns a good/default that requires examination) – Art. 563 of the Polish Civil Code. If the

consumer does not perform his notification duty he loses all his rights based on the existence of this default. After the consumer sent the notification, the seller might choose to try to repair or replace the good in order to avoid termination of the contract. That is possible only once, and the repair or replacement have to happen ‘immediately’ upon the seller receives the notification. If the seller does not offer repair or replacement or does not deliver it ‘immediately’, the consumer may terminate the contract. The Supreme Court in a case of 7 February 2008 (V CSK 410/07) decided that the term ‘immediately’ should be left open to the interpretation of the court adjudicating a given case, and should be terminated based on all the circumstances of the case. Pursuant to this judgment it is not possible to assume any specific period of time would always be reasonable. Pursuant to the Supreme Court case of 22 December 2000 (II CKN 1118/98) the notification may take place in any form, also orally, although the consumer has to be able to prove that he performed his obligation. Notification may be, therefore, sent in electronic format.

Q.9.4. Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?

Art. 395 of the Polish Civil Code states that the parties may agree on a contractual provision giving both or one of them the right to terminate the agreement within a specific period of time. This right might be exercised by notifying the other party. No reasonable notice period is required. The consequences for most contracts are termination of the agreement *ex tunc* which means that the contract is considered never to be concluded and the parties have to return to each other everything they have acquired. In case the contract was long-term for an undetermined period the termination is considered to have *ex nunc* consequences. However, the Supreme Court has decided a few times (e.g. in the case of 23 January 2008 (V CSK 379/07) that parties may decide to give other consequences to the termination of the contract, e.g. decide that they want to terminate it *ex nunc*.

Art. 365¹ of the Polish Civil Code states that contracts concluded for an undetermined period may be terminated with observance of periods of time determined by contract clauses, laws or customs, and if such a period of time has not been set anywhere – immediately after termination. Before this provision was introduced to the Polish Civil Code this termination right of parties to a long-term contract has been recognized based on general contractual rules, such as freedom of contract. This sort of termination has consequences *ex nunc*. The consumer may not be taken away this right (though it might be limited by parties to right for termination only for important reasons). If he does not observe the period of termination notice, the termination notice will be considered invalid. In the doctrine there is also a view, that in the case of long term contracts concluded even for a definite period of time the contract may be terminated by notice of an important reason.

Q.9.5. In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

Polish law regulates only possibility of terminating of the credit agreement when it was concluded with combination of another contract which then is terminated by one of the parties.

10. After sales services.

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

There are no specific legal provisions obliging the service provider to make after sales services available. In most cases, the contract itself will regulate this. In case the consumer concludes a contract for having digital content service provided to him for an unlimited period of time, it may be assumed that out of the nature of the obligation itself comes the obligation for the service provider to provide access to the digital content and its update, as it may be necessary. (R. Sikorski, *Licencje na korzystanie z elektronicznych baz danych*, ABC 2006)

Q.10.2. What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

In case the service provider declares bankruptcy then often, due to contractual provisions, rights of the consumer cease to exist with this moment (with the *ex nunc* effect). (E. Traple, *Umowy o eksploatacje utworow w prawie polskim*, Oficyna 2010) The contractual provision giving a consumer a right to terminate such a service (with *ex tunc* effect) is, however, considered to be void pursuant to Art. 83 of the Law of 28 February 2003 on Bankruptcy (*Prawo upadlosciowe i naprawcze*, Dz.U.09.175.1361).

Q.10.3. Is a provider of digital content service required to provide conversion software in case the device used to make use of the content service has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

There is no legal provision nor case law obliging a provider to do so unless the contract states so.

11. Unfair commercial practices.

Q.11.1. Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service? If there is case law, please provide references and a brief description.

a. the use of incompatible standards to prevent users from switching to other services or hardware;

Pursuant to Art. 15 Sec. 1 Point 5 of the Law of 16 April 1993 on counteracting unfair competition one of the unfair competition practices is a practice that forces the consumer to choose as his contractual counterparty a given service provider. This practice has not been blacklisted in the Law on counteracting the unfair commercial practices of 23 August 2007 (*Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*, Dz.U. 07.171.1206) – it might be considered as an unfair commercial practice if it fulfills the general test.

b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);

The Law on counteracting the unfair commercial practices in Art. 7 Sec. 11 prohibits the provider from using editorial content in the media to promote a product where a provider has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). The same regulation may be found in: Art. 16 Sec. 1 Point 4 of the Law on counteracting unfair competition. In the case of 23 February 2006 the Court of Protection of Competition and Consumers (XVII Ama 118/04) decided that advertisement that creates an impression in the consumers that it conveys objective information and therefore hides the promotional character of the advertising campaign should be considered to be an unfair commercial practice. Product placement in advertisement is also considered to be an unfair commercial practice, whenever the provider paid for the product placement and the consumer was not informed that he was watching an advertisement of the product. (M. Sieradzka, *Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym. Komentarz*, Oficyna, 2008)

Pursuant to Art. 16 Sec. 1 Point 3 of the Law on counteracting unfair competition it is an unfair competition act to advertise a product/service by appealing to consumer's emotion through causing fear, abusing superstitions or children's naivety. The Court of Appeal of Gdansk in case of 6 November 1996 (I ACr 839/96) considered as unfair advertisement, an advertisement which abused a naivety of the consumer and his inability to associate complicated facts and come to conclusions on the basis of a text presented to him which exposed content that the consumer desired. This advertisement was deemed to create certain belief in an average consumer as to the existence of facts which did not take place in reality and therefore caused him to feel disappointed, being ignored and deceived.

Spamming might be prohibited as an unfair commercial practice under Art. 9 Sec. 3 of the Law on counteracting the unfair commercial practices, or under Art. 16 Sec. 1 Point 5 of the Law on counteracting unfair competition, however, it is also directly prohibited as an unfair competition act under Art. 10 of the Law on Provision of Services through Electronic Means.

c. the use of Digital Rights Management to prevent unauthorized use;

This practice has not been blacklisted in the Law on counteracting the unfair commercial practices – it might be considered as an unfair commercial practice if it fulfills the general test.

In general, the use of the DRM to safeguard the digital content and prevent unauthorized use is considered to be a fair commercial practice, however consumers should receive clear information as to how the field of exploitation of digital content has been limited. (K. Gienas, *Systemy Digital Rights Management w świetle prawa autorskiego*, Oficyna, 2008) It is also considered that removing the DRM safety measures in order to make freely authorized use of the good is allowed. It is for the service provider to prove to the consumer that the removal

meant to enable unauthorized use of the good. (W. Machala, *DRM a prawo własności intelektualnej*, Pr.NTech. 2008/1/25)

d. the use of Digital Rights Management to restrict use to a certain region or country;

This practice has not been blacklisted in the Law on counteracting the unfair commercial practices – it might be considered as an unfair commercial practice if it fulfills the general test.

In general, the use of the DRM to safeguard the digital content and prevent unauthorized use is considered to be a fair commercial practice, however consumers should receive clear information as to how the field of exploitation of digital content has been limited. (K. Gienas, *Systemy Digital Rights Management w świetle prawa autorskiego*, Oficyna, 2008)

e. the collection of personal data for marketing purposes or through spyware;

This practice has not been blacklisted in the Law on counteracting the unfair commercial practices – it might be considered as an unfair commercial practice if it fulfills the general test.

The Law on Provision of Services through Electronic Means in Art. 18 Sec. 4 and Art. 19 Sec. 2 Point 2 states that the service provider may collect personal data for marketing purposes only upon consent of the consumer.

f. the collection of sensitive personal data for marketing purposes or through spyware;

This practice has not been blacklisted in the Law on counteracting the unfair commercial practices – it might be considered as an unfair commercial practice if it fulfills the general test.

The Law on Provision of Services through Electronic Means in Art. 18 Sec. 4 and Art. 19 Sec. 2 Point 2 states that the service provider may collect personal data for marketing purposes only upon consent of the consumer. This covers also sensitive personal data if the consumer agrees to give them.

g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;

This practice has not been blacklisted in the Law on counteracting the unfair commercial practices – it might be considered as an unfair commercial practice if it fulfills the general test.

After termination of the contract the service provider may gather and process (sensitive) personal data: if it is necessary to claim payments for the provided service; or for marketing purposes or to improve the quality of the service – but then the gathering and processing of data may be done only with consent of the consumer and unless he specifically consents to the contrary all personal identification should be removed from it; if it is necessary to ascertain whether the consumer made improper use of the service; when other laws allow that – Art. 19 Sec. 2 the Law on Provision of Services through Electronic Means.

h. the use of default options to entice consumers to the purchase of additional services;

This practice has not been blacklisted in the Law on counteracting the unfair commercial practices – it might be considered as an unfair commercial practice if it fulfills the general test.

i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors;

This might be considered to constitute an aggressive marketing practice pursuant to Art. 9 Sec. 5 of the Law on counteracting the unfair commercial practices. This happens when the advertisement consists of a direct appeal to children to buy advertised goods or to convince their parents or other adults to do so. Also, the Law on radio and television services in Art. 16b Sec. 3 Point 4 prohibits broadcasting of any advertisement that could endanger physical, psychological or moral development of children. This would apply to having digital content advertised on TV or via radio. Pursuant to Art. 16 Sec. 1 Point 3 of the Law on counteracting unfair competition it is an unfair competition act to advertise a product/service by appealing to consumer's emotion through causing fear, abusing superstitions or children's naivety.

j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers;

This practice could be seen as blacklisted in the Law on counteracting the unfair commercial practices under Art. 7 Sec. 22 pursuant to which when the provider pretends he is not acting in commercial purpose or pretends to be a consumer, it is considered to be an unfair commercial practice in all circumstances or under Art. 7 Sec. 18 pursuant to which if the provider gives incomplete or untrustworthy information as far as market conditions or availability of the product are concerned in order to convince a consumer to conclude a contract on conditions less beneficial than market conditions – it is an unfair commercial practice.

Q.11.2. Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

No. This law is still relatively new.

Q.11.3. What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;
- the consumer may apply general contract law remedies such as avoidance or adaptation of the contract for mistake or abuse of circumstances;
- the consumer may terminate the contract without having to compensate the trader for the loss of profit; and
- the consumer may claim reduction of the contract price?

A consumer may claim: for a service provider to stop with conducting unfair commercial practice; removal of consequences of this practice; publication of a certain content in a certain form; repair of the damage caused on general rules, specifically annulment of the contract with the obligation to return to each other all that has been provided in performance of the contract including the reimbursement of the costs of acquiring the product for the consumer; certain compensation being paid to a specific social aim associated either with protection of consumers, protection of Polish culture or Polish heritage – Art. 12 of the Law on counteracting the unfair commercial practices. In practice this means that the consumer may claim damages and, separately, declaration of the voidance of the contract combined with claiming back his payment and costs. It has been argued that due to the literal meaning of this

provision the consumer has to annul the contract and that the contract is not void from the start. (M. Grochowski, *Wadliwosc umow konsumenckich (w swietle przepisow o nieuczciwych praktykach rynkowych)*, PiP 2009/7/59)

Q.11.4. To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

In answer to Q.11.1. certain regulations that could be applicable instead of unfair commercial practices provisions were mentioned. These other prohibitions would protect the consumer outside of the scope of the unfair commercial practices directive. If a practice falls under a prohibition in other regulation, e.g. unfair competition, then it might be easier for the consumer to argue that it had a negative influence on his decision-making process, but still the consumer would have to prove other conditions for unfair commercial practice.

12. Minors and other vulnerable consumers.

Q.12.1. Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

The Law on radio and television services in Art. 16b Sec. 3 Point 4 prohibits broadcasting of any advertisement that could endanger physical, psychological or moral development of children. This would apply to having digital content which may be considered harmful or offensive advertised on TV or via radio.

Marketing or selling digital content services to minors might be considered to constitute an aggressive marketing practice pursuant to Art. 9 Sec. 5 of the Law on counteracting the unfair commercial practices. This happens when the advertisement consists of a direct appeal to children to buy advertised goods or to convince their parents or other adults to do so.

Pursuant to Art. 16 Sec. 1 Point 3 of the Law on counteracting unfair competition it is an unfair competition act to advertise a product/service by appealing to consumer's emotion through causing fear, abusing superstitions or children's naivety.

Online gambling, just as regular gambling, is only allowed to people as of 18 years old – Art. 27 of the Law of 19 November 2009 on Gambling (*Ustawa o grach hazardowych*, Dz.U.09.201.1540).

There are many specific laws regulating what services are considered harmful or offensive to minors. Provision of such services would not be allowed even via digital means. E.g. publication of pornographic content in a way which makes it possible for a minor (younger than 15 years old) to access it, is a criminal offence under Art. 202 Sec. 2 of the Penal Code (*Kodeks karny*; Dz.U.97.88.553). This Article applies to publishing such content online in a non-coded (without age verification) way.

Q.12.2. May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the

consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

As far as infringement of the Law on Radio and Television Services is concerned, Art. 53 of that law specifies that the broadcaster will be punished with a fine of up to 50% of yearly payment for using the frequency to broadcast a program, and in case the broadcaster does not pay for the frequency – up to 10% of the income the broadcaster reached in the previous tax year.

Q.11.3. gives answer as to consumer's rights in case unfair commercial practice took place. Unfair competition law gives a possibility to issue claims only to competitors of the service provider, not to consumers. Any competitor may demand (based on Art. 18) termination of unfair practice; removal of consequences of unfair practice; publication of a statement in a certain form and with certain content; on general terms – surrender of profit that was gained without a just cause; or, in case the unfair competition practice was performed in fault - damages to be paid for a specific social aim associated to protection of Polish culture, protection of national heritage.

Q.12.3. Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

As it has been mentioned before: The Court of Appeal of Gdansk in case of 6 November 1996 (I ACr 839/96) considered as unfair advertisement, an advertisement which abused a naivety of the consumer and his inability to associate complicated facts and come to conclusions on the basis of a text presented to him which exposed content that the consumer desired. This advertisement was deemed to create certain belief in an average consumer as to the existence of facts which did not take place in reality and therefore caused him to feel disappointed, being ignored and deceived.

Vulnerabilities of the consumer seem to be taken into account by the courts. Art. 2 Sec. 8 of the Law on counteracting the unfair commercial practices defines an average consumer and establishes that social, cultural and language factors are to be taken into account when establishing who, in a given case, should be treated as an average consumer. This includes taking into account whether the consumer was not a part of a special group of consumers, who are particularly vulnerable to market practices or products, taking into account their age, disability (physical or mental).

There are no other special rules on conducting business with minors in general contract and consumer law. It has been argued that the protection of minors against harmful content in Polish media is insufficient. (E.Czarny-Drozdzejko, *Projektowana ochrona małoletnich przed szkodliwymi treściami prezentowanymi w mediach w polskim systemie prawnym*, ZNUJ 2007/4/81)

There are no special pre-contractual information regulations with respect to minors' protection.

Q.12.4. Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?

Pursuant to Art. 10 of the Polish Civil Code a person stops being a minor when he turns 18 years old or when he gets married (allowed as of 16 years old). As of that moment that person has full legal capacity (Art. 11). No legal capacity have children below 13 years old and people who have been stripped of legal capacity by legal judgment (Art. 12). Legal acts made by a person who has no legal capacity are void (Art. 14 Sec. 1). However, in case that legal act was to conclude a contract that belongs to contracts commonly concluded in petty, everyday matters, such contract becomes valid from the moment of its performance, unless it seriously harms the minor (Art. 14 Sec. 2). Children between 13 and 18 years old have limited legal capacity (Art. 16). Legal acts made by a person with limited legal capacity are valid only if consent has been given thereto by legal guardians (Art. 17). If a contract was concluded by a person with limited legal capacity without consent of the guardian, depends on confirmation of the contract by that guardian (Art. 18 Sec. 1). A person with limited legal capacity may herself confirm the legal act upon becoming of age (Art. 18 Sec. 2). A person who concluded a contract with a person with limited legal capacity may not claim lack of consent of the legal guardian; such person may, however, set a date for the confirmation of the legal act and becomes free if the date was not held (Art. 18 Sec. 3). A person with limited legal capacity may, without the consent of the legal guardian, conclude contracts belonging to contracts commonly concluded in petty, everyday matters (Art. 20) as well as freely spend earned money (Art. 21). The above mentioned rules would also apply to contracts concluded for digital content services since they are general private law provisions applicable to all contractual relations with minors.

Q.12.5. What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

Art. 405 of the Polish Civil Code states that in case the service cannot be returned, its worth has to be paid. However, it requires not only advantage but also disadvantage of the other party. It could be questioned under circumstances. There is no specific exception in Polish law for the minors in this respect.

Q.12.6. Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

Yes. Article 13 of the Polish Civil Code states that a person who is 13 years of age may lose its legal capacity completely as a result of mental illness, mental deficiencies, or other mental problems, such as alcoholism or drug addiction, if she is not able to control herself. All provisions on minors with no legal capacity are applicable to such persons.

Article 16 states that a person of age may have a limited legal capacity in case of a mental illness, mental deficiencies or other mental problems, such as alcoholism or drug addiction, if a state of such a person is not serious enough to justify giving her a ‘no legal capacity’ status but such a person needs help in taking care of herself. All provisions on minors with limited legal capacity apply to such persons.

Q.12.7. Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?

This has not been regulated within contract law nor has it been discussed by Polish courts.

13. Towards a model ‘digital consumer law’.

Q.13.1. Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

There are no ongoing initiatives of that specific sort at the moment. But there are works on the new Polish Civil Code which probably would also address at least partially these issues

Q.13.2. Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

There are no ongoing initiatives of that sort at the moment.

Q.13.3. Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell personal data to third parties? If so, would this model bring about better protection for digital consumers?

The Law on Provision of Services through Electronic Means in Art. 18 Sec. 4 and Art. 19 Sec. 2 Point 2 states that the service provider may collect (sensitive) personal data for marketing purposes only upon consent of the consumer. After termination of the contract the service provider may gather and process, which includes selling them, (sensitive) personal data for marketing purposes – again it may be done only with consent of the consumer and unless the consumer specifically consents to the contrary all personal identification should be removed from the data that the service provider possesses.

Art. 23 of the Law on Protection of Personal Data confirms that the consumer needs to consent to the professional party gathering its data (the consent may be given for the future when the aim of gathering data will not change). Art. 24 specifies that when the service provider processes data the consumer needs to be notified about the address and name of the individual collecting his data, aim of the data collection, known or possible receivers of the data, right to access his own data and correct it, voluntarily basis of giving away the data or the legal basis on which it is obligatory.

The fact that the consumer needs to give specific consent for processing of his personal data and should be informed about third parties to whom the service provider intends to sell them, gives him sufficient protection.

Q.13.4. Can consumers of the following digital content services expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	x	• ... • ...	..
Film or music on a website (streaming)	..	x	..	• ... •	..
Downloaded films or music	..	x	..		..
Games on a CD or DVD*	x		..
Games on the Internet	..	x	..		..
Downloaded games	..	x	..		..
User created content (UCC) ⁶⁰⁷ on a CD or DVD*	..	x			..
UCC on a website	..	x	..		..
Downloaded UCC	..	x	..		..
Personalisation services ⁶⁰⁸	..	x	..		..

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁶⁰⁷ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

on the Internet					
Downloaded personalisation services	..	x	..		..
Software-as-a-Service on a website ⁶⁰⁹	..	x	..		..
Downloaded software ⁶¹⁰	..	x	..		..
Software on a CD or DVD*	..	..	x		..
Communication through a website ⁶¹¹	..	..	x		..
E-learning services on the internet ⁶¹²	..	x	..		..
Downloaded e-learning services	..	x	..		..
E-learning service on a CD or DVD*	..	..	x		..

Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made? Please indicate this in the table below.

⁶⁰⁸ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

⁶⁰⁹ E.g. image editing, photoshopping, automatic translation services.

⁶¹⁰ E.g. anti-virus programs.

⁶¹¹ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

⁶¹² E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	x	..	x	x	x	x	x	• ... • ...
'Free' film or music on a website (streaming)	x	..	..	..	x	x	x	• ... • ...
Paid film or music on a website (streaming) ⁶¹³	x	..	..	..	x	x	x	
'Free' downloaded films or music	..	..	..	..	x	x	..	
Paid downloaded film or	x	..	x	x	x	x	x	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁶¹³ E.g. video on demand services.

music								
Paid games on a CD or DVD*	x	..	x	x	x	x	x	
'Free' games on a website	..	..	..	..	x	x	..	
Paid games on a website	x	..	..	x	x	x	x	
'Free' downloaded games	..	..	..	..	x	x	..	
Paid downloaded games	x	..	..	..	x	x	x	
Paid User created content (UCC) ⁶¹⁴ on a CD or DVD*	x	..	x	x	x	x	x	
'Free' UCC ⁶¹⁵	..	..	..	..	x	x	..	
Paid UCC	x	..	..	..	x	x	x	
'Free' personalisation	..	..	..	..	x	x	..	

⁶¹⁴ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁶¹⁵ E.g. video sharing websites, such as YouTube.

services ⁶¹⁶								
Paid personalisation services	x	x	..	..	x	x	x	
Paid software on a CD or DVD* ⁶¹⁷	x	x	x	x	x	x	x	
'Free' downloaded software ⁶¹⁸	..	..	..	..	x	x	..	
Paid downloaded software	x	x	..	x	x	x	x	
'Free' software-as-a-service on a website ⁶¹⁹	..	..	..	..	x	x	..	
Paid software-as-a-service on a website	x	x	..	x	x	x	x	
'Free' communication	x	..	..	..	x	x	x	

⁶¹⁶ E.g. ringtones and Apps for mobile phones.

⁶¹⁷ E.g.. anti-virus programmes, Office, etc.

⁶¹⁸ E.g. anti-virus programmes.

⁶¹⁹ E.g. image editing, photoshopping etc..

on services ⁶²⁰								
Paid communication	x	x	x	x	x	x	x	
Paid e-learning service on a CD or DVD* ⁶²¹	x	x	x	x	x	x	x	
'Free' downloaded e-learning services	..	..	..	..	x	x	..	
Paid downloaded e-learning services	x	x	..	..	x	x	x	
'Free' e-learning service on the internet	..	..	..	..	x	x	..	
Paid e-learning service on the internet	x	x	..	..	x	x	x	

⁶²⁰ E.g. social networking, such as Facebook, and e-mail services.

⁶²¹ E.g. an online language course.

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Copyright and Associated Rights Law of 4 February 1994 (*Ustawa o prawie autorskim i prawach pokrewnych*, Dz.U.06.90.631)

Law of 29 August 1997 on Protection of Personal Data may apply (*Ustawa o ochronie danych osobowych*, Dz.U.02.101.926)

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Court of Protection of Competition and Consumers (*Sad Ochrony Konkurencji i Konsumentów*) 26 March 2008 (XVII Amc 265/07)
Court of Protection of Competition and Consumers (*Sad Ochrony Konkurencji i Konsumentów*) 29 October 2009 (XVII Amc 574/09)
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SPAIN

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2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)?⁶²² Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

Except in some very particular cases, Spanish legislation does not have any specific rules governing digital content services. Among the aforementioned exceptions are the following: i) art. 102 TR-LGDCU⁶²³: according to section “c”, the *right to withdraw* will not be applicable (unless there is agreement to the contrary) to contracts on the electronic supply of computerized files, when those files may be downloaded and reproduced immediately and permanently; ii) LSSICE⁶²⁴, a national measure on the transposition of Directive 2000/31/EC. Although this does not exclusively circumscribe digital content services⁶²⁵, its provisions are very relevant to and are habitually applied to digital content services.

As well as the said regulations and in the absence of any specific dispositions, the provisions of the Civil code may be applied to a *contract for services*⁶²⁶ (e.g. the provision of information services), *contract for work*⁶²⁷ (services of *streaming, video on demand*, etc.), *lease of goods*⁶²⁸ and *sale contracts*⁶²⁹. The same can be said of the *sale of consumer goods* (arts. 114-127 TR-LGDCU), especially considering the broad definition of “product” adopted in art. 6 TR-LGDCU of 2007 (movable good or chattel in the general sense of art. 335 Cc. and not just a “*tangible* movable item” of Directive 99/44/EC), although the question is disputed. Also applicable are the TRLPI⁶³⁰

⁶²² Consumer rules are only applicable to B2C relationships, never to B2B nor to C2C. Thus, article 2 of the 2007 Consolidated Text of the Act on Consumer Protection. On the problems of qualification of the new definition of “business” in article 5 of that Act, see some hints in answer to Q. 3.1

⁶²³ Spanish Royal Legislative Decree 1/2007, of November 16, which approves the revised and consolidated text of the General Law for the Protection of Users and Consumers and other complementary laws. This law currently includes the regulation of distance contracts (arts. 92-106, implementation of Directive 97/7/EC) and those of sales of consumer goods (arts. 114-127 implementation of Directive 99/44/EC).

⁶²⁴ Law 34/2002, of June 11, on Information Society Services and E-Commerce.

⁶²⁵ Including within its scope of application also the electronic contracting of tangible assets (section “a” of Appendix LSSICE).

⁶²⁶ Arts. 1542-1545 and 1583-1587 Cc.

⁶²⁷ Arts. 1542-1545 and 1588-1600 Cc.

⁶²⁸ Arts. 1543, 1545 and 1546-1582 Cc.

⁶²⁹ Arts. 1445-1537 Cc.

⁶³⁰ Spanish Royal Legislative Decree 1/1996, of April 12, approving the Revised (Consolidated) Text of Intellectual Property Law, regularizing, clarifying and harmonizing related legal provisions in force. Arts. 48, 50, 99, 133 TRLPI and related sections.

provisions of intellectual property in relation to the user license (music downloads, video *software*, and any other digital content susceptible to being filed on durable medium, etc.).

In regards to existing *self-regulating rules* the following are significant: i) the Code of Conduct on the supply of services that carry additional fees⁶³¹ and ii) the Code of Conduct on the supply of services with additional fees based on sending messages⁶³², which, through entering a particular number or password, or by sending a short text message (SMS), charge a specific fee for information, communication or other services (downloading ring tones, flash files, IT programs, etc.); iii) The Code of ethics on e-commerce and Interactive advertising, that, like the LSSICE, regulates different aspects of electronic commerce, including both assets and services, if broadly applied to services; iv) The APTICE⁶³³ Code of conduct, is close to the last in terms of content and focus.

No case law exists in documented records on use that results in a specific analysis of the individual.

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the software on the CD/DVD, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

In the case proposed, *software* and hardware (CDs, DVDs) are independent items from each other, but constitute a single *asset* or *product*⁶³⁴ (never a service). Despite this, its acquisition won't be treated as an instance of sale, but as a *licensing agreement for a non-customized use of a computer program*, as the real property of the whole is not acquired⁶³⁵. In regard to the applicable law, the license terms will rule the rights and duties of the user (number of copies permitted, simultaneous running on distinct computers, reproduction limitations, etc.) and, as for the topics not foreseen in the contract terms, the general provisions of the Civil Code regarding contracts will rule.

In relation to the existence of any *software* malfunctioning as a consequence of error not attributable to the hardware or medium (CD, DVD), the provisions on the contract of sale will not be applied, but a series of regulations that are not just applicable to this⁶³⁶ (mainly the TR-LGDCU in relation to the liability for defective *products* and in relation to lack of conformity), but to any form of distribution of market assets (including the licensing contract for use of software).⁶³⁷

⁶³¹ Resolution of September 15 of 2004, by the State Secretary for Telecommunications and for the Information Society.

⁶³² Resolution of July 8 of 2009, by the State Secretary for Telecommunications and for the Information Society.

⁶³³ Association for the Promotion of Information Technologies and Electronic Commerce.

⁶³⁴ By *accessio* or addition, the work being the main object and the device the accessory.

⁶³⁵ Only hardware of the latter is fully acquired.

⁶³⁶ According to the leading authorities, although not exempt from controversy.

⁶³⁷ TR-LGDCU encompasses the rules on sale of consumer goods (arts. 114-125). But instead of the Directive's definition of goods ("corporeal goods"), the Spanish Law now refers to "product", understood in the sense of the definition of "movable goods" by art. 335 Civil Code (reference to it in arts. 136 and 6 TR-LGDCU), a broad concept which includes both corporeal and incorporeal goods. In theory, only immovable goods and services are excluded. Therefore, if software can be deemed as a service (when tailored ad hoc for a user, irrespective of whether we qualify it as work or service now), it will not be covered by the rules on consumer sales; if software can be deemed as a "product", it would be included (in fact, before that 2007 change this was very doubtful: now the reference to the Civil code allows

Recommended bibliography: APARICIO VAQUERO, J. P., *Licencias de uso no personalizadas de programas de ordenador. Shrink-wrap, click-wrap y otras formas de distribución de software*, Comares, Granada, 2004; RODRÍGUEZ DE LAS HERAS BALLELL, T. "La responsabilidad por software defectuoso en la contratación mercantil", *Revista Aranzadi de Derecho y Nuevas Tecnologías*, nº 10, 2006; VÉRGUEZ SÁNCHEZ, M., *La protección del consumidor en la Ley de garantías en la venta de bienes de consumo*, Aranzadi, Cizur Menor, p. 36.

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer's computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

The responses given in the previous section are valid here. The method of acquisition of the software (electronic means) will not affect the legal nature of the contract, nor the applicable legislative framework in the case it fails to function.

3 Defining consumers and producers

Q. 3.1 Are individuals who offer digital content services to consumers considered to be 'consumers' or 'traders'?

They are not considered consumers,⁶³⁸ but *information society service providers*, and may be considered both *service providers*⁶³⁹ *in the strict sense*, (arts. 1583-1587 Cc.)⁶⁴⁰, or *contractors* in the framework of a contract for work (arts. 1588-1600 Cc.)⁶⁴¹, depending on the particulars of the case.

According to section a) of the Appendix to LSSICE, the concept of information society services "also includes services not remunerated by the recipients, to the extent that it constitutes an economic activity for the service provider". And as such must be understood both the financial activities with advertisements or through the generation of traffic, or, as is proposed later, against (micro-) payments.

On the other hand, the service being free will be relevant to the effects of determining the legal nature of the content provider. When there is no fee, nor counter-performance, nor indirect financing, it is not a service provider in the sense of the LSSICE. And the underlying contract for work or services will be, in any event, atypical. Also, in terms of liability, when the provision of service is free, the Court will have the legal authority to moderate the *quantum* of the compensation due for damages, pursuant to art. 1103 Cc.

inclusion of software as movable goods). Sorry not be more precise but on this point there is no real consensus in Spanish doctrine. We wanted to underline with this paragraph that even when the sales rules would not be clearly applicable to the software (and yes to the DVD), other rules in the TR-LGDCU can be applied (information duties, liability for defective products/services, etc.).

⁶³⁸ Definition of consumer (art. 3 TR-LGDCU, similar to Directives and Proposal of Directive 2008, but including also legal persons and with an "a" business, instead of "his" business): "any natural or legal person who is acting for purposes which are outside a business or profession".

⁶³⁹ Appendix LSSI, section "c": ISP: "person or legal entity that provides an information society service".

⁶⁴⁰ If committed to developing an activity (liability).

⁶⁴¹ If committed to obtaining a concrete results (mandatory result).

From the point of view of consumer protection regulation, “prosumers” have been included in the new definition of “business people” in art. 4 TR-LGDCU (since 2007), based on the definitions of European Directives. Intention to make profit is not integrated into this definition nor should it be understood as a requisite. Although continuity in the provision of services is neither an element included in the definition, some scholars hold that the only ones that should be considered “business people” in this regard are those who operate in the market with a degree of stability or frequency and with minimum business organisation⁶⁴². Therefore, in principle, and despite opinions to the contrary, with strict application of the law in force, contracts between “prosumers” and “consumers” will be considered consumer contracts, although the matter is not closed in the Spanish system.

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

No. The concept of “prosumer” has barely taken hold in our scholarship and case law, less still as a differentiated concept in regard to the applicable liability regime. Therefore, when a consumer (for example a *web hosting* service provider) acts simultaneously as a digital content service provider (in the case of *bloggers*, forum administrators, etc.), the same liability regime will be applied as to other service providers.

Significant instances of this include the STS 2010, of May 18, 2010 (*Quejasonline case*)⁶⁴³; the SAP Madrid, of April 13.1, 2010 (*Rankia case*)⁶⁴⁴; and the SAP Lugo, of July 9, 2010 (*Mindoniense case*)⁶⁴⁵, that in any event the general provisions included in the LSSICE are understood to be applicable to the managers of the website (individual providers of digital content – principally of information).

There is no distinction between prosumers and professionals according to existing legislation.

This term is used by scholars referring to the notion used at the European and international level.

4 Sector-specific consumer law

Q.4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to

- **the conclusion of the contract for digital content services;**

⁶⁴² CÁMARA LAPUENTE, S., "Comentarios al art. 4 TR-LGDCU", in CÁMARA LAPUENTE, S. (ed.), *Comentarios a las normas de protección de los consumidores*, Colex, Madrid, 2010, with arguments based on the some articles of the Code of Commerce and arts. 92.1 (= art. 2.1 Directive 97/7/EC) and 115.1.b TR-LGDCU (= 22 Directive 90/314/EC) and section F of the LSSICE's Appendix.

⁶⁴³ RJ 2010\2319, relating to libellous commentaries directed against an insurance company, written in a forum purportedly by a (false) lawyer of the same company.

⁶⁴⁴ RJ 2010\218575, against commentaries slandering a financial entity contained in the forum of the defendant.

⁶⁴⁵ RJ 2009\328919, referring to the commentaries slandering the mayor of a county in Galicia (Mondoñedo) made by the users of the forum.

- **the pre-contractual information consumers need to be given ;**
- **the termination of the contract (for non-performance or termination for other reasons) for digital content services?**

• *Pre-contractual information*⁶⁴⁶ consumers need to be given: Art. 60 TR-LGDCU includes, in general, prior information that must be provided in any contract with consumers (art. 20 TR-LGDCU also considers the omission of certain information in an offer or advertisement to be unfair commercial practice); on the requisites of prior information in distance selling, see art. 97 TR-LGDCU. Apart from these general rules, there are the following sector regulations:

- The LSSICE (*e-commerce*) stipulates in art. 10 ("general information") the data that all information society service providers must make available in regards to their identification, including, as well as those established by art. 60 TR-LGDCU, others such as their emails and the codes of conduct they must abide by. Further, art. 27 of the same Law includes the obligation to inform on a series of items in relation to the contracting procedure⁶⁴⁷, and the standard terms that, if applicable, the contract will be subject to.
- The RD 899/2009, of May 22, which approves the bill of rights of the users of electronic communications services (CDUSCE, hereinafter), developing the provisions of art. 38.2.b of Law 32/2003, of November 3, General Law on Telecommunications (LGT), stipulates in art. 12 a list of information-related tasks for different points of the contract and the service it governs (types, and maintenance quotas, information on rights in relation to universal service, etc.)⁶⁴⁸
- Organic Law 15/1999, of December 13, on the Protection of Personal Data (LOPD, hereinafter), stipulates in art. 5 the obligation to provide information on a series of points when collecting data on the interested party (for example in the framework of the process of contracting). Said procedure of providing information and its accreditation is completed with the provisions of arts. 18 and 19 of the Regulation of 2007 that develops the cited Law⁶⁴⁹.
- Law 11/2007, of June 22, of electronic access of citizens to public services (hereinafter LAECSP) although outside of the ambit of contracting, stipulates in art. 37 the obligation to set a procedure through which the interested parties can access the state of processing of the administrative procedures they are in.

⁶⁴⁶ in art. 6.1 Ley 7/2010 General de la Comunicación Audiovisual (right to a transparent audiovisual communication). The provider must show in his website: "his name, commercial address, e-mail and other channels to establish a direct and fast communication, as well as the regulatory and supervisor body".

⁶⁴⁷ i) Different procedures that should be followed to execute the contract; ii) if the provider intends to file the electronic document which witnesses the contract and if this document is to be accessible; iii) technical means that are available to identify and correct data input errors; and iv) language or languages in which the contract may be executed. See Appendix of the Law, as the goal to define exceptions and particulars of the referred obligation (art. 27, sections 2 and 3).

⁶⁴⁸ Arts. 38 LGTel, 14 CDUSCE and 4 Orden ITC/912/2006 establish the user right to receive comparable, appropriate and updated information.

⁶⁴⁹ Royal Decree 1720/2007, of December 21, which approves the Regulation developing the Organic Law 15/1999, of December 13 on the protection of personal data (hereinafter, RLOPD).

- Finally, it’s worth noting that the TRLPI (intellectual property) does *not* stipulate specifically the obligation to provide information on technological measures or on information for the management of rights.
- *Conclusion of the contract*: Arts. 59 to 67 TR-LGDCU have the purpose of establishing a general regime of contracts with consumers. Apart from these there are:
 - Art. 23 LSSICE is a specific rule regarding the validity and efficiency of contracts concluded electronically.
 - The CDUSCE stipulates several specific provisions in relation to the conclusion of contracts with service suppliers of electronic communications. Specifically, arts.5 (“conclusion of contracts”), art. 6.1 (“deposit guarantee”), art. 8 (“contents of contracts), and art. 9 (“contractual modifications”).
- *Termination of the contracts*: Apart from the specific regulations governing each type of consumer contract stipulated in TR-LGDCU (and, especially, the general rule of art. 62, introduced in 2006, which in durable or continued services prohibits *contractual clauses* –beyond the “practices” forbidden in art. 9.d Directive 2005/29/EC and in art. 8.2.d LCD– that create obstacles to the rights of consumers to end a contract without penalties or, depending on the case, without these being onerous or disproportionate), the following are worth noting:
 - Art. 8 LSSICE stipulates a procedure by which, with attention to different causes, a judicial or administrative body may determine an interruption of a service and the removal of data. Said precept is complemented with the collaborative duties of the provider stipulated in art. 11 of the same law.
 - In relation to services contracts on electronic communications, the CDUSCE has two specific rules: one relative to the extinction of the contract (art. 7); and another regarding to the process of changing an operator (art.10).

Q.4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

- Articles 19 to 22 of LSSICE are dedicated to the regulation of electronic commercial communications. The most striking of these precepts is: i) the *renvoi* to the general regulation on advertising⁶⁵⁰ (art. 19); ii) the setting of the obligation to identify the commercial purpose, with the word "advertising" or its abbreviation ("*publi*") (art. 20); the establishment of a mechanism for giving consent or *opting-in*, unless a prior contractual agreement existed and the objective of the advertising is the offer of a similar product to that initially contracted (art. 21); and iv) the configuration of the use of devices for storing, filing and recuperation of data in terminals –*cookies, spyware, etc*– (art. 22).⁶⁵¹
- The CDUSCE introduces two precepts in regards to this: art. 13, relative to the commercial communications that refer to offers subject to temporary limitations; and

⁶⁵⁰ Law 34/1988, of November 11, General law on Advertising, modified by Law 29/2009 of December 30, which modifies the general regime for unfair competition and advertising for the benefit of users and consumers (hereinafter, LGP).

⁶⁵¹The limited (as long as not applies in all cases) opt-in procedure of art. 21 is referred only to unsolicited electronic communications (spam). The art. 22 includes not only cookies, but also other kind of software (spyware, malware, etc.) used to collect and recover data from the user’s device.

art. 31, which incorporates, within the rights regarding end-user data protection, the “protection against unsolicited phone calls with commercial purposes”.

- Art. 5.5 LOPD regulates the right to information in data collection when it is aimed at advertising or market research.

- Finally, the RLOPD in arts. 48 and 49, establishes the regulatory framework for the voluntary exclusion files of commercial communications delivery (“Robinson lists”).

- Also, specific provisions exist in regards to this in both the LCD⁶⁵² (arts. 29 and 30) and in the General Law on Advertising (arts. 3 and 4), though the study of those articles has been made in the responses to Q 11.1, where a more detailed analysis can be found. Here, only art. 3.b LGP is mentioned: it covers illegal advertising directed at minors exploiting their inexperience or credulity or other parameters prohibited by the article; the art. 4 LGP prohibits "subliminal advertising", which is not perceived consciously by the addressee.

Q 4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- **does sector-specific law determine any remedies?**
- **could a consumer invoke general consumer and contract law remedies ?**

Please indicate if there is case law on any of the points mentioned. If so, please provide a reference, a short summary of the facts and of the decisions of the courts.

- The LSSICE (on *electronic contracts*), in arts. 30 and 31, stipulates the option to exercise actions for an injunction against the collective or diffuse interests of consumers, with express reference to the procedural rules. Order ITC/1030/2007, regulates the dispute settlement procedure between end users and operators of *electronic communications services*, developing in this way the provision of art. 27 CDUSCE. Also, in regard to *data protection*, arts. 25 and 117 to 119 RLOPD, in conjunction with the specific precepts that will be mentioned below, determine the procedure for exercising right of access (art. 28), rectification and cancellation (art. 32) and opposition (art. 35). Therefore, within the ambit of data protection, art. 19 LOPD stipulates the right to compensation for damages caused, with recourse to ordinary courts in this matter. Finally, in the realm of the law on *intellectual property*, the TRLPI applies arts. 138 ff. a series of specific actions for their defence: art. 139, actions for an injunction; art. 140, actions for claims for damages; and art. 141, precautionary measures.

In any case the consumer may exercise the general rights established both in civil legislation and in specific regulations on consumer protection. Furthermore, the consumer has access to legal actions on unfair competition (arts. 32-36 LCD, revised in 2009) both against infractions related to illegal advertising and against the omission of the information required (*supra*, Q.4.1).

Case Law: There are various administrative and judicial resolutions that apply the aforementioned rules, however, these don't consider the interaction between the different legal provisions and even less in the specific area analysed here.

⁶⁵² Law 3/1991, of January 10, on Unfair Competition, modified by Law 29/2009 (previous footnote).

5 Formation of contract and pre-contractual information

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

Yes, but of general application, independent of the channel used, in all types of contracts concluded with consumers (art. 60 TR-LGDCU: "the business person must provide the consumer and user with the relevant information in a manner that is *clear, comprehensible, adapted to the circumstances*, truthful and adequately covers the essential features of the contract"); also when clauses not negotiated individually are included (in this case standard terms must meet the requisites of *conciseness, clarity and simplicity of expression*, as well as *accessibility and legibility* -art. 80 TR-LGDCU). Furthermore, art. 20 TR-LGDCU (implementation of art. 7.4 and 2.i Directive 2005/29/EC) stipulates that "commercial practices that, *in a manner appropriate to the means of communication used*, include information on the product or service and its price" must contain certain information (on the adaptation to the media, see also art. 7 LCD, which allows transmission via other channels when the means of communication have time or space limitations without being regarded as a case of unfair competition). Also art. 97.2 TR-LGDCU orders that pre-contractual information that must be provided in distance contracts "has to be provided to the consumer and user *in a manner that is clear and unequivocal, via any means appropriate to the particular form of distance communication used*".

Another provision in which the legislator has kept in mind the *channel* in which the terms are presented in is art. 27.1 LSSICE, not in relation to the transparency and comprehensibility of said terms but on the information the provider is obliged to provide prior to contracting. This must be presented "via techniques appropriate to the means of communications used", inasmuch as while the provider will have designed his services "to be accessed through devices with a small or reduced-size screen, the obligation (...) is understood as being met when the provider facilitates in a way that it is easy, direct and accurate the internet address where the information is made available to the addressee".

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

See section Q. 5.4.

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license, considered to be validly concluded contracts?

Contracts concluded via electronic means are valid and legally binding whenever a correct formation of contractual will has existed, according to the terms listed in the following section. In any event, acceptance must fall to the "object and cause [consideration] that constitute the contract" (art. 1262 Cc.). For further remarks on *click-wrap* and *browse-wrap agreements*, see section Q. 5.5.

Q.5.4 Under what conditions are the terms of a standard form agreement binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?

For a contract to be validly concluded, the offer must be precise and unequivocal. Therefore, it should contain, at least, the core terms of the contract (*essentialia negotii*), among which, in all cases, object and cause [consideration] must be mentioned. On the other hand, in accordance with the general theory (Cc), the offer being unequivocal means that the offeror (in this case the service provider) must have a firm will for it to be binding. For this to occur, the offer must be recognisable.⁶⁵³ However, in contracts with consumers, the important art. 61 TR-LGDCU stipulates that the content of the advertising –even if it does not contain all the essential or core elements or even if it states that it is not binding, according to standard interpretation– may be successfully demanded by the consumer, as if it were an offer.

In the cases of *click-wraps* and *browse-wraps*, the way that the links to the standard terms tend to be written (“terms of use”, “conditions of use”, etc.) does not encourage the idea of finding a proposal that ought to be accepted, but a mere unilateral imposition that is unilaterally imposed and non-negotiable.

Therefore, in order for an offer to exist, there must *also* be another element: the *service must be made available* (freedom of access to it). Thus, as happens in other instances of implied offers, in this case the free offer of the service to whomever wants to make use of it, constitutes an unequivocal symbol that we are facing a true offer.

Regarding express or tacit acceptance of a contract, confusion exists surrounding the nature of contractual acceptance via use of electronic means, especially those formalized through browsing, to the extent that some scholars have claimed that browsing constitutes a tacit acceptance of a contract. What really happens (and here is the origin of confusion) is that the object under analysis here results in the paradox that one of the habitual actions from which this implicit declaration of assent is inferred in other contexts (the execution of acts on the part of the user implying the performance of the provisions of the contract), ceases to be here a mere trace or indication of possible consent, to become a pre-established form of acceptance.

This, precisely, is the essence of the *browse-wrap* phenomenon. In contracts that are configured this way, the use of the service need not be evaluated in Spanish law as an alternative means of tacit consent or *facta concludentia*. Such usage does not constitute implied will or *indicio voluntatis*, but an express declaration of consent. As the doctrine of scholars indicates, this occurs “when the deponent communicates to the recipient his declaration with the suitable signs in order to communicate his thoughts”⁶⁵⁴. These signs do not need to be verbal, but can be regarded as such some contractually non-verbal behaviours, such as the case in question.

In the case of *click-wraps*, the question is simplified, given that doubts do not arise from the fact that consent with a click is sufficient to be defined as an express form of acceptance.

Bibliography recommended: GONZÁLEZ GOZALO, A., *La formación de contrato tras la Ley de servicios de la sociedad de la información y de comercio electrónico*, Comares, Granada, 2004; GUIZADO MORENO, A., *Formación y perfección del contrato en Internet*, Marcial Pons, Madrid, 2004, p. 194; PARDO GATO, J. R., *Las páginas Web como soporte de condiciones generales contractuales*, Aranzadi,

⁶⁵³ GÓMEZ LAPLAZA, M. C., "Art. 1262", in ALBADALEJO, M. and DÍAZ ALABART, S., *Comentarios al Código Civil.*, t. XVIII, vol. 10-b, EDERSA, Madrid, 1993, p. 48.

⁶⁵⁴ Díez-PICAZO, L., *Fundamentos de Derecho Civil*, vol. I, Thomson-Civitas, Cizur Menor, 2007, p. 175.

Cizur Menor, 2003; PERTÍÑEZ VÍLCHEZ, F., *Las cláusulas abusivas por un defecto de transparencia*, Aranzadi, Cizur Menor, 2004; RODRÍGUEZ DE LAS HERAS BALLELL, T., "Las condiciones de uso de los sitios *web* y los *browse-wrap agreements*", *Derecho del Comercio Internacional - temas y actualidades*, nº 5/6, 2006.

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy , or may the information also be given via electronic means?

- *About the conclusion of the contract itself*: art. 63 TR-LGDCU and art. 28 LSSICE (in this last case, in the period of twenty-four hours following receipt of acceptance⁶⁵⁵); for distance contracts, art. 98 TR-LGDCU requires it be provided "before the execution of the contract [performance]".

- *About the terms of the contract*: art. 63 TR-LGDCU, applicable to all consumer contracts, and according to which "a receipt, proof, copy or accrediting document with the essential conditions of the operation will be provided, included standard contract terms (...)". Also, for clauses not individually negotiated, in cases of contracting by telephone or electronically with standard terms, the Law requires the acceptance of all clauses of the contract without conventional signatures and it must be sent "immediately" justification of the contract and its terms (art. 80.1.b TR-LGDCU; the highly criticised arts. 2 and 3 RD 1906/1999⁶⁵⁶, of dubious legality and validity, require that the complete text of the standard terms must be facilitated to the party to a contract at least three days before concluding the contract and that once the contract is concluded, the business person must send justification in writing or in durable medium, of the confirmation of the contract and all its terms no later than "the moment of delivery of the product or commencement of the performance of the contract").

In relation to the medium, art. 63.2 TR-LGDCU does not determine *a priori* the method of formalizing the contract, but refers to the particularities of each contract according to current legislation⁶⁵⁷. In respect to electronic contracting or contracting by phone, it accepts the delivery of a contract and its standard terms in writing or "except with the express opposition of the consumer and user, in any durable medium appropriate for the means of distance communication" (art. 80.1.b TR-LGDCU, art. 3 RD 1906/1999); similarly, for any contract concluded by distance –except for one-time-only services – it is accepted written confirmation or on durable medium adapted to the means of communication. On the other hand, art. 28.1 LSSICE determines that, in the process of electronic contracting, it is sufficient that the provider gives the required information via "electronic mail or other equivalent means of electronic communication", when dealing with a return receipt request; or via "a means equivalent to that used during the process of contracting", when dealing with the confirmation of the (contractual) acceptance received.

⁶⁵⁵ With some exceptions: art. 28, section 3 LSSICE: "It is not necessary to confirm the reception of the acceptance of the offer when a) both parties agree and neither of them take into consideration the consumer or b) the contract has been exclusively executed through means of exchanged electronic mail or other equivalent type of electronic exchange, when these means are not used for the exclusive purpose of contractual obligation".

⁶⁵⁶ RD 1906/1999, of December 17, regulating telephonic and electronic contracts with standard terms in development in Law 5.3 of 7/1998, of April 13, concerning standard terms of contracts.

⁶⁵⁷ "(...) making the contract in due form will be free for the consumer, *when the document should be made in writing or in any other durable medium due to legal provisions to do so*".

Q.5.6 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer? If so, please specify.

On certain cases disclosure of information must be handled prior to the initiation of contractual process or to the conclusion of the contract (see. 5.2). Of special note are: i) the requirement to make available the *standard terms of the contract*, enshrined in arts. 27.4 LSSICE (e-commerce)⁶⁵⁸, 12.1 CDUSCE *in fine*⁶⁵⁹ (contracting with operators of electronic communications services) and 22.1.e LAASE⁶⁶⁰ (supply of services in general); ii) the duty to inform on the *features of the contract*, and, in particular, of its “legal and economic conditions of the goods or services”, established in arts. 60 TR-LGDCU (consumer contracts) and the aforementioned 12.1 CDUSCE, *ab initio*; iii) the obligation of making available “all and every one of the contract terms”, foreseen in 80.1.b TR-LGDCU, for all cases of electronic contracting or contracting by telephone *with standard terms*⁶⁶¹; iv) also in the case of electronic contracting (art. 27.1 LSSICE) information must be supplied on the distinct elements that constitute *iter* of formation of the contractual process; v) finally, in the case of contracts concluded by distance, as well as the information listed in 60 TR-LGDCU, the information included in arts. 97 and 98 of the same Law must be given. As may be verified none of these provisions makes express and exclusive reference, in relation to the object, to the providers of digital content services. However, these rules affect them, given the ambit of application of the mentioned Laws.

Information on redress mechanisms: in contracts for electronic communications services (art. 12.2.3° CDUSCE) it is informed that the “policy on compensation and refund, with specific details of the mechanisms for compensation offered”.

Information on contact possibilities after the conclusion of the contract: art. 60.2 TR-LGDCU requires providing (*before contracting*) the address of both the offeror and the trader on whose behalf he is acting (section a). He must also report the full address where the consumer may present complaints (section h), including phone and fax numbers and email (art. 21.3 TR-LGDCU). In the same way, in relation to the contracts for electronic communications services, art 12.1 CDUSCE foresees the need to provide a telephone number to attend the customers and to inform them on the information items cited in that regulation. Art. 62.4 TR-LGDCU orders that in continuous services contracts must expressly be mentioned *in the same contract* the procedure through which the consumer may exercise his right to end the contract.

Q.5.6 Are you aware of any specific information duties for providers of digital content services? If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

In relation to the way of providing information:

⁶⁵⁸ We find here an obvious defect in the Spanish transposition of article 10.4 Directive 2000/31/EC, which not only refers to standard terms but also to the “contract terms”.

⁶⁵⁹ This rule develops art. 38.2.b LGTel.

⁶⁶⁰ Law 17/2009, of November 23, concerning the free access to service activities and their practice.

⁶⁶¹ Making unnecessary and redundant the aforementioned precaution invoked in art. 27 LSSICE in relation to electronic contracts.

- The provider of electronic communications services (art. 12.1 CDUSCE) must publish the standard contract terms *in a place that is easily accessible within the web page* of the provider⁶⁶². Also, in the case that the end user requests it, these terms must be provided in writing. In any event, the provider must report this information via a *customer phone service* “that will carry a maximum cost of an ordinary telecommunications service without surcharge”. In the case of contracts concluded electronically (art. 27.4 LSSICE) there is no specific established form, although these must be able to be “filed and reproduced by the addressee”.
- In regard to the provisions of art. 27.1 LSSICE the obligation to provide certain information is considered fulfilled when the provider includes that information on his web page or site⁶⁶³. Regarding to the techniques appropriate to the means of communications used, as well as the form terms are presented to the consumer (arts. 20, 60, 80, 97 TR-LGDCU, 7 LCD, 21 LSSICE, etc.) see, in deep, answer to Q. 5.1.
- In all cases of contracting services, the information provided in art. 22 LAASE⁶⁶⁴ must be available to the recipient in one of the following forms: a) in the place where the service is supplied or the contract is concluded; b) electronically, at an address given by the provider; c) presenting the information to the recipient in all informative documents facilitated by the provider to the addressee and in which the services are presented in detail; d) electronically by way of a web page.
- In the case referred to in art. 80.1.b TR-LGDCU⁶⁶⁵ the consumer will be sent, except in the case of express opposition to it, justification of the contract concluded *in writing* or any *durable medium* appropriate to the type of distance communication used. This will also be the forms of confirmation employed (art. 98 TR-LGDCU), except in the case of express opposition, in the case of the information required prior to the execution of the distance contract by arts. 97 and 98 TR-LGDCU.

Q.5.7 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?

In the case of non-performance of the obligations derived from art. 27.1 LSSICE (information on the milestones of the contract formation process), the rule does not establish any *remedy*, although, in any event, the provider may incur an administrative sanction of up to the value 30,000 euros (arts. 38.4.e and 39.1.c LSSICE). The same applies in the case of non-performance of the duties to provide information in art. 12.1 CDUSCE, except that in this case, the administrative sanction differs from the previous (see the Appendix to arts. 53.1⁶⁶⁶, 54.o and 56.1, sections a and b LGTel). Also, when the provisions of art. 22.1.e LAASE are violated; in this case, the Fifth Additional Disposition of the same Law addresses, in regard to the sanctioning administrative regimen, to the rules of TR-LGDCU (arts. 49-52), which is also applicable to the infraction of the obligations of its art. 60 and 98.

⁶⁶² As well as the other elements established in the second subsection of the same article.

⁶⁶³ With an exception: when the supplier specifically designs his service of electronic commerce so as to be accessed through devices that include reduced format screens, the obligation is understood to be fulfilled when the Internet address where that information is available is provided in a permanent, easy, direct, and exact way.

⁶⁶⁴ Both the standard terms to which we made reference in the preceding question, as well as the remaining data that are dealt with in the second and third subsections of the cited article.

⁶⁶⁵ See answer to the previous question.

⁶⁶⁶ Note that reference is made to letter "L" (not "1") in art. 53.

In relation to *private law remedies*, the question *is far from being quelledsettled: it has not been dealt with by legislator at all*. There are three broad possibilities proposed by the doctrine: i) voidability of the contract when the lack of information results in a vice of consent (mistake) of enough entity; ii) compensation for damages (real damages and loss of profit), which could include, among other things, the costs of the spoilt contract or the consequent damages for the lost opportunity of having contracted with another provider; and iii) integration of the contract according to good faith and putting it in a level with what could reasonably have been expected if the obligatory information had not been omitted (art. 65 TR-LGDCU); as well as the incorporation into the contract of what was advertised if, in the end, this was not listed in the contract (art. 61 TR-LGDCU). Outside the ambit of effectiveness of the contract, there are other types of administrative sanctions or of injunctions based on unfair competition.

Recommended bibliography: ARROYO I AMAYUELAS, E., "Comentarios al art. 23 LSSICE ", in CÁMARA LAPUENTE (ed.), *Comentarios a las normas de protección de los consumidores*, Colex, Madrid, 2010; CÁMARA LAPUENTE, "Comentarios a los arts. 60, 61 y 65 TR-LGDCU", in ID., *Comentarios* [2010]; GARCÍA RUBIO, M. P., "La responsabilidad contractual en el derecho contractual europeo", *InDret*, nº 2, abril de 2010; YANGUAS GÓMEZ, R., "La carta de derechos del usuario de los servicios de comunicaciones electrónicas (RD 899/2009, de 22 de mayo)", *ADC*, nº 1, 2010, pp. 248-251.

6 Right of withdrawal

Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

Spanish legislation (art. 102 TR-LGDCU), unless otherwise agreed, does not entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him. On this matter it is necessary to highlight a few nuances: i) on the one hand, section "e" of the cited article *excludes the right of withdrawal*⁶⁶⁷ established for contracts concluded at distance (something inherent to the DCSC) "on supply of services whose performance have commenced, with agreement of the consumer and user, before the ending of the period of seven working days"⁶⁶⁸; ii) on the other hand, section "c" of art. 102 TR-LGDCU *extends the reach of the exception in the Directive*, by extending the prohibition of withdrawal⁶⁶⁹ to contracts for the supply of sound recordings or videos, disks or software that have been unsealed by the consumer and user as well as to contracts related to electronic files, supplied electronically, that can be downloaded or reproduced immediately for a permanent use". It's worth noting that the consumer also has the right to withdraw in these exceptional cases by law not only if it is expressly agreed, but also when this is acknowledged in the offer, promotion or advertisement (art. 68.2 TR-LGDCU).

Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the

⁶⁶⁷ Reminder: except if otherwise agreed.

⁶⁶⁸ In the same context as laid out in art. 6.3 de la Directive 97/7/EC.

⁶⁶⁹ See previous footnote.

consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

Yes⁶⁷⁰.

Yes. In the case that the consumer has not been informed of his right, art. 71.3 TR-LGDCU (which contains a rule generally applicable to any kind of contract), in relation to art. 69, will apply⁶⁷¹. Thus, the initial period of seven days will be extended to a maximum of three months, counting from the time of the conclusion of the contract for services. If the supplier performs his duty to provide information during this period, the legal period of seven days will start from that moment.

Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

In principle, in these cases *the consumer will not be obliged to return the service* (given that this is materially impossible), *nor its value*, with basis in art. 74.2 TR-LGDCU ("The consumer and user will not have to refund any amount for the reduction of the asset value, as consequence of its usage, according to the agreement or to its nature, *or for the use of the service*"). However, this does not impede the user from exercising his right to withdraw. Given the potential unjustified enrichment that he may enjoy, the Spanish doctrine is divided on the terms of exercising rights in this particular case. And there are two irreconcilable views: i) those who consider that, despite everything, the consumer can continue to claim the amount paid without providing anything in return⁶⁷²; and, ii) those who endorse the view that he may only claim damages that are caused by the omission of information, as long as they are proved.

Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

Only when dealing with a contract linked to the consumer's financing. In this sense art. 77 TR-LGDCU establishes that: "when, in a contract for which the right to withdraw is exercised, the price to the consumer and user has been totally or partly financed by a credit provided by the contracting business person or by a third party, with the prior

⁶⁷⁰ See Q 6.1.

⁶⁷¹ Although the wording of the article refers to the "obligation to provide information in writing on the contractual document", the Spanish doctrine has come to understand that this expression should be suitable within a concrete context (contracting by telephone, electronic contracting through means of an electronic signature, etc.) given an inflexible interpretation of the literal wording of the precept is inappropriate.

⁶⁷² According to this view the consumer can withdraw and reclaim any money already paid. There is not a prevailing opinion among the most prominent scholars.

There is not a prevailing opinion among the most prominent scholars.

agreement of this third party with the contracting business person, *exercising the right to withdraw will imply at the same time the termination of the credit without any penalty to the consumer or user*" (thus is applied, for instance, in the SAP A Coruña of March 8, 2007 or the SAP Madrid of April 10, 2008 and June 23, 2009)⁶⁷³.

Recommended bibliography: ARROYO APARICIO, A., *Los contratos a distancia en la Ley de Ordenación del Comercio Minorista*, Aranzadi, Cizur Menor, 2003; BELUCHE RINCÓN, I., *El derecho de desistimiento del consumidor*, Tirant lo Blanch, Valencia, 2009; DOMÍNGUEZ LUELMO, A., "Comentarios a los arts. 68-79 TR-LGDCU", in CAMARA LAPUENTE, S. (ed.), *Comentarios a las normas de protección de los consumidores*, Colex, Madrid, 2010.

7 Unfair contractual terms

Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a 'main obligation' under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

In keeping with scholars⁶⁷⁴, the term, "main elements/obligations of the contract" must be interpreted very restricted. If the license for use of digital content accepts different configurations (simple reproduction –*streaming*–, reproduction and filing in a predetermined number of devices, etc.), what appears certain is that clauses such as that cited, which tend towards ensuring a right for the producer or titleholder (specifically, the rights of exploitation of the work) more than defining the positive content of the main obligation (reproduction, reproduction and incorporation into a device, use in several machines, etc), it seems they may not be classified as a main obligation. This argument is supported in the provisions of arts. 160 and 161 TRLPI (intellectual property). Specifically, this last article establishes certain limitations to the imposition of access control technologies (regional restrictions, anti-copy measures, etc.) in relation to particular cases,⁶⁷⁵ *allowing for the possibility of inhibiting them* (and with this the lack of compulsory nature of the previously-cited clauses) if certain conditions are met. It is true that art. 161.5 TRLPI establishes the cited limitations will not be applicable to the work or services licensed via the Internet, leaving the configuration of the license at the will of the titleholder of the intellectual property rights. What is not conceivable is that the definition of what is essential or accessory depends on the manner in which the content is distributed.

The prior arguments are supported by the Spanish case law, which *obiter dicta*, in the assessing of the legality of the installation of *modchips* in videogame consoles (among others, SAP Las Palmas of March 1, 2010⁶⁷⁶ and SAP Valencia of March 7, 2008⁶⁷⁷) underlines as legitimate uses of said games skipping over the device restrictions in order to be able to "play with original games from other countries or use safe copies of original games".⁶⁷⁸

⁶⁷³ Respectively, JUR 2007\132248; AC, 2008\1045; and JUR 2009\343367.

⁶⁷⁴ See recommended bibliography.

⁶⁷⁵ Private copy, procedures for the sake of disabled persons, etc. (see carefully the various cases contemplated in art. 161.1 TR-LGDCU).

⁶⁷⁶ Not yet collected in the case law repertoires. Therefore, it is attached to the Appendix making reference to "SAP Las Palmas of March 1, 2010".

⁶⁷⁷ ARP 2008\250.

⁶⁷⁸ The court in this case does not assess or gives reasons why it could be legitimate for a user to skip restrictions in certain cases, nor does the court offer further reflection on whether the restriction itself

For the same reasons (legal validity of technological protection measures in the TRPLI) it will not be possible to consider the use of this type of clause as unfair contract terms.

Recommended bibliography: CÁMARA LAPUENTE, S., *El control de las cláusulas "abusivas" sobre elementos esenciales del contrato*, Aranzadi, Cizur Menor, 2006; GARROTE FERNÁNDEZ-DÍEZ, I., "Comentarios a los arts. 160 y 161 TRLPI", in BERCOVITZ RODRÍGUEZ-CANO, R. (ed.), *Comentarios a la Ley de Propiedad Intelectual*, Tecnos, Madrid, 2007, pp. 2043-2106; MIRALLES MIRAVET, S. and VERDAGUER CASALS, E., "Las medidas tecnológicas de protección de los videojuegos: introducción técnica y protección jurídica", *La Ley*, 4, 2007, pp. 1506-1521; RODRÍGUEZ TAPIA, J. M., "Comentarios al art. 161 TRLPI", en RODRÍGUEZ TAPIA, J. M. (ed.), *Comentarios a la Ley de Propiedad Intelectual*, 2nd ed., Civitas, Cizur-Menor, 2009, pp. 978 a 986.

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

More than an abusive clause, what we find here is the violation of a *ius cogens* or mandatory rule (LOPD), which prevents violations of the fundamental right to privacy (art. 18.4 CE)⁶⁷⁹, and which has a special protection procedure, as well as corresponding administrative sanctions that an offender could receive. Due to this the appeal to the unfair nature of the term *does not appear the most appropriate mechanism to contest its validity*, since this term will be considered void not because it is an unfair term (which it is, art. 86 TR-LGDCU⁶⁸⁰), but for violating a mandatory rule, as is accounted for in the Spanish legal system in arts. 6.3 Cc. and 10 TR-LGDCU.

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

No. Conclusions in the sense indicated can neither be drawn from existing regulations, nor from reported cases in usual repertoires of case law.

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

Up to the present neither in the Spanish scholarship nor in case law can we find consolidated opinion in regards to this.

could be deemed as an "unfair term". The legal reasonings in the judgment only consider the validity of installing modchips. The rule in the Intellectual Property Act establishes that skipping the control technologies will only be forbidden when that activity explicitly looks for a vulneration of the aim why those measures were included. Unfortunately, there is no consolidated case law on the topic, but only those secondary or "obiter dicta" considerations in this judgment.

⁶⁷⁹ Spanish Constitution of 1978.

⁶⁸⁰ Art. 86 TR-LGDCU, *ab initio*: "In all cases, the clauses which limit or deprive the consumer and user of the rights recognised by mandatory or non-mandatory rules will be deemed as unfair terms".

8 Failure to function properly

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer’s privacy, or the level of journalistic quality that consumers may expect, etc.?

Despite the non-existence of relevant case law, grounded on the normative text (arts. 114-127 TR-LGDCU) a *functional interpretation* of the concept of conformity (or lack of it) can be supported. Thus, art. 116, at the time of defining this concept adopts an evaluation criterion of the *quality or possibility of product use*, with the protection of other more abstract values and interest, in all cases, subject to the corresponding sector rule (legislation on data protection, freedom of expression, etc.).

Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what ‘normal use’ of a service is, e.g. - the ability to make private copies according to copyright law,

- **the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),**
- **the suitability of certain contents for minors as stipulated under audiovisual media law,**
- **journalistic codes of conducts, etc.**

In accordance with the provisions of art. 10 TR-LGDCU “the prior waiving of rights that this rule recognises for consumers is void, and are also void the acts carried out in fraud of law according to the provisions of article 6 of the Civil Code”. And, the already-cited art. 86 of the same Law establishes that “in all cases, terms that limit or deprive the consumer of the rights recognised by dispositive or mandatory provisions (...) are deemed unfair terms”. From the combination of both provisions it can be concluded that the concept of *normal use* will be defined in each case, clarified (and broadened) with the set of rights and obligations established by the applicable corresponding rule (dynamic concept), without the need to establish *a priori* a notion of normal use, given the absence of a legal definition.⁶⁸¹

In Spanish law the concept of a defective product (art. 137 TR-LGDCU) is related to the concept of a *safety defect*, being all that “does not offer the security that may legitimately be expected”. For instances such as that noted (a CD that can only be played in a particular device the judges must always apply the rules on the lack of conformity (because the rules on defective products apply only to the civil liability for damages), not being able to reach, in all likelihood, the same conclusion as that referred

⁶⁸¹ This implies that provisions under copy right law will influence the notion of normal use in their specific area, and therefore they will have to be taken into account in assessing the lack of conformity of products subjected to intellectual property rights.

DMR is allowed while respecting the limits imposed by art. 161.2 TR-LPI (private copy in the sense of art. 31.2, public security and teaching, among others). According to the answers given in Q. 5, the consumer should be informed that DRM is used before the conclusion of the contract, even if the TR-LPI does not impose explicitly this duty, due to the fact that limiting to the use of the product alters (and simultaneously defines) the essential features of the contract (art. 22.1.e LAASE and 60 TR-LGDCU).

to in the questionnaire. In respect to the lack of conformity (if no relevant case law yet exists in this area) the criteria established in art. 116 TR-LGDCU will apply.

Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software? If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer's hardware and middleware?

If, as derived from the provision in art. 60 TR-LGDCU, which establishes the duty to inform the consumer "of the essential characteristics (...) of the goods" as an object of the contract. Characteristics among which must be included the functionality requisites (e.g., format of the contents, software and hardware necessary to access and make use of the content). If the provider fails to inform the contract may be, among other remedies⁶⁸², declared voidable at the request of the consumer. And this independently of whether the content is supplied in a compatible format with the consumer's hardware and middleware.

Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

In accordance with the provisions in art. 119 TR-LGDCU the consumer may exercise *in a preferred manner* (and thereby answer the question of whether there is a hierarchy between remedies in such cases) claim for specific performance. Such remedy, regulated by arts. 119 and 120 TR-LGDCU will enable consumers to choose between repair and replacement of the product, enabling them to choose between the two, provided that the choice is not impossible or disproportionate. Furthermore, if the seller refuses to abide by the consumer requirement, the latter may exercise the corresponding remedies through a third party at their own expense.

But what will happen in the field of digital contents is that reparation, being intangible goods difficult to change (which might only be reprogrammed), it can be very complicated to salvage content specifically designed for a specific user.

In cases that after repair or replacement the digital content does not get to function properly, the consumer may choose *in a subsidiary manner* (art. 121 TR-LGDCU), between termination or a price reduction of the product. This remedy will not be habitually employed in the context analyzed here, given that if the lack of conformity affects to the proper functionality of the good, this will result as completely unusable, and therefore the rebate would become meaningless.

Moreover, (art. 117 TR-LGDCU) the consumer may approach the Civil law legislation (specifically to arts. 1101 Cc. and related provisions) in order to obtain claim for damages. Some scholars have suggested that this approach would allow the consumer to eventually get rid of the hierarchy in the exercise of previously targeted remedies. However, both remedies are not in total agreement as to its purpose, fault of the provider being required to be able to attend this last possibility, which does not happen with previously referred solutions. It also acknowledges that the consumer go through the action of voidability by mistake.

⁶⁸² See the consequences of the lack of information in response to Q 5.7.

Finally, note that these schemes are incompatible with those established in the legislation on defective products and services (by divergence of purpose) and hidden defects (latent defects) (according to art. 117 TR-LGDCU *ab initio*). There is an important doctrinal debate on the meaning of this incompatibility of remedies: most of the doctrine means that the consumer can not claim under the Civil Code provisions for hidden defects in the contract of sale (arts. 1484 ff. Cc.), but some scholars uphold that the consumer cannot exercise both remedies at the same time, but must choose one or the other.

Regarding the case law relative to the hierarchy between remedies emphasizing the SAP Zaragoza from September 14, 2009⁶⁸³, referring to the purchase of a second hand vehicle that, from the beginning had several functional defects. Given the different remedies invoked simultaneously by the plaintiff, belonging to both the special consumer regulations (arts. 114 to 127 TR-LGDCU), as to general civil law. (arts. 1121 and 1154 Cc. –termination of synallagmatic obligations and claim for damages), the Court noted that: “Repair or replacement of the goods (claim for specific performance) are the first option the buyer has to exercise, so the price reduction or termination are only available to the buyer if he/she is not entitled to a repair or replacement or if it had not been carried out in a reasonable period (...) hence it follows that, the consumer (...) cannot claim for damages. Because what is first entitled to is to the repair: only if it is not possible or if exercised non-performance by the vendor can the consumer terminate.” Also, SAP Malaga from November 23, 2009, on a television repair⁶⁸⁴; or SAP Cantabria of March 24, 2009⁶⁸⁵, referring to the failures in the engine of a second hand vehicle⁶⁸⁶.

Recommended Bibliography: MARIN LOPEZ, M. J., *Las garantías en la venta de bienes de consumo en la Unión Europea. La Directiva 1999/44/CE y su incorporación en los Estados miembros*, Instituto Nacional del Consumo, Madrid, 2004; MARTINEZ VALENCOSO, L. M., *La falta de conformidad en la compraventa de bienes*, Bosch, Barcelona, 2007.

Q.8.5 For how long after delivery of the digital content service (weeks, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore) ? If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

Claims for non-performance will be prescribed after *three years from the moment of product delivery* (art. 123.4 TR-LGDCU), thus extending the period of two years established by the Directive.

In any case, we should distinguish the case in which digital content does not function properly (lack of conformity), whose remedy, as we said, prescribes in three years; of those in which there is a *breach of the contract* by the provider in the performance of the service (non-performance) or, in this case, product delivery (digital content). For the latter case one should be directed to the provisions of art. 1124 Cc. (termination of the

⁶⁸³ JUR 2009\437257.

⁶⁸⁴ JUR 2010\94214: "In the Law the possibility of replacing it is *preferred* to terminate the contract. Ultimately, the question to be solved not be limited to arguments such the legal significance as likely to have the fact that the TV is finally repaired, because what is important for the consumer is, actually, if the repair has taken place within a reasonable time and if it is provided with a warranty"

⁶⁸⁵ AC 2009\1382.

⁶⁸⁶ "The Law recognizes four indemnity options *that are linked in the form of a hierarchy*, in the sense that the repair of the good and the replacement (...) prevails over the price reduction and the termination of the contract".

synallagmatic obligations), in which the time of prescription is fifteen years (art. 1964 Cc.). With respect to the remedies for hidden defects, in principle incompatible with those derived from non-performance (*supra* Q 8.4), the period of prescription is six months from the time of delivery (art. 1489 Cc.).

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

So far there is no consolidated scholarly or legal opinion on this topic, although it seems that in such cases the provisions of art. 127 TR-LGDCU regarding the repair and after-sales services will be applicable by analogy, according to which as for "the durable goods (those which we are discussing) consumers have the right to an adequate service and the availability of spare parts *for a minimum period of five years* from the date the manufacturing of the product is discontinued". Since the *ratio* of the provision aims to the functionality of the durable goods against obsolescence, it could be considered that the provision also applies in relation to cases such as the aforementioned. What is questionable in any case is whether the *dies a quo* for the limitation period is the date of delivery or supply of the service, or the most recent update or other not covered therein.

Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identify, geographical address or further details?

a) the operator of that platform, or

b) the third party application service himself?

Should this be done before or after the contract is concluded?

We consider it necessary to define, in advance, from the point of view of general regime, all legal relations arising from the proposed cases, in order to give a clearer answer to the question.

In this regard three legal relationships will arise in the case, namely: i) On the one hand, there will be an agency agreement between the owner of the platform (agent) and who offers the agent and the platform for digital content (the principal)⁶⁸⁷. In this sense, the operator of the platform normally will not only promote commercial transactions over the contents provided by the client through the same⁶⁸⁸, but also *conclude contracts* on his behalf, using the means at his disposal (secure payment, services consisting in the transmission of contents, etc.); ii) Simultaneously, the operator of the platform is constituted as a information society service provider in the sense expressed in LSSICE⁶⁸⁹, to encourage the "contract for goods or services by electronic means" (paragraph to § 1 of Appendix LSSICE), with the consumer being the recipient; iii)

⁶⁸⁷ "In accordance with the provisions of art. 1 of Law 12/1992, of May 27 on Agency Agreement (hereinafter LCAG): "for the agency agreement a natural person or legal entity, called agent, is obligated to another in a continuing or stable way in exchange for a fee, to promote trade acts or transactions on somebody else's account, or promote and conclude by and on behalf of others, as an independent intermediary, without assuming, unless otherwise agreed, the risk of such operations".

⁶⁸⁸ Applications, audio and video files, etc.

⁶⁸⁹ The concept of *information society services* shall bear the following meaning: "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."

Finally, between the content owner (third party) and the purchaser of content there will be a license agreement.

According to those reflections, we can note that, following the provisions of art. 60 TR-LGDCU (and art. 20), the operator of the platform will be, as responsible for the contract offer, the one obliged to render the consumer the relevant information, which includes (among other things) not only the "name and complete address" of the operator itself, but also "the principal on whose behalf it acts, i.e., of the third party. The operator will also be obliged to supply the information indicated in art. 27 LSSICE as information society service provider, category that does not extend to third parties. Finally, 22.1.e LAASE⁶⁹⁰ will not be applicable to third party (but the operator of the platform), to not technically be considered a service provider within the meaning established by the provisions of arts. 1587 to 1587 Cc.

In all cases (art. 60 TR-LGDCU, art. 27 LSSICE, art. 22.1. and LAASE) the information must be rendered prior to contracting.

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

When an agency agreement exists, as noted in the previous answer, the platform operator *will not assume*, unless otherwise agreed, the risk of the commercial transactions (art. 1 *in fine* LCAG). So that the third party will be, in all cases, the one liable for the application's fail to function or non-performance of the service.

In the event that failure occurs as a result of abnormal functioning of the platform, the liable person will continue to be the third party, although he may claim for restitution from the operator in accordance with the general rules of civil liability. Meanwhile, if the failure is caused by the consumer device, both (operator and content provider) will be exempted.

It should be noted that Spanish Law, going farther than the Directive 99/44/EC, establishes direct action against the producer for lack of conformity, when it is impossible or disproportionate for the consumer to seek for the seller (art. 124 TR-LGDCU), although to the relationship that is considered in question 8.8, due to its facts, this rule does not apply.

9 Remedies for non-performance and termination of a long term contract

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

Partially. Actually it is not specific modifications to digital content services or general consumer law. In fact, art. 13 LSSICE, when referring to the liability of information

⁶⁹⁰ See answer Q 5.4.

society providers, it refers to the provisions in "civil, criminal and administrative liability, set in general, in the legal system". What happens is that arts. 103 to 106 TR-LGDCU establish certain modifications around the contract conclusion in the field of *distance selling*. So, being the DCSC distance contracts (although held by a specific manner, which is by electronic means), they must be understood to be included within the scope of the rule.

Going into the content of the legal rules, it appears art. 103 TR-LGDCU imposes a maximum term of 30 days to comply with the performance of the service or delivery of goods, *but does not change the existing remedies*, understanding the doctrine that in this case it will be necessary to apply the general provisions in the Civil Code (arts. 1101 and related articles, and 1124 Cc.).

Art. 104 TR-LGDCU, for its part, will add a nuance to the general regime in relation to a very specific case, which is the *breach* of contract due to *lack of availability of the good or service*. In these cases the content of arts. 1101 and 1124 Cc⁶⁹¹ should be integrated with the aforementioned provision, so that, if impossible to meet the obligation, the consumer *may choose to terminate*. Although in this case, the rules on distance contracts provide for two additional obligations on the provider: i) to inform the consumer about the lack of availability; ii) refund as soon as possible or within the 30 day maximum time frame of the paid amounts. The refund must happen automatically and in cases when it is not produced, the consumer is entitled to claim "to be paid double the amount, without giving up the right to compensation for damages that exceed said amount".

Recommended Bibliography: ARROYO AMAYUELAS, E., "Comentarios a los arts. 92-106 TR-LGDCU", in CÁMARA LAPUENTE, S. (ed.), *Comentarios a las normas de protección de los consumidores*, Colex, Madrid, 2010; SÁNCHEZ GÓMEZ, A., "Capítulo I. Concepto de contratos celebrados a distancia", in BERCOVITZ RODRÍGUEZ-CANO, R. (ed.), *Comentario del Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias. Real Decreto Legislativo 1/2007*, Aranzadi, Cizur Menor, 2009, pp. 1181-1238. And, as regards to regulation prior to the recasted text in RDL 1/2007 (with analogous content and therefore useful for the study of the topic), ARROYO APARICIO, A., *Los contratos a distancia en la Ley de Ordenación del Comercio Minorista según la Ley 47/2002, de 19 de diciembre, de reforma de la Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista, para la transposición al ordenamiento jurídico español de la Directiva 97/7/CE, en materia de contratos a distancia, y para la adaptación de la Ley a diversas Directivas comunitarias*, Aranzadi, Cizur Menor, 2003.

Case law: there is no consolidated case law related to art. 104 TR-LGDCU (*ex- art. 43 LOCM*) within the reported cases in the existing repertoires.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

No. In the case of synallagmatic obligations (art. 1124 Cc.), the consumer *may choose* between specific performance and termination of the contract, with compensation for damages and interest payments in both cases. However, the judge will have some discretion on this point, so that if the performance is still possible and reasonable (i. e., if it does not imply frustration of purpose, which is a prerequisite for the exercise of termination), and the consumer opts for the termination, the Court still may order

⁶⁹¹ For more detail about the functioning of this last one, see Q 9.2.

performance within a specified period should it be requested by the other party. It is, however, a faculty of the judge, not of a system of hierarchy between remedies.⁶⁹²

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or.

In the event that the consumer wishes to terminate it will be enough *his declaration* to set aside the contract, addressed to the provider (even extrajudicially), with no formal requirements regarding the form of issuance of this statement and with no duty to send a requirement (notice of default). Thus, it is common in Spanish case law the use of the following formula: "termination of the contract can be exercised in the Spanish system not only in the courts, but also by a declaration, *not subject to an specific format*" (among others, STSS of May 8, 2002⁶⁹³; November 15, 1999⁶⁹⁴; February 17, 1996⁶⁹⁵; or June 15, 1993⁶⁹⁶).

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?

Yes, in the case of service contracts without a date fixed for its ending (contracts for an undetermined period).

Art. 1583 Cc. establishes for all kinds of services that "may be contracted (...) *without a fixed time period*, for a certain length of time or for an specific work. Contract of services agreed for the lifetime are invalid [partial nullity]". However, one of the fundamental implications involved in the characterization of contract for services as contract of indefinite duration is the source for the parts of an important right of unilateral and discretionary character: the right of withdrawal. So, before the danger of a relationship continuing indefinitely (with the consequent risk of perpetuating), the parties are given an opportunity, through the right of withdrawal, to end, (*ex nunc and without having to give any reason*) the effects of the relationship.

In all cases is imposed to the consumer, for the exercise of this power, a legal duty consistent with observing a notice period of reasonable length. The lawmaker does not specify that period, which will have to depend on the circumstances of the case. In the particular case of electronic communication services, however, the art. 7 CDUSCE

⁶⁹² In reference to the hierarchy of Q 8.4.: Arts. 114 – 122 TR-LGDCU will only apply in B2C contracts in the case of lack of conformity (strictu sensu), but not in the broader case of non-performance.

⁶⁹³ RJ 2002\4047.

⁶⁹⁴ RJ 1999\8217.

⁶⁹⁵ RJ 1996\1408.

⁶⁹⁶ RJ 1993\4836.

establishes that is mandatory to “require [notify] the provider at least two working days prior to the moment the service is deemed to be effective”.

A guideline widely used by the courts in consumer contracts is considering as unfair term (art. 85.2 TR-LGDCU = Appendix I, letter h Directive 93/13/EC) the stipulation which foresees for automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early. The courts have understood that the dates of requirement (notice) set too far away at the time of conclusion of the contract are unfair because they are unexpected and the consumer can not adequately assess whether to continue with a service that he has not enjoyed for enough time. See in depth, about this type of unfair terms, the following judgments: SAP Asturias May 15, 2006, SAP Murcia January 9, 2007 and SAP Soria October 29, 2009⁶⁹⁷.

In the event that the consumer terminates the contract without fair ground or without a right to withdraw (not being a case of contract with indefinite duration), he will have to face the consequences enshrined in art. 1101 and related rules, and art. 1124 Cc.⁶⁹⁸: the provider may opt for performance or for termination. In both, moreover, the consumer must compensate for damages caused. While in this field, as the service provider is usually a large company, releasing the consumer through the exercise of withdrawal will not normally lead to any serious structural or economic loss, beyond the loss of payment (*ad futurum*) of that particular contract. In the Spanish commercial practice are frequent the so-called "early or anticipated termination clauses" providing that the consumer must pay all or part of the outstanding amounts for services that are to be provided to the end of the contract term (but not performed yet); courts tend to moderate the compensation to a reasonable amount by applying the rules on unfair terms.

The situation is different where the consumer untimely exercises his right of withdrawal. In this case, failure to comply with the notice period will result only in an obligation to compensate for damages, not being the provider entitled to require the maintenance of the relationship.

Article 62 TR-LGDCU, whose provision was first established in 2006, applies to the two cases discussed in this issue (withdrawal of contract for services of indefinite duration and termination without just cause in fixed-term contracts): according to it, in “contract for services or supply of goods to be fulfilled through periodic performances, terms imposing excessive length of contract or limitations that preclude or make difficult the consumer's right to terminate the contract *are not binding*” (this kind of "blocking" practices are also prohibited by art. 8.2.d LCD); it also states that "the consumer may exercise the *right to terminate the contract (...) without any penalties or onerous or disproportionate charges,*” such as the fixing of compensation that is inconsistent with the damage actually caused. With those rules, for the contracts for services with consumers is restrained the freedom to agree penalty clauses or disproportionate and discouraging compensation for the terminations without just cause by the consumer or his withdrawal without requirement (as the contract is of determinate or indeterminate period) being-allowed only reasonable sanctions applying to effectively performed services and actually caused damages.

⁶⁹⁷ Respectively, AC, 2006\920, EDJ 2007\116816, AC, 2009\2355; the three discuss the notice period necessary to avoid the tacit prolongation of contracts for elevator maintenance services.

⁶⁹⁸ See Q 9.1 y Q 9.2

Recommended bibliography: CÁMARA LAPUENTE, S., "Comentarios al art. 62 TR-LGDCU", in CÁMARA LAPUENTE, S. (ed.), *Comentarios a las normas de protección de los consumidores*, Colex, Madrid, 2010; Díez Regañón-Alcalá, C.; *La resolución unilateral del contrato de servicios*, Comares, Granada, 2000; Klein, M., *El desistimiento unilateral del contrato*, Civitas, Madrid, 1997; Vaquero Pinto, J. M., "El desistimiento unilateral en los contratos de duración indefinida", in Llamas Pombo, E. (ed.), *Estudios de Derecho de obligaciones: Homenaje al profesor Mariano Alonso Pérez*, La Ley, Madrid, 2006, pp. 897 a 914.

Case law relative to the applicability of the right of withdrawal to all types of contracts, including contract for services: STSS of June 5, 2009⁶⁹⁹ and May 12, 1997⁷⁰⁰; and within the Provincial Courts, SAP Sevilla November 6, 2008; SAP Guipúzcoa November 15, 2007; SAP Murcia October 30, 2007 and SAP Navarra June 29, 2007. So the following statement is customary in case law: "*the failure to indicate a fixed contract duration permits, according to case law applicable to all kinds of indefinite contracts it is unilateral termination*".

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

Yes. See the answer to Q 6.4. In this sense, it is remarkable STS from November 25, 2009⁷⁰¹, in which the Supreme Court had occasion to rule in such situation⁷⁰².

10 After sales services

Q.10.1 Is the consumer entitled to ‘after sales services’ to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

As noted elsewhere in this study⁷⁰³, art. 127.1 TR-LGDCU establishes that: "In *durable goods*, consumers have the right to an adequate technical service and the availability of spare parts for a *minimum period of five years* from the date the manufacturing of the product is discontinued". As to the question whether or not that provision is applicable to case referred to here, the answer is provided by Appendix II of the Royal Decree

⁶⁹⁹ RJ 2002\3382.

⁷⁰⁰ RJ 1997\4121.

⁷⁰¹ RJ 2010\145.

⁷⁰² Numerous sentences of the Provincial Courts already existed related to the designated ⁷⁰² Numerous sentences of the Provincial Courts already existed related to the designated subject "Opening", that perfectly fits the described case. In this sense, the closing of several language academies and the termination of the teaching contract by non performance, causes as well, according to the cited case law, the termination of the contracts for services linked to it. talog of products and services of common, ordinary and generalized use, as well as durable goods, respectively, in articles 2, paragraphs 2, and 11, paragraphs 2 and 5, of the General Law for the Protection of Consumers and Users and related provisions. ing to the cited case law, the termination of the contracts for services linked to it. talog of products and services of common, ordinary and generalized use, as well as durable goods, respectively, in articles 2, paragraphs 2, and 11, paragraphs 2 and 5, of the General Law for the Protection of Consumers and Users and related provisions.

1507/2000⁷⁰⁴, which includes the software within the durable goods and therefore within the scope of the aforementioned rule.

Using this analogy⁷⁰⁵, it can be understood that the period begins either at the time of software acquisition, or from the time when the version is no longer the most updated version provided by the supplier, although there is neither agreement among scholars (for lack of real debate), nor case law (for lack of judgments) in this regard.

As to what the consideration refers, with no case of alleged lack of conformity, nothing prevents that updates are provided in exchange for compensation. Now, art. 127.2 TR-LGDCU sets certain limitations, so that it will be "forbidden to raise prices of spare parts when applied to the repairs and charge for labour, transfer and check amounts greater than the estimated average costs in each sector market". The problem, however, is that the article is intended for other types of goods, making it difficult to estimate the value of reference from which the price can not be increased, given the intangibility of the "supply" (intangible intellectual creation through the insertion of a new source code or modification of the prior one). While the reference to the average costs of each sector market could serve to overcome, at least in part, this difficulty.

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

According to art. 12.3 of the Law 7/1996, of January 15, of Regulation of the Retail Business (from now on, LOCM), the producer or, failing that, the importer will be responsible for ensuring the after sale services. Thus, if they breach their obligation they will incur a punishable administrative offence as provided in art. 49.1.d TR-LGDCU ("It constitutes infringement of Consumer law provisions (...) [the] failure to (...) [the] guarantee or repair of durable goods").

Furthermore, in the event that such breach (regardless of the underlying reasons, - discontinuation, bankrupt, etc-), suppose frustration of the contract purpose, it will be possible the termination by the consumer (art. 1124 Cc.), additionally to the requirement of appropriate compensation for damages (art. 1101 Cc.).

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

There is no consolidated view about this subject. However, the correct interpretation of art. 127 TR-LGDCU does not seem to establish this obligation. And this because the provision aims to avoid the obsolescence of the product itself (technical service and repair obligations), so preserving the technical functionality of the product would not be necessary to provide conversion software unless the content provider and the (only)

the termination of the contracts for services linked to it. talog of products and services of common, ordinary and generalized use, as well as durable goods, respectively, in articles 2, paragraphs 2, and 11, paragraphs 2 and 5, of the General Law for the Protection of Consumers and Users and related provisions.

⁷⁰⁵ See Q 8.6.

reading device provider is the same, as in this case, it is his activity what determines the useful life of the product.

Recommended bibliography: RODRÍGUEZ DE LAS HERAS BALLELL, T., "La responsabilidad por software defectuoso en la contratación mercantil", *Revista Aranzadi de Derecho y Nuevas Tecnologías*, 10, 2006, pp. 83-110; TORRELLES TORREA, E., "Comentarios al art. 127 TR-LGDCU", en CÁMARA LAPUENTE, S. (ed.), *Comentarios a las normas de protección de los consumidores*, Colex, Madrid, 2010; MARÍN LÓPEZ, J. J., "Comentarios al artículo 127", en BÉRICOVITZ RODRÍGUEZ-CANO, R. (ed.), *Comentario del Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*. Real Decreto Legislativo 1/2007, Aranzadi, Cizur Menor, 2009, pp. 1594-1605.

11 Unfair commercial practices

Q. 11.1, Q 11.3 and 11.4⁷⁰⁶

a) There is no specific provision in the legislation of unfair commercial practices, nor does art. 4 (general criteria) of the LCD⁷⁰⁷ apply, so the restriction is valid provided that it meets the relevant pre-contractual information duties of art. 20 TR-LGDCU and other applicable duties of information⁷⁰⁸;

b) In accordance with art. 29.2 LCD, "it is considered unfair commercial practice to make unsolicited and repeated proposals by telephone, fax, *e-commerce* or *other means of distance communication*, except in circumstances and insofar as it is legally justified to comply with a contractual obligation". Within said unfair commercial practices it should be understood to include thus, both the instances of viral marketing and surreptitious advertising. Moreover, and relating to *spam*, art. 21 LSSICE establishes (first paragraph) that "it is forbidden to send commercial communications by electronic mail or other equivalent means of distance communication that has not been previously solicited or expressly authorized by the addressee", with the following exception (second paragraph): "when a previous contractual relationship exists and the provider had obtained, through legal means, the contact information of the addressee and uses it to send commercial communications pertinent to products or services of their own business *or* that are similar to those that were initially contracted by the client.

The consumer may bring any of the remedies foreseen in art. 32 LCD (injunctions; declarative action of unfairness; action of prohibition; action of rectification on incorrect, deceitful or false information; action of compensation for damages and financial losses; or action of unjust enrichment). Also, the act will constitute an administrative infraction under the terms of arts. 49.1.1 TR-LGDCU and 38.3.c LSSICE, in the last case, understanding that it constitutes a serious infraction if the number of unsolicited commercial communications is more than three in a year, which carries a fine of 30,001 to 150,000 Euros, or a minor infraction, if not more than the previous requirement (art. 38.4.d LSSICE), which carries a fine up to 30,000 Euros.

⁷⁰⁶ We have considered that it suits better, for explanatory purposes, to simultaneously answer both questions with the goal of identifying the legal outcome of each unfair commercial practice without needing to resort to appeals or unnecessary referrals.

⁷⁰⁷ "It is considered to be unfair any commercial practice that objectively results contrary to the demands of good faith".

⁷⁰⁸ See Q 5.4.

Moreover, in accordance with arts. 3 and 4 LGP, "subliminal or surreptitious advertising" is considered unfair, so the consumer may rely upon (art. 6.1 LGP) the remedies foreseen in art. 32 against the unfair commercial practices;

c) The use of DRM is legal under arts. 160 and 161 TRLPI, although found limited on certain cases⁷⁰⁹, certainly do not constitute unfair commercial practice;

d) In the case of use of DMR to restrict use to a certain region or country, it is not considered to be unfair commercial practice (*see* prior paragraph), as long as Spanish Courts, *obiter dicta*, seem to allow the use of any technology that permit the consumer to inhibit the access control technology⁷¹⁰;

e and f) The processing of personal data for marketing purposes can only be carried out in the following cases (art. 45.1 RLOPD in relation to 30 LOPD): i) when "from one of the public accessible sources referred in letter j of the article 3 of the Organic Law 15/1999, of December 13, and art. 7 of this Law and the data titleholder has not expressed its refusal or opposition to their data being processed for the purposes described in this section"; and ii) When "*they have been provided by the individuals themselves or obtained with their consent* for specific and legitimate purposes related to the activity of advertising or marketing, having informed the concerned persons [data titleholder] on which specific sector of activity they would receive information or advertising".

Thus, the use of *spyware*, since makes it possible (by definition) to obtain data without consumer consent, should be considered an infringement of mandatory rule and, simultaneously, it will constitute serious infraction (art. 44.3.c LOPD)⁷¹¹ or even very serious infraction, in the case of processing of *sensitive* personal data (art. 44.4.c in relation to art. 7 of the same rule)⁷¹², the partial voidance of the affected provision, under the maxim "the useful is not vitiated by the useless" (*utile per inutile non vitiatur*). But it cannot be considered unfair commercial practice, as there is no specific provision, nor does it satisfy the requirements of *general criteria* of art. 4 LCD (namely the fact that "it distorts the economic behaviour of the consumer"). In any case, these activities may become criminal offence of forgery, in the case of data collected (name and surnames, credit card numbers, etc.) would lead to the identity theft of the consumer, with the resulting charge in their account (art. 395 ff. CP);

g) According to the principles relating to data quality (art. 4.5 LOPD), "personal data will be erased when no longer necessary or relevant for the purpose for which they were collected or recorded". So, as in the previous paragraph, failing consent, that treatment be regarded as illegal, with the same consequences as provided for therein, except the criminal ones.

h) In this case, as well as an unfair commercial practice for distorting the economic behaviour of the consumer, enticing him to the purchase of additional services, implies an infringement of information duties⁷¹³ that may affect the correct formation of the consumer's will. Thus, in addition to the remedies listed in art. 32 LCD, the consumer may challenge the validity of the contract, which could become voidable as a result of the existence of vice of consent. In addition, a similar result to that provided in art. 31 of the Proposal for a Consumer Rights Directive can be reached in Spanish law in two ways: first, because art. 62.1 TR-LGDCU establishes for all consumer contracts that "it must be expressed unambiguously their will to conclude a contract", which will include

⁷⁰⁹ See Q 7.1.

⁷¹⁰ See Q 7.1.

⁷¹¹ With fines of up to 300,000 euros.

⁷¹² With fines from 300,001 to 600,000 euros.

⁷¹³ See Paragraph Q 5.4.

the intent to purchase any additional services; without such unambiguous will –and it is questionable whether certain forms of default options, depending on their presentation, they can do it if they may go unnoticed to the average consumer–, there will be a lack of consent and the new contract will be void, which will enable consumers to demand reimbursement. Similarly, in distance contracts, art. 99 TR-LGDCU requires "*express acceptance*", and, without it, according to art. 100, the consumer "may not claim the price". Second, it is considered unfair term (and it should be noted that in the reform of LGDCU of 2006 is contemplated in the general definition of art. 82 TR-LGDCU, with questionable legal technique, as "unfair terms" both "contractual terms which have not been individually negotiated" as "non clearly consented *practices*"), "price increases for additional services (...)–that does not correspond with additional features which can be accepted or rejected in each case *announced with sufficient clarity or separation*" (art. 89.5 TR-LGDCU) and also "imposing on the consumer additional goods and services or unsolicited items" (art. 89.4 TR-LGDCU).

i) Art. 30 LCD states that "it is considered aggressive commercial practice to include a direct exhortation to children to buy goods or use services or persuade their parents or other adults to buy advertised products for them". Furthermore, according to art. 3.b of the General Law on Advertising, it is considered unfair "advertisement directed to children encouraging them to purchase goods or services by exploiting their inexperience or credulity, or of appearing to persuade parents or guardians to purchase. Children should not be shown, without justification, into dangerous situations. It must not be misleading about the characteristics of the products, nor about their safety, nor on the ability or skills needed in children for using them without causing damages to themselves or others". And irrespective of the product may be considered harmful to minors. In both cases (art. 6.1 LGP) it is possible to rely upon the remedies under art. 32 LCD (*see above, sub b*). There is well-established doctrine of the "Jury of Self Control in Advertising" with some additional guidelines to prevent such aggressive or misleading advertising practices relating to minors. Furthermore, if the child contracted under vice of consent arising from the advertising practice, the contract may be void by him or his legal representative.

j) In accordance with the provisions of art. 10.2 LCD, acts of comparison should be made "objectively". Thus, the existence of sponsorship or commission arrangements could be an indication of lack of objectivity and, moreover, if these points are not presented to consumers in a precise way. Thus, as in other cases, it may rely upon the remedies contained in art. 32 LCD.

Q11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

Given the recent reform introduced by Law 29/2009, there has not yet developed neither consolidate scholarly opinion nor case law that points out the existence of such practices.

12 Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

Yes, in principle providers of digital content services, unlike what happens in other sectors of activity (sale of tobacco⁷¹⁴ or alcohol⁷¹⁵), can market and sell their goods and services to minors. That is, *there is no restriction by area of activity*⁷¹⁶. So that they are only protected from harmful and offensive content by the provisions generally applicable to all right holders (LSSICE, Criminal Code and, where, Cc. and other norms apply).⁷¹⁷ And always with slight differences in relation to advertising (art. 3 LPG and art. 30 LCD), already described earlier in this same document⁷¹⁸.

However, where such commerce takes place, the supplier must comply with certain provisions on the protection of specific personal data if the transaction had to collect the personal data of the minor (for example provided through the completion of *on-line* forms), as provided for in art. 13 RLOPD⁷¹⁹ in connection with the provision of consent of the same⁷²⁰. If the content of the service is harmful, instead of the advertisement, general rules on tort law (Civil Code and Consumer Protection Act, liability for defective services) and on personality rights such as honour, privacy, etc. (Special Laws on that) will be applicable.

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

Providers are subject to the general rules on contractual liability and the corresponding administrative sanctions, if necessary, to provide the (still limited) sectorial regulation. So, in case of violation of art. 13 RLOPD to which we referred in the previous paragraph (a minor's consent in the processing of data), the decree could reach a fine of up to 600,000 euros (arts. 44.3.c and 44.4.c in relation to art. 45 LOPD). For its part, art. 32.1.5° LCD refers in relation to the alleged unfair advertising that is directed at minors, to the general regime of compensation for damages (art. 1902 Cc. and related clauses).

⁷¹⁴ Law 28/2005, of December 26, health measures against smoking and regulating the sale, supply, consumption and advertising of tobacco products.

⁷¹⁵ Various regulations of the Autonomous Communities.

⁷¹⁶ A different issue is that about the full capacity of minors to act traditionally there has been among Spanish scholars an extensive debate and controversy. Suffice it to say here that, at present, the validity of the contract carried out by minors is not, except in relation to certain legal cases specifically identified, discussed, neither in doctrine, nor in case law. It is understood the minor to hold, in this sense, capacity to act in a limited scope for whose determination it will be considered, among others, their maturity and to protect their legitimate interests -principle of supremacy of the interests of the child- (art. 1263 Cc. in interpretation according to arts. 162 and 164 of the same Code and art. 2 of the Organic Law of January 15, Legal Protection of Minors, partially amending the Civil Code and the Civil Law Procedure).

⁷¹⁷ They are allowed to sell or market their product even if the content of the service is harmful/offensive, but there will apply the general provisions in order to protect them.

⁷¹⁸ See Q 11.1.

⁷¹⁹ See Appendix.

⁷²⁰ Art. 96.4 TR-LGDCU indicates that "In any case, existing rules on protection of minors and respect for privacy must be complied with".

What happens is that, as we have seen, the normative development of child protection in the specific field of DCSC is still incipient.

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

Only so long as they can affect the proper formation of the will⁷²¹.

Although only indirectly related to the contractual development, art. 13.3 RLOPD provides that "when the processing relates to data from minors, the information addressed to them must be expressed in a *language that is easily understandable by them* (...)". Moreover, all the requirements of pre-contractual information must be provided, according to art. 60 TR-LGDCU, "clearly, comprehensibly and adapted to the circumstances", which, *ad casum*, will imply adaptation to the vulnerable group to which the information is addressed. Art. 4.3 LCD reflected in the general criteria on unfair commercial practices provisions of Directive 2005/29/EC on the parameter of economic behaviour of especially vulnerable people, which are beyond the concept of average consumer.

In relation to product safety, the legislature only establishes provisions in relation to very specific areas of activity and, in any case unrelated to the digital content services⁷²². In general terms, art. 12 TR-LGDCU requires that information about potential risks from the foreseeable use of a good or service must be made available "in an appropriate way" taking into account "the people for whom they are intended" (see art. 18 TR-LGDCU about general rules on labelling and presentation of goods and services).

Recommended bibliography: LÓPEZ JIMÉNEZ, D., "Los menores de edad en materia de contratación electrónica: el valor de la autorregulación", *Revista de estudios económicos y empresariales*, 21, 2009, pp. 165-208; NAVARRO MENDIZÁBAL, I. A., "La protección del consumidor menor de edad", en LÁRAZO GONZÁLEZ, I. E. y MAYORAL NARROS, I. V. (ed.), *Infancia, publicidad y consumo*, Universidad Pontificia Comillas, Madrid, 2005, pp. 139-177.

Q.12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided? " because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

In accordance with the provisions of arts.1302 and 1303 Cc., contracts entered into by minors⁷²³ or the disabled will be voidable at their request⁷²⁴. This will have a period for

⁷²¹ See Q 12.4 y 12.5.

⁷²² For example, RD 880/1990, of June 29, by adopting the safety standards of toys and transposing Directive 88/378/EEC, in this area, states art. 2 that "toys can only be sold if they do not put at risk the security and/or the health of the users or others, when used for its fitness for purpose, *given the normal behaviour of children*".

⁷²³ Definition of minors: all persons under 18 years old are considered minors (art. 315 Civil Code). Three exceptions (article 314 Civil Code): marriage (if the minor is at least 14 years old); recognition by titleholders of parental authority; declaration by a court.

prescription of four years after leaving their guardianship. This action applies to all types of contracts and includes, therefore, contracts concluded for digital content services.

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

For such cases, art. 1304 Cc. provides a special rule, which introduces an exception to the provision contained in art. 1303 Cc. (obligation to return the asset, with its fruits and proceeds, and the price with interest), whereby "when voidance stems from the incapacity of one party [including here under aged persons by application of art. 1263 Cc.], the unable party will not have the duty to return but only to the extent he benefited with the asset or the price he received". According to leading authorities, said benefit does not only consist of an increase in the patrimony, but also requires that the minor takes any advantage from it, namely, that it reports him usefulness (for example, the satisfaction of a necessity). In this sense, case law has concluded that "the enrichment by the incapable party that forces him to return what he had received by signing a void contract, it does not occur by mere delivery of the amount made, but by the profit or benefit produced in his patrimony by a profitable investment or employment justified in meeting his needs, having the capable contractor the burden of proof on the enrichment understood in this way" (STS of February 9, 1949⁷²⁵, followed, in the case of the Provincial Courts and among others by the SAP Soria of May 29, 2007; SAP Barcelona of December 23, 2004, or SAP Balearic Islands of June 12, 2000).

Recommended bibliography: DELGADO ECHEVERRÍA, J. (coord.), *Las nulidades de los contratos: un sistema en evolución*, Aranzadi, Cizur Menor, 2007; EGUSQUIZA BALMASEDA, M. A., *Cuestiones conflictivas en el régimen de la nulidad y anulabilidad del contrato*, Aranzadi, Pamplona, 1999; LÓPEZ BELTRÁN DE HEREDIA, C., *La nulidad contractual: consecuencias*, Tirant lo Blanch, Valencia, 1995; PASQUAU LIAÑO, M., *Nulidad y anulabilidad del contrato*, Civitas, Madrid, 1997.

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

The rules referred to in the arts. 1302 and 1304 Cc. are fully applicable both to minors and to *legally incapacitated persons* (by a court's order). Among the causes of incapacity (art. 200 Cc.) are "illness or persistent shortcomings either physical or psychological in nature that prevent the person from governing itself" which integrate, in certain circumstances (incapacity to self-government) to the groups cited as examples. With the exception of some recent rules that come from European Law (for example, the cited art. 4.3 LCD on unfair commercial practices), does not exist in Spanish Law recognition –as exists in other countries such as France– of a general category of "vulnerable people" or "particularly vulnerable consumers".

There is not an express legal fiction on a kind of tacit parents permission. In some fields it could be resorted to general legal concepts such as good faith, abuse of right, etc. However, your question is very clever and would require more reflection and time

⁷²⁴ Furthermore, according to art. 1302 Cc.: "(...) capable people cannot, however, allege the incapacity of those with whom they contract".

⁷²⁵ RJ 1949\99.

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?

No. According to what is stated in art. 23 LSSICE, "contracts electronically concluded produce all the effects provided by law, where there is consent and other requirements needed for validity". Among those requirements are *not* included the use of electronic signature nor any age verification system⁷²⁶.

It should be noted, however, the approval by the Government, July 23, 2010, of the Blueprint or Draft Law on Civil Register, which, although not directly influencing the contractual arrangements, nor imposing obligations on the parties, will allow, at least, consultation (and issue of certificates) of the state of capacity or incapacitation of a person. This could be used in the future for contractual purposes by the parties.

13 Towards a model 'digital consumer law'

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

Currently in progress is the Draft Law of Sustainable Economy, a Law that will introduce changes in the LSSICE and TRLPI through its Second Final Provision. The most significant change (though heavily criticized by some scholars), as regards to digital content services, lies in the granting of authority to an administrative body (the Commission on Intellectual Property) to take steps to stop providing a service of the Information Society or to remove digital content when it is deemed that someone is vulnerating intellectual property rights. So far that power belongs only to judges and courts.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

Among the pending legislative initiatives none have been found related to the areas concerned.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content

⁷²⁶ Regarding the electronic signature, both from art. 24 of the LSSICE (that uses a conditional conjunction "*when* contracts concluded by electronic means are signed electronically"), as well as from art. 1.2 of the Law 59/2003, of December 19, on electronic signature ("The provisions of this Law do not alter the rules governing the conclusion, formalization, validity and enforceability of contracts and any other juridical act nor the legislation relating to the documents where both are contained") follows the voluntary use of e-signature when concluding contracts by electronic means, without the need of that e-signature to validate this kind of contracts.

services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

The treatment of personal data as described (gathering and selling) is valid if the consent of the concerned person has been achieved. For this purpose, art. 11.1 LOPD provides that in the event of data communication "data *may only be communicated to third parties* for purposes directly related to the legitimate functions of the transferor and the transferee *with the prior consent of the individual*". However, the second paragraph of that article establishes a number of exceptions to obtaining consent. Among them is the case in which the data are collected from "publicly available sources" (in the sense set out in art. 3.j of the same rule). The statements of the Spanish Agency for Data Protection (AEPD) should be emphasized, because it has indicated on several occasions (the most recent, is through its Report 0342/2008) that the Internet is not considered a publicly available source in the legal sense.

In the field of digital content services a particular type of data stands out: the *data traffic and billing*. On this, the RD 425/2005, of April 15, approving the Regulation on conditions for the supply of electronic communications services, universal service and consumer protection⁷²⁷, settles special provisions. For this purpose, and closely related to obtaining data from publicly available sources, art. 65.3 structures a complex procedure⁷²⁸ to obtain consent if the purpose of processing is "commercial promotion" (including sales), in order to increase the protection of individuals.

In our view, this legislative model, the sanctions regime provided for therein and the work of the AEPD in defence of the legitimate interests of individuals, ensure an adequate protection framework in the field of content digital services that makes further action specifically targeted to it unnecessary.

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

See table below.

⁷²⁷ And which develops the Law 32/2003, November 3, General on Telecommunications.

⁷²⁸ See the wording of this article in the attached Appendix.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ... 	<input type="checkbox"/>
Film or music on a website (streaming)	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • 	<input type="checkbox"/>
Downloaded films or music	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Games on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Games on the Internet	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded games	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
User created content (UCC) ⁷²⁹ on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
UCC on a website	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded UCC	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁷²⁹ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

Personalisation services ⁷³⁰ on the Internet	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded personalisation services	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Software-as-a-Service on a website ⁷³¹	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded software ⁷³²	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Software on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Communication through a website ⁷³³	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
E-learning services on the internet ⁷³⁴	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
E-learning service on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>

⁷³⁰ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

⁷³¹ E.g. image editing, photoshopping, automatic translation services.

⁷³² E.g. anti-virus programs.

⁷³³ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

⁷³⁴ E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<ul style="list-style-type: none"> • ... • ...
'Free' film or music on a website (streaming)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ...
Paid film or music on a website (streaming) ⁷³⁵	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded films or music	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁷³⁵ E.g. video on demand services.

downloaded film or music								
Paid games on a CD or DVD*	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' games on a website	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid games on a website	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded games	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid downloaded games	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid User created content (UCC) ⁷³⁶ on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' UCC ⁷³⁷	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

⁷³⁶ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁷³⁷ E.g. video sharing websites, such as YouTube.

Paid UCC	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' personalisation services ⁷³⁸	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid personalisation services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid software on a CD or DVD* ⁷³⁹	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded software ⁷⁴⁰	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid downloaded software	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' software-as-a-service on a website ⁷⁴¹	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid software-as-	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

⁷³⁸ E.g. ringtones and Apps for mobile phones.

⁷³⁹ E.g.. anti-virus programmes, Office, etc.

⁷⁴⁰ E.g. anti-virus programmes.

⁷⁴¹ E.g. image editing, photoshoping etc..

a-service on a website								
'Free' communication services ⁷⁴²	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid communication	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid e-learning service on a CD or DVD* ⁷⁴³	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded e-learning services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Paid downloaded e-learning services	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' e-learning service on the internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	

⁷⁴² E.g. social networking, such as Facebook, and e-mail services.

⁷⁴³ E.g. an online language course.

Paid e-learning service on a the internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
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UNITED KINGDOM

Prof. Dr. C. Willett, M. Morgan-Taylor LL.M (De Montfort University, Leicester)

2 Level of protection that consumers of digital content services are entitled to expect (as opposed to consumers of tangible products)

2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

As we see below, in the main, the applicable law comes from general contract and consumer law; although there are various isolated cases of specific rules.

2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the disk fails to function in his computer as a consequence of a flaw in the *software on the CD/DVD*, not in the disk itself, can the consumer take recourse under consumer sales law?

(a) Background to 2.2 and 2.3 Answers

Key background points here are:

(i) in contracts for the sale or supply of goods,⁷⁴⁴ there are implied terms (reflecting the conformity standards in the Sales Directive) to the effect that if the goods are sold by description, they comply with the description; that they are of satisfactory quality; and that they are fit for any particular purpose expressly or impliedly made known.⁷⁴⁵

These are ‘strict liability or ‘outcome based’ standards.

(ii) in contracts for the supply of a service, there is an implied term that the supplier will carry out the service with ‘reasonable care and skill’.⁷⁴⁶

This, evidently, is a ‘fault based’ standard.

(b) Specific answer to 2.2

This is a category where the basic legal nature of the supply is in question. A physical vector such as a CD or DVD is clearly goods, and if such a vector (or any computer hardware) is supplied along with software under a single contract this has been held (in the English Court

⁷⁴⁴ In both the Sale of Goods Act 1979, s. 61 and the Supply of Goods and Services Act 1982, s. 18, the definition of goods includes “all personal chattels other than things in action or money.

⁷⁴⁵ Sale of Goods Act (SGA) 1979, ss. 13-15 (contracts for the sale of goods) and Supply of Goods and Services Act (SGSA) 1982, Part 1 (supplies of goods other than sales, e.g. hire, bailment, barter, work and materials contracts).

⁷⁴⁶ A “contract for the supply of a service” is one where the supplier “agrees to carry out a service”; “whether or not goods are also transferred or to be transferred” (S.12(3)(a)).

of Appeal) to be a contract for the sale or supply of goods.⁷⁴⁷ If this is the case, then the (outcome based) statutory implied terms as to description, quality and fitness will apply.⁷⁴⁸

At the same time, there is also equivalent level Scottish authority to the effect that such a contract should not be viewed as one for the sale or supply of goods; but, rather, as a contract *sui generis*.⁷⁴⁹ If this is the case, then the courts might well use common law to imply similar outcome based standards to those that would be applicable under the SGA or SGSA. These would require the hardware and software package as a whole to be reasonably fit for its intended purpose.⁷⁵⁰

In summary, such contracts do not seem to be viewed as service contracts (a classification that would cause the fault based standard from SGSA, s. 13 to apply). Whether or not such contracts are technically viewed as being for goods or as *sui generis*, outcome based standards seem to apply.

2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer's computer as a consequence of a flaw in the software, can the consumer take recourse under consumer sales law?

There is a lack of certainty here as to how judges will treat this question. Again, the basic legal nature of the supply is in question. Where the software has been transferred without any durable medium being involved, the definition of 'software' in a particular contract has been held to mean that goods are being supplied; although if the software is being licensed and not sold (as is typically the case) the contract would be viewed as one for the supply (rather than sale) of goods.⁷⁵¹ This would mean that the (outcome based) statutory implied terms as to description, quality and fitness from SGSA, Part 1 would apply.

At the same time, one view is that there is neither a sale nor a supply of goods in any case where software is all that is being supplied.⁷⁵² This would mean that the statutory implied terms as to the description, quality and fitness of the goods would not apply. However, even if this is the case, it does not seem that such a contract will necessarily be treated as being a contract for a service either. So, as in the case of 2.2 above, the fault based implied term as to reasonable care may not apply. As with the 'mixed contracts' in 2.2, pure software contracts may be treated as contracts *sui generis*. This being the case, it is possible that the courts would, as in the case of 2.2, imply (at common law) similar outcome based implied terms to those applicable under the SGA or SGSA to goods; i.e. essentially to the effect that the software is reasonably capable of achieving its intended purpose.⁷⁵³

N.B. On 2.2. and 2.3 an overriding uncertainty is that the above cases dealt with business to business, not business to consumer contracts; so that it is very hard to predict exactly what will be decided in relation to the latter.

⁷⁴⁷ *St Albans City and District Council v International Computers Ltd.* [1996] 4 All ER 481 CA; *Toby Construction Products Pty Ltd. v Computer Bar (Sales) Pty Ltd.* [1983] 2NSWLR 48

⁷⁴⁸ Whether those deriving from the SoGA or from the SGSA.

⁷⁴⁹ *Beta Computers (Europe) Ltd. v Adobe Systems (Europe) Ltd.* 1996 SLT 604, Lord Penrose.

⁷⁵⁰ See generally *Young & Marten Ltd v McManus and Childs* [1969] 1 AC 454 and *Judge Thornton QC, in Watford Electronics Ltd. v Sanderson* [2001] 1 All ER (Comm) 696.

⁷⁵¹ See *Judge Thornton QC, in Watford Electronics Ltd. v Sanderson* [2001] 1 All ER (Comm) 696.

⁷⁵² *St Albans City and District Council v International Computers Ltd.* [1996] 4 All ER 481, CA, *per* Sir Iain Glidewell at 493.

⁷⁵³ See *Judge Thornton QC, in Watford Electronics Ltd. v Sanderson* [2001] 1 All ER (Comm) 696.

3 Defining consumers and producers

3.1 Are individuals who offer digital content services to consumers and who finance their activities with advertisements “consumers” or “traders”? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-) payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making a profit?

Rules in the general common law of contract and tort (e.g. on formation of contract, misrepresentation, duress, undue influence etc) will apply whatever the status of the seller.

Implied terms (e.g. those referred to above from the SoGA or the SGSA) and rules controlling exclusion of liability and unfair terms⁷⁵⁴ only apply where the supplier is acting in the course of a business or for business purposes.⁷⁵⁵

This issue is assessed on a case by case basis and it is very hard to predict what degree of advertising, regularity, profit etc will be required for a sale to ‘cross the line’ into being one that is viewed as a business sale.

The sort of criteria listed in the question, such as advertising, for payment, or for a period of time are certainly relevant factors. The courts have made reference to whether someone sells with “some degree of professionalism and regularity.”⁷⁵⁶ One might also consider generally whether the seller appears *to the buyer*, to be operating as a business; by displaying “business patterns of behaviour”.⁷⁵⁷ To sum up the following factors are likely to be considered: the use of business premises, the use of a business name, business literature; advertising; regularity of sales; buying in bulk; selling for profit goods that have been purchased for re-sale and profit rather than selling goods that were originally bought for private use; selling goods that were originally used in a business owned by the seller; keeping accounts; paying business rates of tax; and the income from these transactions being a notable part of the income of the seller.

⁷⁵⁴ E.g. the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, implementing 93/13/EEC

⁷⁵⁵ See for example, Sale of Goods Act 1979 section 14(2), Unfair Terms in Consumer Contracts Regulations 1999, Regulation 3(1).

⁷⁵⁶ *Stevenson v. Rogers* [1999] 1 All ER 613.

⁷⁵⁷ *Bridge The Sale of Goods* (1997) OUP, p 292.

3.2 Does the law of your land leave room to differentiate between the activities of professionals and “prosumers”?

The UK courts (by application of the above criteria) either deem a party to be acting in a business capacity or not. There is no formal recognition of “prosumers” as a category that for example, has greater obligations than a purely private seller but fewer obligations than a business seller. Of course, we saw above how open-ended and flexible the test is for determining business status. This very open-endedness obviously provides scope to expand the more traditional understanding of “business” to include at least some “prosumers”.

4 Sector-specific consumer law

4.1 Do specific rules in media, telecommunications, copyright, data protection and E-commerce law or other sector-specific (digital) consumer rights apply pertaining to

- a) **The conclusion of the contract for digital services?**
- b) **The pre-contractual information consumers need to be given?**
- c) **The termination of the contract (for non-performance or termination for other reasons) for digital content services?**

4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed, to consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam, or marketing media services to minors.

4.3 Does Sector Specific Law Determine and Remedies? Could a consumer invoke general consumer and contract law remedies?

To some extent (especially in section (ii) below) we have addressed the issues in 4.1-3 in a way that cuts across the three questions.

(i) Distance Selling and E-Commerce Regimes

The UK regimes implementing the Distance Selling and E-Commerce Directives copy out the relevant rules on information provision.⁷⁵⁸

Of course, art 9 of the E-commerce Directive requires that member states ensure that contracts can be validly concluded electronically. One important point here is that Schedule 1 of the Interpretation Act 1978 provides that:

“writing” includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expression referring to writing are construed accordingly’.

It has been said that:

⁷⁵⁸ Consumer Protection (Distance Selling) Regulations 2000, regs 7-8; Electronic Commerce (EC Directive) regulations 2002, regulation 9.

“this would appear to include computer storage. Words stored in a computer may be reproduced in screen or printed on paper. In any case, it is unlikely that a judge would take a restrictive view of this (...).”⁷⁵⁹

The significance of all this is that where there is a requirement in UK law for contracts to be in writing, this seems to be satisfied when words are stored on a computer; so that the requirements of art 9 of the E-Commerce Directive appear to be satisfied.

Another point worth mentioning in relation to contractual validity is that the general view is that ‘automated’ and ‘virtual’ contracts would be regarded as being binding under general common law principles.⁷⁶⁰

A final point worth noting is one on contract formation. Our understanding is that it is often the case in other member states that an advert on a website will be construed as an offer to the consumer; which is accepted by the consumer. By contrast, the general approach in the UK is that adverts, shop displays etc are viewed only as invitations to treat; the consumer makes the offer; and it is for the trader to accept or reject. This of course allows sellers to refuse to accept the consumer’s order if it is realised that a mistake has been made, e.g. that the goods have been mistakenly underpriced in the advert. The generally accepted view is that the same analysis would be applied to adverts on websites.⁷⁶¹ (It is also possible for adverts in general (and we would say the same of websites) to be construed as offers on the particular-exceptional-facts of the case.⁷⁶²

(ii) Dedicated Sector Specific Regimes⁷⁶³

⁷⁵⁹ D. Bainbridge, *Introduction to Information Technology Law*, 6th ed, (Harlow: Pearson Longman 2008) 359.

⁷⁶⁰ This view is based on application of the logic of the decision in *Thornton v Shoe Lane Parking* [1971] 2 Q.B. 163 to such contracts. See the views of Christopher C. Nicoll, “Can Computers make contracts?” J.B.L. 1998, Jan, 35-49; Simon Jones, “Forming electronic contracts in the United Kingdom”, (2000) 11(9) I.C.C.L.R. 301-308; and Christine Riefa, The reform of electronic consumer contracts in Europe: towards an effective legal framework? *Lex Electronica*, vol. 14 n°2 (Automne / Fall 2009), 1, 14-16.

⁷⁶¹ Andrew D. Murray, “Entering into Contracts Electronically: The Real W.W.W.”, in Edwards & Waelde (eds), *Law & the Internet, A framework for Electronic Commerce* (Oxford: Hart Publishing 2000) 21; John Adams and Roger Brownsword, *Understanding Contract Law*, 4th edition, (London, Sweet & Maxwell 2004) 59; and Riefa, *ibid*, 28-9.

⁷⁶² *Carlill v Carbolic Smokeball Co* [1893] 1 QB 256.

⁷⁶³ The transparency obligations from the Audiovisual Media Service Directive have been implemented. The Department for Culture, Media and Sport was responsible for the implementation (by three pieces of delegated legislation). This is available at: http://www.culture.gov.uk/what_we_do/broadcasting/3173.aspx

The legislation is:

- [The Audiovisual Media Services Regulations 2009 \(SI 2009/2979\)](#)
- [The Audiovisual Media Services Regulations 2010 \(SI 2010/419\)](#)
- [The Communications Act 2003 \(Disclosure of Information\) Order 2010 \(SI 2010/282\)](#)

The relevant transparency obligation is contained in the [The Audiovisual Media Services Regulations 2009 \(SI 2009/2979\)](#) as follows:

“368D Duties of service providers

(1) The provider of an on-demand programme service must ensure that the service complies with the requirements of sections 368E to 368H.

(2) The provider of an on-demand programme service (“P”) must supply the following information to users of the service—

- (a) P’s name;
- (b) P’s address;
- (c) P’s electronic address;

Here we are taking broadcasting and telecommunications services as case studies. Under the Communications Act 2003 and the Broadcasting Act 1996 (as amended), Ofcom⁷⁶⁴ is required to draw up codes for regulating the broadcasting and telecommunication sectors.⁷⁶⁵ These codes, to some extent, cover some of the above issues.

There is nothing as such on when a contract is concluded.

As to pre-contractual information the telecommunications Customer Code of Practice requires some information to be provided pre-contractually and other information to be published on their website and provided on request.⁷⁶⁶ These various obligations cover information on such matters as the contact details of the communications provider, charges for premium rate services, how services work, conditions for termination, access, telephone preference services, internet dialers, maintenance services and dispute resolution.⁷⁶⁷

As to termination, as well as providing information in relation to termination rights (see above) telecommunications providers must take a proportionate, non-discriminatory and sympathetic approach to withdrawal or interruption of services.⁷⁶⁸

Aside from the legal regime implementing the Unfair Commercial Practices Directive, advertising regulation is provided by way of self-regulation, by the Advertising Standards Authority (ASA). It oversees the UK Code of Broadcast Advertising Practice (BCAP Code)⁷⁶⁹ and the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) lay down rules on such matters as, misleading advertising, harm and offence, the protection of minors (under 18's), privacy, distance selling, environmental claims and spam.

Concern has been expressed with respect to behavioural advertising,⁷⁷⁰ which is not covered by either of the above Codes. A self-regulatory Code was written in 2009⁷⁷¹ to address concerns. This Code is being monitored by the OFT and the ICO.

As far as remedies are concerned, and in relation to private redress, telecommunications providers are obliged by the Code to have a complaint system that is transparent, accessible, effective and permits access to alternative dispute resolution.⁷⁷² Clearly there would also be

(d)the name, address and electronic address of any body which is the appropriate regulatory authority for any purpose in relation to P or the service that P provides.”

⁷⁶⁴ The independent regulator and competition authority for the UK communications industries: <http://www.ofcom.org.uk/>

⁷⁶⁵ The Broadcasting Code is at: <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/>

⁷⁶⁶ The requirement is to “publish” the relevant information, there is no obligation to enable electronic search or comparison features. The Telecommunications Code is at: <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/cv0gc300710.pdf> There is an information obligation as to the quality of the service under this Code.

⁷⁶⁷ Part 10 and Annexes 1 and 3, Ofcom Customer Code of Practice: <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/customer-code-practice/>

⁷⁶⁸ Part 13 *ibid*.

⁷⁶⁹ Both Codes are available at: <http://bcap.org.uk/The-Codes.aspx>

⁷⁷⁰ “Can we keep our hands off the net?” Report of an Inquiry by the All Party Parliamentary Communications Group October 2009: http://www.apcomms.org.uk/uploads/apComms_Final_Report.pdf

⁷⁷¹ Internet Advertising Bureau(IAB), <http://www.iabuk.net/> The Code is at: <http://www.youonlinechoices.com/wp-content/uploads/2010/07/IAB-UK-Good-Practice-Principles-for-Online-Behavioural-Advertising.pdf> with discussion at: <http://www.youonlinechoices.co.uk/>

⁷⁷² Annex 4, *ibid*.

the potential for formal legal claims for damages, termination etc, where the telecommunications provider was in breach of contract.

The Broadcast and Non-broadcast Codes for marketing and advertising (see above) are designed to add to and not to replace consumer contract law, or other private law remedies; or the public enforcement remedies available under the regime implementing the Unfair Commercial Practices Directive. These advertising Codes do not offer any personal remedies to the consumer.

(iii) General Contract Law Remedies

However, certainly, advertising could give rise to a common law claim in misrepresentation or breach of contract; potentially allowing for a damages claim and/or rescission of the contract.⁷⁷³ In addition, injunctions can be obtained by enforcement bodies against advertising that is in breach of the ‘misleading practice’ concept from the Unfair Commercial Practices Directive.⁷⁷⁴ Such a practice (as well as infringements of the other general clauses in the Directive) are also criminal offences (subject to defences of due diligence).⁷⁷⁵

5 Formation of contract and pre-contractual information

5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile ‘phone, internet)?

5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile ‘phone, internet)?

Obviously there are the transparency requirements from the Unfair Terms Directive; and the rules on pre contractual information and information on ‘invitations to purchase’ in, for example the Distance Selling and Unfair Commercial Practices and E-commerce Directives. These are copied out in UK implementing legislation.⁷⁷⁶

There are general common law rules to the effect that terms are only incorporated into a contract where either (i) they are in a document signed by the consumer,⁷⁷⁷ or (ii) where there is no signature, the consumer has had ‘reasonable notice’ of their existence.⁷⁷⁸ This obligation can, for example, be met over the internet by the consumer clicking “yes” when asked whether they “accept the terms and conditions”.

⁷⁷³ See for example, *Crystal Palace Football Club (2000) Ltd. v. Dowie* [2007] EWHC 1392.

⁷⁷⁴ Consumer Protection from Unfair Trading Regulations (CPUTR) 2008, regulation 26 and Enterprise Act 2002, Part 8. These implementing Regulations are available at:

<http://www.statutelaw.gov.uk/legResults.aspx?activeTextDocId=1585643>

⁷⁷⁵ CPUTR, *ibid*, regulations 8-18

⁷⁷⁶ See Unfair Terms in Consumer Contracts Regulations 1999, reg 7; Consumer Protection (Distance Selling) Regulations 2000, regs 7-8; and CPUTR, *ibid*, reg 6 (4); Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013).

⁷⁷⁷ *L’Estrange v Graucob* [1934] 2 KB 394

⁷⁷⁸ *Parker v SE Ry Co* (1876-7) LR 2 CPD 416, CA

In general, the application of both the signature rule and the reasonable notice rule is not affected by whether the terms are transparent as such. So, the ‘reasonable notice’ rule does not require transparency of the terms; simply an opportunity to be aware of their existence. However, the ‘Interfoto’ case (5.3 below) shows that where terms are specially onerous or unusual, a high degree of prominence may be required for incorporation (although this principle does not apply to signed documents, where the general rule that signature incorporates the terms still stands).

There are some sector specific rules on the transparency of terms. For example, the Telecommunications Customer Code of Practice requires transparency in the sense that providers must include terms on-

- (a) the identity and address of the Communications Provider;
- (b) the services provided, details of the service quality levels offered and the time for initial connection;
- (c) details of maintenance services offered;
- (d) particulars of prices and tariffs, and the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;
- (e) the duration of the contract, the conditions for renewal and termination of services and of the contract;
- (f) any applicable compensation and/or refund arrangements which will apply if contracted quality service levels are not met; and
- (g) the method of initiating procedures for settlement of disputes in respect of the contract.⁷⁷⁹

5.3 Are non-negotiated contracts concluded electronically, such as through a “click-wrap” or a “browse-wrap” licence, considered to be validly concluded contracts?

There is no definitive answer to this question. In one case on “shrink -wrap” agreements, it seems to have been decided that a customer could not be held to have accepted terms until he had opened the packaging and decided whether to accept the terms.⁷⁸⁰

However, the issue may be different if a party has clicked a button signifying acceptance of terms and conditions, such as by clicking a button stating “I AGREE” or continued to browse a website after reasonable notification of the terms;⁷⁸¹ the former being “click-wrap” and the

⁷⁷⁹ Part 9.2, Customer Code of Practice: <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/cvogc300710.pdf>

⁷⁸⁰ *Beta Computers (Europe) Ltd. v Adobe Systems (Europe) Ltd.* 1996 SLT 604.

⁷⁸¹ The basic common law position as to what is required for terms to be incorporated into the contract is, as described, one of ‘reasonable notice’ for unsigned documents (*Parker v SE Ry* (1876-77) LR 2 CPD 416 CA); which does not generally require that the terms as such must be unambiguous or comprehensible. Of course, the ‘reasonable notice’ that there are terms and where they can be found must be clear; but this is different from saying that the terms themselves must be clear, in proper legible print, language etc.

If the document is signed, the terms inside it are treated as incorporated into the contract; and, again, it is not relevant whether the terms as such are clear, in proper legible print, language etc.

Apart from codes (such as the telecom code above), the requirements for terms themselves to be clear, unambiguous etc have tended to come from the various EU Directives; and are contained in the implementing provisions, e.g. on distance selling, e-commerce, package travel etc.

However, being ‘incorporated’ into the contract is not the end of the story. Even before implementation of the Unfair Terms Directive, the Unfair Contract Terms Act 1977 made some terms (exemption clauses) in a contract (i.e. those that had already passed the common law incorporation test) subject to a test of ‘reasonableness’ (s. 11). One of the factors to be taken into account in deciding on reasonableness (quite apart from the obvious questions as to the fairness *in substance* of clause) is ‘whether the customer knew or ought reasonably to have

latter being “browse-wrap” agreements. There is, as yet, no definitive case-law from the UK on these situations; although there is consensus that the growing body of US case-law may well be followed in the UK, at least for “click-wrap” agreements. This shows that clicking will amount to an acceptance of an offer being made by the supplier.⁷⁸² As indicated above, the general UK rule is that the customer is bound so long as there has been reasonable notice of the existence of the terms;⁷⁸³ suggesting that, as in the US, clicking some indication of awareness of terms would normally suffice.

Of course, the US case law also accepts that clicking does not mean that the relevant terms are enforceable if they are unconscionable, for example as in *Comb v. PayPal*.⁷⁸⁴ Although the UK does not have an identical concept of unconscionability, UK case-law shows that the courts have, in traditional, (non-electronic contracts), held that whilst minimal notice may be sufficient for straightforward or reasonable terms, onerous or unusual clauses need more notice. For example, in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd*,⁷⁸⁵ a clause required payment of a very high “fine” where the goods were retained beyond the agreed 14 day period. The Court of Appeal stated;

*“If one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.”*⁷⁸⁶

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

“Browse-wrap” differs slightly- here there is no clear cut unequivocal act that might be treated as acceptance, unlike the “I AGREE” under “click-wrap”, so it is less clear as to whether there is any agreement at all. There is no UK case law on “browse-wrap” that we are aware of, but the US case law shows an increasing willingness to enforce such clauses- if the

known of the existence and extent of the term ..’ (Schedule 2, para (c)). Obviously, such knowledge is less likely (and the term is less likely to pass the test) if the term is not clearly expressed. It is accepted by the courts that this sets a further, higher standard of transparency than the incorporation rules at common law.

Further, these issues are viewed in the UK as being relevant (along with issues of substantive fairness) to the ‘good faith’ element of the test of unfairness under the regime implementing the Unfair Terms Directive (Director General of Fair Trading v First National Bank [2001] 3 WLR 1297); and there is also, of course, the requirement of ‘plain and intelligible language’ in this regime. In enforcing this regime, the Office of Fair Trading insists that terms be in plain and intelligible language and that the whole contract be transparent in terms of structuring etc. In addition, the Supreme Court (as the old House of Lords) held that ‘good faith’ required that terms be ‘expressed fully, clearly and legibly’; not containing ‘concealed pitfalls or traps’; and being given ‘appropriate prominence’ where they might ‘operate disadvantageously’ to the consumer (Lord Bingham in Director General of Fair Trading v First National Bank).

In short, while common law incorporation rules do not require much in the way of transparency, the various sector specific regulatory codes and EU based regimes have added much here; and, in addition, transparency is required under the unfair terms regimes (terms must be fair-including transparent-even if they have been incorporated at common law).

⁷⁸² See for example, *Hotmail Corp. V. Van Money Pie Inc* 1998 US Dist LEXIS 10729 (D N Ca., 16 April 1998).

⁷⁸³ See *Parker v SE Ry*, note 33 above

⁷⁸⁴ 218 F. Supp 2d 1165 (D N Ca August 2002).

⁷⁸⁵ [1989] QB 433.

⁷⁸⁶ *Dillon LJ*, [1989] Q B 433, at 438-439. Also see Lord Denning in *Spurling v. Bradshaw*, [1956].

consumer known, or ought reasonably to have known of the existence of the terms.⁷⁸⁷ Again, of course, this could very well be subject to the requirement that particularly onerous or unusual terms should be given special prominence.

The general law of unfair contract terms will also be relevant under the regime implementing the Unfair Contract Terms Directive;⁷⁸⁸ particularly when one party attempts to insert clauses limiting the other party's access to justice, such as the mandatory arbitration clauses, which are very common in shrink-wrap agreements.

5.4 Under what conditions are the terms of a standard form agreement binding on the consumer (provided that their content is not unfair)? In particular, is an express manifestation of assent to these terms necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?

Under UK law acceptance of the terms of a contract may be made by express intimation, or implicitly by conduct.⁷⁸⁹ Therefore, a consumer may be taken to have accepted the terms of an offer by using the service etc. (Of course this is subject to the terms being transparent and fair under the Unfair Terms in Consumer Contract Regulations 1999, which implement the Unfair Terms Directive.)

5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable period of time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hard copy, or may the information also be given via electronic means?

Certainly, under general contract law, information in the form of purported terms of the contract will not be treated as part of the contract unless it has been provided prior to conclusion of the contract.⁷⁹⁰ However, there is certainly no requirement under the general principles of contract law to provide information again (whether as to terms, conclusion of the contract, or other matters), i.e. after conclusion of the contract. Of course as we saw above at Q 4, in the telecommunications sector the Code of Practice requires certain information to be published on the provider's website and to be provided on request by the consumer. Clearly such information will be *available* post-contractually and might be requested (and therefore need to be provided) post-contractually.

5.6 Are you aware of any specific information duties for providers of digital content services? If so, which information do these duties cover? Do they include information on redress mechanisms (e.g. complaint forms or phone numbers)? Furthermore, do the information duties include information concerning contact possibilities after the conclusion of the contract?

⁷⁸⁷ Generally on click, shrink and browse wrap contracts in the US see Leon E. Trakman, The Boundaries of Contract Law in Cyberspace, International Business Law journal, 2009, 159.

⁷⁸⁸ Unfair terms in Consumer Contracts Regulations 1999, (SI 1999, No. 2083), implementing Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

⁷⁸⁹ *Brogden v Metropolitan Railway* (1877) 2 App Cass 666.

⁷⁹⁰ *Olley v Marlborough Court Hotel* [1949] 1 All ER 127, CA

As indicated at Q4 above, the telecommunications Code requires certain information to be published and provided on request. This includes information on contact details and redress mechanisms.

5.7 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer? If so, please specify.

As indicated at Q4 above, the telecommunications Code requires certain information to be published and provided on request; although there do not seem to be any requirements as to form as such.

5.8 What are the remedies (in general contract law or in sector-specific legislation) in case a provider of digital content services fails to comply with these specific information duties?

Regulatory action may be taken by the sector specific regulator, and/or the OFT. It should be remembered that failure to adhere to a code of practice can be an unfair practice under the regime implementing the Unfair Commercial Practices Directive.⁷⁹¹ In addition, this regime (as indicated above) allows for enforcement orders to be taken against the various forms of unfair practices (including misleading omissions) set out in the Unfair Commercial Practices Directive; and also makes such practices criminal offences. At present, there are no private law remedies for unfair practices as defined in the Unfair Commercial Practices Directive; however, the issue is under consideration by the English and Scottish Law Commissions.⁷⁹²

There would only be a remedy (e.g. damages or termination) in general contract law if it could be established that the failure to provide the information amounted to a breach of contract. One possible argument in this regard might be that there is an implied term that providers should follow information provision obligations of this nature imposed by regulators. Another possibility might be to argue that a failure to provide the information is in breach of the implied term arising in service contracts to the effect that the supplier will carry out the contract with reasonable care and skill.⁷⁹³ However there is no guarantee that either of these arguments would meet with success in court.

6 Right of withdrawal

6.1 In Addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him?

If so, does it matter whether the consumer has already accessed the service?

Is the introduction of the right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?

6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling-off period with the permission or at the request of the consumer? If so, does the

⁷⁹¹ See Consumer Protection from Unfair Trading Regulations (CPUTR) 2008, regulation 5 (3).

⁷⁹² Law Commission, A Private Right of Redress for Unfair Commercial Practices, November 2008.

right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?

6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?

6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?

There is no general cancellation right in consumer contract law. Of course there are isolated exceptions to this, most notably the regime implementing the Distance Selling Directive; which of course contains provisions on cases where the service has already started, and also the cases where the consumer has not been informed of the right of withdrawal.⁷⁹⁴ Of course the withdrawal right under the Distance Selling Directive does not apply to particular digital services, i.e. “audio or video recordings or computer software if they are unsealed by the consumer”, and the UK implementing Regulations has followed this approach.⁷⁹⁵

We have not been able to find any sector specific digital content rules dealing with cancellation rights.

7 Unfair contractual terms

7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a “main obligation” under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?

There is no clear guidance from the courts as to whether such terms will be classified as core terms. The House of Lords view in the *First National Bank* case⁷⁹⁶ was that a ‘restrictive’ approach should be taken to the main subject matter and price exclusions under the regulation 6 (2) of the Unfair Terms in Consumer Contracts Regulations 1999 (these Regulations implement the Unfair Terms Directive and reg 6 (2) reflects art 4 (2) of the Directive). However, their decision (as the renamed Supreme Court) in the recent bank charges case,⁷⁹⁷ holding bank charges to be excluded price terms, might suggest a more ‘business oriented’ approach.

⁷⁹³ S. 13 Supply of Goods and Services Act 1982, and see above Q2.

⁷⁹⁴ Under the Consumer Protection (Distance Selling) Regulations 2000, SI 2334, Reg. 13 (1)a implementing the Distance Selling Directive 97/7 EC, Art. 6 (3).

⁷⁹⁵ Consumer Protection Distance Selling Regulations 2000, SI 2334, Reg. 13(1)d, implementing Art. 6 (3) Distance Selling Directive 97/7 EC.

⁷⁹⁶ *Director General of Fair Trading v First National Bank plc* [2001] 3 WLR 1297.

⁷⁹⁷ *OFT v Abbey National and others* [2009] UKSC 6.

Of course, these decisions both related to the price exclusion; rather than the main subject matter exclusion. The OFT would certainly be unlikely to consider the sort of term mentioned in the question to be ‘central to how the consumer perceives the bargain’ (their criteria for a term to count as an excluded price or main subject matter term).⁷⁹⁸ It is unclear whether the Supreme Court would agree with the OFT; or whether the apparently ‘business oriented’ approach taken in the bank charges case to the price exclusion suggests that they might take a broad view as to the main subject matter exclusion as well.

7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

A term compromising consumer privacy, and in so doing deviating to the detriment of the consumer, from some specific privacy rule⁷⁹⁹ could certainly be viewed as causing a significant imbalance contrary to good faith (the test from the Unfair Terms Directive). Of course this would require a full assessment of the precise substantive impact of the term in question; and questions as to how transparent the term is.⁸⁰⁰ The OFT certainly agrees with the idea that general rules of law should serve as a benchmark of fairness in the application of the unfairness test in the regime implementing the Unfair Terms Directive.⁸⁰¹

7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

A Case on exclusion of liability for defective software

*St. Albans City and District Council v. International Computers Ltd*⁸⁰² concerned the use of a limitation clause seeking to limit the defendant seller’s liability to £100,000. (An error in the software supplied had led the claimant to suffer a loss of £1,314,846.) Such clauses are subject to the ‘reasonableness test’ under the Unfair Contract Terms Act 1977 (this regime exists alongside the regime implementing the Unfair Terms Directive and applies to business to business transactions such as this as well as business to consumer transactions).

The Court found the limitation clause to be unreasonable, after considering the unequal bargaining strength of the parties, a failure by for the defendant to justify the low limitation figure of £100,000 in comparison to the risk involved, and that the defendants had adequate insurance to cover the full loss and so were better placed to bear the loss.

Clearly, there is likely to be an even higher threshold of fairness in consumer cases; whether under the 1977 Act or the regime implementing the Unfair Terms Directive. In other words clauses likes this are even less likely to be held as reasonable or fair in cases involving private consumers.

⁷⁹⁸ OFT Guidance on Unfair Terms

⁷⁹⁹ E.g. allowing for personal information to be obtained or disclosed contrary to S.55 of the Data Protection Act 1998.

⁸⁰⁰ Transparency is viewed in the UK as a key factor in determining whether there has been a violation of good faith (see Lord Bingham, in particular, in the *First National Bank* case, above, n 50)

⁸⁰¹ See OFT, *Unfair Contract Terms Guidance* (2001) (Introduction), p. 2

⁸⁰² See above, n 4

OFT Practice

The OFT has produced guidance with a list of terms that it considers could be unfair on the basis either of the ‘indicative list’ in Annex 2 of the Unfair Terms in Consumer Regulations 1999 or the general test of unfairness (implementing the Unfair Terms Directive indicative list and general test).

These examples have been selected from cases where OFT took action under the Regulations.”⁸⁰³ Nothing on the OFT’s list of examples (or, of course, the indicative list itself) contains anything exclusive to digital services, but a number of the examples considered to be unfair could be relevant in the digital context. For example-

*“You should know about the laws relating to Wireless Telegraphy and Telecommunications Services.”*⁸⁰⁴ (In a telecommunications contract.)

“The Company reserve the right to suspend provision of service for the duration of any non-payment period and the customer may be liable (at the Company's discretion) to pay a reconnection fee to the Company to recommence subscription services”. (Terms of this nature are common in many different contexts, but in particular can arise in the digital services context.)⁸⁰⁵

*“The Company reserves the right to charge a cancellation fee, the minimum being 30 per cent of the order value, this does not represent a penalty and serves to liquidate the company's costs”.*⁸⁰⁶ (Terms of this nature are common in many different contexts, but in particular can arise in the digital services context.)

7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the indicative list of presumed unfair contract clauses under the proposed Directive on Consumer Protection, but that should be included in the list of (presumed) unfair terms? Has this issue been debated?

(i) The last of the above terms could be covered by para. 1 (e) of the indicative list; which deals with terms requiring consumers who fail to fulfil their obligations to pay a disproportionately high sum in compensation.

However, the first two terms do not really match any of the paragraphs on the indicative list.

(ii) It is also common to find terms restricting the way in which digital services can be used. For example, it is often provided that a game console must be connected to the internet in order to be able to play the game; and that a digital satellite television recorder must be connected to the satellite receiver in order to watch pre-recorded programmes. These sorts of terms do not really match any of the paragraphs on the indicative list; yet they are potentially unfair on application of the general test of unfairness.

⁸⁰³ A1. P.3, Annex.

⁸⁰⁴ Under Group 18(h), P. 127, Unfair contract terms guidance. Annexes, Guidance for the Unfair Terms in Consumer Contracts Regulations 1999. September 2008. OFT311annexes.

⁸⁰⁵ P. 57 Annex, *ibid.*

⁸⁰⁶ p.59, Annex, *ibid.*

8 Failure to function properly

8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc?

[See the discussion at question 2 above for the basis of the analysis to follow].

If a digital 'service' was actually held to be a service, then the question would be whether it had been carried out with 'reasonable care and skill'. Both functional and abstract interests could potentially be relevant here; but we are unaware of any cases in which the issue has arisen. It should also of course be emphasised that even to the extent that abstract interests could be taken into account, so long as 'fault' is avoided, there would be no liability.

If the 'service' was treated as goods or as a sui generis contract, then more 'outcome based' quality and fitness implied terms would apply. Again, both functional and abstract interests could potentially be relevant here; and there would be liability without proof of 'fault'. Again however, we are unaware of any cases in which the issue has arisen.

8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what "normal use" of a service is, e.g.

- the ability to make private copies according to copyright law,**
- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),**
- the suitability of certain contents for minors as stipulated under audiovisual media law,**
- journalistic codes of conducts, etc**

There have not been any cases considering whether these sorts of uses are 'normal' for the purposes of applying implied terms as to quality and fitness for purpose. The issue is likely to turn partly on who the service is aimed at, how it was advertised, marketed etc. These factors would help to shape the expectations of consumers, e.g. in relation to the sorts of factors mentioned in the question. These expectations will play a key role in determining whether the obligations as to quality and fitness for purpose have been met. A particular difficulty may arise in cases where (in relation to legal standards formulated elsewhere) there is a disjuncture between the formal legal position and common practice/reasonable consumer expectations. For example, the UK Copyright Designs and Patents Act 1988 (CDPA) grants very limited rights to copy; so that technically a consumer is in breach if they buy or download music and copy the music to use on a different device. However, industry practice has often been to ignore copying, if the consumer has actually bought a copy of the protected work in question. Now of course copy protection may be physically built in such that the consumer is unable to make any copy. Are the consumer's reasonable expectations as to the normal use of the product to be determined by what he has always been able to do previously in practice; or can he have no complaint given that copying is technically disallowed under the CDPA 1988? It is unclear what a court might say on this matter. It is possible that traders might be expected to provide very prominent warnings in cases where copies cannot physically be made.

8.3 Digital content services, particularly when they are protected by DRM can only be used with compatible consumer equipment. Furthermore, they may require a certain software environment (such as up-to-date version of Windows etc). What this “normal use” is depends on the technical standards that are used. In some European countries there has already been case law saying that CDs that fail to play on different devices (car radio, computers, etc) can be considered as defective products. The question is whether the judges in your country could come to a similar conclusion regarding digital content services, such as downloadable eBooks or music files.

Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software? If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer’s hardware and middleware?

This partly turns on the point made under the last question as to who the product is aimed at, how it is marketed etc. This will help to determine reasonable consumer expectations and whether there is a breach of a standard as to quality or fitness.

A separate angle is whether failure to warn of restricted usability could be considered to be a ‘misleading omission’ under the law implementing the Unfair Commercial Practices Directive.⁸⁰⁷ However, even if this is the case, the law implementing the Directive has not been given private law effects, as yet at least;⁸⁰⁸ and the general law of misrepresentation is not interpreted generally such as to treat omissions as amounting to a misrepresentation.

There is actually a specific proposal from the All Party Parliamentary Internet Group (APIG) to introduce a law requiring that consumers be warned (though labelling) as to restrictions on their use of digital content services.⁸⁰⁹

8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts etc.

The standard consumer remedies apply if the product is for sale or supply of goods; the approach being hierarchical. Based on domestic law, the consumer has an initial “short term right to reject”, so called because it only lasts for a case specific period of ‘reasonable’ time, usually a matter of a few weeks or months.⁸¹⁰ The consumer also has the remedies from the Sales Directive: repair/ replacement; and then price reduction/ rescission.⁸¹¹ These can be exercised instead of the short term right to reject; but will be the only option for the consumer if the short term right to reject has expired. In addition, the buyer may obtain damages for the breach, under pre-existing common law.

⁸⁰⁷ The BIS/OFT guide to the regime implementing the Unfair Commercial Practices Directive does not cite this as possible example of a misleading omission.

⁸⁰⁸ But see above at n 46

⁸⁰⁹ The Report is at: <http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management/DRMreport.pdf>

⁸¹⁰ See for example, *Bernstein v. Pamson Motors (Golders Green) Ltd.* [1987] 2 ALL ER 220; *Clegg v. Andersson* [2003] EWCA Civ 320; *Fiat Auto Financial Services v. Connolly* 2007 SLT (Sh Ct) 111.

⁸¹¹ S. 48 SOGA 1979 & s. 11 SGSA 1982.

If the contract is treated as one for services, or as *sui generis*, the only remedies are damages and termination; but the latter only where the breach is sufficiently serious in the circumstances. (NB here that this is in contrast to breach of the implied terms in goods contracts, where the terms are treated as ‘conditions’ in all cases, meaning that there is always a right to terminate for breach, albeit, as explained immediately above, that this right is only short term).

There are no cases on remedies that are of any particular relevance for digital services.

8.5 For how long after delivery of the digital content service may the consumer invoke a remedy for non-performance of the service does not function properly (anymore)? If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

The general prescription period for breach of contract claims is 6 years (applicable to both buyers and suppliers);⁸¹² and this would apply to a claim for damages or termination for breach of the implied terms as to quality and fitness whether the contract was one for goods, services or was treated as *sui generis*. This same period is also applied by the UK in the case of the repair/replacement/price reduction and rescission remedies from the Sales Directive (taking advantage of the minimum clause in the current Directive).

8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software, and if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

This would depend on how the courts interpreted and applied the ‘durability’ criterion that is relevant to the ‘satisfactory quality’ implied term applicable to goods;⁸¹³ or how ‘reasonable fitness for purpose’⁸¹⁴ was interpreted (the implied term applicable if the contract was treated as *sui generis*); or what was expected in terms of ‘reasonable care and skill’ if the contract was treated as one for services. Clearly these various criteria provide a significant degree of flexibility and we are not aware of any case law that provides specific guidance or examples in the context of digital content services.

8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application’s) identity, geographical address or further details?

- a) the platform operator, or
- b) the third party application service himself?

Should this be done before or after the contract is concluded?

For the purposes of private contract law remedies, the basic question is who the contract is with. This depends on the construction of the contract; in other words whom the reasonable consumer may reasonably believe that they are contracting with.

⁸¹² Limitation Act 1980, ss. 5 and 8

⁸¹³ *Thain v. Anniesland Trade Centre* 1997 SLT 102, Sh Ct.

⁸¹⁴ Business to consumer, *Griffith v. Peter Conway Ltd* (1939) 1 ALL ER 685, c.f. business to business *Slater v. Finning Ltd.* [1997] AC 473.

However, the Unfair Commercial Practices Directive regime regulates the behaviour of all parties involved in “commercial transactions”. This means that the various sorts of parties mentioned in the question could be viewed as having made a misleading omission if they did not give (in an invitation to purchase) the information mentioned in the question.

8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

If the contract is treated as being for goods, the seller or supplier has these obligations; i.e. under the Sales Directive regime. However, as indicated above, if it is a services or sui generis contract, there are no repair or replacement remedies arising as a matter of law; although of course, they could be provided for expressly in the contract or any associated guarantee or warranty, in which case the contract, guarantee or warranty would presumably specify who should do the work.

9 Remedies for non-performance and termination of a long-term contract

9.1 Have- in addition to or in derogation of the remedies in general contract law-specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide examples and references.

We are not aware of any.

9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

There are no remedies specific to digital services. Otherwise (as indicated above) the remedies depend on whether the contract is viewed as one for goods (in which case damages, termination as well as the remedies from the Sales Directive are available); or as one for services or sui generis (in which case only damages and termination).

Of course it is well known that the remedies from the Sales Directive operate in a hierarchical fashion- repair/replacement, followed by price reduction/rescission, under the relevant conditions. UK law allows the consumer to choose between this package of remedies and the right to terminate the contract; although, as indicated above at question 8.4, the right to terminate itself will be lost after a “reasonable period of time”, which tends to be a matter of a month or couple of months at the most.⁸¹⁵

Where the digital content service is held to be a service or sui generis contract and the remedies are therefore restricted to termination and damages, there is a “hierarchy” in the sense, that as indicated above at question 8.4, the termination remedy is only available where the breach is shown to be sufficiently serious.

⁸¹⁵ See for example, *Bernstein v. Pamson Motors (Golders Green) Ltd.* [1987] 2 ALL ER 220; *Clegg v. Andersson* [2003] EWCA Civ 320; *Fiat Auto Financial Services v. Connolly* 2007 SLT (Sh Ct) 111.

9.3 In the case when the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such notice or declaration is required, must it be sent on paper or may it be sent electronically? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

Under any contract, the victim of a breach must indicate clearly an intention to terminate; although there is no form requirement generally. The other party only needs to be given more time if the time for performance has not actually arrived, e.g. if the defective performance has been provided early. So, if the time for performance has arrived and the breach is serious enough to allow for termination⁸¹⁶; then the consumer can terminate without giving time for cure.

Of course, if the right to terminate has run out through lapse of a reasonable time (a few weeks/months) then in sale of goods contracts, the consumer is left with the regime under the Sales Directive. This means that he must go through the repair/replacement tier; and is then only able to move to rescission, subject to the conditions laid down; including the provision as to the repair/replacement not being carried out within a reasonable time. In service or *sui generis* contracts, the Sales Directive based remedies will not apply and a consumer that has lost the right to terminate through lapse of time will only have the right to claim damages.

One possible issue that might arise under any form of contract in relation to a damages claim is as to the duty of the innocent party to 'mitigate' his losses.⁸¹⁷ So, even if the time for performance has arrived and defective performance is tendered, the consumer might be expected to give at least some leeway to supplier to cure if this could be done reasonably easily; otherwise any claim for damages might be affected by the failure of the consumer to mitigate his losses.

9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undermined period? If so, does the consumer have to observe a reasonable notice period? What are the consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?

If the contract is not of a fixed term nature, but is open-ended, and there is no express notice period in the contract, then the consumer is able to terminate by giving reasonable notice. This period of time will be case-specific depending on the circumstances. Often there is express provision in the contract; one month being typical.

If the contract is for a fixed term and the consumer wishes to terminate before the end of this period, then it may be that the contract provides that the consumer must nevertheless pay the

⁸¹⁶ As indicated above, a breach of the implied terms in goods contracts is always treated as being a serious enough breach to allow termination; while in service and *sui generis* contracts, the issue is one for assessment on the facts

⁸¹⁷ *British Westinghouse Electric and Manufacturing Co v Underground Electric Rly Co* [1912] AC 673, HL

full value of any products transferred, such as satellite TV receiving equipment; and the remaining periodic fees. The general legal starting point is that such a provision would be enforceable, and the consumer would be required to make the payments in question. However, there may be some scope to argue in relation to the fairness of such terms under the regime implementing the Unfair Terms Directive; although this also raises difficult questions as to which charges can be said to be excluded from review as core “price” terms under Article 4(2).⁸¹⁸

9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

This depends on whether the other services are provided for under different contracts. If they are all included under one contract then the entire contract will be terminated. If not, then only the contract terminated will be ended.

10 After sales services

10.1 Is the consumer entitled to “after sales services” to remedy existing bugs in the software- assuming such a bug would not constitute a non-performance of the provider of the digital content service- or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

There is no legal right to after sales service; apart from what is provided for expressly in the contract or in any associated guarantee or extended warranty.⁸¹⁹ It is in such express provisions of particular contracts that we would find conditions relating to how long (and in what form) after sales services will be available; and what if any charge there is.

Briefly in relation to charges, it is worth noting that manufacturers guarantees tend to come with most of these products, at no extra charge. There is however a charge for so called “extended warranties” that are sold by retailers

10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

The consumer will have a personal action against the supplier for breach of contract, but they will be classified as an unsecured creditor and so are extremely unlikely to obtain damages (coming, as they will, below the tax authorities, employees of the insolvent trader and secured creditors such as banks etc in the ranking).

10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service has become obsolete or

⁸¹⁸ See the discussion above at question 7.1

⁸¹⁹ Obviously, if there is actually a breach, and the contract is one for goods, then the repair and replacement remedies from the Sales Directive will apply; but we are not treating these remedies as such as ‘after sales service’.

discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

As indicated previously, depending on how the particular transaction is construed, the relevant legal standard could be one requiring the service to reach a reasonable level of quality and fitness for purpose; or it could be one requiring exercise of reasonable care and skill. It would be possible to argue that either of these standards requires the provision of conversion software in the circumstances as described in the question. However we are not aware of any case that has tested the point.

11 Unfair commercial practices

11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract of the relevant restriction as regards to the use of the service? (Please provide any case-law.)

a) The use of incompatible standards to prevent users from switching to other services or hardware.

This might be an aggressive practice under Reg. 7 of the regime implementing the Unfair Commercial Practices Directive;⁸²⁰ to the extent that it restricts the freedom of choice of the consumer and coerces him into deciding to stay with the supplier in question. (There is an aggressive practice under reg 7 where harassment, coercion or undue influence significantly impair the consumer's freedom of choice and the actual or likely result is that the consumer takes a transactional decision different from what he would otherwise have taken). Note, in particular, the guidance on aggressive practices referring to:

“Any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or switch to another product or trader.”(reg 7 (2) (d))

b) Behavioural advertising, or other forms of on-line advertising and marketing (viral marketing, surreptitious advertising, spam, etc.)

(Also see Q4.2 above on spam and behavioural advertising.)

Behavioural Advertising

⁸²⁰ The Consumer Protection from Unfair Trading Regulations 2008, S.I. 2008, No. 1277: <http://www.legislation.gov.uk/ukxi/2008/1277/contents/made>, Implementing the Unfair Commercial Practices Directive (UCPD) 2005/29/EC; See Guidance on The Consumer Protection from Unfair Trading Regulations 2008, http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

There is a self-regulatory regime for behavioural advertising, operated by Internet Advertising Bureau (IAB).⁸²¹ This scheme requires that consumers must be warned by websites that their data will be collected, stored and used for behavioural advertising; and that this warning must involve information as to the procedure for the consumer to follow to decline the use of their data in this way. This probably satisfies the “consent” requirement under the Data Protection Act (DPA), which applies where personal information is concerned.⁸²²

However, first of all, the notification may be hidden in a privacy policy (and so not read by the majority of customers). Secondly, even if the information is read, consumers will not necessarily go to the trouble of opting out. It might therefore be arguable that practices following this (“opt out”) approach will often not really genuinely inform the average consumer to a sufficient degree that there is a realistic possibility of them choosing to opt out. As such it could be argued that this opt out approach represents a misleading omission under reg 6 of the regime implementing the Unfair Commercial Practices Directive; in that the information as to how to opt out is not really likely to enable the average consumer to make an informed decision. There is no clear view on this particular point from regulators. However, the issue of behavioural advertising and the appropriate approach to the “consent” issue is under intense scrutiny by the ICO, the OFT and Apcomms;⁸²³ and the view has been expressed that it would be more appropriate only to allow processing of personal data in the basis of an express “opt in” approach.⁸²⁴ In case industry action proves ineffective, the OFT and the ICO are seeking to agree a Memorandum of Understanding to establish in which circumstances the ICO, or the OFT, would take enforcement action.⁸²⁵

Spam

The Privacy and Electronic Communications Directive⁸²⁶ starts from the position that spam is not permitted, unless the consumer “opts in”, i.e. gives positive consent to receiving such communications. However, the Directive allows Member States to permit such communications (even where there has been no positive “opt in”) in cases where there has been a prior sale or negotiations for supply of similar goods or services, between the parties. In such cases (which will surely be very common), Member States are permitted to require simply that the consumer should be informed of the opportunity to “opt out”, i.e. to indicate positively that they do *not* wish to receive such solicitations. The UK takes this approach under the regime implementing the Directive.⁸²⁷

On the one hand, as in the case of behavioural advertising, it might be suggested that such an approach will often not be particularly transparent to the average consumer. At the same

⁸²¹ <http://www.iabuk.net/> The Code is at: <http://www.youronlinechoices.com/wp-content/uploads/2010/07/IAB-UK-Good-Practice-Principles-for-Online-Behavioural-Advertising.pdf> with discussion at: <http://www.youronlinechoices.co.uk/>

⁸²² See Data Protection Act 1998, particularly the principles in Schs. 1-3.

⁸²³ The All Party Parliamentary Communications Group of MPs (Apcomms). “Can we keep our hands off the net?” Report of an Inquiry by the All Party Parliamentary Communications Group October 2009: http://www.apcomms.org.uk/uploads/apComms_Final_Report.pdf

⁸²⁴ See in particular, The All Party Parliamentary Communications Group of MPs (Apcomms). “Can we keep our hands off the net?” Report of an Inquiry by the All Party Parliamentary Communications Group October 2009: http://www.apcomms.org.uk/uploads/apComms_Final_Report.pdf

⁸²⁵ <http://www.ofg.gov.uk/news-and-updates/press/2010/53-10>

⁸²⁶ Directive 2002/58.

⁸²⁷ The Privacy and Electronic Communications (EC Directive) Regulations 2003, S.I. 2003, no. 2426.

time, spam may be likely not to be taken very seriously in most cases; its impact mostly being in terms of nuisance value. This way of thinking might be likely to inform the approach to interpretation of the regime implementing the Unfair Commercial Practices Directive. The Annex of blacklisted practices from the Unfair Commercial Practices Directive refers to-

“Making persistent and unwanted solicitations by telephone, fax, e-mail, or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.”⁸²⁸

Our point is that in the UK (following the logic of the approach taken to the Privacy and Electronic Communications Directive, and given the likely assumption that spam is a *relatively* innocuous nuisance), where there has been a prior sale or negotiations for supply of similar goods or services, between the parties, solicitations will probably not be viewed as “unwanted” so long as the consumer has been informed of the opportunity to “opt out”, i.e. to indicate positively that they do *not* wish to receive such solicitations.

c) The use of DRM to prevent unauthorised use.

d) The use of DRM to restrict use to a certain region or country.

One important piece of context here is that the Digital Economy Act 2010⁸²⁹ significantly extends the powers of rights holders in terms of the monitoring and blocking of on-line infringements. However this Act does not deal with the aspects of digital rights management which physically prevent certain actions, such as copying or using in another country. We have already dealt with the possibility that failure to inform the consumer of the existence of this form of DRM could amount to a misleading omission under the regime implementing the Unfair Commercial Practices Directive; and that there is a proposal to introduce specific labelling regulations⁸³⁰ (Also see Q8.3 above).

e) The collection of personal data for marketing purposes or through spyware.

We have already seen above (Q 11 1.b) that where personal data is processed, the UK self-regulatory (and possibly the DPA) approach is based on an “opt out” system; but that a case could be made that a more transparent opt-in system is required. We take it that the reference to spyware implies that the consumer has not been given notice in any form (through an “opt in” or “opt out” system). This would clearly be a breach of the DPA and the self-regulatory codes.

f) The collection of sensitive personal data after the termination of the contract &

g) The gathering, processing or selling of sensitive personal data after termination of the contract.

The DPA requires *explicit* prior consent to the collection and processing of *sensitive* personal data; except under very specific circumstances, e.g. when the processing is required for legal reasons.⁸³¹ Often, in practice, these conditions will not be met after the termination of the contract.

⁸²⁸ Sch. 1 practice 26 of the CPRs

⁸²⁹ <http://www.legislation.gov.uk/ukpga/2010/24/contents>

⁸³⁰ <http://www.apcomms.org.uk/apig/current-activities/apig-inquiry-into-digital-rights-management.html>

⁸³¹ S. 4, sch. 2 and Sch. 3, s. 2(1) DPA 1998.

h) The use of default options to entice consumers to the purchase of additional services.

Obviously there is the potential for a misleading omission here. The average consumer might not realise that they may have to opt out, and/or how to opt out. So if this is not clear enough then there may be a misleading omission under the regime implementing the Unfair Commercial Practices Directive.

i) The marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors.

Even when content is not harmful, banned practice 28 in Schedule 1 of the CPRs covers practices- “Including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.” This provision is also contained in the Code of Advertising Practice (CAP) Code.⁸³²

The CAP Code also contains specific provisions on advertising that might be harmful to minors-

“5.1 Marketing communications addressed to, targeted directly at or featuring children must contain nothing that is likely to result in their physical, mental or moral harm:

5.1.1

children must not be encouraged to enter strange places or talk to strangers

5.1.2

children must not be shown in hazardous situations or behaving dangerously except to promote safety. Children must not be shown unattended in street scenes unless they are old enough to take responsibility for their own safety. Pedestrians and cyclists must be seen to observe the Highway Code

5.1.3

children must not be shown using or in close proximity to dangerous substances or equipment without direct adult supervision

5.1.4

children must not be encouraged to copy practices that might be unsafe for a child

5.1.5

distance selling marketers must take care when using youth media not to promote products that are unsuitable for children”⁸³³

Violation of these standards will represent an unfair commercial practice under the regime implementing the Unfair Commercial Practices Directive. This is because it is provided that there is an unfair commercial practice where there has been failure to honour commitments made in a code of conduct.⁸³⁴

j) Sponsorship or commission arrangements on price comparison websites without clear notification to consumers.

⁸³² Part 5 4.2, CAP Code.

⁸³³ Part 5, CAP Code: http://bcap.org.uk/The-Codes/CAP-Code/CAP-Code-Item.aspx?q=CAP+Code+new_General+Sections_05+Children_Rules_Harm

⁸³⁴ Regs. 5 & 6 of The Consumer Protection from Unfair Trading Regulations 2008.

This may be a misleading omission under the regime implementing the Unfair Commercial Practices Directive. A consumer may see a price comparison website as offering an independent price comparison; but may not trust a website which is taking a commission. As a result this is information that is needed by the consumer in order to take an informed decision as to whether to use the site.

11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

We are not aware of any.

11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of-

- **is the contract void ab initio on the basis of a statutory provision;**
- **the consumer may annul the contract on the basis of a specific statutory provision;**
- **the consumer may apply general contract law remedies such as avoidance or adaptation of the contract for mistake or abuse of circumstances;**
- **the consumer may terminate the contract without having to compensate the trader for the loss of profit; and**
- **the consumer may claim reduction of the contract price?**

As indicated above, there is no current right of action in private law for a breach of the standards in the regime implementing the Unfair Commercial Practices Directive.

However, under pre-existing private law, the consumer may have several options. First, they may have an action under misrepresentation. This will apply if the unfair commercial practice amounts to a misrepresentation of fact, which has induced them into the contract.⁸³⁵ The remedies are rescission (i.e. the contract is voidable, not void) and damages. Further, an aggressive commercial practice may amount to undue influence or duress in private law. In either case the only remedy is rescission.

One problem is that these pre-existing private law concepts may often not be as broad and protective as the concepts in Unfair Commercial Practices Directive, e.g. an omission is not usually a misrepresentation in UK private law and the concept of undue influence from the Unfair Commercial Practices Directive is probably broader than that in UK private law.⁸³⁶ Another problem is that there is no damages claim for undue influence and duress. As indicated above, the question of private law remedies for unfair commercial practices is under review.⁸³⁷

11.4 To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

⁸³⁵ For example, *Edgington v. Fitzmaurice* (1885) 29 ChD 459.

⁸³⁶ See discussion in C. Willett, Fairness and Consumer Decision Making under the Unfair Commercial Practices Directive, *Journal of Consumer Policy* (2010) 33: 247-273

⁸³⁷ See above n 46

The above discussion takes account of both the UK domestic/ sector specific rules; the regime implementing the Unfair Commercial Practices Directive; and the interaction between these.

12 Minors and other vulnerable consumers

12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

Above we outlined the self regulatory rules on direct exhortation to children and harmful content. The Code contains a number of other rules. First of all, for the purposes of the Code, a child is someone under 16. The Code operates on the basis of the general principle that the “way in which children perceive and react to marketing communications is influenced by their age, experience and the context in which the message is delivered.”⁸³⁸ More specifically, there are sections on “credulity and unfair pressure” and “promotions”.⁸³⁹ These are as follows:

“Credulity and Unfair Pressure 5.2

Marketing communications addressed to, targeted directly at or featuring children must not exploit their credulity, loyalty, vulnerability or lack of experience:

5.2.1 children must not be made to feel inferior or unpopular for not buying the advertised product

5.2.2 children must not be made to feel that they are lacking in courage, duty or loyalty if they do not buy or do not encourage others to buy a product

5.2.3 it must be made easy for children to judge the size, characteristics and performance of advertised products and to distinguish between real-life situations and fantasy

5.2.4 adult permission must be obtained before children are committed to buying complex or costly products

5.3 Marketing communications addressed to or targeted directly at children:

5.3.1 must not exaggerate what is attainable by an ordinary child using the product being marketed

5.3.2 must not exploit children’s susceptibility

Promotions

5.6 Promotions addressed to or targeted directly at children:

5.6.1 must make clear that adult permission is required if a prize or an incentive might cause conflict between a child’s desire and a parent’s, or other adult’s, authority

5.6.2 must contain a prominent closing date if applicable (see rule 8.17.4)

5.6.3 must not exaggerate the value of a prize or the chances of winning it.

5.7 Promotions that require a purchase to participate and include a direct

⁸³⁸ Part 5, Principle section, CAP Code: http://bcap.org.uk/The-Codes/CAP-Code/CAP-Code-Item.aspx?q=CAP%20Code%20new_General%20Sections_05%20Children#c163

⁸³⁹ Part5, CAP Code.

It is also an offence to send circulars to minors soliciting them to borrow money, obtain goods on credit or hire, obtain services on credit or apply for information or advice on borrowing money or otherwise obtaining credit or hiring goods. However, a defendant may claim in defence that he did not know and had no reasonable way of knowing that the party concerned was a minor.⁸⁴⁰ This may be of interest here as minors might masquerade as adults on-line, and it might not be easy for suppliers to determine their age until payment is tendered, unless they use age verification software. (See Q12.7 later.)

12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the State) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

If the activity is in breach of the regime implementing the Unfair Commercial Practices Directive then, as stated above at question 4, this is a criminal offence and there can be an enforcement order to prevent the practice continuing.

Also as indicated above, a breach of this regime does not in itself give rise to a private law claim. The general private law approach is to allow rescission of certain contracts considered to be unacceptable to make with minors;⁸⁴¹ but not to allow for damages. If no contract has resulted at all, any damage suffered is also likely not to be compensated.

12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?

&

12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

Trade Practices Law

In question 11 above, we have already set out the position in trade practices law applicable to minors (i.e. under the relevant self regulatory code and the regime implementing the Unfair Commercial Practices Directive). The self regulatory code does not deal with the issue of the “form” of information to minors in any systematic way. Nevertheless, there are provisions that emphasise that, where closing dates are applicable, they must be “prominent”.⁸⁴² In addition, it is stated that advertisers must not “exaggerate” the value of any prize or the chances of winning it.⁸⁴³

⁸⁴⁰ S. 50 (1 & 2) Consumer Credit Act 1974.

⁸⁴¹ See further below at discussion of ‘Vitiating Factors in Contract Law’

⁸⁴² Part 5.6.2. CAP Code.

⁸⁴³ Part 5.6.3 CAP Code.

Of course the regime implementing the Commercial Practices Directive contains the provisions requiring that the concepts in the Directive should, where appropriate, be understood by reference to the particular circumstances of vulnerable consumers. So if the trader could reasonably foresee that particular types of consumer are (based on their mental or physical infirmity, age or credulity) likely to be particularly vulnerable to a given practice, or if the practice is directed specifically at a group of consumers especially likely to be influenced by it; then the impact of the practice is to be judged by reference to the average member of the group in question.⁸⁴⁴

Clearly it is conceivable that all of the groups mentioned in the question could be protected in different circumstances by this particular approach to the unfair commercial practices concept; i.e. practices that would be considered to be fair when dealing with the average consumer in general, might not be considered to be fair when dealing with members of these particular vulnerable groups.

In terms of understanding the likely UK approach to these issues, it may be useful to cite the guide on the implementing regulations issued by BERR/OFT.⁸⁴⁵ For ease of reference, we are highlighting this excerpt from the guide in colour.

“Average member of a vulnerable group of consumers” (Type 1)

“14.35 Where a ‘clearly identifiable group of consumers is particularly vulnerable to the practice or to the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee’ and ‘where the practice is likely to materially distort the economic behaviour of only that group’; then it is the average member of that group that is the relevant average consumer. This does not apply if the ‘particular vulnerability of the group arises only from the commercial practice being the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.’

14.36 This offers protection to consumers who may be particularly vulnerable either to a commercial practice or to the underlying product and whose economic behaviour may, as a result of the commercial practice in question, be distorted. A commercial practice will be assessed from the perspective of an average member of that group whose vulnerability the trader could reasonably be expected to foresee. The test is objective. It is not necessary that the trader actually foresees the effect (or likely effect) on vulnerable consumers, only that he could reasonably have been expected to do so.

14.37 Consumers are only (within the meaning of the CPRs) treated as vulnerable, to a practice or to the underlying product, if they are vulnerable because of infirmity, age or credulity:

- *infirmity (mental or physical)*: this covers a range of infirmities including sensory impairment, limited mobility and other disabilities. For example, consumers who need to use wheelchairs might be a vulnerable group in relation to advertising claims about ease of access to a holiday destination or entertainment venue, or those with a hearing impairment may be a particularly vulnerable group in relation to advertising claims about ‘hearing aid compatibility’ in a telephone advertisement.

⁸⁴⁴ Consumer Protection from Unfair Trading Regulations 2008, regs 2 (3)-(5)

⁸⁴⁵ Available at: http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

- *age*: it may be appropriate to consider a practice from the perspective of an older or younger consumer. For example, the elderly might be particularly vulnerable to certain practices connected with burglar alarm sales, or children might be particularly vulnerable to advertisements relating to toys shown on daytime television.

- *credulity*: this covers groups of consumers who may more readily believe specific claims. The term is neutral, so the effect is to protect members of a group who are for any reason open to be influenced by certain claims. An instance might be members of a group who, because of a particular misfortune, might believe certain claims more readily than others.”⁸⁴⁶

“Average member of a targeted group of consumers (Type 2)

14.34 The **average targeted consumer** will be relevant where a **commercial practice** is directed to a particular group of **consumers**. If a practice is targeted like this then it is the **average member** of that group and that member’s characteristics which are relevant. Indications of whether a group is targeted might be found in the way advertising is placed, the language of a commercial communication, the nature of the **product** and the context. Examples are:

- *television advertisements during children’s programmes may be directed at children (and/or their parents)*

- *advertisements for a particular type of credit **product** may be directed at ‘non-status’ or ‘sub-prime’ borrowers*

- *the sale of a **product** related to a certain disability may be directed at **consumers** who are vulnerable because of that disability.”⁸⁴⁷*

Vitiating Factors in Contract Law

We have already noted that the UK has not yet given private law effects to the concepts of unfairness from the Unfair Commercial Practices Directive. As such, the rules as to how vulnerable consumers are treated in contract law are contained in pre-existing domestic contract law.

As to this domestic contract law, the age, disability or other vulnerabilities of the consumer could certainly have an impact on the interpretation of various doctrines. First of all, contracts can be set aside on the basis of such doctrines as undue influence, duress and unconscionability. There is no space here to explain these doctrines in detail. However, there is no doubt that, under appropriate circumstances, a party would often be more likely to succeed in pleading one of these doctrines where they suffered from a disability or other vulnerability or where youth or senility caused them to be more vulnerable.⁸⁴⁸ It is also possible that, in assessing the fairness of terms in the regime implementing the Unfair Terms Directive, account could be taken of the vulnerabilities of categories of consumers that the term in question affects.⁸⁴⁹

⁸⁴⁶ P 68-70 *ibid*, Guidance.

⁸⁴⁷ Para. 14.34 p. 69, in the Guidance, available at: http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft1008.pdf

⁸⁴⁸ See the discussion in D. Capper, Protection of the Vulnerable in Financial Transactions-what the common law vitiating factors can do for you, in M. Kenny, J. Devenney and L. Fox-Mahoney, Unconscionability in European Private Financial Transactions, 2010, Cambridge University Press, 166-183

⁸⁴⁹ See the discussion in C. Willett, Fairness in Consumer Contracts, 2007, Ashgate, 311-320, 344-351, 356-8 and 361-3.

Aside from these general doctrines, any contract with a minor is voidable, unless the contract is for necessities,⁸⁵⁰ (those under the age of 18); and if the contract *is* set aside, the supplier may have an action in restitution, for the return of any product supplied.⁸⁵¹ However, the contract will be enforceable if the minor does not repudiate the contract before reaching the age of 18, or the minor ratifies the contract upon reaching 18.

The Mental Capacity Act 2005 (MCA) provides that a party lacks the capacity to contract if he is “unable to make a decision for himself in relation to the matter” at the time the contract is made; whether or not the mental impairment is permanent or temporary.⁸⁵²

Impairment is defined in terms of the ability:

“(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).”⁸⁵³

Standards of Service in Contract Law

We have explained above how there is the possibility, depending on the particular contract, of implied terms as to quality, reasonable fitness for purpose and the exercise of reasonable care and skill. (See question 2 above.) Although these are objective standards, they can, where appropriate, be applied in the context of the supplier’s knowledge as to the particular circumstances of the consumer. In other words, where suppliers of digital services are aware of particular needs or vulnerabilities of customers, affecting their ability to use their service, this could conceivably influence the application of the implied terms in question.

12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature- e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

See above on the possibility of a restitutionary claim in these circumstances.

12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organisational measures to ascertain the ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?

No, and this has been subject to criticism. For example, children’s charity NCH conducted a study involving a 16 year old girl, who was asked to try and create on-line gambling accounts with 37 UK based websites, using a Solo debit card (which some banks give out to under 18’s). Claiming that she was actually 21, not 16, she was able to create accounts and gamble with 30 of the websites.⁸⁵⁴

⁸⁵⁰ S. 3 (2 & 3) SOGA & The Minors’ Contracts Act 1987, and digital services are highly unlikely to amount to necessities.

⁸⁵¹ S. 3 Minors’ Contract Act 1987.

⁸⁵² Mental Capacity Act 2005, s. 2.

⁸⁵³ S. 3 (1) Mental Capacity Act 2005.

⁸⁵⁴ <http://news.bbc.co.uk/1/hi/uk/3927645.stm>

13 Towards a model ‘digital consumer law’

13.1 Are there any on-going initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

-Report commissioned by Department of Business, Innovation and Skills, Consumer Rights in Digital Products, Professor Robert Bradgate, September 2010. (Not yet published.)

-OFT consultation on E-Consumer Protection Consultation - Promoting Business Compliance.⁸⁵⁵

-Behavioural advertising is continuing to be monitored by the OFT/ICO & ASA (see question 4 above).

13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

We are not aware of anything.

13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

Clearly there is a market for sensitive personal data. As indicated above in question 8.2, explicit consent is needed for any processing (including the sale of) sensitive personal data.

13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

In broad terms the answers to the above questions have tended to show that either the same or broadly similar types of rules are applicable whether or not the contract is one for digital content services or not. As such, although there may of course be particular exceptions in relation to some of the items mentioned below, we feel that the most appropriate response is to check the same/similar protection boxes in all cases. Obviously, a quite separate question is as to whether specialised, better or at least clearer protection is needed in some cases.

⁸⁵⁵ <http://www.offt.gov.uk/OFTwork/consultations/current/eprotection/econsumerprotection-business>

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	x	• ... • ...	..
Film or music on a website (streaming)	x	• ... •	..
Downloaded films or music	x		..
Games on a CD or DVD*	x		..
Games on the Internet	x		..
Downloaded games	x		..
User created content (UCC) ⁸⁵⁶ on a CD or DVD*	x		..
UCC on a website	x		..
Downloaded UCC	x		..
Personalisation services ⁸⁵⁷ on the Internet	x		..

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁸⁵⁶ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

Downloaded personalisation services	..	..	x		..
Software-as-a-Service on a website ⁸⁵⁸	..	..	x		..
Downloaded software ⁸⁵⁹	..	..	x		..
Software on a CD or DVD*	..	..	x		..
Communication through a website ⁸⁶⁰	..	..	x		..
E-learning services on the internet ⁸⁶¹	..	..	x		..
Downloaded e-learning services	..	..	x		..
E-learning service on a CD or DVD*	..	..	x		..

Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made? Please indicate this in the table below.

With reference to “updates”, please note the position as described under question 10 above. In particular, note that the “yes” answers given below are very much subject to the construction of the main contract and any associated warranties and guarantees.

⁸⁵⁷ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

⁸⁵⁸ E.g. image editing, photoshopping, automatic translation services.

⁸⁵⁹ E.g. anti-virus programs.

⁸⁶⁰ E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

⁸⁶¹ E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	“Y	“Y	“N	“N	“Y	“Y	“Y	• ... • ...
‘Free’ film or music on a website (streaming)	“No obligation if no consideration. Otherwise YES	“NO obligation if no consideration. Otherwise YES	“N	“N	“Y	“Y	“NO obligation if no consideration. Otherwise YES	• ... • ...
Paid film or music on a website (streaming) ⁸⁶²	“Y	“Y	“N	“N	“Y	“Y	“Y	
‘Free’ downloaded films or music	“No obligation if no consideration. Otherwise	“NO obligation if no consideration. Otherwise	“N	“N	“Y	“Y	“NO obligation if no consideration. Otherwise	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁸⁶² E.g. video on demand services.

	YES	e YES					YES	
Paid downloaded film or music	Y	Y	N	N	Y	Y	Y	
Paid games on a CD or DVD*	Y	Y	N	N	Y	Y	Y	
'Free' games on a website	No obligation if no consideration. Otherwise YES	NO obligation if no consideration. Otherwise YES	N	N	Y	Y	NO obligation if no consideration. Otherwise YES	
Paid games on a website	Y	Y	N	N	Y	Y	Y	
'Free' downloaded games	No obligation if no consideration. Otherwise YES	NO obligation if no consideration. Otherwise YES	N	N	Y	Y	NO obligation if no consideration. Otherwise YES	
Paid downloaded games	Y	Y	N	N	Y	Y	Y	
Paid User created	No obligation	Y	N	N	Y	Y	Y	

content (UCC) ⁸⁶³ on a CD or DVD*	if no consideration. Otherwise YES							
'Free' UCC ⁸⁶⁴	No obligation if no consideration. Otherwise YES	NO obligation if no consideration. Otherwise YES	" N	" N	" Y	" Y	NO obligation if no consideration. Otherwise YES	
Paid UCC	" Y	" Y	" N	" N	" Y	" Y	" Y	
'Free' personalisation services ⁸⁶⁵	No obligation if no consideration. Otherwise YES	NO obligation if no consideration. Otherwise YES	" N	" N	" Y	" Y	NO obligation if no consideration. Otherwise YES	
Paid personalisation services	" Y	" Y	" N	" N	" Y	" Y	" Y	
Paid software on	" Y	" Y	" Y Back-	" N	" Y	" Y	" Y	

⁸⁶³ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁸⁶⁴ E.g. video sharing websites, such as YouTube.

⁸⁶⁵ E.g. ringtones and Apps for mobile phones.

a CD or DVD* ⁸⁶⁶			up copy					
'Free' downloaded software ⁸⁶⁷	" No obligation if no consideration. Otherwise YES	" NO obligation if no consideration. Otherwise YES	" Y Back-up copy	" N	" Y	" Y	" NO obligation if no consideration. Otherwise YES	
Paid downloaded software	" Y	" Y	" Y Back-up copy	" N	" Y	" Y	" Y	
'Free' software-as-a-service on a website ⁸⁶⁸	" No obligation if no consideration. Otherwise YES	" NO obligation if no consideration. Otherwise YES	" N	" N	" Y	" Y	" NO obligation if no consideration. Otherwise YES	
Paid software-as-a-service on a website	" Y	" Y	" N	" N	" Y	" Y	" Y	
'Free' communication	" No obligation	" NO obligation	" N	" N	" Y	" Y	" NO obligation if	

⁸⁶⁶ E.g., anti-virus programmes, Office, etc.

⁸⁶⁷ E.g. anti-virus programmes.

⁸⁶⁸ E.g. image editing, photoshopping etc..

on services ⁸⁶⁹	if no consideration. Otherwise YES	n if no consideration. Otherwise YES					no consideration. Otherwise YES	
Paid communication	“ Y	“ Y	“ Depend s on context	“ N	“ Y	“ Y	“ Y	
Paid e-learning service on a CD or DVD* ⁸⁷⁰	“ Y	“ Y	“ N	“ N	“ Y	“ Y	“ Y	
‘Free’ downloaded e-learning services	“ No obligation if no consideration. Otherwise YES	“ NO obligation if no consideration. Otherwise YES	“ N	“ N	“ Y	“ Y	“ NO obligation if no consideration. Otherwise YES	
Paid downloaded e-learning services	“ Y	“ Y	“ N	“ N	“ Y	“ Y	“ Y	
‘Free’ e-learning service on the internet	“ NO obligation if no consideration.	“ NO obligation if no consideration.	“ N	“ N	“ Y	“ Y	“ NO obligation if no consideration.	

⁸⁶⁹ E.g. social networking, such as Facebook, and e-mail services.

⁸⁷⁰ E.g. an online language course.

	Otherwise YES	Otherwis e YES					Otherwise YES	
Paid e-learning service on a the internet	" Y	" Y	" N	" N	" Y	" Y	" Y	

UNITED STATES

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A preliminary comment on terminology and scope.

The law in the United States concerning digital products (good and services) is not unified, clear, or well developed. Nonetheless, it is vast and scattered through statutes and case law at the federal level and in the 50 states. It would take a multi-volume treatise to describe this body of law with reasonable completeness and accuracy. Furthermore, for most issues, there are arguments rather than answers and little binding authority. Federal diversity cases (cases involving parties from two different US states) and cases from another jurisdiction have persuasive, not binding, authority. Also, common law cases not involving digital products can be used as authority, so there is always some authority, even though only by sometimes strong and sometimes weak analogy.

This country report on Digital Content Services for Consumers (DCSC) in the US is thus only an introduction and will focus on cataloguing the major applicable federal statutes, uniform state laws, and state consumer protection laws, as well as two principles projects that focus on aspects of the law of digital products.

Terminology as well as proper scope of any law or law reform effort are much contested in the US. The phrase “digital content services,” used in the CSECL-IViR project on DCSC on behalf of the Executive Agency for Health and Consumers (“the DCSC project”), is not a phrase that is generally used in the US, at least not in the same way. In the US, there is reference to support services for software, but transactions to allow access to software and digital content such as movies, music, and facts over the Internet through computers and mobile phones would more frequently be called “access contracts” and not service contracts. See Uniform Computer Information Transactions Act (UCITA), section 102(a)(1), and American Law Institute, Principles of the Law of Software Contracts (ALI Principles), section 1.01(a). The terminology of “access contracts” reflects an idea that these contracts involve access to digital products. These contracts are not thought of as particularly involving services in the way American law often uses the term services, referring to human labor. On the other hand, there is another usage of the term “services,” which is refer to utility services and this usage may be more apt to some DCSC.

In the US, two main scope issues concerning various DCSC laws are whether to distinguish software (computer programs), on the one hand, from digital art and data, on the other, and also whether to distinguish products accessed or downloaded online as opposed to delivered on hardware such as a computer or a disk. See the complex scope provisions of UCITA, section 103, and the ALI Principles, sections 1.06-1.08. Software is sometimes distinguished from digital content, including digital art (expression) such as movies, e-books and music and digital databases of factual information, on the basis that software is a functional product used to manipulate content, including expressive material and factual information. Software is not usually thought of as content in the US. The ALI Principles, for example, cover software but not

digital content, which includes digital art or digital data, although the project invites application by analogy to digital art and data. See the ALI Principles at p. 15. UCITA covers informational content in electronic form as well as computer programs, but it distinguishes content from computer programs. See section 101(a)(10), (12), and (35).

Furthermore, there is a tendency in the US to view digital products (software and also movies, music and books in electronic form) as goods more than services, although with some thought that digital products might be *sui generis*. Use of the word “services” is not common, except for ancillary support services such as telephone help lines; instead, reference is made to digital products, digital information, computer information, or software contracts, and these are overlapping terms with shifting and unclear meanings. The term “computer information,” used in UCITA, is considered problematic by experts in intellectual property law because it seems to conflate digital expression, including software and digital art, that gets US Copyright protection and digital data, because pure information is not copyrightable under US law. Thus, even within the category of “digital content,” there is another fraught distinction—expression versus facts, with the latter not protected by copyright law although perhaps protectable from copying by using contract terms.

The word “services” is avoided for software because of the particular nature of the distinction in US law between goods and services. Transactions in goods are covered by Article 2 of the Uniform Commercial Code, which is often used as a source of law for digital products such as software. Software may be delivered loaded on hard media such as disks, computers or other equipment, or it may be downloaded over the Internet. It may also be accessed over the Internet without permanent downloading, using random access memory. The common law of contract governs service transactions, and performance standards for services—which contemplate the imperfections of humans services—are lower than for goods, although in other ways the common law may produce the same results as UCC Article 2 (for example when it comes to whether a contract was formed). UCC Article 2 is used for digital products, particularly software, because it works reasonably well for many issues, such as contract formation, performance standards, warranties, and damage remedies. In the case of state consumer protection statutes, they frequently have broad scope and there is no reason to decide whether goods, services, neither, or both are involved, for example when a statute covers trade or commerce.

In sum, this country report sets forth sources of law applicable to transactions in software and digital content including movies, music and factual information, which the DCSC project puts under one umbrella term, “digital content services,” a term that would not typically be used in that way in the US.

1. Introduction

Major sources of law applicable to digital content in the US.

Given the US federal system (involving national statutes passed by Congress, state statutes passed by the state legislatures, case law under either federal or state statutes, and state common law, meaning judge-made law without benefit of a legislative enactment), it is extremely

complex to describe US law concerning digital content. Federal law is supreme over state law and can preempt state law, but US preemption doctrine tends to allow the two levels of law to co-exist absent express preemption or implied preemption, because of conflict between federal and state law.

At the state level, common law governs obligations absent displacement by state statutes, and usually statutory law—such as UCC Article 2—does not displace common law but rather is supplemented by it. See UCC Article 2, section 1-103(b) (“Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.”). Thus, the common law of contracts is an important source of law for DCSC in general as well as of consumer protection, for example under the doctrine of unconscionability, which is also recognized in UCC Article 2, section 2-302. Tort law, such as the law of fraud, can also supplement statutory law. Even though unconscionability is a feature of Article 2 as well as of the common law, it is interpreted differently in the 50 states, so it is hard to generalize about what terms this doctrine will make unenforceable. Also, unconscionability is a flexible doctrine that often depends on the procedures used to enter into transactions as well as the substance of them, so there is a great deal of uncertainty in application. Attention to both procedure and substance also make the law expensive to invoke.

Another important point is that state contract law and UCC Article 2 do not provide for recovery of attorneys’ fees, and damage remedies are limited by principles of compensation, avoidable loss, foreseeability and reasonable certainty, so use of Article 2 or the common law in consumer transactions is often not feasible as a practical matter. This point is reflected in the idea of the difference between the law on the book and the law in action. Legal rights can be theoretical because the cost of invoking them would exceed any recovery.

Public enforcement by federal and state consumer protection agencies is more feasible but usually only occurs if there are many consumer complaints against the same business concerning the same practice. State consumer protection statutes typically provide private rights of action with attorneys’ fees and multiple or statutory damages for prevailing parties, so these are more feasible to use than the UCC or common law. Still, public enforcement or private class actions are often the most feasible approach, even under state consumer protection statutes. An individual consumer whose legal rights have been violated often cannot get any legal relief (as opposed to informal adjustment because the provider wants to maintain good relations and reputation) unless an aggregate mechanism, such as public enforcement or a private class action, can be used. Another obstacle for consumers is that their contracts often include arbitration clauses, which may bar class relief and provide for confidential proceedings so that others do not find out about results.

The sources of relevant law include: federal statutes concerning intellectual property and consumer protection; state consumer protection statutes (every state has some form of consumer protection statute); uniform state laws; individual states’ statutes on particular topics (such as spyware statutes), and state common law of contract, tort and property, which vary to some extent from state to state. The focus in this report is on major federal statutes, uniform state laws, state consumer protection statutes, and law reform principles projects.

Federal Statutes

The **Copyright Act** applies to copies in digital form, or otherwise there would be no copyright protection against making digital copies. See Title 17, United States Code (U.S.C). See especially §§ 101 (defining copies in terms of “material objects” from which a work can be perceived, including “with the aid of a machine”) and 106, 107 and 1201 (concerning exclusive rights in copyrighted works, fair use rights, and protection against circumvention of technological measures). The **Patent Act** may also apply to software. See ALI Principles, section 109, cmt. a (concerning coverage of computer programs by federal intellectual property law, both the Copyright Act and the Patent Act). Fair use protects user rights, but it is often vague as to scope of user rights and also as to whether user protections are default rules, which can be limited by contract, or mandatory rules. The ALI Principles discuss this problem in section 109’s commentary. Displacement of default rules can also be regulated under common law principles, specifically nonenforcement of terms that are against public policy or unconscionable. See ALI Principles, sections 110 and 111.

The **Federal Trade Commission Act** broadly empowers the FTC to regulate “unfair or deceptive acts or practices in or affecting commerce,” 15 U.S.C. § 45(a)(1). The statute applies to any type of transaction in or affecting commerce and thus includes digital content transactions. See FTC Staff Working Paper, Dot Com Disclosures: Information About Online Advertising (May 3, 2000), available at <http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf> (stating, at p. 1, “The same consumer protection laws that apply to commercial activities in other media apply online. The FTC Act’s prohibition on unfair or deceptive acts or practices encompasses Internet advertising, marketing and sales. In addition, many Commission rules and guides are not limited to any particular medium used to disseminate claims or advertising, and therefore, apply to online activities.”)

A recent enforcement action against Twitter (for deception in not protecting customers’ privacy as represented) illustrates the online, digital reach of the FTC Act. See *In the Matter of Twitter, Inc., a corporation*, FTC File No. 092 3093 (settled by a consent agreement as of June 24, 2010).

The FTC Act provides for rulemaking (currently a little used power) and public enforcement but does not provide private causes of action, but state statutes with similar language usually do provide private rights of action as well as for public enforcement at the state level, most often by state attorneys general.

The **Magnuson-Moss Warranty Act**. 15 U.S.C. §§ 2301-2312. This statute regulates warranties for tangible consumer products, defined as products “normally” used for personal, family and household purposes, which means that products purchased by businesses that are normally purchased for personal, family and household purposes are covered (for example, TV sets purchased by a motel would be covered because TV sets are normally purchased for household purposes). It is generally assumed that Magnuson-Moss applies to transactions in electronic copies of software, even though the issue is not completely settled under Magnuson-Moss. Software producers typically comply with Magnuson Moss to avoid litigation. For example, this Microsoft EULA for Windows 7 has disclosures at the end that are designed to comply with Magnuson-Moss.

<http://img1.store.microsoft.com/prod/clusterb/v2/framework/pages/content/help/EULA/Windows7.pdf>

Electronic Signatures in Global and National Commerce Act (E-SIGN), 15 U.S.C. §§ 7001-7031. This law authorizes use of electronic records and electronic signatures to comply with writing and signature requirements of most federal (such as a written agreement to arbitrate under the Federal Arbitration Act) and state law (such as the UCC Article 2 statute of frauds in section 2-201). E-SIGN has disclosure requirements for consumer transactions to get consent to use of electronic records and requires that electronic records used to meet record requirements be capable of accurate retention.

Uniform State Laws

Uniform Commercial Code **Article 2** (UCC Article 2), sponsored by the National Conference of Uniform State Laws (NCCUSL) and the American Law Institute (ALI) and enacted in 49 states (the exception is Louisiana), covers “transactions in goods” and has frequently been used to deal with issues concerning digital product transactions. See *Micro Data Base Systems, Inc. v. Dharma Systems, Inc.*, 148 F.3d 649, 651-54 (7th Cir. 1998) (applying Article 2 to a transaction involving a “license fee” for customized software and noting in an opinion by Judge Richard Posner that this approach represents “the weight of authority” and reaches “the right result—for we can think of no reason why the UCC is not suitable to govern disputes arising from the sale of custom software.”) If custom software is covered as goods under Article 2, it is easier to find that mass-market software is also covered. Courts that use Article 2 for software and other digital content do not necessarily indicate whether Article 2 is being used directly or by analogy, meaning as persuasive authority concerning the common law of contracts.

UCITA, first promulgated by NCCUSL in 1999 and amended by NCCUSL in 2000 and 2002, was intended as a uniform state law but has been enacted in only two states. It covers “computer information transactions,” which include transactions in electronic “information,” including text, data, sounds, images, and computer programs. Section 102(a)(10), (11), and (35). It is thus a relatively comprehensive statute covering software and other digital content, but the uniform enactment process foundered when various customer interests organized to defeat it after two quick enactments in Maryland and Virginia. UCITA was originally conceived of as UCC Article 2B on licenses, but the project lost its potential UCC status when the ALI withdrew because of its complexity, poor drafting, and producer bias. Although UCITA was enacted in only two states, UCITA could be used by analogy or because of choice of law clauses in other states. Several jurisdictions with strong consumer protection traditions (Iowa, North Carolina, Vermont, and West Virginia) have enacted so-called “bombshelter” legislation to guard against application of UCITA to their residents through choice of law clauses and presumably by analogy, too. See IOWA CODE ANN. § 554D.104; N.C. GEN. STAT. ANN § 66-329; VT. STAT. ANN., Tit. 9 § 2463a; W. VA. CODE § 55-8-15.

The **Uniform Electronic Transactions Act**, a state uniform law enacted in more than 40 states and in many ways equivalent to the federal E-SIGN statute, discussed above, deals with use of electronic records and electronic signatures in transactions and is intended to facilitate electronic commerce.

State Consumer Protection Statutes

Every US state has at least one general consumer protection statute. See Jonathan Sheldon et al, *Unfair and Deceptive Acts and Practices* (National Consumer Law Center 2008 and 2009 Supplement) (with appendix describing the statutes in each state). These statutes are sometimes called “little FTC Acts” because they often use the same or similar language to the FTC Act, that is, language to prohibit unfair or deceptive acts or practices in trade or commerce, and their interpretation may be informed by FTC interpretations of the FTC Act. These statutes are also often called UDAP statutes, for unfair or deceptive acts or practices, and typically they provide both for public enforcement and private rights of action. These statutes are thus an important source of law for DCSC, even though they are not restricted to DCSC.

Principles Projects

ALI Principles. An ALI principles project is intended as a somewhat less definitive work than a Restatement. This type of project is used by the ALI when the area of law is not well settled. The **ALI Principles of the Law of Software Contracts**, published in 2010, directly address only software contracts and not contracts for digital art such as movies, e-books, and music in digital form, or digital data. See sections 1.06(a) (scope of the project is limited to software contracts) and 1.01(j)(2) (excluding digital content from the definition of software). The ALI Principles acknowledge the possibility of their use by analogy. The ALI Principles draw upon federal intellectual property law, UCC Article 2, and UCITA, among other sources, and are intended as persuasive authority for courts deciding legal issues in software contracts, whether under statutes or common law. The ALI Principles are not limited to consumer transactions.

Americans for Fair Electronic Commerce Transactions—12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products (AFFECT Principles). AFFECT is a coalition of mass-market digital product customers, including household consumers, libraries, and businesses. The AFFECT Principles may be closest in focus to the scope of DCSC project, with the difference that AFFECT is a nongovernmental advocacy organization, albeit an unusual one in that the participation of business customers has produced a centrist statement within the US context rather than a strong consumer advocacy statement of principles. For a self-description and list of members, see <http://www.ucita.com/who.html> (noting that AFFECT was originally founded in 1999 to defeat UCITA). For a description of the AFFECT Principles, including their history in the difficulties with producing consensus uniform state law in the US, see my paper/chapter, Jean Braucher, *New Basics: 12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products* (January 2006). Arizona Legal Studies Discussion Paper No 06-05. Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=730907 This paper is published as chapter 8 in a book with 14 chapters, most of which should be helpful to develop an understanding the state of DCSC law in the US: Jane K. Winn (ed.), *Consumer Protection in the Age of the ‘Information Economy’* (Ashgate 2006).

The 12 AFFECT Principles cover much of the same ground as the DCSC project. They are:

- I. Customers are entitled to readily find, review, and understand proposed terms when they shop.
- II. Customers are entitled to actively accept proposed terms before they make the deal.
- III. Customers are entitled to information about all known nontrivial defects in a product before committing to the deal.

- IV. Customers are entitled to a refund when the product is not of reasonable quality.
- V. Customers are entitled to have their disputes settled in a local convenient venue.
- VI. Customers are entitled to control their own computer systems.
- VII. Customers are entitled to control their own data.
- VIII. Customers are entitled to fair use, including library or classroom use, of digital products to the extent permitted by federal copyright law.
- IX. Customers are entitled to study how a product works.
- X. Customers are entitled to express opinions about products and report their experiences with them.
- XI. Customers are entitled to the free use of public domain information.
- XII. Customers are entitled to transfer products as long as they do not retain access to them.

My paper, cited above with a link to ssrn.com, provides some categorization and explanation of these principles. The first three deal with the procedures of contracting and the rest address substance of transactions.

2. Protection of consumers of digital content services

Q.2.1 Have *specific* rules of consumer law or contract law (including co- or self-regulation) been developed in your legal system *pertaining to digital content services*? If not, is consumer sales law applied (directly or by analogy)? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.

UCITA specifically covers computer information transactions, broadly defined, but has only been enacted in Maryland and Virginia. UCC Article 2 is frequently used to address disputes involving software transactions, although it was drafted in the 1950s to address hard goods, prior to the digital era. See discussion of uniform state laws in the introduction above.

The two principles projects described above (those of ALI and AFFECT) are also targeted at aspects of digital content transactions but they are persuasive rather than binding authority. The ALI Principles address all software contracts, not just consumer contracts. The AFFECT Principles are more targeted, in that they apply only to mass-market transactions in software and other digital products, including digital expression products such as movies, music and e-books.

There are federal and state statutes targeted at particular aspects of digital content transactions, such the federal Children's Online Privacy Protection Act described in item 12 below and state "spyware" statutes. Another federal statute is the U.S. Safe Web Act (Pub. L. No. 109-455, codified to the FTC Act, 15 U.S.C. § § 41 et seq.) The FTC describes its functions as follows:

This Act provides the FTC with a number of tools to improve enforcement regarding fraudulent spam, spyware, misleading advertising, privacy and security breaches, and other consumer protection matters, particularly those with an international dimension. Among other things, the Act allows increased cooperation with foreign law enforcement authorities through confidential information sharing, provision of investigative assistance, and enhanced staff exchanges. In certain limited circumstances it enables the FTC to

obtain information in domestic or foreign consumer protection matters from third parties without tipping off investigative targets.

See also <http://www.ftc.gov/os/2009/12/P035303safewebact2009.pdf> (Dec. 2009 FTC report on activities during the first three years under the Safe Web Act).

Q.2.2 In case a consumer purchases a piece of software on a CD or a DVD, will the purchase be treated as a contract for the sale of goods or as a service contract? If the CD fails to function in his computer as a consequence of a flaw in the software on the CD/DVD, not in the CD/DVD itself, can the consumer take recourse to consumer sales law?

Article 2 is frequently used to deal with quality problems concerning digital products, whether delivered on a disk or not. It should be noted that the primary method of delivery of digital products is loaded on computers or other hardware such as printers or various other equipment, appliances, and vehicles (cars now come loaded with embedded computers and a great deal of software). CDs and DVDs can also be used for delivery of software. Hard goods with digital components are often treated as goods without even identifying that the digital elements create any issue. Article 2, drafted in the 1950s prior to the digital era, has nothing explicit on whether to cover digital components on hardware and digital products on disks, but its application to software on a disk or on hardware is common. Article 2 applies to transactions in goods, defined as “things” that are “movable.” Sections 2-101, 2-105(1). “Thing” is a word of deliberate vagueness and thus can encompass electronic copies, whether on a disk or downloaded. Downloading could be considered a form of moving a thing. On the other hand, there are opposing arguments that goods do not include electronic copies because they are not things.

A related question is the transaction type. Producers often call DCSC transactions licenses. The ALI Principles cover software contracts no matter what the nominal transaction type. See section 1.06(a) (covering software contracts whether to sell, lease, license, access, or otherwise transfer or share). Article 2’s scope provision refers to “transactions in goods,” but its other sections mostly apply to buyers and sellers, so arguably licensors and licensees are not covered, although the courts are not prone to make this distinction. See *Micro Data Base Systems, Inc. v. Dharma Systems, Inc.*, *supra* (referring to a transaction involving a license fee as a sale).

Q.2.3 In case a consumer purchases a piece of software through an online (automated) update service or a real-time (remote) software support service, will the purchase be treated as a contract for the sale of goods or as a service contract? If the software fails to function in the consumer’s computer as a consequence of a flaw in the software, can the consumer take recourse to consumer sales law?

There are cases questioning use of Article 2 for downloaded digital content, but Article 2’s use for this type of transaction is common, whether directly or by analogy as persuasive authority. For example, in *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2nd Cir. 2002) (opinion by Judge Sotomayor, now Justice Sotomayor of the U.S. Supreme Court), the court made reference to Article 2, UCITA and the common law of contract and found no difference on the issue in question (and held that there was no manifestation of assent to terms on a website to which the user was not asked to click and which terms were below the visible screen on a scroll-down page). The court did not decide whether Article 2 or the common law applied but

questioned whether Article 2 applied to downloaded software; in fact most of Article 2 would not have applied for a reason not mentioned by the court, which is that most sections of Article 2 refer to buyers and sellers, and the case involved a download of freeware and thus was not a transaction for “a price,” which is part of the definition of a “sale” under Article 2, section 2-106(1). The court found no manifestation of assent under any of the possible sources of law, including UCITA by analogy (not enacted in the relevant jurisdiction).

3. Defining consumer and producer

Q.3.1 Are individuals who offer digital content services to consumers considered to be ‘consumers’ or ‘traders’? Is it, in this respect, relevant whether they offer their services to consumers for free or against (micro-)payments? Is it, in this respect, relevant whether they offer such services continuously or for a certain period of time, or with the intention of making profit?

Q.3.2 Does the law of your country leave room to differentiate between the activities of professionals and ‘prosumers’ (e.g. in terms of professional diligence, duty to care, reasonable expectations consumers are entitled to have, remedies, etc.)?

A major issue in the US is who is a “consumer.” One common definition of a consumer is someone who purchases for personal, household, or family use (a household consumer), as under Magnuson-Moss (although Magnuson-Moss also extends to business customers who acquire consumer products, that is products normally acquired by household consumers, as discussed in the introduction above). Another definition is an end-use customer, which can include businesses. Article 2 and the common law are not restricted to household consumers, although courts certainly take into account whether a household consumer was involved when applying some doctrines such as unconscionability. There is also a concept of a “mass-market transaction” or “standard form transfer” in which the customer may be a household consumer or a business. UCITA, sections 102(a)(44), (45) and 209. ALI Principles, sections 1.01(l), 2.02. These concepts refer to transactions in which no negotiation typically occurs and most terms are standard and set forth in a standard form.

Article 2 limits the making of an implied warranty of merchantability to “merchants,” defined as those who deal in goods of the kind or who hold themselves out as having particular skill or knowledge concerning the goods. See section 2-104(1), 2-314(1). An individual can thus be a merchant, but only if the individual is either a dealer or has equivalent skill or knowledge concerning the goods in question.

The ALI Principles cover transfers of software “for a consideration.” Section 1.06(a). “Consideration,” an Anglo-American concept, includes transfers for a return promise, such as a promise to make source code available, thus covering open source transactions not involving payment of a price in money. See cmt d. to Section 1.06. However, the ALI Principles also provide that certain implied terms do not apply unless there is a monetary obligation. See sections 3.01(a) (concerning implied indemnification against infringement, and requiring a monetary payment or monetary obligation for this to arise), section 3.03, cmt. a (discussing

grounds on which open source developers may not be liable for warranties and stating in particular that hobbyists do not give the implied warranty of merchantability), and section 3.05(b) (providing that a transferor for money or for a monetary obligation gives a mandatory warranty of no material hidden defect).

4. Sector-specific consumer law

As noted in the introduction, UCITA is a sector-specific statute at the state level, but it has been very controversial and as a result has only been enacted in two states, while at least four other states have enacted statutes to make choice of law clauses an ineffective way to make UCITA apply to their residents. UCC Article 2, although a more general law for all sales of goods including commodities such as cotton and coal and manufactured goods of all types, has often been used to fill the gap in other states. It remains unclear to what extent Article 2 governs software and digital content and to what extent the common law of contract governs. Many times either body of law would produce the same result. The more individualized services involved in a transaction, such as training, adaptation by programmers, or help with operational problems, the more likely the transaction may be considered a common law services transaction and not a sale of goods. But a transfer of a mass-market digital product is today usually seen as covered by Article 2. On the other hand, Article 2 does not explicitly answer many questions about digital products, such as what default rights customers have to use and transfer their interests. The law of DCSC is very unsettled and indefinite as a result.

The ALI Principles and AFFECT Principles are both reactions to UCITA. ALI was originally a co-sponsor of UCITA's antecedent project, UCC Article 2B. ALI withdrew from the project for various reasons, including the producer bias of UCITA. It then embarked on its own project, which was completed with publication in 2010. AFFECT was organized in response to concern about UCITA. After successfully resisting enactment of UCITA beyond two states, AFFECT also decided to try to state principles for certain software and similar transactions. Both of these principles projects are directed to aspects of DCSC but neither is binding law on courts. The ALI Principles have the prestige of the American Law Institute behind them and are available as persuasive authority to courts deciding issues concerning software contracts, whether under the common law of contracts or under UCITA or UCC Article 2. The ALI Principles also discuss at length the relationship between intellectual property law and transactional law and suggest a three-stage process for deciding whether a contract term is enforceable. The first question is whether federal intellectual property law sets mandatory rules that cannot be varied by contract (and answers are not settled in many instances). Even if this is not the case, courts can still decide a term is against the public policy embodied in federal intellectual property law, making use of the state contract doctrine that contract terms against public policy will not be enforced. Finally, the doctrine of unconscionability—under UCC Article 2, section 2-302, or the common law—can be used to refuse to enforce a term. Unconscionability doctrine typically considers both the process of arriving at a contract and the harshness of terms. If a term is in fine print in a standard-form, nonnegotiated contract between a large enterprise and an unsophisticated individual, the fact that the term takes away a fair use, for example, may make it unconscionable. The three-step framework for review of unenforceability of terms in software contracts is set

forth in sections 1.09 through 1.11 of the ALI Principles. The ALI Principles directly address only software and not digital art or digital data, so they are narrower in scope than DCSC in that respect. On the other hand, they are not limited to consumer transactions and address any software contract, including negotiated contracts between two large enterprises. In this way, they are broader in focus than DCSC.

The AFFECT Principles, written by a coalition of software customers, are focused on mass-market software and other digital products and therefore are well-aligned with the scope of the DCSC project. They represent the considered judgment of those most affected by the limited state of consumer protection in the US for these products. The AFFECT Principles could be a point of reference for law reformers or for courts. They are available as persuasive authority but do not have the same stature as the ALI Principles. They are largely consistent with the ALI Principles, so the two projects can be used as persuasive authority together.

There are many narrow initiatives in the US from time that affect aspects of DCSC. A recent example is that on Oct. 14, 2010, the Federal Communications Commission announced a proposed new rule to require mobile phone price alerts to customers so that they can avoid “bill shock.” The rule would require alerts when customers might exceed volume on their regular mobile phone plans or otherwise might incur high charges. http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-180A1.doc This new rule is not specifically targeted at DCSC but will affect such services accessed on mobile phones.

Q.4.1 Do specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights apply pertaining to

- **the conclusion of the contract for digital content services;**
- **the pre-contractual information consumers need to be given⁸⁷¹;**
- **the termination of the contract (for non-performance or termination for other reasons) for digital content services?**

One example would be E-SIGN, which requires disclosures about electronic records and consumer consent to their use. See 15 U.S.C. 7001(c).

When it comes to DRM technology, there are no specific disclosure requirements. On the other hand, general law of consumer protection prohibiting deception could be used to police a failure to disclose important aspects of any transaction. This theory was used in an action initiated by the Electronic Frontier Foundation against Sony BMG for including flawed DRM technology on disks, creating security and privacy issues for consumers. The action was settled. See <http://www.eff.org/cases/sony-bmg-litigation-info>

Q.4.2 Have specific rules in media, telecommunications, copyright, data protection and e-commerce law or other sector-specific (digital) consumer rights been developed as regards the way (digital) products and services are advertised and marketed to

⁸⁷¹ For example, the copyright laws of some countries require service providers to inform users whether technological protection measures, such as Digital Rights Management technologies are used; national data protection laws foresee specific duties to inform consumers about the way their personal data will be used; etc.

consumers (unfair commercial practices)? Possible examples could include behavioural advertising, spam or marketing media services to minors.

See items 11 and 12 below for some general FTC guidance concerning behavioral advertising and concerning children's online privacy.

Q.4.3 In case a provider acts in conflict with one of the aforementioned provisions of sector-specific consumer law,

- **does sector-specific law determine any remedies?**
- **could a consumer invoke general consumer and contract law remedies⁸⁷²?**

The Copyright Act, 17 U.S.C. section 107, protects as fair use copying as part of criticism, comment, news reporting, teaching, scholarship, or research. Fair use is a defense to an action for copyright infringement. The doctrine is vague, which creates uncertainty about user rights. In addition, it is unsettled to what extent fair use rights can be eliminated by contract terms. The ALI Principles address the latter issue in its sections 1.09 through 1.11 on preemption, public policy and unconscionability, grounds not to enforce terms in software contracts that attempt to take away fair use rights. Although section 117 of the Copyright Act protects the rights of users to make a copy of a computer program for archival purposes, there is no protection against DMR technology preventing this sort of copying. Also, it is arguable that a contract term could take away the archiving right. Thus, the law is unsettled and not clearly protective of users. Fortunately, market pressure has made it common for producers to explicitly provide for users to be able to make backup copies

The common law of contract applies to any contracts, including contracts concerning DCSC. The FTC Act and most state consumer protection statutes also apply to DCSC. In addition, UCC Article 2—which applies to transactions in goods—is often used as a source of law for DCSC. See discussion of uniform laws in the introduction above and also items 2.2-2.3 above. As the ALI Principles note, courts have the power to refuse to enforce contract terms that restrict user rights to comment, criticize and make a back-up copy, using either the common law doctrine of contracts against public policy or the doctrine of unconscionability, which is part of both common law and the UCC (section 2-302). Courts could similarly use state consumer protection statutes, finding it an unfair practice to try to take away such rights.

5. Formation of contract and pre-contractual information concerning non-negotiated contracts

The AFFECT Principles address concerns about advance availability of terms and lack of real assent in Principles I and II (calling for advance disclosure of terms and active assent). Principle III also calls for advance disclosure of known nontrivial defects in software and other digital products. All three principles are discussed in Braucher, *supra*. The ALI Principles also refer to

⁸⁷² E.g. unfair commercial practices, unfair contract terms, avoidance/voidability of the contract, termination or damages.

the same ideas. See sections 2.02(c)(1)-(3) (concerning advance availability of terms and active assent in standard form transactions, particularly when entered into on line) and 3.05(b) (providing that a transferor for a monetary obligation gives a mandatory warranty of no material hidden defect).

Q.5.1 Is there regulation regarding the transparency and comprehensibility of contract terms, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

This is part of the law of unconscionability in the general common law of contract (and under UCC Article 2). It is also part of unfairness or deception under the FTC Act and state consumer protection statutes. Many states have plain language statutes for consumer contracts in general.

Q.5.2 Is there regulation regarding the moment when the contract terms should be made available to the consumer, e.g. in relation to the channel through which the contract terms are presented to the consumer (e.g. mobile phone, Internet)?

The timing of availability of terms is a contested issue in the US. In *Hill v. Gateway 2000, Inc.*, 105 F. 3d 1147 (7th Cir. 1997), the court enforced an arbitration clause on a piece of paper included inside a shipping box for a computer ordered over the telephone; the analysis relied on the difficulty of disclosing terms in advance when a telephone order was used. In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the same court enforced a shrinkwrap license that was inside a packaged digital product purchased in a store. These cases pre-dated general use of the Internet, and the ALI Principles now call for electronic availability of standard-form terms, for example on a producers' web site. Section 2.02(c)(1).

Q.5.3 Are non-negotiated contracts concluded via electronic means, such as through a click-wrap or a browse-wrap license⁸⁷³, considered to be validly concluded contracts?

See ALI Principles, section 2.02, Reporters' Notes, cmt. b, for a list of cases enforcing clickwrap and the comment that "browsewrap is more problematic," and citing the *Specht* case, *supra*, as well as several other cases on the non-enforceability of browsewrap.

It should be noted that some clickwrap involves delayed terms. If a customer must click to agree to terms when ordering on line, this is active assent. However, if the customer only gets the terms after order and delivery—whether on a disk, by download, or by access to a web site—and perhaps also after electronic payment by credit or debit card, clicking is less indicative of assent. If the customer must unwind a transaction to avoid assent, the customer does not have as much choice to avoid the terms as when they are displayed in advance of an order and must be clicked on as part of the order process. The ALI Principles note this point in section 2.02(c)(1) by referring to availability of terms "prior to initiation of a transfer."

Q.5.4 Under what conditions are the terms of a standard form agreement⁸⁷⁴ binding on the consumer (provided that their content is not unfair)? In particular, is an express

⁸⁷³ 'Browse-wrap' means that a consumer consents to the terms governing the use of a certain service that is provided through a website by visiting that website.

⁸⁷⁴ For instance those included in the click-wrap or a browse-wrap license.

manifestation of assent to these terms⁸⁷⁵ necessary or are non-negotiated contracts also binding following an implicit manifestation of assent?⁸⁷⁶

Both express and implied manifestations of assent are recognized in the common law of contract, as well as under Article 2, section 2-204 (requiring that the parties “show agreement” and providing that this can be by conduct), but the question is what conduct does expressly or implicitly show agreement. See above concerning general acceptance of clickwrap but not of browsewrap.

Q.5.5 Is the provider of the digital content service required to provide the consumer, within a reasonable time after the conclusion of the contract, with a confirmation of (1) the conclusion of the contract itself, (2) the terms of the contract, and/or (3) other information? Must this information be given in hardcopy⁸⁷⁷, or may the information also be given via electronic means?⁸⁷⁸

There is no general requirement of confirmation of contracts or for DCSC in particular. This is a common business practice.

Q.5.6 Are you aware of any legal provisions and/or case law regarding the form in which information needs to be presented to the digital consumer?⁸⁷⁹ If so, please specify.

The Magnuson-Moss Warranty Act (see above concerning assumption it applies to digital products, although this is by no means certain) and its implementing federal regulations require conspicuous disclaimer of implied warranties and conspicuous exclusions of consequential damages, and where a written warranty is given (which under E-SIGN would include a warranty in an electronic record), implied warranties cannot be entirely excluded although they can be limited to the duration of an express warranty of reasonable duration. 15 U.S.C. §§ 2302, 2308; 16 C.F.R., Part 701. Part 701.3 requires detailed disclosures of what is covered by a warranty and how to get performance of warranty obligations. A failure to provide the information gives the FTC enforcement powers and also gives consumers who are damaged private rights of action. 15 U.S.C. § 2310.

The FTC’s “Dot Com Disclosures” working paper, issued in 2000 and discussed above in the introduction under the Federal Trade Commission Act, made many suggestions about best practices for making disclosures on the Internet, disapproving of practices that obscure important information. It called for prominent and understandable disclosures. The overall stress was on effective communication, a requirement for disclosures in general in any medium. Although the FTC has not yet updated this report to reflect further technological changes, such as small screens on mobile phones, its focus on effective, understandable communication calls for common sense adaptation.

⁸⁷⁵ E.g. by clicking ‘I agree’ in a dialog box.

⁸⁷⁶ E.g. through the continued use of a website, following a warning that such continued use will be interpreted as assent to the application of the standard contract terms.

⁸⁷⁷ E.g. on paper or on CD/DVD.

⁸⁷⁸ E.g. by e-mail, on a website with the possibility to print or to store the information on the consumer’s computer.

⁸⁷⁹ E.g. before the signing of a contract, in clear and comprehensible language, in sufficiently large letters, etc.

6. Right of withdrawal

- Q.6.1 In addition to or in derogation of the Distance Selling Directive, does the law of your country entitle the consumer to withdraw from a contract pertaining to digital content services once the service has been rendered to him? If so, does it matter whether the consumer has already accessed the service? Is the introduction of a right of withdrawal in addition to or in derogation of the Distance Selling Directive debated in your country?**
- Q.6.2 Does the consumer lose his right of withdrawal if the service is rendered during the cooling off-period with the permission or at the request of the consumer? If so, does the right of withdrawal remain available to the consumer if he was not informed of his right of withdrawal before the service was provided?**
- Q.6.3 If the consumer is awarded a right of withdrawal even in case the service provider has performed the contract (but, for example, has omitted to inform the consumer of his or her right of withdrawal) and the consumer indeed withdraws from the contract, how is the consumer's obligation to return the performance of the service provider shaped if the service cannot be returned itself? For instance, is the consumer required to return the value of the service? If so, how is that value determined (e.g. by reference to the market price)?**
- Q.6.4 Does the exercise of a right of withdrawal regarding a service that is part of a package of jointly ordered or interdependent services affect the contracts concerning these other services?**

The US does not have a federal equivalent to the European Union Distance Selling Directive. We have a longstanding FTC rule for a cooling off period for door-to-door sales, 16 C.F.R., Part 429, but nothing concerning a cooling-off period applicable to distance selling, including over the Internet.

Sometimes there are contractual rights to return or rights to return not to accept delayed terms, although usually upon use, there is acceptance of the terms and no continuing right to return.

7. Unfair contractual terms

- Q.7.1 Is a contractual term that prevents a piece of music from being copied or that restricts its playability to only a certain region a 'main obligation' under a digital content service contract? If it is not, could it be declared unfair pursuant to the rules on unfair contractual terms?**

Q.7.2 Could a contractual term pertaining to the privacy of the consumer be declared unfair if it diverges from the rules on the protection of privacy?

Q.7.3 Have other specific contractual terms pertaining to digital content services been declared as (presumably) unfair by law or in case law? In case such decisions were made in case law, please provide a short summary of the facts and of the decisions of the courts.

Q.7.4 Are there (commonly used) terms pertaining to the delivery of digital content services that are not currently covered by the list of (presumably) unfair contract clauses under the Proposed Directive on Consumer Protection, but that should be included in the list of (presumably) unfair terms? Has this issue been debated?

Unfair terms in the US may be unenforceable under contract law (particularly the doctrines of unconscionability and contracts against public policy). In addition, state consumer protection statutes addressing unfair and deceptive acts or practices and the FTC Act can be used to address unfair terms, sometimes by rulemaking and otherwise by public or private enforcement actions challenging particular terms. Under any of these approaches, there may be a mixture of attention to the procedure of the transactions (such as use of fine print and obscure language) in addition to the substance of the terms (that is, is the term unduly harsh and not justified by costs or other considerations from the point of view of the provider).

Although the FTC has the power to make rules concerning specific unfair or deceptive terms or practices, it has made little use of that authority in recent decades. Instead, it uses a combination of discussion with industry and consumer representatives at workshops (to promote self-regulation) and enforcement actions for egregious behavior. The FTC tends to view rulemaking as too slow for constantly changing practices and often instead tries to influence business practices more informally.

An example of use of informal process was in the production of the FTC's Dot Com Disclosures staff working paper, referred to in the introduction above. Footnote 1 to that report describes the FTC process:

The Commission initially requested written comment on a proposal that discussed how it would apply its rules and guides to online activities. 63 Fed. Reg. 24998 (May 6, 1998). After reviewing the comments, the Commission held a public workshop on May 14, 1999, to explore the issues further. *See* 64 Fed. Reg. 14156 (Mar. 24, 1999) (announcing the workshop). Twenty-five groups, including businesses, trade associations and consumer organizations, participated in the workshop discussion. The focus of the workshop was an evaluation of how disclosures required by FTC rules and guides can be displayed clearly and conspicuously in Internet advertisements. A shorter session examined how terms such as written, writing, and printed are used in FTC rules and guides and should be interpreted in light of the use of electronic media. Additional written comments were submitted after the workshop. The public comments and the workshop transcript are available at <http://www.ftc.gov/bcp/rulemaking/electmedia/index.htm> or from the FTC's Consumer Response Center, 600 Pennsylvania Avenue, NW, Room 130, Washington, DC 20580.

Another example was an FTC Workshop on Warranties for High-Tech Products and Services, held Oct. 26-27, 2000. See www.ftc.gov/bcp/workshops/warranty The agenda for this meeting stated, "Through this public forum, the FTC hopes to facilitate discussion of how government, private industry, and consumer advocates can work together to ensure that consumers receive adequate information when shopping for software and other computer information products and services." <http://www.ftc.gov/bcp/workshops/warranty/agenda.htm> This session, however, did not result in a staff report equivalent to that on Dot Com Disclosures. In other words, the issues did not receive even informal agency commentary, although the FTC comment process resulted in submissions by industry, consumer and academic participants.

There are no national rules generally addressing unfair terms in DCSC. Copyright law provides some general rights for users of copyrighted material (particularly fair use rights) but is unclear about whether these rights can be eliminated by contract. See ALI Principles for a discussion of nonenforcement of contract terms concerning software based on federal intellectual property law, public policy of state law (which could take into account federal intellectual property law), and unconscionability. Sections 1.09-1.11., pp. 44-84 (including commentary and many citations).

DRM technology has raised the additional concern that even fair uses can be prevented by technology, and the Copyright Act does not give circumvention rights for purposes of fair use other than a limited rights concerning security testing and reverse engineering to make interoperable products. 17 U.S.C. section 1201. The Electronic Frontier Foundation has been a leader in pushing for elimination of DRM technology. See 11.1 (c. and d.) below concerning the FTC's interest in DRM and a link to the strong EFF's submission to the FTC. The Digital Millennium Copyright Act provides for rule-making to set exceptions allowing circumvention of DRM technology, but so far this has produced very limited results. EFF has criticized the process of DMCA rule-making but has won a few concessions as well. See <http://www.eff.org/issues/dmca-rulemaking> The major victories for consumers have come from market pressure. For example, Apple has removed DRM technology from its iTunes downloads under consumer pressure, although there is a charge for upgrading old files to remove DRM technology. <http://www.nytimes.com/2009/01/07/technology/companies/07apple.html> and http://www.macworld.com/article/138000/2009/01/drm_faq.html

The AFFECT Principles address the substance of terms for software and other digital products in Principles IV-XII. These are discussed in Braucher, *supra*.

8. Failure to function properly

Q.8.1 When evaluating the quality of a digital content service and whether the service is in accordance with the legitimate expectations of the consumer, will judges adopt a rather functional perspective (e.g. whether a CD can play or not), or will they also consider more abstract interests, e.g. the freedom of expression, choice, the protection of the consumer's privacy, or the level of journalistic quality that consumers may expect, etc.?

A consumer is likely to be on better legal ground if asserting a functional problem with DCSC. On the other hand, a failure to provide promised security or privacy will be seen as a functional problem. The real problem for consumers with quality complaints is practical, however, in that in the absence of a widespread problem, legal relief may not be cost-effective, particularly given the vagueness of implied warranties of quality (such as the UCC Article 2 warranty of merchantability under section 2-314), leaving great uncertainty as to what level of quality is to be expected. Thus, public enforcement and private class actions are more feasible but usually are more likely if there has been deception as well as serious harm. A lone customer with a quality problem with a relatively low-cost item is unlikely to be able to find a lawyer, and as a practical matter, will have the best chance of redress by simply making a demand for some sort of satisfaction from the provider. Absent that, the individual is likely to have to “lump it,” as Americans refer to lack of remedy or redress.

- Q.8.2 To what extent do (legal) standards formulated elsewhere play a role in defining what ‘normal use’ of a service is, e.g. - the ability to make private copies according to copyright law,**
- the protection of personal data as provided for under national data protection law (e.g. the protection against phishing and the sale of personal data),**
 - the suitability of certain contents for minors as stipulated under audiovisual media law,**
 - journalistic codes of conducts, etc.**

The US Copyright Act includes certain fair use rights. The Digital Millennium Copyright Act, which amends the Copyright Act, protects producers’ rights to use technological controls on access to copyrighted materials, with limited exceptions. There is a great of uncertainty about the extent to which user rights under intellectual property law are mandatory or merely default rules. The ALI Principles discuss this problem in the commentary of Section 1.09, specifically cmts b and c. Even where copyright law does not protect users, the doctrines of contracts against public policy and of unconscionability may protect users. ALI Principles, Sections 1.10-1.11. See also *infra* item 11.1 (c. and d.) concerning concerns about the impact of digital rights management technology.

- Q.8.3 Is the provider of the digital content service required to inform the consumer prior to the conclusion of the contract of the required hardware and software?⁸⁸⁰ If the provider fails to inform the consumer of the required hardware and software, may the consumer reasonably expect that a digital content service is delivered in a format that is compatible with the consumer’s hardware and middleware?**

- Q.8.4 What remedies apply if digital content services do not function properly? Is there a hierarchy between remedies? Is there case law to this extent? If so, please provide a short summary of the facts and of the decisions of the courts.**

E-SIGN mandates disclosures of hardware and software requirements before consent to use of electronic records by consumers. See 15 U.S.C. 7001(c)(1)(C) (concerning disclosure of hardware and software requirements for access to and retention of electronic records).

⁸⁸⁰ *Idem.*

In addition, UCITA provides a disclaimable implied warranty of system integration where the licensor is supplying goods (hardware) and computer information (software) and has reason to know that the licensee is relying on the licensor to select components. See UCITA, section 4.05(c) (concerning this warranty) and 4.06 (concerning disclaimer).

Rights to compatibility between hardware and software would probably otherwise depend on whether the producer made other warranties of compatibility. Under American law, express warranties can be made by representations and descriptions. See UCC Article 2 section 2-313. Arguably, hardware and software sold together have to work together under the implied warranties of merchantability and fitness for a particular purpose. See UCC Article 2, sections 2-314 and 2-315; ALI Principles section 3.04(b) and cmt. b (concerning the giving of an implied warranty of fitness for a particular purpose in some circumstances when hardware and software are sold together).

Q.8.5 For how long after delivery of the digital content service (weeks, months, years, economic lifespan of the service) may the consumer invoke a remedy for non-performance if the service does not function properly (anymore)?⁸⁸¹ If the period for invoking a remedy has elapsed, may the consumer still oppose a claim for payment by claiming the non-performance of the service (prescription)?

The UCC Article 2 statute of limitations on a breach of warranty is four years. Section 2-725. See item 9 concerning other aspects of the Article 2 remedial scheme.

Q.8.6 May consumers reasonably expect that the digital content service works properly on new hardware or software and, if need be, is updated (either for free or against payment)? If so, for how long after delivery of the digital content service may they expect that the service is compatible with new hardware or software?

Consumer legal rights in the US concerning compatibility of DCSC with new technology are probably dependent on contract. See above in item 8.3 concerning UCITA, which has a very limited and disclaimable warranty concerning system integration.

Business considerations are probably the main source of consumer protection, in that producers usually don't want to lose customers and so will build in compatibility. However, sometimes they want to discontinue support for old technology to save money and perhaps also to try to force new sales, and customers may not be protected.

Q.8.7 If a digital content service allows third party applications or services to sell services via his platform, who is obliged to inform the consumer about his (the provider of the third party application's) identify, geographical address or further details?
a) the operator of that platform, or
b) the third party application service himself?
Should this be done before or after the contract is concluded?

Q.8.8 Who is liable (to repair or replace defective services or compensate damage caused by digital content) if the third party application or service fails to function? Does it

⁸⁸¹ Apart from the situation where the service is no longer of use due to technological developments, see the next question for that situation.

matter whether it can be established if the defect is caused by the digital content supplied by the third party, by the platform or by the device on which the digital content service is downloaded?

I am not aware of any US law on these points.

9. Remedies for non-performance and termination of long-term contracts

Q.9.1 Have – in addition to or in derogation of the remedies in general contract law – specific remedies for non-performance been developed in legislation on digital content services or general consumer law? Please provide case law examples and/or literature references.

Q.9.2 Is there a hierarchy between the remedies that the consumer may invoke in the case of non-performance by the provider of the digital content service?

Q.9.3 In the case the consumer wishes to claim termination of the contract for non-performance or damages, is he required to first send a notice of default or a declaration to set aside the contract? If such a notice or declaration is required, must it be sent on paper or may it be sent in electronic format? If a notice of default is required, what is considered to be a notice period of reasonable length to allow the consumer to terminate the contract if the provider has not repaired or replaced the original performance within the original period?

Other than UCITA, mentioned below, there is no special law on remedies for breach of DCSC. UCITA only applies directly in Virginia and Maryland, as discussed above.

UCC Article 2 has an elaborate regime on nonperformance, with indefinite timing for the various stages. It does have a hierarchy of remedies. Initially, a buyer can reject a performance and exit from the transaction for any nonconformity to the terms of the contract, express or implied. Section 2-601 (known informally as “the perfect tender rule”). Notice by the buyer must be given to make an effective rejection. Section 2-602(1). Cure is only permitted to the seller if the time for performance has not yet arrived or the seller had reason to believe that the nonconforming tender would be acceptable. Section 2-508.

At some point, usually by passage of time, the buyer is considered to have accepted the goods and cannot exit unless there is a substantial nonconformity in performance, with notice to the seller required. Section 2-606 and 2-608. Exit by rejection or revocation of acceptance of goods gives the buyer the right to get the price back (or not pay the price) in addition to damages based on cover. See section 2-711(1). After passage of more time, the buyer can only claim breach of express or implied warranty and get difference money damages plus consequential damages (unless excluded by contract), but cannot exit the transaction and thus is liable for the price (although with offset for damages). Notice of breach of warranty must be given. Section 2-607(3)(a). The UCC Article 2 statute of limitations on a breach of warranty is four years. Section 2-725.

UCITA, in sections 701 and 703, has lower standards of performance (material breach, rather than any nonconformity) and a more expansive right of cure of defects by the licensor.

Q.9.4 Is the consumer allowed to terminate a contract for the provision of digital content services in a situation where the service provider has not breached his obligations towards the consumer? Does it, in this respect, matter whether the contract was for a fixed period or for an undetermined period? If so, does the consumer have to observe a reasonable notice period? What are consequences if the consumer terminates the contract without being allowed to do so or without respecting a notice period of sufficient length?⁸⁸²

Q.9.5 In case a service is part of a package of jointly ordered or interdependent services, does the termination of the contract regarding this service affect the contracts concerning these other services?

Customer termination rights would be a matter of contract, which means usually an attempt by a customer to terminate and avoid further obligations (such as to make payments), despite a contract for a set term, would be a breach. Sometimes providers allow consumers to terminate in contract terms, but other times they have fees for early termination.

The Federal Communications Commission has expressed concern about hefty early termination fees (ETFs) in mobile phone contracts and consumers' lack of understanding of these terms. It gathered policies on ETFs in late 2009 and early 2010 and posted responses from the major mobile phone service providers on its web site. See <http://www.fcc.gov/cgb/etf/>

10. After sales services

Q.10.1 Is the consumer entitled to 'after sales services' to remedy existing bugs in the software – assuming such a bug would not constitute a non-performance of the provider of the digital content service – or to update the content? If so, for how long after the delivery of the digital content service may the consumer expect that such remedies or updates remain available to the consumer? Are such remedies provided free-of-charge or for reward?

Q.10.2 What is the legal position of a consumer who loses the functionality of the acquired digital content once the online service is discontinued, bankrupt or otherwise?

Q.10.3 Is a provider of digital content services required to provide conversion software in case the device used to make use of the content service⁸⁸³ has become obsolete or discontinued, in a similar manner as a car manufacturer could be obliged to supply spare parts for a car for a reasonable period after the purchase of the car?

⁸⁸² For instance: is the notice of termination invalid or must the consumer pay damages?

⁸⁸³ E.g. to play the obtained music or video content.

I am not aware of any specific legal rights to the services described in this part. Contract principles would apply. If the provider promised such services—expressly or implicitly—there would be contract rights.

In part to avoid the need for after sales services or at least to warn purchasers of problems, the AFFECT Principles would require advance disclosure of known defects concerning software. Principle III calls for disclosure of known nontrivial defects in software and other digital products. The ALI Principles also provide in section 3.05(b) that a transferor for a monetary obligation gives a mandatory warranty of no material hidden defect. Disclosure of known defects before a transaction would satisfy the demands of either project.

11. Unfair commercial practices

Both the FTC Act and state consumer protection statutes address unfair (and deceptive) practices in DCSC. See introduction above.

Q.11.1 Would the following commercial practices be considered unfair, and if so, under which conditions? In particular, is it considered relevant whether or not the provider of digital content services has informed the consumer, prior to the conclusion of the contract, of the relevant restriction as regards to the use of the service?

- a. the use of incompatible standards to prevent users from switching to other services or hardware;**
- b. behavioural advertising, or other forms of online advertising and marketing (viral marketing, surreptitious advertising, spam, etc.);**
- c. the use of Digital Rights Management to prevent unauthorised use;**
- d. the use of Digital Rights Management to restrict use to a certain region or country;**
- e. the collection of personal data for marketing purposes or through spyware;⁸⁸⁴**
- f. the collection of sensitive personal data for marketing purposes or through spyware;**
- g. the gathering, processing or selling of (sensitive) personal data after termination of the contract;**
- h. the use of default options to entice consumers to the purchase of additional services;⁸⁸⁵**
- i. the marketing of certain digital content services to minors, e.g. digital content which may be considered harmful to minors;**
- j. sponsorship or commission arrangements on price comparison websites without clear notification to consumers.**

If there is case law, please provide references and a brief description.

⁸⁸⁴ E.g. in order to enable the provider of the digital content service or third parties to adjust advertisement to the specific circumstances of the consumer.

⁸⁸⁵ See also Art. 31 of the Proposal for A Consumer Rights Directive.

Q.11.2 Are there any other instances of unfair commercial practices with regard to digital content services that you are aware of? If there is case law, please provide references and a brief description.

This section lists known consumer protection efforts concerning specific practices.

b. From the FTC Staff Report, Self-Regulatory Principles for On-line Behavioral Advertising (Feb. 2009) at 9-10, available at <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf> [footnotes omitted]:

The proposed Principles include four governing concepts. The first is transparency and control: companies that collect information for behavioral advertising should provide meaningful disclosures to consumers about the practice and choice about whether to allow the practice. The second principle proposes reasonable security and limited data retention: companies should provide reasonable data security measures so that behavioral data does not fall into the wrong hands, and should retain data only as long as necessary for legitimate business or law enforcement needs. The third principle governs material changes to privacy policies: before a company uses behavioral data in a manner that is materially different from promises made when the company collected the data, it should obtain affirmative express consent from the consumer. The fourth principle states that companies should obtain affirmative express consent before they use sensitive data – for example, data about children, health, or finances –for behavioral advertising. Finally, staff’s proposal requested additional information regarding the potential uses of tracking data other than for behavioral advertising, including whether such secondary uses raise concerns and merit heightened protection.

c and d. Digital rights management. The Digital Millennium Copyright Act generally protects the right of copyright owners to use technological tools to prohibit copying and protect access to copyrighted works and bars circumvention of technological tools by users. An exception is made for reverse engineering to make an interoperable product. See ALI Principles, section 1.09, cmt c. and Reporters’ Notes on cmt c., with citations to the relevant provisions and to caselaw.

The FTC held a workshop on DRM in March 2009. See <http://www.ftc.gov/bcp/workshops/drm/index.shtml> (describing the meeting), <http://www.ftc.gov/bcp/workshops/drm/topics.shtml> (listing issues for discussion) and <http://www.ftc.gov/os/comments/drmtechnologies/index.shtm> (with links to 841 public comments receiving by the FTC). For a strongly stated submission by the Electronic Frontier Foundation setting forth threats to competition, privacy and consumer protection from DRM, see <http://www.ftc.gov/os/comments/drmtechnologies/539814-00713.pdf> The FTC has not issued a report on this topic.

e. Collection of personal data for marketing purposes or through spyware

The Directive on Data Protection effective in the European Union has had some impact in the US, in that the US Department of Commerce runs a safe harbor program so that US companies can receive personal data from Europe. See http://www.export.gov/safeharbor/eg_main_018236.asp This program is consistent with and

refers to the Federal Trade Commission's approach to privacy of personal data, which is encourage companies to have primary policies; when these are not complied with, enforcement actions can be brought for deception. The FTC has the power to bring enforcement actions for deception. Thus, industry self-regulation involving disclosure carries potential for government enforcement consequences for non-compliance with a privacy policy.

f. The FTC has brought enforcement actions against spyware providers. See **Federal Trade Commission v. CyberSpy Software, LLC, and Tracer R. Spence**, (US Dist. Ct., Middle District of Florida, 2008), Civil Action No. 08-CV-01872, FTC File No. 082 (action against provider of keylogger software for spying on customers, settled by a stipulated final order as of June 2, 2010).

Note also the FTC action, mentioned above in the introduction under the Federal Trade Commission Act, against Twitter for deception in not providing promised security. The action was settled in 2010 by consent agreement.

g. The FTC approach of bringing enforcement actions against companies that do not comply with their own privacy and security policies extends beyond the time that a customer has a contract with the company. Enforcement based on deception does not depend on a current contract.

Q.11.3 What are the consequences if a provider of digital content services has made use of an unfair commercial practice and the consumer has concluded a contract as a result? One may think of:

- the contract is void from the start on the basis of a specific statutory provision;
- the consumer may annul the contract on the basis of a specific statutory provision;
- the consumer may apply general contract law remedies such as avoidance or adaptation of the contract for mistake or abuse of circumstances;
- the consumer may terminate the contract without having to compensate the trader for the loss of profit; and
- the consumer may claim reduction of the contract price?

The FTC Act provides for public enforcement, which can include civil penalties. 15 U.S.C. § 45(m). State consumer protection statutes typically provide both for public enforcement by a state official, usually the state attorney general, often with penalties, and for private rights of action. In the latter instance, state consumer protection statutes often provide for actual damages and multiple or statutory damages, along with attorneys' fees, for prevailing consumers. See Sheldon, *supra*. Public enforcement actions, both federal and state, are often settled with the payment of substantial amounts of money, along with agreements to refrain from the practice and to be subject to public monitoring for a period of years, but without an admission of wrongdoing. In addition to the deterrence of penalties, negative publicity from public enforcement actions makes providers cautious and prompts behavior to avoid legal issues.

Q.11.4 To what extent are prohibitions as these also relevant when interpreting consumer law's rules on e.g. unfair commercial practices and whether a practice is in accordance with professional diligence?

Federal and state unfair practices statutes are very flexible and can of course make use of the fact that any given practice is otherwise prohibited by law. Where the FTC finds a practice unfair or deceptive, often states will treat the FTC decision as the basis for finding a violation of the state consumer protection statute, thus giving rise to private rights of action under state law. Thus, the FTC Act works in tandem with state consumer protection acts, one of the reasons they are sometimes called “little FTC Acts.”

12. Minors and other vulnerable consumers

Q.12.1 Are providers of digital content services allowed to sell or market their product to minors? Is this the case also if the content of the service may be considered harmful or offensive?

Q.12.2 May a service provider who acts in conflict with the specific rules to protect minors (and other vulnerable consumers), be held liable to pay damages (to the consumer and/or the state) under general contract or consumer law? What other consequences under general contract law or consumer law may follow from such conduct?

Q.12.3 Do age, disability or other vulnerabilities of the consumer play a role when interpreting general consumer and contract law? For example, would the law require that pre-contractual information for underage consumers is provided in a form that corresponds to the experience and mental capacity of minors? Or would the law (or judges applying the law) require a higher level of care for the safety and proper functioning of a service that is delivered to an underage user?

Q.12.4 Do such rules protecting minors exist in your country? If so, do they apply also to contracts concluded for digital content services? Under what conditions may the contract be voided?⁸⁸⁶

Q.12.5 What happens if the contract may, in principle, be voided, but the service has already been rendered and it cannot be returned because of its nature – e.g. because the service consists of the streaming of a movie? Does the minor (or do his parents) still have to pay for the service?

Q.12.6 Do such rules also apply to protect the patrimony of other vulnerable consumers, e.g. the mentally handicapped or senior citizens? If so, under what conditions?

Q.12.7 Do the laws or case law in your country require technological systems of age verification or other technical and/or organizational measures to ascertain the

⁸⁸⁶ E.g. the age of the minor, the type of contract, whether the conclusion of such a contract is to be considered as ‘normal’ for a child of a certain age.

ability to conclude legally binding contracts? If so, does the usage of age verification or similar measures improve the legal standing of service providers?⁸⁸⁷

Contracts with minors are not enforceable under the common law doctrine of incapacity to contract. After reaching the age of majority, individuals can affirm contracts they made as minors and make them enforceable. Usually concerns about minors and DCSC are not about enforcing contracts, however; they are more likely to be about protecting children from access to explicit violence or sexual content and protecting their privacy.

The federal Children's Online Private Protection Act of 1998, 15 USC 6501 et seq, was implemented by the Children's Online Private Protection Rule, 16 CFR Part 312, promulgated by the FTC. Here is the FTC's description of the act, available at <http://www.ftc.gov/privacy/privacyinitiatives/childrens.html>:

The primary goal of the Children's Online Privacy Protection Act (COPPA) Rule is to give parents control over what information is collected from their children online and how such information may be used.

The Rule applies to:

- Operators of commercial Web sites and online services directed to children under 13 that collect personal information from them;
- Operators of general audience sites that knowingly collect personal information from children under 13; and
- Operators of general audience sites that have a separate children's area and that collect personal information from children under 13.

The Rule requires operators to:

- Post a privacy policy on the homepage of the Web site and link to the privacy policy on every page where personal information is collected.
- Provide notice about the site's information collection practices to parents and obtain verifiable parental consent before collecting personal information from children.
- Give parents a choice as to whether their child's personal information will be disclosed to third parties.
- Provide parents access to their child's personal information and the opportunity to delete the child's personal information and opt-out of future collection or use of the information.

⁸⁸⁷ E.g. in terms of reduced liability, duties of care, burden of proof, etc.

- Not condition a child's participation in a game, contest or other activity on the child's disclosing more personal information than is reasonably necessary to participate in that activity.
- Maintain the confidentiality, security and integrity of personal information collected from children.

In order to encourage active industry self-regulation, COPPA also includes a [safe harbor](http://www.ftc.gov/privacy/privacyinitiatives/childrens_shp.html) provision allowing industry groups and others to request Commission approval of self-regulatory guidelines to govern participating Web sites' compliance with the Rule. [See http://www.ftc.gov/privacy/privacyinitiatives/childrens_shp.html]

See also FTC Report to Congress, Virtual Worlds and Kids: Mapping the Risks (December 2009), available at <http://www.ftc.gov/os/2009/12/oecd-vwrpt.pdf> (discussing access to explicit content in online virtual worlds accessed by children).

13. Towards a model 'digital consumer law'

Q.13.1 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared towards the situation of consumers of digital content services? Please describe briefly.

The US does not have any initiative for a national model law for DCSC. The uniform laws process in the US failed, with NCCUSL and ALI unable to agree. As a result, NCCUSL produced the unsuccessful UCITA, which is viewed as an anti-consumer law, and ALI has more recently attempted a principles project, which is more consumer friendly but is not a model statute. Instead, it is guidance for courts when interpreting statutes and applying common law.

Q.13.2 Are there any recent or ongoing initiatives in your national law to suggest rules that are specifically geared to protect minors or other vulnerable consumers of digital content services? Please describe briefly.

The FTC has some initiatives. See item 12 above.

Q.13.3 Can (sensitive) personal data of consumers be seen as an economic commodity that may be gathered and sold by a provider of digital content services? If so, must the consumer be informed that the provider of digital content services gathers the information (also) in order to sell the personal data to third parties? If so, would this model bring about better protection for digital consumers?

It is fair to say that personal data is viewed as a commodity in the US. The FTC attempts to regulate privacy, but primarily by encouraging disclosure of privacy policies, so that a failure to

meet these policies will be deceptive. Privacy issues with social media such as Twitter and Facebook do not appear to be dissuading consumers from using them.

Q.13.4 Can consumers of the following digital content services generally expect a similar, lower or higher level of protection, as compared to consumers of traditional, tangible products? Please indicate this in the table below.

Consumer protection in the US is generally rather weak, depending as it does on vague standards such as unconscionability and unfairness, without detailed articulation in most instances, leading to case-by-case review that consumers often cannot afford. Private rights of action are rarely invoked. Public enforcement focuses on the most egregious provider behavior. The FTC also tries to stimulate self-regulation through workshop discussions among consumer advocates, industry representatives, academics, and its own staff. Consumers' best recourse is often to demand satisfaction, independent of legal rights. Blogging about common grievances sometimes produces favorable industry responses. In other words, market forces are much more important than consumer regulation. It is a generally accurate statement that consumer protection for DCSC in the US is about the same as for traditional products.

Table 1: What level of consumer protection may the consumer expect: more, less or the same protection as with regard to a regular consumer sales contract?

Type of service / level of consumer protection in comparison to tangible products on the basis of consumer sales law	More protection	Less protection	Same/similar protection	Other (please specify)	Service not available in my country
Film or music on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ... 	<input type="checkbox"/>
Film or music on a website (streaming)	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ... 	<input type="checkbox"/>
Downloaded films or music	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Games on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Games on the Internet	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded games	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
User created content (UCC) ⁸⁸⁸ on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
UCC on a website	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Downloaded UCC	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>
Personalisation services ⁸⁸⁹ on the Internet	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁸⁸⁸ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁸⁸⁹ E.g. ringtones, screensavers, apps/applications (e.g. for mobile phones).

Downloaded personalisation services	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Software-as-a-Service on a website ⁸⁹⁰	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded software ⁸⁹¹	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Software on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Communication through a website ⁸⁹²	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
E-learning services on the internet ⁸⁹³	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
Downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>
E-learning service on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>

Q.13.5 What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made? Please indicate this in the table below.

⁸⁹⁰ E.g. image editing, photoshopping, automatic translation services.

⁸⁹¹ E.g. anti-virus programs.

⁸⁹² E.g. email, social networking sites such as Facebook, voting for talent shows such as Idols, and Skype and VOIP.

⁸⁹³ E.g. an online language course.

Table 2: What expectations may a consumer reasonably have with regard to the service if no specific arrangements have been made?

Type of service / reasonable expectations	Compatibility with hardware/software with which it is intended or expected to interact	Updates (either free or against payment)	Private copy	Free from user restrictions (Digital Rights Management)	Protection of personal data against phishing	No commercial use of personal data by provider of service unless consumer consents	Undisturbed reception of service	Other (please specify)
Paid film or music on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> • ... • ...
'Free' film or music on a website (streaming)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<ul style="list-style-type: none"> • ... • ...
Paid film or music on a website (streaming) <small>894</small>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded films or music	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded film or music	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

* Please specify in your answer which parts refer to problems relating to the physical medium and which concern problems with the digital content.

⁸⁹⁴ E.g. video on demand services.

Paid games on a CD or DVD*	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' games on a website	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid games on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded games	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded games	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid User created content (UCC) ⁸⁹⁵ on a CD or DVD*	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' UCC ⁸⁹⁶	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid UCC	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' personalisation services ⁸⁹⁷	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

⁸⁹⁵ Content which requires an active contribution from users: creating own content, moderating and reviewing existing content. Well-known examples include blogs and YouTube.

⁸⁹⁶ E.g. video sharing websites, such as YouTube.

⁸⁹⁷ E.g. ringtones and Apps for mobile phones.

Paid personalisation services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid software on a CD or DVD* ⁸⁹⁸	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' downloaded software ⁸⁹⁹	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded software	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' software-as-a-service on a website ⁹⁰⁰	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid software-as-a-service on a website	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' communication services ⁹⁰¹	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid communication	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

⁸⁹⁸ E.g., anti-virus programmes, Office, etc.

⁸⁹⁹ E.g. anti-virus programmes.

⁹⁰⁰ E.g. image editing, photoshopping etc..

⁹⁰¹ E.g. social networking, such as Facebook, and e-mail services.

on								
Paid e-learning service on a CD or DVD* ⁹⁰²	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
'Free' downloaded e-learning services	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid downloaded e-learning services	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
'Free' e-learning service on a the internet	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Paid e-learning service on a the internet	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

⁹⁰² E.g. an online language course.

Appendix of Key Sources of DCSC in the US

Statutes

Federal

Copyright Act

Patent Act

Federal Trade Commission Act

E-SIGN Act

State Uniform Law

NCCUSL, Uniform Computer Information Transactions Act (UCITA)

NCCUSL and ALI, Uniform Commercial Code (UCC) Article 2

NCCUSL, Uniform Electronic Transactions Act

State Consumer Protection Statutes

Jonathan Sheldon et al, Unfair and Deceptive Acts and Practices (National Consumer Law Center 2008 and 2009 Supplement) (with appendix describing the statutes in each state). <http://shop.consumerlaw.org/unfairanddeceptiveactsandpractices.aspx>

Principles Projects

ALI, Principles of the Law of Software Contracts (2010). See http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=121

AFFECT, 12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products (AFFECT Principles), available at <http://www.ucita.com/pdf/AFFECTbrochure2-05.pdf> . See also AFFECT's web site: <http://www.ucita.com/index.html>

Other

Jane K. Winn (Editor), Consumer Protection in the Age of the 'Information Economy,' (Ashgate 2006).