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UNILATERAL TERMINATION AND ADJUSTMENT OF THE CONSUMER CONTRACT ON DIGITAL CONTENT

Unilateral termination and adjustment of the business to consumer contract in the perimeter of digital content continuously raises new questions for legal practitioners. The study approaches the intricacies inherent to the consumer's right to seek the judicial termination of the modified contract, in the case of the unilateral adjustment of the contract for the supply of the digital content by the seller. According to Article 19, para. 2 of Directive (EU) 2019/770, the termination of the contract remains open to the consumer, who is entitled to terminate the contract in the circumstances when the unilateral alteration of the contractual terms negatively impacts the consumer's access to or use of the digital content, unless such negative impact remains to have only minor repercussions for him/her. Our analysis insists on the fact that in the case of a minor lack of conformity, the consumer's request for the termination of the contract is legally unacceptable. On the other hand, in cases in which the impact of the unilateral modification significantly affects the consumer's rights, the consumer is entitled to terminate the contract in a non-onerous manner within 30 days of the time when the digital content has been modified. We argue that the consumer's anticipatory renunciation of the right to termination of contract represents unfair terms, as are the contractual clauses which are imposing the consumer's unilateral adjustment relating to the supply of digital content.

Keywords: consumer, digital products, termination of contract, unilateral adjustment.

1. INTRODUCTORY REMARKS

Perceived (most often) as being the "central piece" of the legal protection recognised to consumers in online-concluded B2C contracts, the mechanism of the withdrawal right on consumer consent not only sequentially describes one of the stages of progressive formation of the online B2C agreement, but also coagulates other subjacent protectionist mechanisms, such as the one represented by the informative formalism in the B2C distance-formed contracts or the one represented by the specific content of the pre-contractual information

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obligation incumbent on the professional traders. As resulting from the provisions of the second paragraph of Article 19 of Directive (EU) 2019/770, the option for termination of the contract is limited to the consumer, who is entitled to terminate the contract under the hypotheses that the unilateral alteration of the contractual terms negatively impacts the consumer's access to or use of the digital content. 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 the professionals have an 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 specified in Article 8 of the Directive (EU) 2019/770[398], as long as the consumer expressly agreed to a specific deviation from the objective criteria of conformity of the digital content in the pre-contractual stage while implementing the mandatory rules aiming to avoid the consumer's disadvantage in the field of digital services contracting.

From the perspective of the professional trader' liability, the duty of informing the consumer in the pre-contractual stage is, on the segment represented by the formation of distance B2C contracts (including the digital version of the business-to-consumer contract formation), doubled or seconded by the obligation to deliver certain pieces of information at the moment of the concluding of the contract. The latter revolves around the idea that the consumer needs timely information, inserted in the distance contract, which is meant to warn the consumer about the existence of specific rights and obligations, the importance of which the legislator has assessed as being central, such as those relating to the right of consent withdrawal that may be exercised within 14 days (or 12 months and 14 days, in cases where the professional has not complied with the requirements of the information formalism) from the moment of the contract formation. In terms of its intrinsic purpose, the obligation of the professional to provide the consumer with certain information at the pre-contractual stage is primarily intended to enable the consumer to compare the various offers received in order to select the most appropriate one for the consumer's specific needs. Nevertheless, as regards the obligation to provide consumers with certain information at the time of acceptance of the offer (incorporation of mandatory clauses, as an expression of the informative formalism in B2C contracts), its regulation aims to enable consumers to become aware of their rights and obligations under the distance-formed contract, thus ensuring the communicating to consumers of adequate information necessary for the exercise of their rights, particularly on the existence, the limits and the timeframe of the right of withdrawal from the B2C contract.

The premises for the situations in which a consumer's right to withdraw the original consent[399] exist do not include, specifically, the cases in which the ordered digital content/ contracted digital services were customised at the consumer's request. Nevertheless, in practice, the gradients and valences of the notion of „product customisation" remain

[398] Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32019L0770.

[399] See Pusztahelyi, R.: Abuse of the Right of Unilateral Termination in Contract Law, In: Acta Univ. Sapientiae, Legal Studies, Vol. 7, No 1 (2018), p. 49–60.

difficult to determine for the court of law, which remains sovereign in determining whether or not it is in the presence of a genuine „product customisation" involving the configuration of aspects that deviate from the standard content of the sale offer. In these hypotheses, it is important to note that the analysis implies the necessary delimitations between the contracts of sale (or of sale of future goods) and those of enterprise (personalised manufacture of products, according to the specifications / preferences stated by the customer, involving, for the professional, a customised performance), in order to determine whether, in those cases, personalisation services have been provided which expel the B2C contract concluded within the perimeter of the agreements formed online in respect of which the consumer's right of withdrawal subsists.

In this regard, the characteristic informative formalism, which is incident in the formation of B2C distance contracts[400], implies for the professional the obligation to restate the information delivered in the pre-contractual stage to the consumer, in the form of expressed provisions introduced in the contract text (or in digital format), which are meant to highlight, for the consumer, the essential aspects related to the existence, limits and modalities of the exercise of essential rights, respectively, the consequences of non-performance of specific obligations incumbent on the consumer, the purpose being, at the time of contract formation, to ensure the expressing of an informed consent[401] (a purpose that characterises the pre-contractual obligation to inform), while allowing the consumer to become aware of the existence of essential rights / obligations the legal substance of which would be neglected, in the absence of adequate information, especially on the timeframe applicable to the consumer's right of withdrawal. Firstly, in situations where the formation of the B2C contract involved the use of a means of distance communication which allowed a limited space or time for the display of information, communication to the consumer of the standardised model withdrawal form in clear and intelligible language remains possible for the professional, through a source other than the original means of distance communication (which, by hypothesis, involved space constraints or time limits).

Secondly, it is important to note that the mentioned right of withdrawal is intended to compensate for the informational disadvantage resulting from the consumer – professional trader informational imbalance in the pre-contractual stage of a B2C distance-formed contract, while allowing the consumer to benefit from an appropriate period of reflection during which the consumer enjoys the opportunity of examining and testing the digital content or the delivered product (as stated in the CJEU decision in case *Messner*, C-489/07, from September 3rd, 2009[402], as well as from the CJEU decision in case C-430/17, from January 23, 2019[403]).

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[400] Grundmann, S. Digital Technology as a Challenge to European Contract Law – From the Existing to the Future Architecture, In: European Review of Contract Law, vol. 13 (2017), p. 255-293.

[401] Julien, J. Droit de la consommation. 3rd edn. Paris: L.G.D.J., 2019, p. 81-87; Mohty, O. L'information du consommateur et le commerce électronique. Rennes: Presses Universitaires de Rennes - P.U.R., 2020, p. 56-72; Pellier, J.-D. Droit de la consommation. 3rd edn. Paris: Dalloz, 2021, p. 118-123.

[402] The CJEU decision in case C-489/07, Messner, from September 3rd, 2009 is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=73082&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=633991.

[403] The CJEU decision in case C-430/17, from January 23, 2019 is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=210175&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=634251.

Thirdly, the study accentuates the limits applicable to the exercise of the consumer's right to adjustment or to termination of the contract, according to the provisions of Article 8 of Directive 2019/770/EU, since any lack of conformity resulting from an incorrect installation of the products presenting digital content will be considered equivalent to a lack of conformity of the products if the installation is part of the contract of sale of the products and the products were installed by the seller or under its responsibility. The provisions contained in Article 8, para. 1 will also apply if the product intended to be installed by the consumer is installed by the customer, and the incorrect installation is due to a deficiency in the installation instructions in terms of informational non-conformity.

2. PROLEGOMENA FOR THE EXERCISING OF THE CONSUMER'S RIGHT TO UNILATERAL TERMINATION OF CONTRACT

As previous scholars have underlined[404], the non-onerous nature of the withdrawal right (thus excluding the costs related to the return of the products) implies *inter alia* that, consequently, the consumer has no obligation to bear other costs, except in the case of the abnormal handling of the returned product, than those necessary to establish the nature / characteristics of the delivered product or its usual inspection, such as unpacking the product, unsealing the package in order to verify its characteristics and functionality, etc. After receiving the consumer's intention to withdraw, on the professional is in turn incumbent the obligation to reimburse to the consumer the amounts paid (yet not having an obligation to reimburse the cost of installing services, if those were delivered), without undue delay and no later than 14 days from the receipt by the trader of the notice on the consumer's withdrawal from the B2C contract. However, the trader may postpone or even suspend the refund of the price until the date of recovering the products or the date of receipt of the proof of shipment from the consumer.

Typically, the formation of the B2C online-concluded contracts on digital content and digital services is not characterised by a withdrawal right of the consumer's consent due to the fact that the digital content is usually already accessed at the moment at which the consumer intends to retract the previous consent. Nevertheless, in the circumstances when the digital content lacks objective or subjective elements of conformity, as described in Articles 7 and 8 of Directive 2019/770/EU, the consumer enjoys the right to unilateral termination of the contract for non-conformity or, alternatively, the right to obtain an adjustment of the contractual obligations. The notion of product conformity designates the manner in which the product sold and delivered to the consumer corresponds to the legitimate expectations of the consumer (a), to any mandatory provisions of the law on the standardization of the manufacturing process (b) or to contractual specifications (c), both materially and procedurally, as being relative to the identity of the delivered product with the one agreed in the sale-purchase contract, to its quality and the delivered quantity (I), as well as from a functional point of view, relative to the functions, attributes, characteristics and technical limits initially agreed (II).

[404] See Picod, N. and Picod, Y. Droit de la consommation. 5rd edn. Paris: Sirey, 2020, p. 94-102; Piedelièvre, S. Droit de la consommation. 3rd edn. Paris: Economica, 2020, p. 71-86.

The legitimate expectations of the buyer regarding the conformity of the product may be incidental, including tacitly, in the case of technical characteristics or qualities of the product that are typical / usual. Instead, the atypical qualities / functions of a product must be expressly agreed in the contract (and must be the subject of express contractual stipulations) so that, subsequently, their absence in respect of the delivered product justifies a consumer's request to repair the lack of conformity.

Comparatively, it should be noted that the warranty of conformity of tangible products, as regulated by Article 8 of Directive 2019/771/EU, operates for two years from the date of delivery of the product and cannot be removed or restricted in contractual clauses, even if those contractual provisions have been accepted by the consumer (since these clauses are considered to be unfair terms). Instead, through express contractual clauses, consumers can be offered a more advantageous guarantee than the minimal legal one (for example, a three-year guarantee for lack of objective conformity). Based on the legal guarantee, the consumer who faces a defect in the product in the first two years after delivery can obtain a free repair / replacement of the product or, if these are no longer possible, a total or partial refund of the price.

Another salient feature characterises the types of compliance in the perimeter of the conformity warranty given that, regarding the delivery of the product, one can firstly signalise a material (objective) conformity, which is implicit or in accordance with the explicit contractual specifications[405] regarding the identity of the delivered good with the one initially established (as being the derived object of the sale than the one ordered), the quantity and quality of the product, as it results from the contractual clauses, from the commercial usages[406], from the imperative norms of the law (if this is the case). Secondly, the delivered product must also have a functional (subjective) conformity, in accordance with the typical attributes of a similar product, respectively with the technical attributes stipulated in the contract. The delivery of a product which proves to be unfit to be used for the destination assigned by the buyer thus can lead to the deficiency compliance.

It is also worth mentioning that, according to Recital (19) of Directive 2019/770/EU, in the objective sphere of incidence of the mentioned regulation and harmonised norms, the Directive address specific issues across different categories of digital content, digital services, and their supply (dematerialised or tangible / durable medium), covering, *inter alia*, computer soft programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, as well as digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media, while addressing the numerous

[405] Narciso, M. 2017. Consumer Expectations in Digital Content Contracts – An Empirical Study, In: Tilburg Private Law Working Paper Series No. 01/2017, available at SSRN: https://ssrn.com/abstract=2954491 , visited on September 12, 2021.

[406] Spindler, G. 2016. 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), In: InDret, Vol. 3 (2016), available at SSRN: https://ssrn.com/abstract=2832162 , visited on September 14, 2021.

ways for digital content or digital services to be supplied, such as transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media. The Directive should apply independently of the medium used for the transmission of, or for giving access to, the digital content or digital service. However, it should be noticed that the Internet access services are expressly excluded from the sphere of incidence of the provisions of Directive 2019/770/EU on certain aspects concerning contracts for the supply of digital content and digital services.

It is important to notice, however, that, in terms of selecting the remedy of price adjustment and reduction, according to the provisions of Article 14, para. 4 of Directive 2019/770/EU, the consumer is considered to be entitled to either a proportionate reduction of the price in accordance with paragraph 5, in cases which are characterised by the fact that the digital content or digital service has been supplied in exchange for a payment of a price, or, as an alternative remedial measure; to request the termination of the contract in accordance with paragraph 6, under the hypotheses that it was considered impossible to bring the digital content or digital service into conformity or disproportionate from the trader's perspective on objective grounds; the same alternative applies in cases in which the trader has not brought the digital content or digital service into conformity in accordance with paragraph 3 of the mentioned article (i), or in the situations in which there is a lack of conformity despite the trader's attempt to bring the digital content or digital service into conformity (ii); it is worth recalling that the same remedial option remains available to the consumer in situations in which

the lack of conformity has been proven to be of such a serious nature as to justify an immediate price reduction or termination of the contract (iii); or even in cases in which the trader has declared (or it results from the objective circumstances), that it will not be able to bring the digital content or digital service into conformity within a reasonable time[407], or without significant inconvenience for the consumer[408]. Under these circumstances, the consumer is entitled to the proportionate reduction of the price[409], adequately correlated 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 delivered in plain conformity (while applying concurrently subjective and objective criteria of conformity)[410].

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[407] Clavier, J.-P. and Mendoza-Caminade, A., *op. cit*., p. 81-94.

[408] Julien, J., *op. cit*., p. 68-73.

[409] *Ibidem*.

[410] Clavier, J.-P. and Mendoza-Caminade, A., *op. cit*., p. 82-90. For an analysis of the conceptual impact of the precedent regulation, see Luzak, J. A. 2013. To Withdraw or Not to Withdraw? Evaluation of the MandatoryRight of Withdrawal in Consumer Distance Selling Contracts Taking into Account Its Behavioural Effects on Consumers. Amsterdam Law School Legal Studies Research Paper No 2013-21 – Centre for the Study of European Contract Law Working Paper No 2013-04, available at http://ssrn.com/abstract=2243645, accessed on September 12, 2021.

3. UNILATERAL TERMINATION AND ADJUSTMENT OF THE BUSINESS-TO-CONSUMER CONTRACTS ON DIGITAL CONTENT

As specified in Article 11 of Directive 2019/770/EU, in case of non-conformity, the consumer has the right to request the seller to replace the digital content first or has the right to request the replacement of the product or the re-performance of the digital services, in each case free of charge, unless the measure is impossible or disproportionate. It is worth accentuating, however, that a remedial measure will be considered disproportionate if it imposes on the seller certain costs that are unreasonable compared to the other remedial measures which are available, taking into account: (a) the value that the products would have had if there had been no non-compliance; (b) the importance of non-compliance from the perspective of the contractual object.

The plethora of the conditions according to which the consumer may invoke the seller's warranty for lack of conformity includes the exigencies referring to the conformity of the products with specifications[411] included in the sale-purchase contract as regulated by the provisions of Articles 5 and 7 of Directive 2019/770/EU, according to which the seller is obliged to deliver to the consumer products that are in accordance with the sale-purchase contract on digital content[412], a product is considered to be in compliance with the contractual provisions if it:

(a) corresponds to the description given by the seller and have the same qualities as the products which the seller has presented to the consumer as a sample or model;

(b) corresponds to any specific purpose requested by the consumer, a purpose made known to the seller and accepted by him at the conclusion of the sale-purchase contract;

(c) corresponds to the purposes for which products of the same type are normally used;

(d) being of the same type, has normal quality and performance parameters which the consumer can reasonably expect, given the nature of the product and the public statements concerning its actual characteristics made by the seller, the manufacturer or its representative, especially by advertising or by inscribing on the product label. Termination of the contract cannot be requested if the lack of conformity is a minor one[413], which limits the exercise of the consumer's right to the cases in which it has been established the existence of a substantial lack of conformity of the digital content, as described in Article 8 of Directive 2019/770/EU.

From the angle of the warranty term and incidental time bars, the legal guarantee of conformity covers, according to Articles 11 and 13 of Directive 2019/770/EU, the defects / deficiencies manifested in an interval of two years, calculated from the date of delivery of

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[411] Twigg Flesner, C. 2020. Conformity of Goods and Digital Content/Digital Services. In: Arroyo Amayuelas, E. and Cámara Lapuente, S. (dirs.), El Derecho privado en el nuevo paradigma digital, Barcelona-Madrid, Marcial Pons, 2020, available at SSRN: https://ssrn.com/abstract=3526228 , visited on September 12, 2021.

[412] Farinha, M. and Morais Carvalho, J. 2020. Goods with Digital Elements, Digital Content and Digital Services in Directives 2019/770 and 2019/771, In: Revista de Direito e Tecnologia, Vol. 2, No. 2 (2020), p. 257-270, available at SSRN: https://ssrn.com/abstract=3717078 , visited on September 12, 2021.

[413] Morais Carvalho, J. 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 September 14, 2021.

the product. The legislator also established a limitation period (from the right to sue for the corresponding price reduction / in resolution), of two months from the date of finding the lack of conformity by the consumer. Within two months from the date of finding / manifestation of the defect, the consumer must inform the seller about the occurrence of the defect, requesting the involvement of priority extra remedial adjustments (repair / product replacement); if such request is not addressed to the seller within two months, the consumer forfeits the right to sue for the corresponding price reduction / in resolution of the contract[414] (it is presumed that the evidence regarding the origin of the defect has not been brought). It is worth noting, in this context, that according to Recital (20) of Directive 2019/770/EU, these remedies are not only applicable to genuine digital formats, but would also apply to digital content which is supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content. However, as it has been expressly mentioned, instead of the provisions of this Directive on the trader's obligation to supply and on the consumer's remedies for failure to supply, the provisions of Directive 2011/83/EU on obligations related to the delivery of goods and remedies in the event of the failure to deliver will become applicable, as modified by the provisions of Directive 2019/2161/EU. Additionally, it is worth recalling that the provisions of Directive 2011/83/EU on the right of withdrawal and the nature of the contract under which those products are supplied (in the circumstances in which digital content was supplied on a tangible medium), would also continue to apply to tangible media and to the digital content supplied on it, in terms of conformity exigencies and contractual remedies for lack of objective conformity, including the adjustment of reciprocal contractual obligations.

Certain aspects of the burden of proof, under these circumstances, are also worth recalling, given that the burden of proof with regard to whether the digital content or digital service[415] was supplied in accordance with the provisions of Article 5 of Directive 2019/770/EU is primarily incumbent on the trader. Subsequently, in cases referred to in Article 11, para. 2 of Directive 2019/770/EU, the burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader, which becomes apparent within a period of one year from the time when the digital content or digital service was supplied. On the other hand, it should be noted that in situations referred to in Article 11, para. 3 of the mentioned Directive, the burden of proof with regard to whether the digital content or digital service was in conformity within the period of time during which the digital content or digital service is to be supplied under the contract shall be on the trader for lack of conformity which becomes apparent within the respective period of time. For obvious reasons, the provisions of paragraphs 2 and 3 of Article 11 of Directive 2019/770/EU are not expected to apply in cases in which the trader demonstrates 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

[414] Savin, A. 2019. Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context, Copenhagen Business School, CBS Law Research Paper No. 19-35, available at SSRN: https://ssrn.com/abstract=3474289 , visited on visited on September 14, 2021.

[415] Picod, N. and Picod, Y., *op. cit.,* p. 96-101.

requirements in a clear and comprehensible manner before the conclusion of the contract. As it has been noticed, this exclusion depends upon the performance of the professional trader of the duty to deliver adequate information in the pre-contractual stage of the B2C contract. The importance of the duty to collaborate has also been stressed, since it is on the consumer to fulfil a specific obligation to 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, para. 2 and para. 3 of Directive 2019/770/EU, as applicable, origins in the consumer's digital environment (intrinsic non-conformity)[416]. Obviously, the obligation to cooperate is limited to the technically available means which are least intrusive for the consumer. Nevertheless, in most of the cases in which the consumer fails to cooperate, and where the premises indicate that the trader informed the consumer of such requirement in a clear and comprehensible manner before the conclusion of the contract, in the pre-contractual stage, the burden of proof with regard to whether the lack of objective / subjective conformity existed at the time specified in Article 11, para. 2 and para. 3 lies with the consumer (inversion of the burden of proof).

Nevertheless, as resulting from the provisions of Article 13 of Directive 2019/770/EU, in the circumstances in which the trader has failed to supply the digital content or digital service[417] in accordance with Article 5, the consumer may request from the trader to supply the digital content or digital service and, accordingly, if the trader then fails to supply the digital content or digital service without undue delay, or within an additional period of time, as expressly agreed to by the parties, the consumer will be entitled to the termination of the contract[418].

4. JURISPRUDENTIAL BENCHMARKS ON THE CONSUMER'S RIGHT OF WITHDRAWAL

One of the conceptual issues clarified by the CJEU decision from October 8, 2020 in Case C-641/19[419] was the shaping of the concept of "digital content", which was not seen as monolithic, while noticing, in that regard, that Article 16 of Directive 2011/83, as correlated with the provisions of Article 2, point 11 has been interpreted in CJEU jurisprudence as referring to the fact that the consumer's right of withdrawal subsists in the context in which the main object of the online-concluded B2C contract between the user and the professional trader resided in the performing of intermediating services on the virtual

[416] Cámara Lapuente, S. 2016. 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"), In: InDret, Vol. 3 (2016), available at SSRN: https://ssrn.com/abstract=2832160 , visited on September 12, 2021.

[417] Julien, J., *op. cit.,* p. 112-116.

[418] Loos, M. 2016. 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 September, 14, 2021.

[419] The text of the CJEU Decision in case C-641/19 is available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=232155&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=628560.

platform, while not implying the delivering of genuine digital content.

In CJEU judgement (Sixth Chamber) from October 8, 2020, in Case C-641/19[420] in which the preliminary ruling under Article 267 TFEU was requested by the Local Court of Hamburg, Germany, in the proceedings *EU vs PE Digital GmbH,* it has been retained that "in order to determine the proportionate amount to be paid by the consumer to the trader where that consumer has expressly requested that the performance of the contract concluded begin during the withdrawal period and withdraws from that contract, it is appropriate, in principle, to take account of the price agreed in the contract for the full coverage of the contract and to calculate the amount owed *pro rata temporis*. It is only where the contract concluded expressly provides that one or more of the services are to be provided in full from the beginning of the performance of the contract and separately, for a price which must be paid separately, that the full price for such a service should be taken into account in the calculation of the amount owed to the trader under Article 14, para. (3) of that directive". Secondly, the Court underlined that „Article 14, para. 3 of Directive 2011/83/EU, read in the light of recital 50 thereof, must be interpreted as meaning that, in order to assess whether the total price is excessive within the meaning of that provision, account should be taken of the price of the service offered by the trader concerned to other consumers under the same conditions, and that of the equivalent service supplied by other traders at the time of the conclusion of the contract". Thirdly, from the CJUE decision in case C-641/19 results that "Article 16, let. (m) of Directive 2011/83/EU, read in conjunction with point 11 of Article 2 thereof, must be interpreted as meaning that the generation of a personality report by a dating website on the basis of a personality test carried out by that website does not constitute the supply of 'digital content' within the meaning of that respective provision"[421].

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[420] Recitals (42)-(44) of the mentioned decision in case C-641/19 retain that "As stated in recital 19 of that directive, 'digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means. Article 16(m) of Directive 2011/83, which constitutes an exception to the right of withdrawal, is, as a provision of EU law which restricts the rights granted for reasons relating to consumer protection, to be interpreted strictly (see, by analogy, judgment of 14 May 2020, NK (Planning for the construction of a new single-family house), C-208/19, EU:C:2020:382, paragraphs 40 and 56 and the case-law cited). In those circumstances, a service, such as that provided by the dating website at issue in the main proceedings, that allows the consumer to create, process, store or access data in digital form and 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, cannot, as such, be regarded as the supply of 'digital content' within the meaning of Article 16(m) of Directive 2011/83, read in conjunction with Article 2(11) of that directive and in the light of recital 19 thereof".

[421] It has been specified that "[t]he market value should be defined by comparing the price of an equivalent service performed by other traders at the time of the conclusion of the contract. Therefore, the consumer should request the performance of services before the end of the withdrawal period by making this request expressly and, in the case of off-premises contracts, on a durable medium. Similarly, the trader should inform the consumer on a durable medium of any obligation to pay the proportionate costs for the services already provided" (CJEU judgement (Sixth Chamber) from October 8, 2020 in Case C-641/19, in the proceedings E.U. vs. PE Digital GmbH).

5. CONCLUDING REMARKS

The legal guarantee of conformity is imperative one, while being regulated by mandatory norms and, therefore, it may be seconded by a contractual guarantee of conformity (expressly agreed with the consumer), which would obligatorily be more advantageous for the consumer than the legal one (already imperatively incidental). According to the mentioned provisions, the contractual clauses or agreements concluded between the seller and the consumer before the lack of conformity is established by the consumer and communicated to the seller, and which limits or removes, directly or indirectly, the consumer's rights under the special law being null and void. Disregarding the imperative nature of the legal guarantee of conformity of products (for example, the imposition by the seller of a new product of a warranty period restricted to six months or one year from the date of delivery of the good to the consumer) is contravening to the imperative legal exigencies. Product conformity designates the manner in which the product sold and delivered meets the legitimate expectations of the consumer (a), any mandatory provisions of the law on the standardization of the production process (b), or contractual specifications (c), both materially and in terms of identity, the product delivered with the one agreed in the sales contract, at its quality and the quantity delivered (I), as well as from a functional point of view, relative to the functions, attributes, characteristics and technical limits initially agreed with the consumer (II).

The legitimate expectations of the buyer regarding the conformity of the product may be incidental, including tacitly, in the case of technical characteristics or qualities of the product that are typical / usual. Instead, the atypical qualities / functions of a product must be expressly agreed in the table of contents of the contract (must be the subject of express contractual stipulations) so that, subsequently, their absence in respect of the delivered product justifies a request of the consumer to obtain adequate adjustment or efficient remedies for the lack of conformity. The absence or omission of adequate information on the risks resulting from the typical and foreseeable use of the products, inserted on the package leaflet, the user manual, the information on the label / packaging of the product, represents a defect of the product for which the liability of the producer / importer in the EU space for the physical / patrimonial damage caused to the consumers of the defective product can be retained. Three categories of defects attributable to manufacturers can be identified: (a) manufacturing defects, due to unwanted syncope in the production chain (human errors, failures of production facilities / equipment, etc.); (b) design defects (the way in which the product was designed / conceived involves risks of consumption that far outweigh the benefits of consuming the product); (c) information deficiencies (absence of information on the risks resulting from the normal and foreseeable use of the products, in the package leaflet, the user manual, the information on the product label / packaging). The termination of the contract remains open to the consumer, who is basically entitled to terminate the contract under the circumstances in which the unilateral alteration of the contractual terms negatively impacts the consumer's access to or use of the digital content, unless such negative impact remains to present minor repercussions.

As resulting from previous CJUE jurisprudence, Article 16(m) of Directive 2011/83, which constitutes an exception to the right of withdrawal, is to be interpreted strictly, as a provision of EU law which restricts the rights granted for reasons relating to consumer protection. Therefore, it has been retained that the consumer benefits from the right of withdrawal even in the circumstances in which the consumer has asked for the provision of services before the end of the withdrawal period. Nevertheless, should the consumer have exercised the right of withdrawal, the trader is entitled to the calculation of the proportionate amount of the price for the service which has already been performed, based on the elements of the price agreed in the B2C contract, unless the consumer demonstrates that that total price is itself disproportionate (CJEU judgement from October 8, 2020, in case C-641/19, *EU vs PE Digital GmbH*), in which case the amount to be paid will be calculated on the basis of the market value of the service provided.

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