

## THE CONSUMER RIGHTS DIRECTIVE AND ITS IMPLICATIONS FOR CONSUMER PROTECTION REGARDING INTANGIBLE DIGITAL CONTENT

by

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*The provision of digital content delivered in a process of streaming or downloading, thus not on tangible media of expression, came with immense digital and technological revolution central for electronic commerce. Yet, it is not clear what rights, if any, consumers have with respect to these transactions, as gaps in legislation cause troublesome consumer protection lacuna. To address these issues, inter alia, the new Consumer Rights Directive was adopted. This article explores the reasons for adoption of the new measure, as well as its practical impact on consumer protection regarding these products. As the level and scope of consumer protection greatly depends on the legal nature of the product, analysis of the legal definition of intangible digital content is provided. Moreover, the consumer protection in electronic transaction features a distinct right of withdrawal, hence the use and application of this right is examined as well. The last part of the article discusses the causes of consumers' detriment and seeks to evaluate whether the Consumer Rights Directive has clarified the matter of consumer remedies in the case of detriment, or whether the area remains uncertain.*

### KEYWORDS

*Consumer protection, Electronic commerce, Digital content, Consumer Rights Directive*

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## 1. INTRODUCTION

On the 6<sup>th</sup> of December in 2012, the European Commission released results of a Sweep<sup>1</sup> focused on the websites supplying selected intangible digital content<sup>2</sup> and their compliance with relevant Union legislation pertaining to business-to-consumer (hereinafter referred to as “B2C”) electronic commerce.<sup>3</sup> Almost two thirds of the reviewed websites did not appear to obey the rules. Consumers substantially encounter unfair commercial practices and contract terms, including wide liability disclaimers, lack of remedies for faulty goods, inadequate information on the seller, characteristics of the products and the final price.<sup>4</sup> While the provision of intangible digital content blooms, current consumer protection framework remains ambiguous on various aspects of this market fragment. Moreover, unwanted gaps in present legislation only foster the consumers’ detriment. The European Commission (hereinafter referred to as “the Commission”), being aware of the foresaid, did address these matters when proposing the new consumer protection measure.<sup>5</sup> The Directive 2011/83/EU on Consumer Rights<sup>6</sup> (hereinafter referred to as “the CRD”), adopted in October 2011, aims to clarify, update and strengthen consumer protection and has several implications for intangible digital content. Particularly, it establishes the legal definition of digital content and respective consumer rights, including additional information obligations of the e-tailors. The following article explores the nature of the CRD, as well as the new changes and their impact on strengthening and clarifying the consumer protection in relation to electronic provision of digital content.

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<sup>1</sup> European Commission 2012, *Sweep on on-line games, books, videos and music*, MEMO/12/945, EC, Brussels, viewed 21 January 2012 < <http://europa.eu/rapid/search-result.htm?page=5&locale=en&type=memo>>.

<sup>2</sup> Books, games, videos and music.

<sup>3</sup> Directive 97/7/EC OJ L 144/19, Directive 2005/29/EC, OJ L 149/22, Directive 2000/31/EC, OJ L 178/1, Directive 93/13/EEC OJ L 095/29.

<sup>4</sup> OECD 2011, *OECD Round Table on Consumer Protection in the Purchase of digital content Products*, DSTI/CP(2011)14/FINAL, OECD, Paris, viewed 21 January 2012 < [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DSTI/CP\(2011\)14/FINAL&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DSTI/CP(2011)14/FINAL&docLanguage=En)>.

<sup>5</sup> European Commission 2009, *Proposal for a Directive of the European Parliament and of the Council on consumer rights*, COM (2008) 614 final, EC, Brussels, viewed 21 January 2013 < [http://ec.europa.eu/consumers/rights/docs/Directive\\_final\\_EN.pdf](http://ec.europa.eu/consumers/rights/docs/Directive_final_EN.pdf)>.

<sup>6</sup> Directive 2011/83/EU of the European parliament and of the Council of 25th October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European parliament and of the Council and repealing Council directive 85/577/EEC and Directive 97/7/EC of the European parliament and of the Council, OJ L 304/64.

## 2. RETHINKING CONSUMER PROTECTION IN AN INTANGIBLE DIGITAL ECONOMY - THE NEED FOR NEW MEASURE.

The new CRD is an inevitable consequence of revision of Union consumer protection legislative framework that took place in 2006. As the Commission noted in the Green paper on consumer *aquis*,<sup>7</sup> the union legislation had not provided for the creation of a level playing field for online consumer transaction in the internal market.<sup>8</sup> The Directive 97/7/EC,<sup>9</sup> having been adopted in the advent of the electronic commerce when provision of digital content was marginal, is dated. In the meantime, the technological advances have been extensively influencing the key trends in the market. Due to high-speed communication, increase of upstream and downstream bandwidth and wide penetration of internet access, the online trade, particularly the provision of intangible digital content, has grown exponentially. In 2011, digital content was the fastest growing model of e-commerce with 26% growth in the US.<sup>10</sup> Various studies have also shown that this speed of expansion shall be maintained in upcoming years. By 2016, it is expected that 67% of all spending on entertainment and media will be digital spending.<sup>11</sup> Apparently, new channels for transactions and new forms of products, including intangible digital content, were created. In the UK, as much as 95% of music single sales are digital downloads.<sup>12</sup> The Union measures, however, were failing to catch up with these developments. The significant gaps and legal uncertainty emerged, which benefited neither consumers nor on-

<sup>7</sup> European Commission 2006, *Green Paper on the Review of the Consumer aquis*, COM (2006) 744 final, EC, Brussels, viewed on 21 January 2013, <[http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/green-paper\\_cons\\_acquis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf)>, pp. 3.

<sup>8</sup> Twigg-Flesner, Ch. 2012, *A cross-border-only regulation for consumer transaction in the EU: A fresh approach to EU consumer law*, Springer, New York, pp.16.

<sup>9</sup> Directive 97/7/EC, Directive 2005/29/EC, Directive 2000/31/EC, Directive 93/13/EEC.

<sup>10</sup> *Digital Future in Focus – Key insights from 2011 and what they mean for the coming year* 2012, ComScore, Reston, viewed 21 January 2013, <[comScore\\_2012\\_US\\_Digital\\_Future\\_in\\_Focus.pdf](http://www.comscore.com/Assets/PDF/Digital_Future_in_Focus.pdf)>.

<sup>11</sup> PWC 2012, *Global entertainment and media outlook: 2012-2016*, PWC, viewed 21 January 2013 <<http://www.pwc.com/gx/en/global-entertainment-media-outlook/data-insight-s.jhtml>>.

<sup>12</sup> Bradgate, R. 2010, *Consumer Rights in Digital Products*, A research report prepared for the UK Department for Business, Innovation and Skills, BIS, Institute for Commercial studies, University of Sheffield, viewed 21 January 2013, <<http://www.bis.gov.uk/assets/biscore/consumerissues/docs/c/10-1125-consumer-rights-in-digital-products.pdf>>, pp. 8.

line sellers.<sup>13</sup> Moreover, while the online environment offers superb room for full exploitation of the single market, the cross-border online trade did not seem to take up. Minimum harmonization approach to previous directives and disparate laws caused fragmentation of the market. The consumers and businesses were uncertain of their rights and obligations when trading across borders, and the development of e-commerce was hampered.<sup>14</sup> What is more, considerable economic consumer empowerment has changed their behaviour. The modern consumers are increasingly aware and in charge of their own rights and are becoming capable of pursuing them. Consequently, reflecting these changes and rethinking the scope of the consumer rules is necessary for attainment of effective and proportionate protection.<sup>15</sup> Similarly, a term average consumer, as defined by the Court of Justice of the European Union,<sup>16</sup> has evolved rapidly. As the number of consumers having experience with online shopping is growing,<sup>17</sup> the term average consumer shall also include a digital consumer who buys products or receives services online.<sup>18</sup>

Reflecting the abovementioned, the original proposal of the CRD was drafted. To prevent further fragmentation of rules and to address various issues, the CRD was proposed as a wide, horizontal instrument merging the questions of doorstep<sup>19</sup> and distant selling,<sup>20</sup> as well as unfair terms<sup>21</sup> and consumers' guarantees.<sup>22</sup> Even though the final text repeals only Directive 85/577/EEC and Directive 97/7/EC, it still claims the original goal. As the Re-

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<sup>13</sup> Butler, M. 2007, 'Consumer aquis – proposed reform of B2C regulation to promote cross-border trading', *Computer & Telecommunications Law Review*, vol.13, no. 4, pp. 111.

<sup>14</sup> Groote, B. D. & Vulder K.D. 2007, 'European Framework for Unfair Commercial Practices: Analysis of Directive 2005/29' (Legislative Comment), *Journal of Business law*, vol. 22, no. 1, pp. 24.

<sup>15</sup> OECD, *OECD Round Table on Consumer Protection in the Purchase of digital content Products*, op. cit.

<sup>16</sup> Case C-210/96 *Gut Springenheide GmbH and Tusky v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-4657 and C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] I-00117.

<sup>17</sup> 43% in 2009. See EUROSTAT 2010. *Eurostat regional yearbook 2010*, EC, Brussels, viewed 21 January 2013 <[http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-HA-10-001/EN/KS-HA-10-001-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-HA-10-001/EN/KS-HA-10-001-EN.PDF)>. pp. 123.

<sup>18</sup> Decision of the District court of Poprad from the 20<sup>th</sup> December 2011, *Obmudspot v Pro Content s.r.o.* no. 17C/113/2010-759.

<sup>19</sup> Directive 85/577/EEC, OJ L 372/31.

<sup>20</sup> Directive 97/7/EC, OJ L 144/19.

<sup>21</sup> Directive 93/13/EEC, OJ L 095/29.

<sup>22</sup> Directive 99/44/EC, OJ L 171/12.

Recital 2 reads, the CRD objective is “*simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules.*” Since the disparities between consumer protection rules among the member states substantially hindered growth of cross-border trade within the single market,<sup>23</sup> the minimum harmonisation approach was abandoned, and the CRD is based on fully targeted harmonisation. In regards to Recital 5 and Article 4 of the CRD, this approach shall secure not only uniformly high levels of the consumer protection, but also better functioning of the B2C internal market. Since this article is aimed at the implications of the CRD for the consumer protection when buying intangible digital content, the following text will focus on new rules regarding this online market category.

### 3. INTANGIBLE DIGITAL CONTENT: NEW LEGAL DEFINITION

Level and scope of consumer protection broadly depends on the legal regime of the contract in question. Hence, the legal nature of intangible digital content contracts is more than an academic question. The term “digital content” includes a variety of products offered in tangible, as well as intangible form. Regarding the content delivered electronically by means of download or stream, three major categories can be recognized: computer programs, downloads and streaming. From the technical point of view, digital content can be defined as “*data or information products supplied in digital format as a stream of zeros and ones so as to be readable by a computer and give instructions to the computer.*”<sup>24</sup> However, there is no consensus among jurisdictions or experts on its legal definition and legal regime applicable thereto.

The crucial legal dispute is about whether the digital content is to be considered goods, services, both or neither.<sup>25</sup> According to the first view, these contracts shall be, by their substance, deemed contracts on the sale of goods. Currently, the European Parliament considers goods as any intangible item usable in a manner which can be equated with physical posses-

<sup>23</sup> Schurr F. A. 2007, ‘The Relevance of the European Consumer Protection Law for the Development of the European Contract Law’ *V.U.W.L.R.* vol. 38, no.1, pp. 143.

<sup>24</sup> Bradgate, R. *Consumer Rights in Digital Products* op. cit. pp. 7.

<sup>25</sup> Department for Business innovation & Skills 2012, *The supply of digital content: Impact assessment*, BIS, London, viewed 21 January 2013, <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31357/12-961-supply-of-digital-content-impact.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31357/12-961-supply-of-digital-content-impact.pdf)>, pp. 2.

sion.<sup>26</sup> Digital content made available to the consumer by means of download has been also integrated into Common European Sales Law, which, despite robust criticism, was recently supported also by the European Parliament.<sup>27</sup> Moreover, it is also argued that in the case of sale of intangible digital content, a predominant purpose test shall be applied, and this transaction shall be regarded as a sale.<sup>28</sup> Similarly, the Court of Justice has in its judgement in *UsedSoft GmbH v Oracle International Corp.*<sup>29</sup> concluded that transaction, which includes downloading of a copy of computer program from the internet for remuneration, constitutes a sale within the meaning of Directive 2009/24 /EC.<sup>30</sup> This decision has its opponents, but the analysis would go unduly beyond the scope of this article. Nevertheless, the main argument against the said approach is the lack of ownership transfer as a conceptual feature of any sale contract. Intangible digital content, being primary an intellectual asset, is licensed, and in most cases, there is neither intention nor possibility to transfer ownership. Therefore, having acknowledged this, the second approach considers digital content a service. The Commission, in its report, Digital Content Services for Consumers,<sup>31</sup> has favoured this concept and has assumed intangible digital content a service accessible online. On the other hand, opinions considering intangible content neither service nor goods, but rather a “hybrid” between the two, are not rare either.<sup>32</sup> Furthermore, some researchers have shared the conclusion that “while downloads may be treated as goods (with possible adaptations), other

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<sup>26</sup> Loos, M.B. M. Helberger, N. Guibault, L. Mak, C. Pessers, L. Cseres, K. J. Sloot, B. & Tigner, R. 2012, *Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts*, University of Amsterdam, Amsterdam, visited 21 January 2013, <[http://www.ivir.nl/publications/helberger/digital\\_content\\_contracts\\_for\\_consumers.pdf](http://www.ivir.nl/publications/helberger/digital_content_contracts_for_consumers.pdf)>, pp. 172.

<sup>27</sup> European Commission 2012, *European Parliament Committee backs Common European Sales Law*, MEMO/12/777, EC, Brussels, viewed 21 January 2013, <[http://europa.eu/rapid/press-release\\_MEMO-12-777\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-777_en.htm)>.

<sup>28</sup> Adams, J.N. 2009, ‘Software and Digital content’, *Journal of Business law*, vol. 24, no. 4, pp. 396-402.

<sup>29</sup> Case (C-128/11) *UsedSoft GmbH v Oracle International Corp.* OJ C 287/10.

<sup>30</sup> OJ L 111/16.

<sup>31</sup> Europe Economics 2011, *Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers*, Report 4, LOT 1. London, viewed 21 January 2011, <[http://ec.europa.eu/justice/consumer-marketing/files/empirical\\_report\\_final\\_-\\_2011-06-15.pdf](http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf)>, pp. 3.

<sup>32</sup> Baden-Powell, E. Bennett, O. 2013, ‘Hit or BIS - in Search of Clarity for Digital Content Consumers’, *Entertainment Law review*, vol. 24, no. 1, pp. 13.

*products, such as those that are cloud-based, may be classified as services. Other products could be seen as a mix of goods or services.*"<sup>33</sup>

Since the jurisdictions treated intangible digital content in dissimilar manner, discrepancies occurred and subsequently created confusion. Hence, provision of the definition of digital content is undoubtedly the main attribution of the CRD in clarifying the issue. The Article 2(11) of the CRD provides that "*digital content means data which are produced and supplied in digital form.*" Recital 19 further elaborates this definition, providing that digital content is data "*such as computer programs, applications, games, music, videos or text irrespective*" of the form in which they are accessed. For the purpose of the CRD, tangible digital content shall be deemed goods. Thus, music, videos, software or games sold on tangible media of expression, such as CDs, DVDs, are items regulated by the legal regime of sale contracts. The situation is different concerning downloaded or streamed digital content. By adopting the third possibility, a *sui generis* approach, the legislator inclined creation of separate regime. Finally, contracts on intangible digital content are, according to Recital 19 of the CRD, deemed neither sales nor service contract for the purpose thereof. This approach acknowledges that while intangible digital content may have a lot in common with goods and services, it is, particularly regarding consumers' rights, distinct.<sup>34</sup>

#### 4. CAN YOU RETURN YOUR MP3?

When shopping online, consumers are unable to inspect the product or assure the nature of the service. Therefore, the right of withdrawal is a pivotal technique for consumers' protection in online transactions. It provides for a cancellation period in which they may terminate the contract without giving a reason. Since the absence of the possibility to see the product is the most frequented reason for not shopping online (58%)<sup>35</sup>, withdrawal right has positive implications for businesses, also. It is governed by Article 6 of

<sup>33</sup> OECD. *Round Table on Consumer Protection in the Purchase of digital content Products*, op. cit. pp. 4.

<sup>34</sup> Loos, M.B. M. Helberger, N. Guibault, L. Mak, C. Pessers, L. Cseres, K. J. Slood, B. & Tigner, R. 2012, *Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts*, University of Amsterdam, Amsterdam, visited 21 January 2013, <[http://www.ivir.nl/publications/helberger/digital\\_content\\_contracts\\_for\\_consumers.pdf](http://www.ivir.nl/publications/helberger/digital_content_contracts_for_consumers.pdf)>, pp. 13.

<sup>35</sup> European Commission 2009, *Report on cross-border e-commerce in the EU*, SEC (2009) 283 final, EC, Brussels, viewed 21 January 2013, <[http://ec.europa.eu/consumers/strategy/docs/com\\_staff\\_wp2009\\_en.pdf](http://ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf)>, pp. 2.

the Directive 97/7/EC, and its application is different in a case of contracts of sale from a case of provisions of services.

Regarding downloaded or streamed digital content, the application of existing Directive 97/7/EC would, adopting any of the foresaid approaches, amount to the same conclusion, non-existence of this right. In the case of sale of goods, a consumer has a right to return it within seven working days from the day of receipt. On the other hand, the Article 6(3) of the Directive 97/7/EC contains additional provisions. It states that the right of withdrawal may not be exercised in respect to goods which, by reason of their nature, cannot be returned. As withdrawal from the contract is a way to terminate the contract, each party has to return what it has already obtained from the other party. In most of the cases, intangible digital content cannot be, by its nature, returned. Consumers may make copies of the purchased content and then, even after refund, freely use it. Typically, the supplier may not be able to detect and prevent such further use; therefore, intangible digital content, by its nature, cannot be returned.<sup>36</sup> Similarly, there shall be no right of withdrawal when applying the legal treatment of services, provided the provision of the services had started before the seven working days “cooling off” period lapsed. Thus, if the download had begun before the end of the withdrawal period, the consumer may not cancel. It is interesting and could be noted that many online stores<sup>37</sup> providing intangible digital content have adopted this approach. Furthermore, even when considering the provision of intangible digital content as a specific contract with distinct rules applying thereto, the cancellation right may not be exercised. This conclusion is justified by analogical application of the Article 6(3) on software, music or video recordings. The non-existence of the withdrawal right is conditioned with unsealing the plastic cover. However, every analogy has its limitations. As books are fully omitted in this provision and magazines and periodical are treated differently, the Article 6(3) cannot serve as an encom-

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<sup>36</sup> This however does not apply to all types of intangible digital content. When the digital content is accessed through an online account the provider may simply deactivate the account or by other means prevent such further use. See Loos, M.B. & Mak, C. 2012, *Remedies for buyers in case of contracts for the supply of digital content: Brief note*, PE 462.459, European Parliament, Brussels,

<<http://www.europarl.europa.eu/document/activities/cont/201206/20120618ATT47122/20120618ATT47122EN.pdf>> pp. 18.

<sup>37</sup> iTunes Terms and Conditions, Google play Terms of Service, Terms and Conditions of Alza.sk.



passing and comprehensive treatment of all categories of intangible digital content.

Since the CRD introduced a new definition of the intangible digital content, the abovementioned conclusions would not be, to a certain extent, feasible. Therefore, the Recital 19 and subsequent Article 16(m) stipulate distinct conditions for the use of the right to withdraw. In light of the Article 16(m), the right of withdrawal shall not be provided for in respect of contract on *"the supply of digital content, which is not supplied on tangible medium if the performance has begun with the consumer's consent and his acknowledgement that he thereby loses his right of withdrawal."* Thus, two conditions for non-existence of cancellation right are imposed. Firstly, the performance of the contract (e.g. downloading) has to begin during the withdrawal period with the consumer's consent. Secondly, the consumer had acknowledged thereof, hence had acknowledged that he shall lose his right should the performance of the contract begin in cancellation period.

At this point, it shall be also noted that the CRD has redesigned some features of the current cancellation right. In the light of Article 9, a consumer shall have a cancellation period of 14 days, instead of the current 7. On the other hand, the Commission has, due to numerous difficulties, abandoned the concept of working days. Therefore, the 14-day withdrawal period refers to calendar days. Moreover, regarding electronic commerce, the right of withdrawal will be also applicable to online auctions (e.g. eBay), provided it is a case of B2C trade. Furthermore, the e-tailers shall be rather immaculate about proper communication of the cancellation right to the consumers. Under the new rules, failing to comply with their obligations may be too perilous and result in prolongation of the cooling off period by 12 months.<sup>38</sup>

## 5. ENHANCING CONSUMER PROTECTION

By defining tangible and intangible digital content differently, the CRD creates a clear distinction in consumers' rights in this respect. As the tangible digital content falls within the scope of consumer protection regarding sale of goods, the consumer purchasing music in CD format can avail himself of a wide range of guarantees. By contrast, the consumer purchasing the same album delivered by electronic means does not obtain this high standard of protection. The outcome of this approach is that it rather unjustly treats

<sup>38</sup> Article 10 of the CRD.

products differently merely on the basis of the form in which they are supplied. As a consequence, the consumers' legal standing regarding intangibles is weakened.

As it has been outlined above, the online digital content market is continuously growing. Subsequently, so the estimated amount of faulty or poor-quality goods also grows, causing considerable consumers' detriment.<sup>39</sup> It has been found that 43% of people that had bought a download had been disappointed.<sup>40</sup> Even though different studies show different numbers in factors evoking consumers' detriment, the following are considered amongst the major ones: i) lack or vagueness of information on the product, ii) lack of transparency, iii) poor visual or sound quality of the product, or iv) problems with accessibility due to potential geographical restrictions.<sup>41</sup> Frequently, the purchased content did not live up to the consumers' expectations, did not fit the proclaimed purpose or even damaged his or her software. Moreover, many practices of the suppliers seem to harm a vulnerable group of customers, children. The suppliers use a concept of in-game purchase, which includes offering games for free, but requiring purchase at the later stages.<sup>42</sup> Likewise, consumers experienced specific problems with unclear, non-transparent and lengthy Terms and Conditions. Even more complexity is added by copyright law as consumers buying copyrighted digital content are entitled to use it under the licence. Since the text thereof may be complicated and cover various legal aspects, consumers may find it hard to understand the specific terms of use of the product or, generally, what rights they have (e.g. private copy, personal format shifting, etc.).<sup>43</sup> Moreover, copyright license agreement is a tool to protect the copyright holder, not the consumer, thus a set of imbalanced rights and obligations is imposed.

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<sup>39</sup> An annual sale of intangible digital content is to be 1.629 million Pounds (GBP). While estimated faulty downloads are of value of 260.6 million which is over 15%. Department for Business innovation & Skills, *The supply of digital content: Impact assessment*, op. cit. pp. 9.

<sup>40</sup> Ibid. pp. 12.

<sup>41</sup> Department for Business innovation & Skills, *The supply of digital content: Impact assessment*, op. cit., pp. 2.

<sup>42</sup> Stenzel, U. Lima, M.G.S. & Downes, J.J. 2010, *Study on Digital Content Products in the EU*, Framework contract: Evaluation impact assessment and related services, Lot 2: Consumer's Policy, EC, Brussels, viewed on 21 January 2013, < [http://ec.europa.eu/consumers/enforcement/sweep/digital\\_content/docs/dcs\\_complementary\\_study\\_en.pdf](http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf) >, pp. 9.

<sup>43</sup> Consumer Focus, *Ups and Downloads – Consumer experiences of buying digital goods and services online*, op. cit. pp. 14.

The CRD intends to address these issues by specifying the rules applying in this context and requiring provision of clearer information on digital content. Recital 19, in connection with Article 6 (1)(2), imposes additional information obligations and requirements on the e-tailors supplying digital content. In particular, these obligations include information on the characteristic of the content. The digital content supplier has to inform consumers on the functionality of the product, e.g. if the product may be used for consumer behaviour tracking or if any technical protection measures, such as digital rights management or regional coding that would deny access from different territories, apply to the product. Secondly, the supplier shall inform on any relevant interoperability of the content with both hardware and software, provided he is aware or should have reasonably been aware of.

Nonetheless, the notion of functionality and interoperability only partially covers the problems that consumers experience. The pre-contractual information should make consumers better informed; however, the CRD does not stipulate what rights consumers have regarding quality of the content.<sup>44</sup> Since the protection rules in this area depart from standardized protection regarding goods or services, it is not clear what rights of redress, if any, consumers have in abovementioned cases. Consequently, the consumers are exposed to risk in cases of detriment, and the availability of potential remedies greatly depends on the goodwill of the content providers.<sup>45</sup> Therefore, while provisions of the CRD might be considered a good start, broader inclusion and definition of the consumers' remedies will be necessary. Ultimately, this is also presumed by the Directive itself, as the Recital 19 provides that further harmonization of provisions of digital content may be needed. The way toward standardization of consumer protection and granting consumers specific digital rights, however, might be a long run. The main challenge when adopting additional rules will be tackling the right balance between copyright and consumer protection, while keeping the legislation technically neutral and business-friendly.

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<sup>44</sup> Baden-Powell, E. & Bennett, O. *Hit or BIS - in Search of Clarity for Digital Content Consumers*, op. cit. pp. 14.

<sup>45</sup> Ibid. pp. 3.

## 6. CONCLUSION

As technology flourishes, a vibrant digital market has been established. The use of intangible digital content delivered by the process of streaming or downloading became part of European consumers' daily lives. Unfortunately, legislation repeatedly fails to catch up with and address these changes, thus no explicit rules pertaining to intangible digital content have, until recently, existed. The new EU measure, Directive 2011/83/EU, aims to ensure up-to-date consumer protection standards and has introduced new rules on digital content. Clarification of the definition of intangible digital content, as well as clear stipulation of the conditions for non-existence of the withdrawal right shall be, in respect to consumer protection, welcomed. To the contrary, imposing different treatment of tangible digital content than intangible content apparently creates two, distinct levels of consumer protection. While the CRD seeks to lessen consumers' detriment by establishing complementary information obligation that suppliers need to comply with, the question whether it will, in practice, constitute a sufficient tool in protecting consumers is legitimate. As the CRD fails to include wider stipulation of consumers' rights, the remedies for this issue remain unclear. Therefore, given the exponential growth of the digital market, it is undeniable that further regulation will be required.

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