

# Spain

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## A. Introduction

As a result of the transposition of Directive (EU) 2019/770 (DCD)<sup>1</sup>, Spain has new provisions concerning contracts for the supply of digital content and digital services. However, the transposition of Directive 2019/771 (SGD)<sup>2</sup> only adapts the sales contract to the changes brought about by technological advances and sustainable consumption. Both European rules have been incorporated into the *Texto Refundido de la Ley General de Defensa de los Consumidores y Usuarios* (TR-LGDCU) by means of Royal Decree-Law (RDL) 7/2021 of 27 April 2021.<sup>3</sup> The reform broadens the list of definitions, sets out the scope of the new rules (in accordance with the exclusions provided for in the directives) and divides the new articles between, on the one hand, the general part of consumer contracts (Book II, Title I, Chapter I) and, on the other, guarantees and after-sales services (Book II, Title IV, Chapters I-V). No specific book has been created for the

<sup>1</sup> OJ L 136, of 22.5.2019.

<sup>2</sup> OJ L 136, of 22.5.2019.

<sup>3</sup> BOE 101, of 28.04.2021.

new contract for the supply of digital content and digital services. Catalonia has its own norms, which have been incorporated into the Catalan Civil Code (CC Cat), and to which only *ad hoc* reference will be made here.<sup>4</sup>

## B. Overview of the reform

### I. Legislative technique

- 2 RDL 7/2021 amends, once again, the TR-LGDCU. The Generalitat of Catalonia has also used a Decree-Law to transpose the two directives, although transposition has taken place into Catalonia's Civil Code and not into its Consumer Code. This difference in approach is important because in a civil code the rules are general for all contracting parties, notwithstanding the fact that they may also include special features specific to consumer contracts (e.g. regarding knowledge of the defect that prevents a claim; or presumptions of lack of conformity).<sup>5</sup>
- 3 There are good reasons to support the extension to contracts other than consumer contracts. A strictly consumer-centric view forgets that along with the rights and duties of the consumer, it is also necessary to cover those of the trader or business. However, the Spanish legislator is silent on the entitlement of the seller or supplier of digital content to claim payment, withhold performance, or request interest when the consumer does not comply with the incumbent duties and, in particular, the obligation to pay the price. Even worse, the duty placed on the trader by Art. 16.3 DCD to refrain from using the data provided by the consumer when the consumer terminates the contract (Art. 119 *ter* 1 and 5 TR-LGDCU) does not apply when it is the trader who terminates it.<sup>6</sup>

### II. Some new developments

- 4 The Spanish legislator has increased consumer protection at several points where the directives were of minimum harmonisation, in particular with regard to the lengthening of the liability periods in the sale of goods (from 2 to 3 years, Art. 120 TR-LGDCU), the extension of the presumption of non-conformity (now 2 years, Art. 121 TR-LGDCU)<sup>7</sup>, or the suppression of the burden of notifying the lack of conformity within a certain period as a requirement for the consumer to exercise the remedies for lack of conformity. On the other hand, the Spanish legislator has retained provisions not covered by the directives, such as direct claim against the producer (Art. 125.1 TR-LGDCU); moreover, the suspension of the liability period has been regulated *ex novo* (Art. 122.1 and 2 TR-LGDCU); and prescription has been extended to 5 years. The legislator has also provided for generous after-sales services and availability of spare parts (Art. 127 *bis* TR-LGDCU). Furthermore, personal data collected by the trader for commercial purposes are the

<sup>4</sup> Decret Llei 27/2021, of 14.12.2021 (DOGC 8564, of 16.12.2021). See Arnau Raventós and Gramunt Fombuena, "Cap a un dret català conforme a les directives (UE) 2019/770 i 2019/771" (2022) 2 *InDret*, 171.

<sup>5</sup> See art. 621–26.2, 621–73.3 and 621–74.2 CC Cat (but see, for all types of sales, art. 621–24.1 and 2 CC Cat).

<sup>6</sup> Warning of the need to go beyond the directive, Sein and Spindler "The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 2", (2019) 4 *ERCL* 365 (379–380).

<sup>7</sup> In the case of second-hand goods, see below H. I (periods of liability) and III (The reversal of the burden of proof).

price or consideration for digital content or services (Art. 59.4, 119 *ter* 2 TR-LGDCU). Consequently, new rules on the contractual effects of the withdrawal of consent to data processing needed to be adopted (Art. 119 *ter* 7 TR-LGDCU).

## C. The legislative framework

### I. The relationship between consumer law and general contract law

Preamble IX 12 of the DL 7/2021 emphasises that the artificial distinctions between defect and *aliud pro alio* should not persist, which means that the consumer should not be able to choose between the rules of lack of conformity set out in the TR-LGDCU and those of non-performance contained in the Spanish Civil Code, which is congruent with the fact that consumer remedies are fully harmonised (Recital 47 SGD). It is therefore striking that the directives still allow a supplementary general regime on hidden defects to be maintained in national laws (Art. 3.7 SGD; Recital 12 DCD). Nevertheless, Art. 116 TR-LGDCU declares the non-compatibility between the conformity regime and the regime of *saneamiento*.<sup>8</sup> This reference in Art. 116 TR-LGDCU to *saneamiento* not only includes remedies for hidden defects, but also remedies for eviction, since the lack of conformity is now extended to legal defects (Art. 117.1 TR-LGDCU).<sup>9</sup> However, Art. 117.2 TR-LGDCU allows recourse to corrective measures other than those provided for lack of conformity when a law so declares. This is the same as provided for in the Directives (Art. 9 SGD and 10 DCD) because some Member States wanted to preserve the possibility existing in their legislation to consider contracts that violate copyright law as null and void.<sup>10</sup> The problem is that, in Spain, it is not clear what the reason for this reference is.<sup>11</sup> Certainly that law should not be the Spanish Civil Code, despite the unfortunate reference to the legal guarantee for eviction in Recital 54 DCD, because it would be of no advantage to the consumer to have to wait to be defeated in court before being able to claim against the trader and because it would undermine the directives' *effet utile* to impose a regime that is clearly less favourable for the consumer.

### II. The relationship of consumer contract law with other matters

Digitalisation makes it necessary to harmonise contract law with other areas, such as data protection or copyright. Regulation (UE) 2016/679 of 27.4.2016, on the protection of natural persons with regard to the processing of personal data (GDPR)<sup>12</sup> must be applied in full and infringement of basic principles such as data minimisation or data protection by design and privacy (Art. 25 GDPR) may constitute a lack of conformity if it contravenes one or more of the conformity criteria set out in the DCD; for example, if a software bug allows identity theft, or discloses payment data (Recital 48 DCD).<sup>13</sup> This is a significant change of perspective, which should have been emphasised by the Spanish legislator.

<sup>8</sup> For more details on the understanding of the rule, see Arroyo Amayuelas, "The Implementation of EU Directives 2019/770 and 771 in Spain" (2022) 11 *EuCML*, 35 (36).

<sup>9</sup> Castilla Barea, *La nueva regulación europea de la venta de bienes muebles a consumidores* (2021), 336.

<sup>10</sup> Thus, Staudenmayer, "Die Richtlinien zu den digitalen Verträgen" (2019) 4 *ZEuP*, 663 (685).

<sup>11</sup> Same criticism, Castilla Barea (fn 9) 334.

<sup>12</sup> OJ L 119, of 4.5.2016.

<sup>13</sup> See Staudenmayer, Art. 8 Dir (UE) 2019/770, in Schulze and Staudenmayer (eds.), *EU Digital Law. Article by Article Commentary* (2020), 131 (137).

- 7 Moreover, personal data collected by the trader for commercial purposes are the price or consideration for digital content or services (Art. 59.4, 119 *ter* 2 TR-LGDCU). This has forced the Spanish legislator to address the consequences of the withdrawal of consent to data processing for the contract and whether the trader is entitled to be compensated in such a case (Art. 119 *ter* 7 TR-LGDCU).<sup>14</sup> By contrast, no progress has been made in enshrining the rights of consumers as opposed to those of authors. It remains unclear to what extent the consumer can claim against the trader for lack of conformity when the licence of the digital content s/he acquires for unlimited use prevents her/him from making copies, including back-up copies, using the content on different devices, sharing it with family or friends, or accessing the content already acquired once the platform that markets it stops offering it.<sup>15</sup> Under Directive EC 99/44, the Spanish intellectual property doctrine considered that the consumer who did not legally have those rights could not have any expectations and therefore no lack of conformity can be claimed.<sup>16</sup> However, consumers' reasonable expectations are not only normative expectations, and it is therefore legitimate for them to aspire to have the same rights in the digital and analogue worlds.<sup>17</sup> Even so, it must be acknowledged that, in the absence of concrete legislative expression of protected rights or interests of consumers acquiring copyrighted digital content,<sup>18</sup> it is not easy to identify what parameters serve to establish that there is an objective lack of conformity, because of the diversity of content, because the consumer does not always know what to expect, or because it is the industry that ultimately establishes at any given moment what is possible.<sup>19</sup> It is surprising that neither the DCD nor the SGD clearly answer the question of whether this more than probable deficit in consumer protection can be mitigated by the application of Directive EEC 93/13 on unfair terms.<sup>20</sup>

## D. Material scope of the reform

### I. The contractual types

- 8 Directive EU 2011/83 of 25.10.2011, on consumer rights (CRD)<sup>21</sup> echoes the dichotomy between (tangible) goods and (intangible) services and reserves the contract of sale for the former.<sup>22</sup> The SGD also applies only to tangible goods (Art. 2.1) – even if they incorporate digital elements – and the DCD, on the other hand, to intangible goods –

<sup>14</sup> See below D.IV (Data as consideration) and I (Remedies for non-conformity).

<sup>15</sup> In this regard, Oprysk and Sein, "Limitations in End-User Licensing Agreements: Is There A Lack of Conformity Under the New Digital Content Directive?" (2020) 51 *IIC*, 594; Spindler, "Digital Content Directive and Copyright-related Aspects" (2021) 2 *JIPITEC*, 111 (119 ff, 124 ff).

<sup>16</sup> See the discussion in Cabeda Serna, "Los consumidores y las medidas tecnológicas de protección incorporadas en soportes digitales", in Moreno Martínez (ed.), *Limites a la propiedad intelectual y nuevas tecnologías* (2008), 66 (103–105) (consulted via V-Lex).

<sup>17</sup> Based on an empirical study showing that restrictions on the use of digital content often interfere with consumers' reasonable expectations, Oprysk and Sein (fn 15) 611 ff.

<sup>18</sup> However, see Art. 5.2 Directive 2009/24/EC of 23.04.2009 (OJ L 111, of 5.5.2009) on the legal protection of computer programs: "[T]he making of a back-up copy by a person entitled to use the program may not be prevented by contract in so far as it is necessary for such use". In Spanish Law, see Art. 100.2 of Real Decreto Legislativo 1/1996, of 12.04.1996 (BOE 97, of 22.04.1996).

<sup>19</sup> Spindler (fn 15) 118–119; Oprysk and Sein (fn 15) 598.

<sup>20</sup> OJ L 95, of 21.4.1993.

<sup>21</sup> OJ L 304, of 22.11.2011.

<sup>22</sup> Art. 2.5 and 2.6 CRD. See CJEU C-583/18, of 12.03.2020, *Verbraucherzentrale Berlin* (§ 22); CJEU C-208/19, of 14.05.2020, *NK* (§ 62).

even if they are embodied in a medium. However, these intangibles are no longer classified as service contracts (as a category, as opposed to sales), since they are both the subject of digital services as such (Art. 2.2 a and b DCD) and of other, distinct digital content contracts (Art. 2.1 DCD). From the point of view of the classification of contracts on the basis of their subject matter, this raises the question of when exactly each case is involved. Software, for example, can be a type of digital content as well as a service (Recital 19 DCD).<sup>23</sup> In fact, the answer matters little, because the distinction between content and services mainly serves to emphasise that the DCD extends to any form of digital supply.<sup>24</sup>

What is relevant in the DCD is the form of access, i.e. whether there is a permanent and unlimited supply over time or whether limited temporary access to the digital content or service is provided. And it is theoretically on the basis of this distinction that national laws may provide for different contractual types (Art. 12 DCD). The Spanish legislator has not followed this path. The types of contracts subject to new rules in the TR-LGDCU are sales and a generic contract for the supply of digital content and services. In view of the huge number of access modalities, this decision does not merit any reproach.<sup>25</sup>

## II. In particular, Sales of goods

Art. 59 *bis* 2 TR-LGDCU establishes that sales can only relate to tangible movable goods, thus excluding the acquisition of ownership (of a copy) of the digital content, even in cases where the consumer is granted a licence for indefinite use.<sup>26</sup> In contrast, Art. 59.4 TR-LGDCU does refer to the possibility of digital content or services being the subject matter of a sales contract. Art. 59 *bis* 1 letter f TR-LGDCU removes the mention of the price in the definition of the sale of goods, but it is evident that it cannot be dispensed with. According to the Spanish CC, the price must be in money or a sign representing it (Art. 1445 CC). The SGD does not refer to the fact that the price may be the consumer's personal (or other) data, although this is perhaps simply because, in practice, it is not the most frequent situation in transactions that take place in the offline world that involve tangible goods. However, the reasoning is no longer relevant if the goods are smart goods, as personal data are usually provided along with a monetary consideration. In fact, the same could happen in any other online sale with a different object and, for this reason, there should be no objection to Art. 59.4 TR-LGDCU also being applicable

<sup>23</sup> However, see Savin, "Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context", in Durovic and Tridimas (eds), *New Directions in European Private Law* (2021), 211 (221): "while content refers to raw data, services refer to a product or a platform". For a more complete analysis, Mischau, "The Concept of Digital Content and Digital Services in European Contract Law" (2022) 1 *EuCML*, 6.

<sup>24</sup> Schulze, "Die Digitale-Inhalte-Richtlinie-Innovation und Kontinuität im europäischen Vertragsrecht" (2019) 4 *ZEuP*, 695 (700–702).

<sup>25</sup> Ramberg, "Digital Content – A digital CESL II- A paradigm for contract law via the backdoor?", in Grundmann (ed), *European Contract Law in the Digital Age* (2018), 315 (326): "The efforts to categorise the legal nature of various contract types are not a viable way for the future".

<sup>26</sup> Cf. CJEU C-128/11, of 3.07.2012, *UsedSoft* (§§ 44–49); Cf. CJEU C-410/19, of 16.09.2021, *The Software Incubator* (§§ 37–42).

in this hypothesis.<sup>27</sup> Nor does the TR-LGDCU address payment by means of a representation of value (Art. 2.7 DCD) or with virtual currencies (Recital 23 DCD).<sup>28</sup>

### III. Mixed contracts

- 11 How the contract should be qualified when it is a package with different elements does not receive a homogeneous answer in the EU directives. Art. 3.6 I DCD stipulates that insofar as goods or other services (e.g. provision of digital television and the purchase of electronic equipment, Art. 33 DCD) are contracted together with the digital content or services, each element is governed by its own rules. In the context of the sale of tangible goods, however, the opposite is true. Thus, according to Art. 2.5 CRD, a contract that has as its object both the transfer of ownership of the goods and the provision of related services offered by the seller, such as installation or maintenance, is qualified as a sales contract. This means that, in principle, its rules also apply to performance that is not typical of such a contract. The advantage for the consumer is that this avoids having to resort to a different liability regime (objective/fault-based).
- 12 In the SGD the view is different. Indeed, although installation is part of the sales contract if it has to be carried out by or under the responsibility of the seller (Art. 8.1 letter a SGD), Recital 17 SGD warns that otherwise, where a contract includes elements of both goods and supply of services, it is up to Member States to decide whether the whole contract can be classified as a sales contract. Art. 59 *bis* letter f TR-LGDCU does not clearly adopt one solution or the other. The provision merely stipulates that sales “may include the provision of services”, but does not specify on what basis the classification as a sale is to be retained in any such case. In interpreting the provision, it will certainly be necessary to take into account what was established in CJEU C-247/16, of 7.09.2017, *Schottelius* (§§ 38, 44) which, under Directive EC 99/44, specified that for the transaction to be considered a sale, the provision of services had to be ancillary<sup>29</sup> or, in other words, that the main purpose or predominant element of the contract should be the transfer of ownership.<sup>30</sup>
- 13 On the other hand, when defining a service contract, Art. 59 *bis* 1 letter g stipulates that it can also be of a digital nature. Therefore, if the above criteria are also to be applied, it is possible that a contract that includes the provision of digital services (e.g. the purchase of a bicycle and a training app) should also be classified as a contract for the sale of goods in accordance with Art. 59 *bis* letter f TR-LGDCU. However, unless the services are services that are to be embedded in goods, without which the goods would not be able to fulfil their function – for then the sale will have *vis attractiva* (Recital 15 SGD) – such an interpretation would clash with Art. 3.6 I DCD, which requires each provision to be governed by its own rules. If, therefore, the mixed nature of the contract is to be preserved, it would have been reasonable for the Spanish legislator to foresee the consequences if the consumer terminates the contract due to lack of supply or lack of confor-

<sup>27</sup> Different opinion, Cámara Lapuente, “Un primer balance de las novedades del RDL 7/2021, de 27 de abril, para la defensa de los consumidores en el suministro de contenidos y servicios digitales (La transposición de las Directivas 2019/770 y 2019/771)”, *Diario La Ley*, of 29 June 2021, 1 (20 and 30 fn 55), who also highlights the lower level of consumer protection offered by the SGD on this issue. Same criticism, De Franceschi, *La vendita di beni con elementi digitali* (2019), 60.

<sup>28</sup> See Art. 1170.1 of the Spanish CC; Arroyo Amayuelas (fn 8) 36.

<sup>29</sup> See Arnau Raventós, “Transmisión onerosa de un producto y su conformidad con el contrato: una relectura de la STJUE de 7 de septiembre de 2017 (Asunto 247/16, *Schottelius*)” (2018) 2 *RED*, 42.

<sup>30</sup> See Commission notice Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights (OJ C 525, of 29.12.2021) 7–9.

imity of one or the other of the two elements of the bundle, or because of the unilateral modification of the digital elements by the trader. Indeed, according to Art. 3.6 III DCD, the legislator should have provided whether the termination of any of the elements affects the contract with respect to all elements or whether the contract is preserved in respect of the non-affected elements. Exceptionally, and only in the case that the contract contains at least one internet access service or number-based interpersonal communications services, Art. 107.2 of the Electronic Communications Code establishes that the termination affects the entire contract.<sup>31</sup>

#### IV. Data as consideration

When regulating the purchase or use of digital content or services, the DCD allows consumers to transfer their personal data for purposes that go beyond those that would be necessary to comply with the law or to perform the service. Since the conditions that the supplier attaches to access to the good or service exceed what would be required to agree to a donation and, furthermore, there is never a generous intention on behalf of the traders, the contract thus shaped can never be deemed to be gratuitous. However, this payment with the consumer's personal data is not called a price (see Art. 2.7 DCD), and the reason is to be found in the opinion expressed by the European Data Protection Supervisor, according to whom personal data can never be considered as consideration.<sup>32</sup> Even so, Spanish law does consider them as such (Art. 119 *ter* 2 TR-LGDCU). The only exception is the scenario provided for in Recital 32 and Art. 3.5 letter f DCD regarding free and open software where personal data are used exclusively to improve security, compatibility and interoperability without being a price (Art. 114.2 letter h TR-LGDCU).<sup>33</sup>

The DCD should apply when the trader provides digital content or services, and the consumer provides personal data that are used by the trader for purposes other than the mere provision of the digital content or digital service or the fulfilment of legal requirements. RDL 7/2021 welcomes the idea that there can indeed be a contract in such a case, after recalling that the traditional understanding did not contemplate such a hypothesis.<sup>34</sup> This means that the grounds for the transaction must be lawful, and consent must be freely given (Arts. 1261, 1262.1 CC).

Regulation EU 2016/679 (GDPR) is relevant in this case because the processing of personal data must be consented to by the consumer (Art. 6.1 letter a). Consent should not be considered freely given if the data subject does not have a genuine or free choice (Recital 32, Arts. 4.11 and 7.4 GDPR). The Spanish Data Protection Agency (AEPD) has recently rejected that browsing a website is a valid form of consent.<sup>35</sup> However, the DCD does not settle whether or not the consent to conclude the contract must be given in accordance with the GDPR. It is sensible to answer this question in the negative in order to

<sup>31</sup> Directive (EU) 2018/172, of 11.12.2018 (OJ L 321, of 17.12.2018).

<sup>32</sup> Opinion dated 14.03.2017. However, see Recitals 15, 16 of the European Electronic Communications Code (fn 31).

<sup>33</sup> Sein and Spindler, "The New Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1" (2019) 3 *ERCL*, 257 (268).

<sup>34</sup> Preamble IX 20 of the RDL 7/2021.

<sup>35</sup> Asociación Española de Protección de Datos (AEPD), *Guidance on the use of cookies*, July 2020, pp. 21, 23. Available at: <https://www.aepd.es/es/prensa-y-comunicacion/notas-de-prensa/aepd-actualiza-guia-cookies> (last visited 30 June 2022). Also CJEU C-673/17, of 1.10.2019, *Planet49* (§§ 70–71). Previously, see Aparicio Vaquero, "La protección de datos personales en las redes sociales. Apuntes desde los ordenamientos europeos y español" (2020) 1 *Tecnología e Diritto*, 209 (236–237).

prevent non-compliance with the requirements of the GDPR from leading the trader to deprive the consumer of the protection afforded to him by the TR-LGDCU.<sup>36</sup> In any event, consumer law always requires express consent to enter into any payment obligation (Art. 66 *quater*, Art. 101 TR-LGDCU), which should certainly not be excluded when this is not in money. In fact, since Art. 59.4 TR-LGDCU declares the applicability of Book II to any contract in which the consideration is paid with personal data,<sup>37</sup> it is obvious that Arts. 60.1 letter c, 60 *bis* TR-LGDCU, on the clarity and comprehensibility of the price and additional payments that must be expressly accepted, also apply in this case. All this would lead to the conclusion that when it comes to economically exploiting the data of users of digital services, *browse agreements*, which are characterised by requiring implicit consent through access to websites, should not be permitted under Spanish consumer law.<sup>38</sup>

### E. Subjective scope of application

- 17 Both directives limit their personal scope of application to consumer contracts and deal exceptionally – and very sparingly – with B2B relations, only regarding the right of redress.<sup>39</sup> This is so even though online platforms are the main entry point to markets for most small businesses in the digital economy and this leads to asymmetries and disadvantages when trading. The rationale for removing barriers in the internal market also applies here. It is thus a step backwards to limit the scope of application to B2C contracts, even if the explicit *caveat* is included that national laws can go further.<sup>40</sup> Spanish law does not offer such a broad scope, even though the definition of consumer provided by Art. 3 TR-LGDCU is more comprehensive than in European law, because it covers entities without legal personality<sup>41</sup> and non-profit legal persons.
- 18 Furthermore, in the digital environment it can be very difficult to distinguish between personal and professional use and this is maybe the reason why the Directives no longer define when a person concluding a dual-purpose contract should be considered a consumer (Recital 17 DCD, 22 SGD). The Spanish legislator has not done so either, but Spanish case law has expanded the notion of consumer to mixed contracts, and *a priori* it is not realistic to think that it will abandon this approach, sometimes somewhat erratic in determining whether the test of the main purpose of the contract or that of the resid-

<sup>36</sup> García Pérez, “Interacción entre protección del consumidor y protección de datos personales en la Directiva 770/2019: licitud del tratamiento y conformidad de los contenidos y servicios digitales”, in Arroyo Amayuelas and Cámara Lapuente (dirs), *El Derecho privado en el nuevo paradigma digital* (2020), 175 (191–192); Milà Rafel, “Datos personales como contraprestación en la directiva de contenidos y Servicios digitales”, in Gómez Pomar and Fernández Chacón (dirs), *Estudios de Derecho Contractual Europeo: Nuevos problemas, nuevas reglas* (2022), 407 (442–443).

<sup>37</sup> On this, Cámara Lapuente (fn 27) 18–20.

<sup>38</sup> It is nevertheless sensible to claim for a clear regulation at European level. See Cámara Lapuente “Nuevos perfiles del consentimiento en la contratación digital en la Unión Europea: ¿navegar es contratar (servicios digitales «gratuitos»)??”, in Gómez Pomar and Fernández Chacón (fn 36), 331 (384).

<sup>39</sup> For criticism, Schulze (fn 24) 702–703; Beale, “Digital Content Directive and Rules For Contracts on Continuous Supply” (2021) 2 *JIPITEC*, 96 (105).

<sup>40</sup> Recital 16 DCD; Recital 21 SGD. Formerly, Recital 13 CRD; Recital 29 Dir. 2002/65, of 23.11.2002 (OJ L 271, of 09.10.2002) concerning the distance marketing of consumer financial services: “[...] extension by Member States [...] of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs”.

<sup>41</sup> Judgement of the Spanish Supreme Court (STS) of 13.04.2021 (RJ 2021\1710). Cf. CJEU C-329/19 of 2.04.2020, *Condominio di Milano* (§§ 34–37).

ual commercial activity should be given priority.<sup>42</sup> However, on the one hand, new and changing online activities are leading to a development of the notion of consumer that is very different from the traditional one<sup>43</sup> and, on the other hand, it is difficult to distinguish between professional and personal use when acquiring certain types of digital content (e.g. software). In Catalonia, the category of consumer is retained for those who primarily act for purposes unrelated to their profession (Art. 621–2 CC Cat).

It would have been appropriate to broaden the subjective scope of application of the directives, especially considering that some of their rules are naturally addressed to businesses. For example, it is mainly businesses that will require digital content adapted to their needs (Recital 26, Art. 3.2 DCD).<sup>44</sup> Moreover, it is provisions designed for the B2B context, such as the CISG, that can help to understand certain aspects of these directives; in particular, how the acceptance of the individual purpose expressed by the buyer to the trader should be interpreted.<sup>45</sup> Lastly, it is extremely easy to circumvent the protection provided to the consumer by the directives with regard to the potential exclusion of specific requirements of objective conformity, as if it were a contract between traders, who can always freely waive the protection provided to them by the law. It seems, therefore, that there is not much of a difference between the rules governing the one type of contract and the other.

## F. Some objective conformity criteria

One of the objective conformity criteria is the durability or ability of the goods to maintain their required functions and performance through normal use (Art. 2.13 SGD; Art. 59 *bis* 1 letter i TR-LGDCU). It is a feature that can also relate to updates of digital content, which are due irrespective of whether there are any agreements on this point (Art. 8.2 DCD, Art. 115 *ter* 2 TR-LGDCU).<sup>46</sup>

## I. Durability

The consumer's expectation when buying a good is that it will not become obsolete prematurely and also that it can be repaired if it suffers from wear and tear. This approach has not been adequately reflected in the SGD. Despite Recital 48 SGD, repair is not enforced on a preferential basis, even if the consumer wants to keep the good.<sup>47</sup> Nor does the SGD impose a duty on sellers to ensure the availability of spare parts (Recital 33), even though nothing prevents the manufacturer from undertaking to sup-

<sup>42</sup> STS of 3.06.2016 (RJ\2016\2300); STS of 5.04.2017 (RJ\2017\2669); STS of 7.11.2017 (RJ\2017\4763); STS of 28.01.2020 (RJ\2020\114).

<sup>43</sup> Concerning social media, CJEU C-498/16, of 25.01.2018, *Maximilian Schrems*. Concerning a poker player, CJEU C-774/19, of 10.12.2020, *Personal Exchange International*.

<sup>44</sup> Schmitt, Thomas R., "A new warranty law for digital content ante portas" (2018) 2 *University of Vienna Law Review*, 1 (5).

<sup>45</sup> Regarding the interpretation of Art. 7 letter b DCD in accordance with Art. 35.2 letter b CSIG (but the same would apply to art. 6 letter b SGD), see Beale (fn 39) 97–98, fn 20. But see for the opposite opinion, Marco Molina, "Los criterios legales de la conformidad con el contrato en el futuro Libro VI del Codi Civil de Catalunya: la llamada conformidad subjetiva o adecuación de lo entregado al fin individual del comprador", in Llàcer Matacàs (ed), *La codificación del Derecho Contractual de Consumo en el Derecho Civil Catalán* (2015), 193 (197–200).

<sup>46</sup> Twigg-Flessner, "Conformity of Goods and Digital Content/Digital Services", in Arroyo Amayuelas and Cámara Lapuente (fn 36) 49 (75); De Franceschi (fn 27) 17–18.

<sup>47</sup> See Terryn, "A Right to Repair? Towards Sustainable Remedies in Consumer Law" (2019) 4 *ERPL*, 851 (857–858).

ply them in the commercial guarantee (Art. 17.1 SGD). Moreover, the SGD does not provide for a minimum lifetime for goods, though it acknowledges that Member States may go further, because longer periods encourage the production of more durable goods, allow easier repair and, in short, encourage businesses to make more sustainable decisions.<sup>48</sup> It is paradoxical that the European legislator allows the reduction of the guarantee period for second-hand goods to a minimum of one year (Art. 10.6 SGD), regardless of the previous use that has been made of them, as if second-hand goods necessarily were always expected to last for a shorter period. In fact, the agreement excluding the seller's liability (Art. 7.5 SGD) seems to have been envisaged precisely with the durability of these goods in mind (Recital 36 SGD). These are certainly not measures that encourage their acquisition.<sup>49</sup>

- 22 In the context of the Spanish Circular Economy Strategy 2030,<sup>50</sup> the TR-LGDCU does indeed go somewhat further than the SGD. First of all, it preserves and reinforces the current legislation and ensures the existence of an adequate technical support service, as well as the necessary spare parts, for a minimum period of time, which is now 10 years instead of the previous 5 years, from the date on which the good ceases to be manufactured (Art. 127 *bis* 1 TR-LGDCU).<sup>51</sup> The aim is thus to ensure that goods are kept for as long as possible. Even so, it is clear that the requirement for manufacturers to ensure the existence of spare parts for 10 years should have been placed in relation to the expected useful life of each type of good according to the sector to which they belong (e.g. household appliances, automobiles, electronic devices), in line with the provisions of other European Regulations, which provide for periods of 7, 8 and 10 years and which, in any case, are preferentially applicable precisely because of their origin.<sup>52</sup>
- 23 Ensuring adequate technical service and spare parts is a provision that certainly contributes to maintaining the goods' value for as long as possible and helps to reduce waste (DL 7/2021 Recital IX 18). However, it is a provision independent of the statutory liability period. Although the TR-LGDCU also tries to guarantee the durability of goods by broadening the minimum warranty periods (3 years instead of 2) and the presumption of lack of conformity (2 years instead of 1), the fact is that the right to repair the good, thanks to the availability of a technical repair service and spare parts, does not mean that it does not have to be paid for if it breaks down after those three years, even if the reasonable period of use is much longer. A longer seller's or trader's liability period would have been preferable or, even better, one adapted to the foreseeable maintenance of the functions of the goods (depending on the type of good) throughout their useful life.<sup>53</sup> If the duration depends on the type of good, why not also the legal guarantee? If obsolescence is programmed so that the good stops working in the fourth year, just one year after the expiry of the warranty, this does not contribute to responsible consumption either. On the contrary, reinforcing the legal warranty helps to produce more robust

<sup>48</sup> Van Gool and Michel, "The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis" (2021) 4 *EuCML*, 136 (141).

<sup>49</sup> Against, Pazos García, "Sustainability, the Circular Economy and Consumer Law in Spain" (2020) 5 *EuCML*, 212 (215).

<sup>50</sup> Referred to in Preamble IX 18 of DL 7/2021, available at: <https://www.miteco.gob.es/es/calidad-y-evaluacion-ambiental/temas/economia-circular/estrategia/> (last visited 30 June 2022).

<sup>51</sup> The Spanish legislator claims to have been inspired by the European Parliament Resolution of 25 November 2020: "Towards a more sustainable single market for business and consumers" (P9 TA(2020)0318. 2020/2021(INI) (OJ C, of 20.10.2021) and does not mention Recital 33 SGD (Recital IX 17 of DL 7/2021).

<sup>52</sup> Avilés García, "El nuevo derecho a la reparación de bienes de consumo en los Servicios técnicos postventa de una economía circular", *Diario LaLey*, 2 July 2021, 1.

<sup>53</sup> In this sense, Van Gool and Michel (fn 48) 142.

products. For the time being, however, greater consumer protection depends entirely on what the seller may have declared (Art. 7.1 letter d SGD, Preamble IX 16, of DL 7/2021, Art. 115 *ter* d TR-LGDCU) and, where applicable, on the manufacturer's commercial guarantee (Art. 17.1 SGD; Art. 127.1 TR-LGDCU). The government's future regulation on new labelling including a reparability index for electronic devices has not yet materialised.

## II. Updates

Conformity extends to the updates available for digital content or digital services. 24 These may be security updates (to fix bugs, flaws and defects in the software), or they may be in response to new operating systems and market-imposed changes,<sup>54</sup> but they should not be mistaken for a duty to provide upgraded versions of the product.<sup>55</sup> Updates are never indefinite,<sup>56</sup> and it is precisely the nature of the contract that governs the time during which the seller or the trader must provide them. Thus, if the supply of digital elements is continuous (Art. 8.2 letter a, Art. 8.4 DCD), the duty extends throughout the life of the contract (Art. 115 *ter* 4 TR-LGDCU). This is also the case in the sale of goods with continuous supply of digital elements, though here it is clarified that the seller must provide updates for a minimum of two years even if the contract lasts for less than two years (Art. 7.3 letter b SGD which refers to Art. 10.2 SGD).<sup>57</sup> In the TR-LGDCU, that period is three years (Art. 115 *ter* 2 letter b TR-LGDCU) because the legislator has made use of the scope for discretion allowed by Art. 10.3 SGD (Art. 120.2 TR-LGDCU). The intention is not to undermine the liability period that applies to the good, but it would have been reasonable to make the provision of updates dependent on the durability foreseen for each type of good.<sup>58</sup>

If the contract is based on the scheme of single acts of supply of digital content or digital services, then the duty to update lasts for as long as the consumer can reasonably expect. On that point, there is no difference from the sales contract (Recital 31 SGD, Art. 7.3 letter a SGD and 8.2 letter b DCD). There is no longer a fixed period during which the trader must fulfil his/her obligation, nor is the use of the digital elements limited by a hypothetical duration of the contract (Art. 57 DCD). This is also the case in Spanish law (Art. 115 *ter* 2 letter a TR-LGDCU), although a period of liability of the trader of two or three years is expressly provided for (Art. 120.1 TR-LGDCU). Consequently, the consumer's reasonable expectations may coincide with the trader's liability period, but also go beyond it (e.g. regarding security updates, Recital 47 DCD) and, in the case of goods with digital elements, judges may take into account the durability of the good.<sup>59</sup> In any case, it is risky for the national legislator to transform this unspecified period into a fixed one, i.e. to concretise the reasonable expectations into a specific time limit.<sup>60</sup> 25

<sup>54</sup> Wendehorst, "Aktualisierungen und andere Digitale Inhalte", in Stabentheiner, Wendehorst and Zöchling-Jud (Hrsg.), *Das neue europäische Gewährleistungsrecht* (2019), 111 (122–123).

<sup>55</sup> Twigg-Flessner (fn 46) 69; Staudenmayer (fn 13) 154–155; Wendehorst (fn 54) 123.

<sup>56</sup> Against this possibility, Staudenmayer (fn 13) 160.

<sup>57</sup> Schulze and Zoll, *European Contract Law* (2021), 227.

<sup>58</sup> See European Parliament Resolution of 25.11.2020 (P9 TA(2020)0318. 2020/2021(INI), paragraph 7(a): "corrective updates – i.e. security and conformity updates – must continue throughout the estimated lifespan of the device, according to product category".

<sup>59</sup> Schulze and Zoll (fn 57) 227; Wendehorst (fn 54) 130.

<sup>60</sup> Bach, "Neue Richtlinien zum Verbrauchgüterkauf und zu Verbraucherverträgen über Digital Inhalte" (2019) 24 *NJW*, 1705 (1711).

## G. The modification of the digital content and digital services contract

- 26 For technological reasons, the trader could be obliged to modify the features of the digital content and digital services provided over a period of time (e.g. cloud storage or access to social networks), beyond what is necessary to maintain conformity – i.e. beyond updates – and in order to improve them (Recital 75 DCD). A unilateral change of contractual terms and conditions is not possible (Art. 3.1 letter j Directive EEC 93/13), and therefore Art. 19.1 DCD requires that the modification be provided for in the contract. The failure to extend the rule to the supply of individual acts is unclear.<sup>61</sup> Chapter IV TR-LGDCU (Arts. 126 and 126 *bis*) only implements Art. 19 DCD because of maximum harmonisation,<sup>62</sup> but if, as seems to be the case, the drafting of these rules is flawed, the Spanish legislator should have gone further.<sup>63</sup>

## H. Time Periods

### I. Periods of liability

- 27 Art. 120.1 TR-LGDCU sets a period of liability for the seller of three years from the delivery of the goods (Art. 10.1 and 3 SGD) – extended by one year with respect to the provisions of the SGD – although Art. 120.1 II TR-LGDCU allows a period of no less than one year to be agreed when the goods are second-hand (according to Art. 10.6 SGD). If the former aims to guarantee durability, the latter is clearly contrary to that purpose. If the good embodies digital elements of continuous supply, Art. 120.2 TR-LGDCU provides for a distinction according to the duration of the contract: if it is less than three years, the seller is liable for any lack of conformity of the digital content or services that occurs or manifests itself within a period of three years (it is in accordance with Art. 10.3 and 10.2 I SGD). If the contract lasts longer than three years, the liability extends to the whole duration of the contract for any lack of conformity that occurs or becomes apparent during that period (this is in line with Art. 10.2 II SGD). In a contract for the supply of digital content or digital services, the period of liability is two years from each individual act or acts of supply (Art. 120.1 TR-LGDCU, Art. 11.2 II DCD).
- 28 Where there is a continuous supply (Art. 11.3 DCD), the liability period coincides with the duration of the contract (Art. 120.2 TR-LGDCU), which significantly reduces the liability of the trader when the contract lasts less than three years.

## II. Identifying the day of delivery or supply

- 29 To facilitate the calculation of the time periods, Art. 123.1 TR-LGDCU establishes that, in the absence of proof to the contrary, the delivery or supply is understood to have been made on the day that appears on the invoice or purchase receipt, or on the corresponding delivery note if this is later. This rule, now adapted to the digital context, is derived from the previous legislation, but it is no longer appropriate in the event that the

<sup>61</sup> Critical, Bach (fn 60) 1707; Wendland, Art. 19 Dir (EU) 2019/770, in Schulze and Staudenmayer (fn 13), 317 (321).

<sup>62</sup> Only possible option, according to Wendland (fn 62) 321. Agreeing, Cámara (fn 27) 7, 15.

<sup>63</sup> Sein, "Goods With Digital Elements and the Interplay With Directive 2019/771 on the Sale of Goods (January 30, 2020), 1 (8). Available at: <https://ssrn.com/abstract=3600137> (last visited 30 June 2022); De Franceschi (fn 27), 41, 99–100.

goods sold are not simple goods, but goods with digital elements embedded, if it turns out that these are supplied after the delivery of the physical component.<sup>64</sup> In line with Recital 39 SGD, delivery can only be deemed to have taken place when the physical component has been delivered and, furthermore, the single act of supply of the digital content or services has taken place or the continuous supply has been initiated. This makes sense, because the consumer is not in a position to assess the lack of conformity of the good until the digital content or services are supplied, if this occurs later.

On the other hand, it is not possible to establish a presumption as to the time of delivery in the contract for the supply of digital content and services, ex Recital 11 DCD.<sup>65</sup> Indeed, Art. 12.1 DCD provides that the burden of proof of supply *under the conditions set out in Art. 5 DCD* (my italics) lies with the trader. A delivery note or invoice only shows the time of purchase (and the price) but does not prove the effective supply if it is not supported by, for instance, the access key to the digital content. Such documents cannot fulfil the function required by Art. 5 DCD. To understand otherwise by means of a legal presumption, leaving it to the consumer to prove that the content or service was not supplied to him, is certainly contrary to Art. 12.1 DCD, which clearly states that the proof of supply lies with the trader.

### III. The reversal of the burden of proof

The period of presumption of lack of conformity from the time of delivery of the goods (with or without embedded digital elements) is extended to two years (it was previously 6 months) unless the opposite is proved, or unless this presumption is inconsistent with the nature of the goods or with the nature of the lack of conformity (Art. 11.2 SGD). The period is one year from the supply in the contract of digital content and digital services made by means of an individual act or a series of individual acts of supply (Art. 12.2 DCD; Art. 121.1 TR-LGDCU). The new Art. 121.1 II TR-LGDCU extends the presumption to two years for second-hand goods, but it can be reduced to one year by agreement.

In the case of continuous supply of digital content and services (whether or not embedded in the goods), the burden of proof is reversed for the entire period of liability of the seller or supplier (Art. 11.3 SGD, Art. 12.3 DCD, Art. 121.2 TR-LGDCU) because in this case, unlike in the case of a single delivery or individual acts of supply, it cannot be said that the supply leaves the sphere of influence of the trader to enter that of the consumer.<sup>66</sup>

Art. 121.3 and 4 TR-LGDCU render the presumption inoperative in the very same cases as Art. 12.3 and 4 DCD. The SGD is silent on the issue and Art. 121.5 TR-LGDCU excludes the application of these rules in contracts concerning goods with embedded digital elements, perhaps because it is supposed that in this scenario the idea that the trader does not have access to or is not aware of the consumer's digital environment does not fit well.<sup>67</sup> However, this digital environment does not necessarily refer only to the hardware in which the digital content is integrated – which the trader is aware of – but

<sup>64</sup> Cámara (fn 27) 16–17.

<sup>65</sup> Cámara (fn 27) 30, fn 45.

<sup>66</sup> Gsell and Araldi, “Plazos de las medidas correctoras en caso de vicios ocultos según la Directiva (UE) 2019/770 sobre contratos de suministro de contenidos y servicios digitales y la Directiva (UE) 2019/771 sobre el contrato de compraventa de bienes” (2020) 2 CDT, 475 (495). He considers a presumption unnecessary, Zoll, Art. 12 Dir (EU) 2019/770, in Schulze and Staudenmayer (fn 13), 212 (218, 221).

<sup>67</sup> But see Agüero Ortiz, “Nuevo régimen de garantías de los bienes de consumo y otras novedades introducidas por el RDLey 7/2021 en el TRLGDCU” (2021) 11 AC, 1 (4).

also extends to the installation that makes this supply possible (Art. 59 *bis* 1 letter j TR-LGDCU: "any network connection")<sup>68</sup> and, consequently, there will be cases in which the same differentiated approach to the burden of proof should also be imposed. This is also logical if it appears that the consumer has not taken all the measures available to him/her to ensure the compatibility of the digital environment when the trader had informed her/him of this.

#### IV. Suspension of the liability period

- 34 The liability period can be suspended in the case of repair or replacement (Art. 122.1 and 2 TR-LGDCU) but not, for example, while an out-of-court settlement of the conflict is being sought, or when the consumer exercises her/his right to suspend payments. Such a suspension implies, in fact, an extension of the liability period. Even though only Recital 44 SGD refers to this possibility, the Spanish legislator has decided to extend the rule to contracts for the supply of digital content or digital services. Moreover, the seller/trader is liable within one year after the delivery of the good or the supply of the digital content or service if the same lack of conformity appears again, which also means an extension to the liability period if it occurs in the last year. It is presumed that it is the same lack of conformity when defects with the same origin as those initially manifested recur (Art. 122.3 TR-LGDCU).

#### V. Prescription of claims

- 35 The two directives distinguish between liability periods and prescription for claims to enforce this liability. Both admit that the Member States may decide not to transpose the liability periods, and that only prescription periods apply (Art. 11.2 II and 11.3 II DCD; Art. 10.5 SGD). The Spanish legislator's option has been to combine liability and prescription periods. Correct transposition requires that the trader's/seller's liability period should not be circumvented through the prescription period (Recital 42 and Art. 10.4 SGD; Recital 58 and Art. 11.2 III DCD). Nothing is expressly said either in the directives or in the TR-LGDCU, but this double term model is not possible in cases of legal conformity.<sup>69</sup> There can be no liability period because the buyer's claim against the trader or seller depends on an event over which s/he has no control, such as the exercise of third party rights. It is therefore only possible to consider the prescription periods for such a claim.
- 36 Art. 124 TR-LGDCU establishes a prescription period of five years whose starting date is subjective, i.e. the calculation starts from the manifestation of the lack of conformity, which is what allows awareness of it (presumed awareness must be admitted if the ignorance is negligent). The objective prescription period, which in the previous regulation was three years from the delivery of the good, has been abandoned. The latter would have been consistent with the presumption that the defect already existed at the time of delivery and would have favoured legal certainty but, if the model had been maintained, it would have been necessary to create an *ad hoc* rule for the hypothesis of continuous supply of digital content. Be that as it may, it is striking that in addition to

<sup>68</sup> Cámara (fn 27) 6, 7 and fn 21.

<sup>69</sup> See art. 621–6.3 CC Cat.

following a subjective approach, the limitation period is also extended by two years. The latter was certainly not necessary.<sup>70</sup>

The fact that the *dies a quo* of the limitation period is fixed from the manifestation of the lack of conformity and that it is not added that this manifestation must take place during the liability period may excessively lengthen the time during which the trader is exposed to the consumer's action. Indeed, it could be the case that a lack of conformity that occurs during the period of supply of the digital content only becomes apparent after the termination of the contract and, consequently, it would be from that moment that the 5-year period would start. Art. 124 TR-LGDCU deserves to be re-read for corrective purposes.<sup>71</sup>

## I. Remedies for non-conformity

### I. General points

The consumer has the well-known remedies at her/his disposal: repair and replacement (primary remedies) – although the DCD omits this distinction – and price reduction and termination (secondary remedies), whose exercise requires a simple notification that no Directive requires to be made on a durable medium (Art. 2.3 DCD, 2.11 SGD). In certain situations, a direct transition to secondary remedies is possible without first going through primary remedies. Thus, if the non-conformity is serious or it is clear that the trader will not solve the problem, it is possible to directly request a price reduction or termination of the contract. This is a very important novelty in both directives that neither the European nor the Spanish legislator emphasises sufficiently.<sup>72</sup>

### II. Repair and replacement

Bringing into conformity must be free of charge (Art. 14.1 letter a SGD; Art. 14.3 DCD, Art. 118.4 letter a TR-LGDCU), but no provision of the TR-LGDCU obliges the seller to bear the transport or delivery costs in advance (e.g. by means of the provision of postage-paid packaging). CJEU C-52/18, of 23 May 2019, *Füllä*, does not impose this as a rule either, although it admits there will be cases in which it will be necessary so as not to dissuade consumers from filing a claim (§§ 54, 56). In the sale of goods, the elimination of any charge includes the costs of removing and installing goods (Art. 14.3 SGD, Art. 118.6 TR-LGDCU), and this is the case whether they are to be replaced or only repaired, which goes beyond the provisions of CJEU C-65/09 and C-87/09, *Weber and Putz*.<sup>73</sup> Art. 118.4 letter a TR-LGDCU does not clarify the meaning of what complying

<sup>70</sup> For a different opinion, see Tur Faúndez, “El régimen de la falta de conformidad tras la reforma de la Ley general para la defensa de los consumidores y usuarios por el Real Decreto Ley 7/2021, de 27 de abril” (2021) 83 *La Ley Mercantil*, 1 (7). In Catalonia the subjective approach is followed and the limitation period of three years has remained unchanged (art. 621–44.1 – 3 CC Cat).

<sup>71</sup> The regulation is also unclear in the directives. For criticism, see Gsell and Araldi (fn 66) 489, 491.

<sup>72</sup> Concerning European directives, Koch, “Das System der Rechtsbehelfe”, in Stabentheiner, Wendehorst and Zöchling-Jud (fn 54) 162.

<sup>73</sup> Zöchling-Jud “Das neue Europäische Gewährleistungsrecht für den Warenhandel” (2019) 3 *GPR*, 115 (129).

with free-of-charge conformity in the case of digital content and digital services contract actually involves.<sup>74</sup>

- 40 In accordance with CJEU C-404/06, of 17.04.2008, *Quelle* (§§ 41, 43), Art. 14.4 SGD provides that the consumer shall not be liable for the normal use of the goods replaced during the period prior to their replacement (Recital 57 SGD). This rule is not paralleled in the DCD. Consequently, Art. 118.7 TR-LGDCU only refers to the goods replaced.
- 41 The Spanish legislator does not set a specific timeframe for bringing the goods or the digital elements into conformity. It was not advised by Recital 64 DCD (not appropriate, given the diversity of digital content), but it was suggested by Recital 55 SGD (even with regard to certain categories of products).<sup>75</sup> Art. 118.4 letter b TR-LGDCU does not provide either for the consumer to establish such a period (as seems to be inferred from Recital 50 SGD) or for the parties to agree on a specific one (as suggested by Recital 64 DCD).<sup>76</sup> Consequently, it does not lay down any further requirements for the validity of such a hypothetical agreement. It must be understood, however, that the applicability of the rules on unfair terms would not be prevented if the period unilaterally imposed by the trader were longer than would be reasonable in view of the characteristics of the service (nature of the goods, complexity of the digital elements, seriousness of the defect, etc.).<sup>77</sup> According to Art. 118.4 letter b TR-LGDCU, the period starts from the moment the consumer informs the trader of the lack of conformity, which corresponds to both Art. 14.1 letter b SGD and Art. 14.3 DCD.
- 42 Art. 118.5 TR-LGDCU requires the consumer to place the goods to be repaired or replaced at the disposal of the seller (Art. 14.3 SGD). This can mean either that the latter must collect them from the place where they are located – so that the consumer must provide him/her with access – or that the consumer must send or take them to the place of business for repair or replacement, or to the place of business of a third party who does it on his/her behalf (e.g. the technical service workshop). The SGD does not specify where the seller must fulfil his/her obligation to repair/replace, and the TR-LGDCU also fails to do so, although this was a matter for the national legal systems to determine (Recital 56 SGD). The circumstances of each case can help to specify the rule;<sup>78</sup> therefore, non-negotiated clauses that *a priori* provide that the remedy must always take place at the domicile or registered office of the debtor (trader/seller), as established by default in the CC (Art. 1171), could be considered abusive.
- 43 Member States were also free to establish under what conditions the consumer could repair at his own expense and then pass on the costs to the seller (Recital 54 SGD). The Spanish legislator has not taken any such action either, so it is still up to the judges to determine when this is possible.<sup>79</sup>

### III. Price reduction

- 44 Nothing is said in the directives about how the right to a price reduction can be exercised. It may be the unilateral exercise of a right by means of a statement (*Gestal-*

<sup>74</sup> A restrictive interpretation, Koch (fn 72) 166–167. Against, Gsell, Art. 14 Dir (EU) 2019/770, in Schulze and Staudenmayer (fn 13), 241 (250–251).

<sup>75</sup> Gsell (fn 74) 249. In France, the timeframe cannot exceed thirty days (art. L217–10 *Code de la consommation*). In favour of setting different timeframes, Castilla Barea (fn 9) 220, 237.

<sup>76</sup> For criticism of the wording of Recital 50 SGD, Koch (fn 72) 184, fn 143.

<sup>77</sup> Gsell (fn 74) 250.

<sup>78</sup> CJEU C-52/18, of 23.05.2019, *Fülla*.

<sup>79</sup> For the cases and conditions under which it is admitted in the case law, Arroyo Amayuelas (fn 8) 39.

tungsrecht, derecho potestativo),<sup>80</sup> which could also be exercised in court by means of the *exceptio non rite adimpleti contractus*. Or it can be exercised in the form of a claim for reimbursement of what has already been paid, in which case Art. 119 *quater* TR-LGDCU (common to the remedies of price reduction and termination) generalises for the sales contract what Art. 18 DCD provides for digital content and digital services contracts regarding the time limits and form of reimbursement by the trader. This is not an incorrect transposition because Art. 16.3 II SGD refers the determination of these issues to the Member States.

## IV. Termination

The out-of-court exercise of remedies avoids having to resort to Art. 1124 CC in the case of termination.<sup>81</sup> Termination is not possible when the lack of conformity is minor (Art. 119 *ter* 2 TR-LGDCU) unless the consumer pays with personal data in a contract for the supply of digital content or digital services (Art. 119 *ter* 2 in fine TR-LGDCU; Art. 14.6 DCD). However, it has been said that in some cases direct termination is possible, i.e. if the lack of conformity is of a serious nature, i.e. severe, substantial.

There are special features to the termination of a contract for the supply of digital content and digital services. In a contract of continuous supply, according to Art. 16.1 II DCD, the trader must refund only the part of the price paid corresponding to the period during which the digital content or services were not in conformity and any other payment made in advance corresponding to the service not received because of termination. It is unclear whether this period during which the performance was not in conformity should be calculated from the time when the lack of conformity occurs, or only from the time when the lack of conformity becomes apparent, which will be less detrimental to the trader.<sup>82</sup> Art. 119 *ter* 5 letter a TR-LGDCU does not provide any solution either.

If the consumer has paid with personal data (e.g. name, address), termination of the contract prevents the trader from making further use of them (Art. 7.2 II GDPR, Art. 16.2 DCD, Art. 119 *ter* letter b GDPR), and the consumer also has the right to be forgotten (Art. 17.1 letter b GDPR). Consumers can also withdraw their consent to the processing of their data at any time. Withdrawal of consent is a fundamental right (Recital 42 RGPD Art. 4.11, 7.3 and 7.4, 21 RGPD) and therefore Art. 119 *ter* 7 TR-LGDCU prohibits any kind of penalty. Accordingly, it also does not seem appropriate to give the trader a right to terminate the contract, as if there were a cause of non-performance by the consumer. The balancing of interests justifies that in this scenario the trader should stop offering the digital elements, but it would have been more appropriate to grant the trader a right of denunciation, withdrawal or rescission of the contract rather than a right to terminate it.<sup>83</sup>

Following termination, the trader must refrain from using any content created or provided by the consumer other than personal data (photos, messages, graphics, poems), but, as already mentioned, such a requirement only applies, incorrectly, when it is the consumer who terminates the contract (Art. 119 *ter* 1 and 5 TR-LGDCU) and not also the trader.<sup>84</sup> The consumer should be able to retrieve such content (with exceptions), but

<sup>80</sup> Vid. Zöchling-Jud (fn 73) 130; Gsell (fn 74) 264; Sein and Spindler (fn 6) 377; Koch (fn 73) 174, 191.

<sup>81</sup> Art. 621–624 CC Cat.

<sup>82</sup> Different opinions, Bach (fn 60) 1710 (no exceptions for latent defects) and Twigg-Flessner, Art. 16 Dir (EU) 2019/770, in Schulze and Staudenmayer (fn 13), 278 (283) (art. 16.1 II is not intended to apply to latent defects).

<sup>83</sup> See now Art. 621–78.1 CC Cat ("desistir"). Cf. § 327 q BGB ("kündigen"). Milà Rafel (fn 36) 441.

<sup>84</sup> See Sein and Spindler (fn 6).

neither the European nor the Spanish legislator specifies when the consumer must request the retrieval, how long s/he has to do so, how long the trader must keep it, or within what period of time the trader must fulfil this obligation (Art. 16.4 II DCD, Art. 119 *ter* letter e TR-LGDCU).

## V. Withholding payment and damages

- 49 Art. 117 TR-LGDCU grants the consumer the right to withhold payment (Art. 117 TR-LGDCU), but then does not establish the requirements for exercising this remedy and the question remains in the hands of courts.<sup>85</sup> The same Art. 117.1 TR-LGDCU acknowledges the consumer's claim to damages, in addition to other remedies. Such damages include the costs of removing and installing the good, as expressly provided for in Art. 14.3 SGD (Art. 118.6 TR-LGDCU). Otherwise, the trader must compensate the consumer only if fault is involved, by application of the rules on contractual liability in Art. 1101 CCff, to which Art. 116.2 TR-LGDCU refers.<sup>86</sup> It is questionable whether damages can be claimed even if the trader's/seller's liability period has expired. There is nothing in the directives to suggest that this cannot be the case, since the European rules do not concern those matters that are not covered, and compensation for damages is one of them (Recital 8 and Art. 3.6 SGD, Recital 73 and Art. 3.10 DCD). Furthermore, the DCD does not even establish a time limit for the trader's liability. Since Art. 116.2 TR-LGDCU refers to the general civil law for the conditions for exercising the remedy, this suggests that the only limit is prescription. Art. 1106 CC establishes full compensation, with the limit of the foreseeability of the damage (Art. 1107 CC) (Recital 61 SGD, Recital 73 DCD).

## J. Redress and direct claim

- 50 Both directives deal with the right of redress of the trader/seller who is liable to the consumer against the party who is liable for the lack of conformity (Art. 20 DCD, Art. 18 SGD). The European legislator does not interfere with B2B agreements, which is why Recital 63 SGD explicitly leaves open the option for the parties to restrict this right. The point of view of Recital 78 DCD seems to be different ("[...] it is important to ensure that the trader has appropriate rights [...]"), but it does not seem reasonable to disregard the size of the companies complaining or being complained about before imposing a mandatory rule.<sup>87</sup> On the other hand, Art. 125.2 TR-LGDCU does not prohibit clauses limiting or excluding liability. Nor does the provision attribute specific rights or state against whom the claim should be brought.
- 51 The Directives do not foresee direct claims by the consumer against the producer either, but Art. 125.1 TR-LGDCU does recognise the consumer's right to directly request the conformity against them, in the same terms and conditions as against the contractual party. However, this is only in a very restricted manner when it is impossible or excessively burdensome for the consumer to take action against the other party to the contract. The direct claim is a contractual claim against the producer when the lack of con-

<sup>85</sup> Further detail, Arroyo Amayuelas (fn 8) 39.

<sup>86</sup> STS of 11.03.2020 (RJ 2020752). For criticism of this non-regulation of damages in the TR-LGDCU, see Castilla Barea (fn 9) 251–254.

<sup>87</sup> In the same vein, other arguments, Mozina, Art. 20 Dir (EU) 2019/770, in Schulze and Staudenmayer (fn 13), 321 (328–329). Staudenmayer (fn 13) 156, clarifies that it was not intended to interfere with B2B contracts.

formity relates to the origin, identity or suitability of the goods or digital content or services, in accordance with their nature and purpose and the rules governing them. Neither termination nor price reduction can be exercised against the producer, and it has always been understood that the direct claim did not allow the consumer to make a claim for any damages that may have been suffered either, so that these should be undertaken through other channels (Art. 1902 CC, Arts. 128, 142 TR-LGDCU). More recently, though, case law on Dieselgate has accepted that they can claim contractual damages from the manufacturer, on the understanding that this is a basic consumer right that could be frustrated by the difficulty of claiming them from a seller who could be insolvent, or who could be harmed in the event that the seller was in good faith and, in contrast, the manufacturer was fraudulent (Art. 1107 CC).<sup>88</sup>

## K. Overall assessment

What is the overall assessment of the reform? In a manifesto addressed to the European Commission in June last year,<sup>89</sup> the European digital industry already complained about what it considers to be disproportionate regulation. It denounces three years of warranty instead of two (which makes the product more expensive) as excessive; and suggests that the imposition of the duty to make available spare parts for 10 years, without distinguishing according to the nature of the goods, durability or price, generates an excessive burden for manufacturers, who will be forced to produce parts for all that time without knowing what the real demand is. It should be added that this time provision contradicts some European regulations and that it does not correspond at all with the seller's liability period, which is only 3 years for most goods, even though durability is an objective criterion of conformity (Art. 115 *ter* 1 letter d TR-LGDCU). In addition, such a short period of liability is at odds with the consumer's reasonable expectation that the good – at least certain types of goods – will last longer. In any case, the industry assumes that the sector innovates rapidly and that new products are better adapted to consumers' wishes. For the industry, consumer protection is best left to commercial guarantees.

Leaving aside considerations of legal policy, from a strictly technical legislative point of view, things could have been done in a more convenient and more comprehensible way. To begin with, the legislative framework is not very clear, the relationship with other topics is not explored in depth, and the structure and systematics of the norm could be much improved. The reform has given rise to very long articles that are difficult to work with, which in different paragraphs of the same provision reiterate identical or very similar rules for contracts whose subject matter is goods and for others whose subject matter is digital content and services. Furthermore, it is not always clear who the contractual partner of the consumer, generally referred to as “the business”, is. There are serious errors, such as the fact that “price” is not included in the list of definitions, that the need for this in the sales contract is omitted, and that some articles establish that this contract can only cover tangible movable goods (Art. 59 *bis* 2 TR-LGDCU) whereas other articles contradict this idea by stating that digital content can be the object of the contract (Art. 59.4 TR-LGDCU).<sup>90</sup> Furthermore, it is not made sufficiently clear that the term “goods” used throughout the articles also refers to those that embody digital elements, and this has consequences because it does not correctly convey the idea that the

<sup>88</sup> STS of 11.07.2021 (RJ 2020752); STS of 23.07.2021 (RJ 20213583).

<sup>89</sup> <https://www.digitaleurope.org/resources/digital-industrys-concerns-with-the-spanish-transposition-of-the-sales-of-goods-directive-2019-771/> (last visited 30 June 2022).

<sup>90</sup> See above D II (In particular, Sales of Goods)

digital element embedded in the good may also form part of the seller's performance, and that it is the seller who will have to respond to the consumer for the lack of supply or the lack of conformity of the digital element (e.g. for omission of updates) even if the ultimate party liable is a third party. In the same vein, is also missing a rule which specifies that, when the object of the contract is a good with digital elements, in the case of doubt it is presumed that this supply is included in the contract of sale, regardless of who executes it.<sup>91</sup>

- 54 On the other hand, the legislator does not explain the seller's grounds for relief when he warns the consumer about the inadequacy of the materials or instructions provided (Recital 20 SGD) because, instead of improving the defective rule contained in the former Art. 116.3 TR-LGDCU, it has eliminated it.<sup>92</sup> It has also eliminated the consumer's burden of notifying the lack of conformity within a specific period of time (Art. 123.5 TR-LGDCU), and therefore the consumer's duty to respond for the damages that late notification could cause the trader (former Art. 123.5 TR-LGDCU) has also disappeared.<sup>93</sup> Art. 115 *ter* 5 TR-LGDCU does not specify either how acceptance of the divergence from the objective requirements of conformity (Art. 7.5 SGD, Art. 8.5 DCD) should take place. It seems that it would not be sufficient to impose the waiver in the general terms and conditions of the contract,<sup>94</sup> but if it is only a matter of providing knowledge to the consumer, this would not require the clause to be negotiated either.<sup>95</sup> Moreover, the Spanish legislator does not incorporate the requirement of active and unequivocal behaviour on the part of the consumer (Recital 49 DCD, Recital 36 SGD), nor does it expressly exclude the validity of an oral statement.<sup>96</sup> Other very relevant aspects remain unregulated, such as the moment at which the calculation of the period of liability for lack of conformity begins in the case of installation of the goods;<sup>97</sup> the modalities and requirements for the exercise of certain remedies; or the liability of intermediary platforms.
- 55 In short, RDL 7/2021 illustrates well the central role of digitalisation in private law in such a classic area of civil law as contract law; yet the task of implementing such important European directives could have been handled much better and much more could have been achieved.

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<sup>91</sup> By contrast, see art. 621–3.3 CC Cat.

<sup>92</sup> On the contrary, art. 621–27. Cf. furthermore, art. 621–37.3 and 4 CC Cat.

<sup>93</sup> *Vid.* the critique of Sánchez Lería, "Mercado digital y protección del consumidor: a propósito de la Directiva 770/2019 y su transposición al ordenamiento jurídico español" (2021) 4 *InDret*, 33 (79).

<sup>94</sup> Zöchling-Jud (fn 73) 120; De Franceschi (fn 27), 103: Graf von Westphalen, "Some Thoughts on the Proposed Directive on Certain Aspects Concerning Contracts for the Sales of Goods" (2018) 2 *EuCML*, 66 (70). On Art. 16.1 letter a CRD, see also Commission CRD Guidance (fn 31) 59.

<sup>95</sup> Sánchez Lería (fn 93) 62. But see, Graf von Westphalen (fn 94) 70. He points out the role that transparency control should play, Cámara (fn 28) 21; Beale (fn 39) 98, indicates that the meaning of "express" is that of "clear".

<sup>96</sup> Thus, Zöchling-Jung (fn 73) 120. Critical of this possibility, Artz, Markus, "Pactos sobre no conformidad en las Directivas 2019/770 y de franceschi 2019/771" (2019) 2–3 *LaNotaria*, 120 (121).

<sup>97</sup> Cf. art. 621–23.1 and art. 621–24.4 CC Cat.

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### Abbreviations

|         |                                                                                             |
|---------|---------------------------------------------------------------------------------------------|
| AC      | <i>Actualidad Civil</i>                                                                     |
| CDT     | <i>Cuadernos de Derecho Transnacional</i>                                                   |
| ERCL    | <i>European Review of Contract Law</i>                                                      |
| ERPL    | <i>European Review of Private Law</i>                                                       |
| EuCML   | <i>Journal of European Consumer and Market Law</i>                                          |
| GPR     | <i>Zeitschrift für das Privatrecht der Europäischen Union</i>                               |
| IIC     | <i>International Review of Intellectual Property and Competition Law</i>                    |
| JIPITEC | <i>Journal of Intellectual Property, Information Technology and Electronic Commerce Law</i> |
| NJW     | <i>Neue Juristische Wochenschrift</i>                                                       |
| RED     | <i>Revista Electrónica de Direito</i>                                                       |
| ZEuP    | <i>Zeitschrift für Europäisches Privatrecht</i>                                             |

