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The Traders' Liability for Lack of Conformity of the Digital Content and of the Digital Services, as Regulated by Directive (EU) 2019/770

Juanita Goicovici[1]

Abstract: Regulated within the notion of „conformity", the legal requirements set by the recently adopted EU legislation on digital content and digital services supplied by a trader to a consumer continue to raise several interrogations, especially for practitioners. One of the most salient features, under the regulation materialised in Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, is whether conformity should be evaluated according to certain subjective criteria, as laid down in the contractual terms, or according to specific objective criteria, pertaining to the general expectations consumers have with regard to a given type of digital content or service. The main purpose of our study is to underline the fundamentals of the traders` liability for the lack of conformity of the digital content, while identifying the pillars of the new regulation in terms of substantial criteria applicable to the contractual conformity.

Keywords*:* digital content; digital services; conformity; liability; consumers.

1. Introductory observations

The (relatively) recent adoption of the twin-directives on consumer rights[2], the Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services[3] and Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive

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[1] Lecturer PhD, Faculty of Law, Babeș-Bolyai University, Cluj Napoca, e-mail: juanita.goicovici@law.ubbcluj.ro.

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[3] Published in OJ L 136, 22.5.2019, p. 1–27. Directive (EU) 2019/770 must be transposed into the national legal system by the Member States by July 1st, 2021 and will apply to the supply of digital content or digital services which occurs from 1 January 2022.

2009/22/EC, and repealing Directive 1999/44/EC[4] marked the presence of the "wind of change" for the harmonised regulation of consumer rights[5], raising

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[4] Published in OJ L 136, 22.5.2019, p. 28–50. Directive (EU) 2019/771 must be transposed into the national legal system by the Member States by July 1st, 2021 and will apply to B2C *(business to consumer)* contracts concluded from 1 January 2022.

[5] See, for a general analysis and for specific features, S. Grundmann, Ph. Hacker, „Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture", *European Review of Contract Law*, vol. 13, 2017, p. 255-293; J. Morais Carvalho, „Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771", available at SSRN: https://ssrn.com/abstract=3428550, visited on 14 November, 2020; M. Loos, „European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content", *Amsterdam Law School Research Paper* No. 2016-27, *Centre for the Study of European Contract Law Working Paper Series* No. 2016-08, available at SSRN: https://ssrn.com/abstract=2789398, visited on 14 November, 2020; A. Savin, „Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context" (October 23, 2019), *Copenhagen Business School, CBS LAW Research Paper* No. 19-35, available at SSRN: https://ssrn.com/abstract=3474289, visited on 12 November, 2020; M. Narciso, „Consumer Expectations in Digital Content Contracts – An Empirical Study" *Tilburg Private Law Working Paper Series* No. 01/2017, available at SSRN: https://ssrn.com/abstract=2954491, visited on 12 November, 2020; C. Twigg-Flesner, „Conformity of Goods and Digital Content/Digital Services" (January 20, 2020), in E. Arroyo Amayuelas & S. Cámara Lapuente (dirs.), *El Derecho privado en el nuevo paradigma digital*, Barcelona-Madrid, Marcial Pons, 2020, available at SSRN: https://ssrn.com/abstract=3526228, visited on 12 November, 2020; D. Clifford, „Data Protection and Consumer Protection: The Empowerment of the Citizen Consumer" (May 27, 2020), in *Research Handbook on Privacy and Data Protection Law: Values, Norms and Global Politics,* G. González Fuster, R. van Brakel, P. De Hert (eds.), Edward Elgar Publishing, *ANU College of Law Research Paper* No. 11/2020, available at SSRN: https://ssrn.com/abstract=3611436, visited on 12 November, 2020; D. Leczykiewicz, „Judicial Development of EU Fundamental Rights Law in the Digital Era – A Fresh Look at the Concept of 'General Principles'" (September 1, 2019), in *General Principles of EU Law and the EU Digital Order*, edited by U. Bernitz, X. Groussot, J. Paju, S. de Vries (Kluwer Law International, 2020), *Oxford Legal Studies Research Paper* No. 54/2019, available at SSRN: https://ssrn.com/abstract=3462506, visited on 12 November, 2020; G. Spindler, „Contratos De Suministro De Contenidos Digitales: Ámbito De Aplicación Y Visión General De La Propuesta De Directiva De 9.12.2015" („Contracts for the Supply of Digital Content – Scope of Application and Basic Approach of Proposal of the Commission for a Directive on Contracts for the Supply of Digital Content") (July 2016), *InDret,* Vol. 3/2016, available at SSRN: https://ssrn.com/abstract=2832162, visited on 14 November, 2020; S. Cámara Lapuente, „El Régimen De La Falta De Conformidad En El Contrato De Suministro De Contenidos Digitales Según La Propuesta De Directiva De 9.12.2015" („Remedies for Non-Conformity Under Contracts for the Supply of Digital Content in the Proposal for a Directive of 9.12.2015"), *InDret,* Vol. 3/2016, available at SSRN:

the level of confidence in their key contractual rights and setting the premises for an adequate contractual framework for digital content and digital services, while contouring more efficient remedies[6] for consumers who suffer financial and non-financial detriment.

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https://ssrn.com/abstract=2832160, visited on 12 November, 2020; C. Bedir, „Contract Law in the Age of Big Data", *European Review of Contract Law*, vol. 16, no. 3/2020, *Tilburg Law School Research Paper*, available at SSRN: https://ssrn.com/abstract=3631023, visited on 12 November, 2020; A. Metzger, „A Market Model for Personal Data: State of Play Under the New Directive on Digital Content and Digital Services" (August 4, 2020), in S. Lohsse, R. Schulze, D. Staudenmayer (eds.), *Data as Counter-Performance – Contract Law 2.0?*, Münster Colloquia on EU Law and the Digital Economy V, 2020, available at SSRN: https://ssrn.com/abstract=3666805, visited on 12 November, 2020; C. Bedir, „Data as Counter-Performance: Yet Another Point Where Digital Content Contracts and the GDPR Conflict" (August 10, 2018), available at SSRN: https://ssrn.com/abstract=3648092, visited on 12 November, 2020; M Farinha, J. Morais Carvalho, „Goods with Digital Elements, Digital Content and Digital Services in Directives 2019/770 and 2019/771", *Revista de Direito e Tecnologia*, Vol. 2 (2020), No. 2, p. 257-270, available at SSRN: https://ssrn.com/abstract=3717078, visited on 12 November, 2020.

[6] See, for details on the precedent regulation, M. B.M. Loos, C. Mak, L. Guibault, N. Helberger, „Digital Content Contracts for Consumers", *Journal of Consumer Policy,* 2013, vol. 36, p. 37-57; M. Loos, „The Regulation of Digital Content B2C Contracts in CESL", *Centre for the Study of European Contract Law Working Paper Series* No. 2013-10, *Amsterdam Law School Research Paper* No. 2013-60, available at SSRN: https://ssrn.com/abstract=2343176, visited on 14 November, 2020; T. Regner, „Efficient Contracts for Digital Content", *Leverhulme CMPO Working Paper* No. 04/108, 2004, available at SSRN: https://ssrn.com/abstract=644823, visited on 12 November, 2020; C. Mak, „Fundamental Rights and the European Regulation of Consumer Contracts", *Centre for the Study of European Contract Law Working Paper Series* No. 2008/05, available at SSRN: https://ssrn.com/abstract=1219863, visited on 12 November, 2020; C. Mak, M. Loos, „Remedies for Buyers in Case of Contracts for the Supply of Digital Content", ad hoc briefing paper for the European Parliament's Committee on Legal Affairs, May 2012, PE 462.459, 25 p., *Amsterdam Law School Research Paper* No. 2012-71, *Centre for the Study of European Contract Law Working Paper Series* No. 2012-08, available at SSRN: https://ssrn.com/abstract=2087626, visited on 12 November, 2020; K. Havu, „Unfair Commercial Contracts and Online Content Distribution: Insights into Problems, Regulation and Potential of European Harmonization", *Helsinki Legal Studies Research Paper* No. 33, 2014, available at SSRN: https://ssrn.com/abstract=2524271, visited on 14 November, 2020; N. S. Kim, „Expanding the Scope of the Principles of the Law of Software Contracts to Include Digital Content", *Tulane Law Review*, Vol. 84, 2010, p. 1595, available at SSRN: https://ssrn.com/abstract=1597366, visited on 14 November, 2020; A. Reyna, „What Place for Consumer Protection in the Single Market for Digital Content? Reflections on the European Commission's Optional Regulation Policy", *European Journal of Consumer Law*, no. 2/2014, p. 333-361, available at SSRN: https://ssrn.com/abstract=3056708, visited on 14 November, 2020.

The recently harmonised rules on conformity seem to set a hierarchical system of evaluation, which gives priority to subjective criteria, while allowing the courts to resort to objective criteria of conformity, should the text of the contract (concluded by the professional trader and the consumer) be silent or unclear in that regard. Along with the references to the contractual enforcement of the traders` obligations raising from marketing declarations, one important aspect of the concept of conformity is the placing of the burden of proof on the trader's shoulders, the latter being the one called to offer sufficient evidence that the digital content[7] or service does not lack conformity. Since the burden of proof rests in principle with the supplier, according to the new set of rules embodied in Directive (EU) 2019/770, in cases in which the consumer claims the content or service is faulty, it is the trader's mission to prove the contrary in a judicial court.

1.1. Contemplating subjective criteria of conformity – what kind of pre-eminence?

Challenging the supremacy of the objective criteria of conformity, the provisions of Directive (EU) 2019/770 explicitly stipulate that the digital content or service must be in conformity both with the subjective requirements for conformity (Article 7) and the objective ones (as described in Article 8). Comparatively, where objective criteria for conformity come into play only as subsidiary ones (to the extent that the contract for the supply of digital content does not stipulate the subjective requirements in a clear and comprehensive

[7] The objective / material field of incidence for the Directive (EU) 2019/770 provisions encompasses the supply of digital content (i), as well as digital services provided for consumers (ii) and the sale of goods with digital elements (iii). In accordance with article 2 of the Directive (EU) 2019/770, „digital content" refers to „data which are produced and supplied in digital form", while 'digital service' means either „a service that allows the consumer to create, process, store or access data in digital form" or „a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service". The B2C contract concluded might also refer to the supply of 'goods with digital elements', which describe „any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions". Certain types of software supply are, however, excepted, in terms of article 3, par. (5), let. (f); contracts related to the supply of „software offered by the trader under a free and open-source licence, where the consumer does not pay a price and the personal data provided by the consumer are exclusively processed by the trader for the purpose of improving the security, compatibility or interoperability of that specific software" are excluded from the scope of the Directive (EU) 2019/770. See also J. Morais Carvalho, „Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771", *cit. supra,* p. 2.

manner), the subjective requirements of conformity represent the major pillars of the new conceptual system. As it has been underlined, consumers will be able to opt out of objective requirements for conformity only if the deviation from the technical standards of conformity is made known to them explicitly beforehand, since on the professionals` shoulders is placed a autonomous duty of pre-contractual information, especially pertaining to the fact that a particular characteristic of the digital content or digital service was deviating from the objective requirements for conformity laid down in article 8 of the Directive (EU) 2019/770, as long as the consumer expressly and separately (through the means of an distinctive clause) accepted a specific deviation when pre-concluding the contract.

1.2. Mandatory rules avoiding the consumer's detriment in the field of digital services

Another peculiarity resides in the level of harmonisation attempted in the field of digital content e-commerce, since, according to article 4 of Directive (EU) 2019/770, the new body of rules aims at maximum harmonisation, thus implying that Member States would not be allowed to provide for more consumer-friendly rules in their national legal systems, in areas that fall within the directive's scope; as stated in article 4, „Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive". The maximum harmonisation level may be seen to be contrasting to minimum harmonisation usually characterising EU rules on consumer contractual protection, whereby Member States need to provide for a minimum standard as required by a specific directive, while remaining free to enact rules which are more favourable towards consumers.

The intricating issue that needs to be addressed is whether, in the field of contracts relating to the supply of digital content and digital services, it is possible to refine the concept of 'mandatory rules of public policy', despite its appearance as a (partly) vague notion, giving it a precise and non-eclectic meaning. Since the interests at stake are general and reverberating on the development of genuine digital single market, the mandatory character of the rules pertaining to the consumer protection policy in the field of digital content e-commerce is absolutely decisive, as none of the protagonists (consumer or professional) is allowed to deviate from the rules involved. Thus, the infringement of a mandatory rule from this category protects the interests of the e-society as a whole, while the interests usually attached to the rules of public policy of protection are fundamentally individual, though common to large groups of consumers who may find themselves placed in a similar detrimental situation in terms of lack of conformity of the digital content.

2. New valences for a classical binomen: subjective versus objective requirements of conformity

2.1. Subjective standards of conformity of the digital content – can subjectivity be objectified?

The subjective requirements of conformity, as synthesised in article 7 of Directive (EU) 2019/770, are meant to become primarily applicable, their pre-eminence towards the objective criteria of conformity being justified upon the importance of specific contractual provisions between the professional trader and the consumer. According to the subjective criteria, in order to conform with the contractual provisions, the digital content or digital service must be identical to the description, quantity and quality, and possess „the functionality, compatibility, interoperability and other features", as required by the contractual terms. Nonetheless, the digital content or digital service must also be fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader at the latest at the time of the conclusion of the contract, and in respect of which the trader has given acceptance. Thus, one can conclude that only the bilaterally agreed atypical or particular purposes will be inflicted upon the seller, excluding the unilaterally intended purposes, envisaged by the consumer, yet not expressly accepted by the trader prior to the contract conclusion.

Congruently to the precedent observations, it is also necessary that the digital content was supplied with all accessories, instructions, including on installation, and customer assistance as required by the contractual term and, upon the case, be updated as stipulated by the contract (for instance, according to specific clauses referring to the updating of software).

2.2. Objective requirements of conformity of the digital content – are there any typical trends?

Additionally, along with the complying with any subjective requirement for conformity, the digital content or digital service must respect certain objective criteria of conformity, such as those described in article 8 of Directive (EU) 2019/770. While approaching the typical purpose or the typical use, the digital content must be „*fit for the purposes for which digital content or digital services of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct*". Nonetheless, the objective standards of conformity impose that the digital content delivered to the consumer be of the quantity and possess the qualities and performance features, „*including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which the consumer may reasonably expect*".

Besides the reasonable expectations of the consumer, the final theses of article 8, par. (1), b) authorises the courts to take into account the marketing assertions or the advertising messages and „any public statement made by or on behalf of the trader, or other persons in previous links of the chain of transactions, particularly in advertising or on labelling". Unless the trader shows that it was not, and could not reasonably have been, aware of the public statement in question and unless, by the time of conclusion of the contract, „the public statement had been corrected in the same way as, or in a way comparable to how, it had been made", the trader will be held responsible for any lack of conformity resulting from a decalage between the previously made advertising assertions and the characteristics of the digital product delivered to the consumer. Subsequently, should the trader bring proof that the consumer's decision to acquire the digital content or digital service could not have been influenced by the public statement (almost a *probatio diabolica* in certain cases, being exceptionally difficult to proof that the advertising campaign has not reached the particular consumer and thus has not influenced his/her decision to purchase the digital content), the trader will be exonerated for the consequences of the non-conformity.

Another objective criterion of conformity worth mentioning is the fact that the digital content is supplied along with any accessories and instructions which the consumer may reasonably expect to receive and „*comply with any trial version or preview of the digital content or digital service, made available by the trader before the conclusion of the contract*".

Certain objective requirements are also set for contouring the object of the trader's duty to adequately inform the consumer, ensuring that the latter is supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity, for the period of time during which the digital content or digital service is to be supplied under the contract and that the consumer may reasonably expect, given the type and purpose of the digital content or digital service and taking into account the circumstances and nature of the contract, independently of the fact that the contract provides for a single act of supply (a) or a series of individual acts (b) of supply of the digital content.

Between the significant valences of the trader's obligation to adequately inform the consumer, one can enumerate the situation in which the consumer fails to install the updates supplied by the trader; the trader will not be considered to be liable for any lack of conformity resulting solely from the lack of the relevant update, provided that the trader informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it and the failure of the consumer to install or the incorrect installation by the consumer of the update was not due to shortcomings in the installation instructions provided by the trader; however, any syncope due to

the deficient information provided in the instructions represent *per se* a non-conformity case.

Additionally, at the time of the conclusion of the contract, the consumer must be specifically informed that a particular characteristic of the digital content or digital service was deviating from the objective requirements for conformity and the consumer expressly and separately accepted that deviation when concluding the contract; unless these requirements are met, the trader remains liable for the non-conformity resulting from an inadequate or incomplete level of information on the discrepancies existing between the standard technical characteristics of the digital product and the actual characteristics of the digital content delivered to the consumer. As it has already been mentioned, the contractual derogatory clauses, deviating from the typical objective characteristics must be bilaterally agreed upon by the parties.

Finally, as stated in article 8, par. (6), „*unless the parties have agreed otherwise, digital content or a digital service shall be supplied in the most recent version available at the time of the conclusion of the contract*", implying that the courts will operate with the relative, non-peremptory presumption that the parties have agreed to deliver the most recent version of the digital content.

2.3. Non-conformity raising from incorrect integration of the digital content or digital service

In accordance with the provisions of article 9 of Directive (EU) 2019/770, in the hypotheses in which the lack of conformity is resulting from the incorrect integration of the digital content or digital service into the consumer's digital environment, the situation will be regarded as lack of conformity of the digital content or digital service in two types of contractual circumstances:

(a) "the digital content or digital service was integrated by the trader or under the trader's responsibility"; in these situations, the integration of the digital content is the object of an autonomous type of service performed by the professional and for the compliance of which the latter remains responsible;

(b) "the digital content or digital service was intended to be integrated by the consumer and the incorrect integration was due to shortcomings in the integration instructions provided by the trader"; the incomplete, insufficient or deficient information provided by the trader represents *per se* an autonomous type of deficiency; therefore, the consumer is entitled to a just compensation (or to any other specific legal remedy) in the context in which the lack of conformity is resulting from the incorrect integration of the digital content or digital service into the consumer's digital environment, but the latter is caused by a syncope in the manner in which the trader provided the inherent instructions in order for the consumer to proceed to an adequate integration of the digital content.

3. Pre-contractual duty of information in contracts for the supply of digital content: are the means meeting the objectives?

3.1. What compatibility risks should traders disclose to the consumers, in contracts for the supply of digital content?

The trader has the obligation to disclose to the consumer, prior to the contract conclusion, that there are certain technical requirements that the consumer's digital medium and devices must mee, in order for the digital content to be adequately installed. Should the trader demonstrate that the digital environment of the consumer is not compatible with the technical requirements of the digital content or digital service and where the trader informed the consumer of such requirements in a clear and comprehensible manner before the conclusion of the contract, the trader will be exonerated for the legal end economic reverberations raising from such an incompatibility between the digital environment of the consumer and the delivered digital content.

One of the salient features of the new legal regime of non-conformity of the digital content is the duty of contractual cooperation imposed not only to the trader, but also to the consumer, in B2C contracts for the supply of digital content. As stated in Article 12, par. (5) of Directive (EU) 2019/770, „*The consumer shall cooperate with the trader, to the extent reasonably possible and necessary, to ascertain whether the cause of the lack of conformity of the digital content or digital service at the time specified in Article 11(2) or (3), as applicable, lay in the consumer's digital environment. The obligation to cooperate shall be limited to the technically available means which are least intrusive for the consumer. Where the consumer fails to cooperate, and where the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, the burden of proof with regard to whether the lack of conformity existed at the time specified in Article 11(2) or (3), as applicable, shall be on the consumer.*"

3.2. Contractual content deducted from marketing allegations and the contractual enforcement of the trader's obligations raising from advertising messages

The reasonable expectations of the consumer are not the only subjective criterion taken into account when establishing the alleged non-conformity of the digital content. As it has been explained in the previous section, the final theses of article 8, par. (1), b) authorises the courts to take into account the marketing assertions or the advertising messages and „any public statement made by or on behalf of the trader, or other persons in previous links of the chain of transactions, particularly in advertising or on labelling". Several remarks can be drawn relating to the impact of the new regulation. Unless the

trader shows that it was not, and could not reasonably have been, aware of the public statement in question and unless, by the time of conclusion of the contract, „the public statement had been corrected in the same way as, or in a way comparable to how, it had been made”, the trader will be held responsible for any lack of conformity resulting from a decalage between the previously made advertising assertions and the characteristics of the digital product delivered to the consumer. Subsequently, should the trader bring evidence that the consumer’s decision to acquire the digital content or digital service could not have been influenced by the public statement and that the advertising campaign has not reached the particular consumer and thus has not influenced his/her decision to purchase the digital content, the trader will be exonerated for the consequences of the non-conformity.

3.3. Does unilateral modification of digital content or of digital service represent a valid option for the trader?

The problematic of the unilateral modification of the digital content is raised preponderantly in the cases in which the B2C contract provides that the digital content or digital service is to be supplied or made accessible to the consumer over a certain period of time, thus the supply being sequential. In these situations, the trader may manifest the interest to modify the digital content or digital service beyond what is necessary to maintain the digital content or digital service in conformity in accordance with Articles 7 and 8 of Directive (EU) 2019/770, thus raising the question of legitimacy and of validity of these unilateral interventions in the contractual structure. Unsurprisingly, the text of article 19 allows the trader to unilaterally modify the conditions for the supply of digital content, thus postulating the principle of permission for this type of interventions, even beyond what is necessary to maintain the digital service in conformity. However, the trader is given permission to operate such unilateral adjustments only in cases in which there is cumulative compliance with the following conditions (which must be are met simultaneously):

(a) “the contract allows, and provides a valid reason for, such a modification”; from the assertion of the first condition it can be observed that one fundamental premise for the unilateral alteration of the contractual terms by the trader, in contracts for the supply of digital content, is the existence of an explicit clause permitting the trader to adjust the terms under certain technical boundaries;

(b) “such a modification is made without additional cost to the consumer”; only non-onerous adjustments of the contractual terms are eligible, thus the unilateral migration towards upper costs is prohibited during the initial period;

(c) the legal efficiency of the unilateral modification of the contractual terms by the trader and even its opposability towards the consumer depends on the trader's compliance to the duty to inform the consumer, in a clear and comprehensible manner, of the modification; therefore, the consumer is entitled to be informed, in a reasonably adapted manner, in advance or prior of the entering into force of the modification. This informative note should be provided on a durable medium, expressly referring to and describing the features and time of the modification; the trader must also mention the consumer's right to terminate the contract or of the possibility to maintain the digital content or digital service without such a modification in accordance with the previously made agreements.

One of the inherent intricacies, in the case of the unilateral adjustment of the contract for the supply of the digital content by the trader, is the consumer's right to seek for the judicial termination of the modified contract; thus, in accordance with paragraph (2) of article 19 of Directive (EU) 2019/770, the option for a termination of the contract remains open to the consumer, who is basically entitled to terminate the contract, should the modification negatively impact the consumer's access to or use of the digital content or digital service, unless such negative impact is only minor; in the latter case, as well as in the case of minor lack of conformity, the consumer's request for the termination of contract is inacceptable. Nonetheless, should the impact of the unilateral modification be significant, the consumer is entitled to terminate the contract in an non-onerous manner, free of charge, within 30 days of the receipt of the information or of the time when the digital content or digital service has been modified by the trader, „whichever is later", as resulting from paragraph (2) of article 19. Thus, is should be noted that the legal term for the unilateral termination of contract invoked by the consumer is usually of 30 days from the receipt of the informative note on the contractual adjustments proposed by the trader. In our opinion, the anticipatory renunciation of the consumer to the exercise of this right to termination of contract and, thus, any contractual clause imposing the consumer, relating to the supply of digital content, to unilaterally and anticipately renounce to his/her right to request the termination of contract would generate a significant imbalance between the procedural rights of the parties and thus may be considered unwritten by a court of law, as being identifiable to an unfair term. Addressing the imbalances in the rights and obligations of consumers and those of sellers when a B2C contract for the supply of digital content is concluded, it should be observed that the contractual terms that may be regarded as unfair and which are therefore not binding for consumers include the terms imposing to consumers to renounce to their right to seek for the termination of the contract in the case in which the seller unilaterally modifies the characteristics of the product or the terms of the digital service provided for consumers. Confronted with the

consumer's request for the termination of the contract, the trader would be able to preserve the contractual relationship if the trader has enabled the consumer to maintain (basically, with no additional costs implied) the digital content or digital service without the modification, and the digital content or digital service remains in conformity as stipulated in the original contractual terms, prior to any unilateral modification.

4. What kind of remedies can consumers rely on, in case of non-conformity of the digital content?

A truistical observation, regarding the remedies available in the cases in which the consumer is confronted with a lack of conformity of the digital content, is that the consumer is able to opt (while respecting the boundaries of reasonability) for one of the three possible remedies: (i) free service or a non-onerous replacement of the digital product; (ii) a re-estimation of the price and partial reimbursement; (iii) termination of contract and complete reimbursement. In accordance with article 14, par. (1) of the Directive (EU) 2019/770, „In the case of a lack of conformity, the consumer shall be entitled to have the digital content or digital service brought into conformity, to receive a proportionate reduction in the price, or to terminate the contract".

Obviously, the primary remedy the consumer may pursue is represented by the non-onerous replacement or by the solicitation of the bringing of the digital content or digital service into conformity; nonetheless, this measure is not available in the hypotheses in which this type of measure would be impossible to apply (lack of stock, for example) or would impose costs on the trader that would be disproportionate. The "disproportionate" character of the mentioned measure remains to be established by the court, in litigious circumstances; however, par. (2) of article 14 mentions a set of circumstances of the case which may be taken into account, including: „(a) the value the digital content or digital service would have if there were no lack of conformity; and (b) the significance of the lack of conformity."

The reasonable period of time involved in the cases in which the trader is asked to bring the digital content or digital service into conformity pursuant to paragraph 2 of article 14, as mentioned above, represents a decisive criterion in the selection of an adequate remedy. The replacement of the defective product, as well as the non-onerous service intervention must be conducted within a reasonable period of time from the moment the trader has been informed by the consumer about the lack of conformity. As it has been previously underlined, this primary set of measures are meant to be seen as non-onerous remedies from the consumers' point of view, and they will be offered free of charge and without any "significant inconvenience" to the consumer. In order to establish the significance of the inconvenience generated for the consumer, the courts may take account of (i) the nature of the digital

content or digital service and (ii) the purpose for which the consumer required the digital content or digital service.

Secondly, it must be underlined that, should the first two remedies be inaccessible or should these remedies (the replacement of the defective product, as well as the non-onerous service intervention) create a significant inconvenience for the consumer or should these measures imply an excessive, non-reasonable period of time, the consumer will be entitled to either a proportionate reduction of the price[8] in accordance with paragraph 5 of article 14, in the cases in which the digital content or digital service is supplied in exchange for a payment of a price[9]. Nevertheless, the consumer may opt for the termination of the contract in accordance with paragraph 6 of article 14, instead of an estimative action, in any of the following cases:

[8] It should be noted that there are time limits that are incident in these cases, as well as certain means of reimbursement by the trader, according to article 18 of Directive (EU) 2019/770, stipulating the incidence of a maximum period of 14 days of the date on which the trader is informed of the consumer's decision to invoke the consumer's right for a price reduction or to terminate the contract. Thus, any reimbursement that is owed to the consumer by the trader for lack of conformity of the digital content, pursuant to Article 14(4) and (5) or 16(1) of Directive (EU) 2019/770, due to a price reduction or termination of the contract, must be carried out „without undue delay" and, in any event, „within 14 days of the date on which the trader is informed of the consumer's decision to invoke the consumer's right for a price reduction or to terminate the contract." In what the means of reimbursement are concerned, the trader can carry out the reimbursement using „the same means of payment as the consumer used to pay" for the digital content or digital service, „unless the consumer expressly agrees otherwise", and provided that the consumer does not incur any fees as a result of such reimbursement; therefore, the parties are allowed to derogate from these suppletive rules concerning the means of reimbursement, between the boundaries set by the non-onerous nature of the reimbursement, which must be kept in all circumstances. Thus, no fee on the consumer in respect of the reimbursement may be imposed by the trader, should the latter comply o the requirements of article 18 of Directive (EU) 2019/770 on contracts for the supply of digital content and digital services. See also S. Grundmann, Ph. Hacker, „Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture", *cit. supra*, p. 257; C. Bedir, „Contract Law in the Age of Big Data", *cit. supra*, p. 12.

[9] The main body of rules set by Directive (EU) 2019/770 is applicable to both categories of contractual supply of digital content to consumers (onerous and non-onerous); therefore, the consumer may benefit from the first two remedies (the replacement of the defective product, as well as the non-onerous service intervention) even in the case in which he/she contracted a free supply of the digital content; for obvious reasons, the consumer will not be able to request for a proportionate reduction of the price in accordance with paragraph 5 of article 14, since the contractual clauses did not stipulate the payment of a price.

(a) the hypotheses in which the remedy to bring the digital content or digital service into conformity is impossible for the trader or disproportionate in accordance with paragraph 2 of article 14 of Directive (EU) 2019/770;

(b) the explicit refuse of the trader to bring the digital content or digital service into conformity in accordance with paragraph 3 of article 14, or the cases in which the trader / its commercial partners failed to bring the digital content or digital service into conformity, though initially accepted this mission;

(c) the cases in which a lack of conformity appears or manifests itself despite the trader's attempt to bring the digital content or digital service into conformity; recurrent lack of conformity may justify the consumers' choice to seek for the judicial termination of the contract for the supply of digital content;

(d) the amplitude of the lack of conformity may represent an alternative criterion; thus, should the lack of conformity be of such a serious nature as to justify an immediate price reduction or termination of the contract, the consumer's request to terminate the contract has higher chances to be acceptable in a court of law;

(e) in the cases in which there is an explicit (unilateral) declaration of the trader stating that the replacement or the non-onerous service will be refused, the consumer may question in court the reasonability of this refuse, thus requesting the judicial termination of the contract in order for the paid price to be reimbursed; therefore, should the trader had declared, or should it be clear from the circumstances of the case, that the trader will not bring the digital content or digital service into conformity within a reasonable time, or without significant inconvenience for the consumer, the latter's request for the termination of the contract may be seen as justified by the court[10].

There are several configurations for an adequate reduction of price, in the case of lack of conformity of the digital content; according to the standard set in art. 14, par. (5) of Directive (EU) 2019/770, "*the reduction in price shall be proportionate to the decrease in the value of the digital content or digital service which was supplied to the consumer compared to the value that the digital content or digital service would have if it were in conformity.*" In certain cases, the B2C contract contains an autonomous clause, stipulating that the digital content or digital service will be periodically supplied (the supply of the digital service will take place over a period of time) in exchange for the payment of a price; in these cases, the reduction in price requested by the consumer for the lack of

[10] See, for details, M. Loos, „European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content", Amsterdam Law School Research Paper No. 2016-27, Centre for the Study of European Contract Law Working Paper Series No. 2016-08, *loc. cit. supra;* A. Savin, *op. cit.,* p. 12.

conformity would only apply to the period of time during which the digital content or digital service was not in conformity.

It is also worth reminding that, in the cases in which the digital content or digital service is supplied in exchange for the payment of a price (onerous character of the contract), the consumer is not considered to be entitled to terminating the contract[11], unless the lack of conformity is not minor; nevertheless, in the hypotheses in which the lack of conformity is not significant, the request for contract termination will be rejected (except for recurrent lack of conformity which might be considered a major breach of contractual duties, in a court of law), keeping in mind that the burden of proof with regard to whether the lack of conformity is minor is to be provided by the trader. Minor defects of the digital content are, thus, non-constitutive of pertinent reasons for a termination of the contract, nor are these eligible for justifying a partial price reimbursement, unless voluntarily agreed by the trader. One should keep in mind that the consumer's right to terminate the contract[12], despite the uncured non-conformity of the digital content, is (totally

[11] Should the trader be confronted with the termination of the contract upon the consumer's request, and should the reason for the lack of conformity be imputable to a third party, the trader would benefit from the exercise of a right of redress, as regulated by article 20 of Directive (EC) 2019/770, thus invoking the fact that there is at least a convergent culpable conduct of a third party, which makes the remedies incongruent with the trader's contribution to the detriment suffered by the consumer. Therefore, it must be underlined that, in the cases in which the trader is liable to the consumer due the failure to supply the digital content or digital service, or because of a lack of conformity resulting from an act or omission imputable to a third party or to one of its partners in previous links of the chain of transactions, the trader will be entitled to pursue remedies against the third party liable in the chain of sequential commercial transactions. Obviously, it resides under the competence of the national legislator to determine the fundamental aspects and the mechanism of this right of redress, establishing legal procedural means for the identification of the person against whom the trader may pursue remedies, and the relevant actions and conditions of exercise. See J. Morais Carvalho, „Goods with Digital Elements, Digital Content and Digital Services in Directives 2019/770 and 2019/771", *loc. cit. supra.*

[12] There are certain specific obligations incumbent to the consumer in the event of termination of contract for the supply of digital content, in accordance with the duties enumerated in article 17 of Directive (EU) 2019/770. Thus, consequently to the termination of the contract, the consumer is asked to refrain from continuing to use the digital content or digital service and from making it available to third parties. Additionally, in cases in which the digital content was supplied by the professional trader on a tangible medium, the consumer has the duty, at the request and at the expense of the trader, to return the tangible medium to the trader „without undue delay" (in a reasonable period of time, no undue delays permitted). Should the trader decide to request the return of the tangible medium (this specific request represents an option for the trader), that request must be made (communicated to the consumer)

or partially) excluded in the cases in which the non-conformity does not impair the functionality, interoperability or other main performance features of the digital content[13], at least not in terms of accessibility, continuity and security of the digital content, which may seem decisive for the consumer's choice to terminate the contract[14].

5. Is there a consumer's right to retrieve the digital content created by the consumer, in the event of contract termination?

Article 16, par. (4) of Directive (Eu) 2019/770 seems to postulate a veritable duty of the trader to „*make available to the consumer any content other than personal data, which was provided or created by the consumer when using the digital content or digital service supplied by the trader*", upon the consumer's request. This assertion of the trader's obligation would imply that the consumer is entitled to retrieve the digital content he/she generated by the use of the digital service provided by the trader (along with the right to access the personal data, applicable under Regulation (EU) 2016/679). The exportability of data in the event of contract termination may rise concerning interrogations, both in the case of digital services allowing the creation, processing or storage in digital form of data provided by the consumer (i) and of digital services allowing the sharing of data and interaction with data in digital form (ii), if those data are provided by other users of the service[15].

within 14 days of the day on which the trader is informed of the consumer's decision to terminate the contract. One should also note, congruently to the precedent observation, that the consumer would not be liable to pay for any use made of the digital content or digital service in the period, prior to the termination of the contract, during which the digital content or the digital service was not in conformity or has not been brought to conformity by the trader.

[13] See G. Spindler, „Contratos De Suministro De Contenidos Digitales: Ámbito De Aplicación Y Visión General De La Propuesta De Directiva De 9.12.2015", *cit. supra*, p. 9.

[14] It should be remarked that there are no formal requirement for the exercise of the right of termination by the consumer; a simple explicit statement would suffice, as resulting from the text of article 15 of Directive (EU) 2019/770, according to which „*The consumer shall exercise the right to terminate the contract by means of a statement to the trader expressing the decision to terminate the contract.*"

[15] This segment envisages the digital services supplied against some form of onerous counter-performance by the consumer, either monetary (payment of a price) or in the form of data (e.g. the consumer's personal data), both raising the question of the consumer's right to retrieve the digital content he/she generated by the use of the digital service provided by the trader. See, for details, D. Clifford, „Data Protection and Consumer Protection: The Empowerment of the Citizen Consumer", *loc. cit. supra.*

6. Incidence of special terms and time limits for the imperative warranty of conformity

6.1. Termination pro rata temporis and its reverberations on the diminution of the reimbursed value

In certain cases, the consumer subscribed to digital content for a certain period of time in exchange for a fee (implying periodically paid costs), and the digital content was defective for part of that time, although it was in conformity with the contract / with the consumer's legitimate expectations during the remaining part of the subscription period, the question raised is that of the determining of the reimbursement value to which the consumer is entitled. In this hypothesis, it must be underlined that the consumer may terminate the contract only with regard to the period of time when there was non-conformity, which means that, in this case, the refund due from the supplier will also be proportionate to the period of time during which the digital service was lacking conformity.

6.2. The 30 days term for invoking the termination of contract

When confronted with the trader's decision to unilaterally alternate the primary contractual terms (pertaining to the technical characteristics of the digital content or of the digital service, for example), the consumer will be entitled to terminate the contract if the modification negatively impacts the consumer's access to or use of the digital content or digital service, unless such negative impact is only minor. In that case, the consumer will be entitled to terminate the contract free of charge (no additional cost applicable) „*within 30 days of the receipt of the information or of the time when the digital content or digital service has been modified by the trader, whichever is later*", as stated in article 19, par. (2) of Directive (EU) 2019/770.

7. Conclusive remarks

Significantly reformed, the hierarchical system of criteria proposed in the Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services valorises the subjective perception of the lack of conformity, while insisting on the inherent correlation between the subjective standards of conformity and the objective standards, in the field of digital content e-commerce. Consequently, after the elapse of a reasonable period of time, it should be clear if the trader has or has not performed the contract for the supply of digital content. Should the latter case occur, the consumer may resort to one of two secondary remedies, opting either for the cancelling (termination) of the contract altogether, while demanding a complete refund of the price, or to keep the defective digital

content or service, while claiming a partial refund of the costs. As noted in the previous paragraphs, the consumer may also demand a partial or total refund, if removing the defects would be „impossible, disproportionate or unlawful". Especially, in cases in which the attempt to remove the defects would cause "significant inconvenience" to the consumer, as well as in the cases in which it is clear from the circumstances that the trader will not remove the defects (implicit or explicit refuse or implicit impossibility to remove the defects), the consumers may opt for a partial or total refund, especially if they have informed of that impossibility or of the trader's refuse to replace the digital content. The following conclusive remarks can be drawn from the previously made assertions:

(a) in the cases in which the consumer is confronted with a lack of conformity of the digital content, the consumer will able to opt for one of the three possible remedies: (i) free service or a non-onerous replacement of the digital product (if it represents a reasonable and non-disproportionate measure); (ii) a re-estimation of the price and partial reimbursement, thus receiving a proportionate reduction in the price; (iii) termination of contract and complete reimbursement of the costs,

(b) the consumer is entitled to a just compensation, as well as to any other specific legal remedies, such as the unilateral termination of contract, in the cases in which the lack of conformity is resulting from the incorrect integration of the digital content or digital service into the consumer's digital environment, but the latter is caused by a syncope in the manner in which the trader provided the inherent instructions in order for the consumer to proceed to an adequate integration of the digital content into the consumer's digital environment; the same solutions are applicable in the cases in which the non-conformity is resulting from a deficient manner of integration, if the digital content or digital service was integrated by the trader or under the trader's responsibility;

(c) minor defects of the digital content are, thus, non-constitutive of pertinent reasons for a termination of the contract, nor are these eligible for justifying a partial price reimbursement, unless voluntarily agreed by the trader; in these cases, the consumer may request for the trader to bring the digital content or digital service into conformity within a reasonable time, provided that these remedies can be applied without significant inconvenience for the consumer;

(d) from the perspective of shared liability, in the cases in which the trader is liable to the consumer due the failure to supply the digital content or digital service, or because of a lack of conformity resulting from an act or omission imputable to a third party or to one of its partners in previous links of the chain of transactions, the trader who has been held responsible against the consumer (including compensation for misrepresentation, defective

products or unsatisfactory digital services) will be entitled to pursue remedies against the third party liable in the chain of sequential commercial transactions;

(e) unilateral modification of the technical or juridical features for the digital service provided to the consumer is not prohibited; however, the trader is given permission to operate such unilateral adjustments only in cases in which there is cumulative compliance with the following conditions (which must be are met simultaneously): the contract allows, and provides a valid reason for such a unilateral modification of the contractual terms; the modification proposed by the trader is made without any additional cost to the consumer; nonetheless, the consumer is informed in a clear and comprehensible manner of the modification implemented by the trader;

(f) the new set of rules also provides for specific time periods during which the reimbursement of the price is due to the consumer; thus, any reimbursement that is owed to the consumer by the trader for lack of conformity of the digital content, pursuant to Article 14(4) and (5) or 16(1) of Directive (EU) 2019/770, due to a price reduction or termination of the contract, must be carried out "without undue delay" and, in any event, "within 14 days of the date on which the trader is informed of the consumer's decision" to invoke the consumer's right for a price reduction or to terminate the contract;

(g) along with the right to have the non-conformity cured, the consumer has the right to opt for the remedy of immediate termination of contract, except in the case of minor lack of conformity; however, the hierarchical system of remedies imply that the consumer may not demand a total or partial refund upfront, but must wait for the supplier to cure the digital content "within a reasonable time", as a prior remedy;

(h) confronted with the logic of hierarchal remedies, the consumer may opt for the termination of the contract or may claim a partial refund (reduction of price) only if cure of non-conformity is impossible, disproportionate or unlawful; the termination of contract remains a valid option also in cases in which the cure of non-conformity was not completed within a "reasonable time" and in cases in which the cure of non-conformity requested by the consumer would eventually be possible, yet it would cause "significant inconvenience" to the consumer; last, but not least, in hypotheses in which the suppliers have declared they will not cure the non-conformity, or it is clear from the circumstances that the supplier will not cure the non-conformity, the consumer may resort to seek (judicial) termination of contract;

(i) keeping in mind that the syntagms of "reasonable time" for curing the non-conformity, as well as the syntagm "significant inconvenience" are not expressly defined in Directive (EU) 2019/770, thus remaining an open-ending notion, future legal uncertainty is not totally excluded in this field, leaving the floor for the courts to establish the exact meaning of these notions in contracts for the supply of digital content and digital services.