

RESEARCH OUTPUTS / RÉSULTATS DE RECHERCHE

Digital content and sales or service contracts under EU Law and Belgian/French Law

Jacquemin, Hervé

Published in:

Journal of Intellectual Property, Information Technology and Electronic Commerce Law

Publication date:

2017

Document Version

Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for published version (HARVARD):

Jacquemin, H 2017, 'Digital content and sales or service contracts under EU Law and Belgian/French Law', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, no. 8, pp. 27-38.

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal ?

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Digital Content and Sales or Service contracts under EU Law and Belgian/French Law

by **Hervé Jacquemin**, Professor at the University of Namur, Head of eCommerce Unit – Research Centre on Information, Law and Society (CRIDS), Member of the Brussels Bar

Abstract: The rather novel concept of “digital content” is defined and regulated both in the Consumer Rights Directive and in the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (dated 9 December 2015). In this paper, the concept is presented, as well as the reasons why the European legislator adopted (or is willing to adopt) protection measures to the benefit of consumers in this context. Relying on this analysis, the paper will further discuss the articulation issues between the notion of “digital content”

and other relevant concepts under EU Law and some national laws (of civil Law countries). First, a comparison between the notion of digital content and other concepts used at the EU level (and in the corresponding legal framework adopted in the Member States), in regulations protecting the consumers (the concepts of “goods”, “services”, “sales” or “services contracts”, etc.) will be carried out. The concept will then be compared with the classical notions used in Belgian (and French) Contract Law, especially in the Civil Code (“contract of enterprise”, “sales contract”, etc.).

Keywords: Digital content; consumer protection; goods; services; sales contract; service contract; articulation issues between concepts; French and Belgian Civil Law

© 2017 Hervé Jacquemin

Everybody may disseminate this article by electronic means and make it available for download under the terms and conditions of the Digital Peer Publishing Licence (DPPL). A copy of the license text may be obtained at <http://nbn-resolving.de/urn:nbn:de:0009-dppl-v3-en8>.

Recommended citation: Hervé Jacquemin, Digital Content and Sales or Service contracts under EU Law and Belgian/French Law, 8 (2017) JIPITEC 27 para 1.

A. Introduction

- 1 The concept of “digital content” was introduced into the EU legal framework by the directive 2011/83/EU on consumer rights¹ (hereafter, “Consumer Rights Directive”), where it is defined as “data which are produced and supplied in digital form”.²
- 2 This definition is broad and, accordingly, the examples of “digital content” are numerous. Some of them are provided by the Recital 19 of the Consumer

Rights Directive: “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”. Social networks, archiving services in the Cloud, or some OTT services (WhatsApp for instance) could also be added.

- 3 Consumers are increasingly becoming recipients of digital content and, considering that the protection mechanisms already enacted in the sector-specific regulations or in the horizontal regulations protecting consumers are no longer sufficient, some additional legal provisions especially dedicated to digital content (albeit very few) were introduced in the Consumer Rights Directive.³ Namely: information

1 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJL 304, 22.11.2011.

2 Art. 2, 11°, of the Consumer Rights Directive.

3 On the legal measure (to be) enacted in order to protect the consumer of digital content, see F. COPPENS, M. DEMOULIN,

duties, no matter the contract is concluded at a distance, off-premises or face-to-face in a bricks and mortar shop;⁴ specific starting point for the withdrawal period;⁵ and possible exception from the right of withdrawal.⁶

- 4 On 9 December 2015, the EU Commission formulated a Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content⁷ (hereafter, “the Proposal”). It is an initiative, among many others, delivered by the Commission in the context of its Digital Single Market Strategy,⁸ which was launched in May 2015.
- 5 There are indeed some differences among the Member States with regard to the consumer Contract Law rules applicable to the digital content, especially when it is provided online and across borders. The lack of a clear legal framework and the correlative legal uncertainty for both businesses (that must expose additional costs in order to comply with distinct mandatory rules at the national level) and consumers (suffering from a lack of confidence when buying digital contents) constitutes an obstacle to the growth of electronic commerce in Europe.⁹ Following Recital 5 of the Proposal, “in order to remedy these problems, both businesses and consumers should be able to rely on fully harmonised rules for the supply of digital content setting out Union-wide contractual rights which are essential for this type of transaction”. Accordingly, the Proposal provides

protection rules dealing with the conformity of the digital content with the contract, as well as with the termination and the modification of the contract (including remedies and modalities for the exercise of the rights granted to the consumers).

- 6 The purpose of the present paper is not to analyse the protection rules lying in the Proposal as such. Instead, it will focus on the concept of “digital content”, as defined in the Consumer Rights Directive and in the Proposal, and on the reasons why the European legislator adopted (or is willing to adopt) protection measures to the benefit of consumers in this context. Relying on this analysis, the paper will further discuss the articulation issues between the concept of “digital content” and other relevant concepts under EU Law and some national laws (of civil Law countries). First, a comparison between the concept of digital content and other concepts used at the EU level (and in the corresponding legal framework adopted in the Member States), in regulations protecting the consumers (the concepts of goods, services, sales or services contracts, etc.) will be carried out. The following section then compares the classical concepts used in Belgian (and French) Contract Law, especially in the Civil Code (“contract of enterprise”, “sales contract”, etc.). The objective is not only theoretical and conceptual as such concepts are indeed the key factors that determine the scope of the legal framework.

B. Concept of “digital content” and purpose of the legal framework protecting consumers

I. Legal definition of “digital content”

1. Broad definition of the digital content under the Proposal

- 7 Notwithstanding the broad definition already provided by the Consumer Rights Directive (see above), the Proposal includes another definition of the “digital content”. It “means (a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software; (b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and (c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service”.¹⁰

R. ROBERT et S. DUSOLLIER, *Digital products in the acquis communautaire in the field of consumer protection*, Research study for the BEUC, 2009 ; M. DEMOULIN, *Droit des contrats à distance et du commerce électronique*, Brussels, Kluwer, 2010, p. 7 et seq.; H. JACQUEMIN, «Digital Content and Consumer Protection within European Law», *Proceedings of the 8th International Workshop for Technical, Economic and Legal Aspects of Business Models for Virtual Goods*, Namur, PUN, 2010, p. 41 et seq.; M.B.M. LOOS, N. HELBERGER, L. GUIBAULT, C. MAK, L. PESSERS, J.K. CSERES, B. VAN DER SLOOT et R. TIGNER, *Comparative analysis, Law and Economics analysis, assessment and recommendations for possible future rules on digital content contracts*, Study of the University of Amsterdam, 2011; U. STENZEL, M. G. S. LIMA et J.J. DOWNES, *Study on Digital Content Products in the EU*, IBF International Consulting for the European Commission, 2012, 86 p.; N. HELBERGER, M.B.M. LOOS, L. GUIBAULT, C. MAK et L. PESSERS, «Digital Content Contracts for Consumers», *J. Consum. Policy*, 2013/36, pp. 37-57; H. JACQUEMIN, “La protection du consommateur de contenus numériques », *D.C.C.R.*, 2015/108-109, p. 5 et seq.

4 Art. 5 (1), (g) and (h), and 6 (1), (r) and (s), of the Consumer Rights Directive.

5 Art. 9 (2), (c), of the Consumer Rights Directive.

6 Art. 16 (m) of the Consumer Rights Directive.

7 COM(2015) 634 final.

8 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A Digital Single Market Strategy for Europe”, COM(2015) 192 final.

9 See Recitals 1-4 of the Proposal.

10 Art. 2 (1) of the Proposal.

- 8 *Littera a*) is equivalent to the definition given in the Consumer Rights Directive (see the Introduction above). *Littera b*) and *Littera c*) are new and confirm that the “services” on data shall also be considered as digital content. Pursuant to Recital 11 of the Proposal, “in order to cater for fast technological developments and to maintain the future-proof nature of the notion of digital content, this notion as used in this Directive should be broader than in Directive 2011/83/EU of the European Parliament and of the Council”. In that context, and although in my opinion, both services mentioned under b) and c) should normally be included in the definition of digital content under the Consumer Rights Directive, the definition of the Proposal provides a higher level of legal certainty and prevents possible discussion on this point.
- 9 For the sake of clarity and consistency, the definition of digital content provided in the Consumer Rights Directive should be amended. Otherwise, there will be distinct definitions of a single concept at the EU level and one could contest that services under b) and c) are also subject to the Consumer Rights Directive.
- 10 Some additional features confirm the broadness of the concept under the Directive and (even more under) the Proposal. First, the distribution channel or the medium used for the transmission are not relevant: no matter whether it is provided online (by streaming, downloading, access to the social media, etc.) or offline, on a tangible medium (on a DVD, CD, Flash Card, USB, etc.).¹¹ It must however be noted that in the Consumer Rights Directive, protection rules applicable to the digital content are different, depending whether it is supplied on a tangible medium or not (see below). Such a distinction is not made in the Proposal and it must be approved. The Proposal even goes a step further, as the directive shall also apply to “any durable medium incorporating digital content where the durable medium has been used exclusively as a carrier of digital content”.¹² The legal framework (and the corresponding protection measures) applicable to the digital content is therefore extended to the medium. In other words, the digital content is the “principal” and the medium, considered as the “accessory”, shall be subject to an equivalent legal framework (it is expressed by the old legal proverb “*accessorium sequitur principale*”). This is contradictory to the meaning of the Consumer Rights Directive, where the digital contents supplied on a tangible medium are considered as goods and governed by the legal protection measures applicable to them (see below).
- 11 Secondly, the digital content shall be subject to an agreement concluded between the supplier and the consumer, and in this context, no matter the counter-performance provided by the consumer – money, personal data or other data. This is very clear in the Proposal, where it is expressly stated.¹³ It should also be the case under the Consumer Rights Directive, at least when the digital content is provided online (following the DG Justice Guidance Document issued in June 2014).¹⁴ It shall obviously be approved as soon as the business model of various social networks or platforms (that must be considered as “digital content”) is not necessarily built on the price paid in money by the consumers, but on the revenues gained with the processing of their personal data and the advertising.
- 12 The existence of a “digital content” is a condition *sine qua non* for the application of the Proposal (or the specific provisions of the Consumer Rights Directive using this concept) but is it not the only one (see also the *ratione personae* requirements, for instance). Furthermore, various contracts are excluded from the scope of these regulations as under the Proposal, the directive “shall not apply to contracts shall regarding : (a) services performed with a predominant element of human intervention by the supplier where the digital format is used mainly as a carrier; (b) electronic communication services as defined in Directive 2002/21/EC; (c) healthcare as defined in point (a) of Article 3 of Directive 2011/24/EU; (d) gambling services meaning services which involve wagering a stake with monetary value in games of chance, including those with an element of skill, such as lotteries, casino games, poker games and betting transactions, by electronic means and at the individual request of a recipient of a service; (e) financial services”.¹⁵ These exclusions tend to mitigate the consequences resulting from the broadness of the concept of digital content.
- 13 Finally, it is interesting to point out that under Belgian Law, the concept of “digital content” is not used in the legal provisions (except in the provisions

11 See Recital 11 of the Proposal.

12 Art. 3 (5) of the Proposal (with the exception of Articles 5 and 11).

13 See Article 3 (1) of the Proposal.

14 DG Justice Guidance Document concerning Directive 2011/83/UE of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, June 2014, p. 8 (hereafter the DG Justice Guidance Document): “Contrary to the definition of sales and service contracts, the Directive does not mention ‘payment’ for the latter two types of contracts. Therefore, it would seem to apply also to contracts for the supply of public utilities and online digital content even if they did not involve payment”.

15 See Art. 3 (2) of the Consumer Rights Directive and Art. 3 (5) of the Proposal.

implementing the Consumer Rights Directive¹⁶ and in a single other case).¹⁷ The concepts of immaterial or intangible goods are used much more frequently by the legislator or the judge¹⁸ but it was obviously not the option taken in Consumer Law.

2. Consequences resulting from the use of a broad definition

- 14 The choice of a broad concept is very positive, if the objective is to ensure that the protection measures shall be observed within a wide range of occurrences. As already mentioned, the number of occurrences could however be limited with the exclusion of numerous contracts from the scope of the regulation (and this is the case in the Proposal). Even in that case, some issues resulting from the potential concomitant application of other regulations shall be addressed; at best, the legal framework will be very complex and therefore not easy to apply, and at worst, some contradictions will need to be resolved.
- 15 We will discuss some of these issues below; more precisely, the comparison will be made with some concepts consecrated at the EU level in the Unfair Commercial Practices Directive, in the Consumer Rights Directive, and in the directive 1999/44/EC on sales of consumer goods. As soon as various occurrences can be qualified as digital content under the Proposal and as goods, services, products, etc., under these other regulations protecting consumers, various legal provisions shall be observed simultaneously.
- 16 Some issues could also result from the articulation with the key concepts used in other regulations, not necessarily dedicated to consumer protection¹⁹

16 See Book VI and Book XIV of the Belgian Code of Economic Law.

17 Art. 4 of the Decree of the Flemish Community of 18 March 2011 modifying the Decree of 13 July 2001 portant stimulation d'une politique culturelle locale qualitative et intégrale, en ce qui concerne la bibliothèque digitale, *Moniteur Belge*, 11 April 2011.

18 See the examples given by P. LECOCQ and A. PUTTEMANS, «Rapport belge provisoire – questionnaire relatif au thème n° 1: L'immatériel et les biens», *Journées espagnoles sur l'Immatériel*, Association Henri Capitant des amis de la Culture juridique française, 19-23 May 2014, available <http://www.henricapitant.org/sites/default/files/Belgique_0.pdf>, pp. 3-4.

19 See N. HELBERGER, M.B.M. LOOS, L. GUIBAULT, C. MAK et L. PESSERS, «Digital Content Contracts for Consumers», *J. Consum. Policy*, 2013/36, pp. 44 et s.; S. DUSOLIER, «The relations between copyright law and consumers'rights from a European perspective», note for the European Parliament, 2010, available on <www.ssrn.com/abstract=2127736>; H. JACQUEMIN, «La régulation de certains aspects juridiques du commerce électronique par les Communautés», report for the Conseil Supérieur de l'Audiovisuel, Brussels, 2011, 73

and accordingly, the concurrent application of these regulations with the Proposal. Most digital contents are indeed protected under copyright Law; some digital contents could be considered as personal data, protected under the General Data Protection Regulation;²⁰ digital contents could also be considered as information society services, in the meaning of the directive on electronic commerce,²¹ or as audiovisual media services in the meaning of the Audiovisual Media Services Directive;²² some trust services governed by the eIDAS regulation²³ – electronic signature; electronic time-stamp, etc. – could be qualified as digital contents etc.

II. Weakness of the consumer of digital contents

- 17 Prior to the adoption of the Consumer Rights Directive, many EU directives were already dedicated to consumer protection.²⁴ Namely, among others

p., available on <http://www.csa.be/system/documents_files/1659/original/HJACQUEMIN_competence_communautes_commerceFINAL.pdf?1326376554>.

20 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, *OJ L 119*, 4 May 2016, p. 1-88. The “information society services” is “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services” (Art. 2 (a) of the directive on electronic commerce, which refers to Art. 1 (2) of directive 98/34/EC as amended by Directive 98/48/EC).

21 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L 178* of 17 July 2000, p. 1-16.

22 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, *OJ L 95*, 15 April 2010. Audiovisual Media Services means “a) a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph ; ii) audiovisual commercial communications” (Art. 1 (1) (a) of the AVMS Directive).

23 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, *OJ L 257*, 28 August 2014.

24 For an overview of Consumer Law within the European

they dealt with: unfair contract terms;²⁵ unfair commercial practices;²⁶ and sale of consumer goods and associated guarantees;²⁷ etc. Some legislative interventions were particularly dedicated to contracts concluded at a *distance* – directive 97/7/EC on distance contracts²⁸ – and by *electronic means* – directive 2000/31/EC on electronic commerce.²⁹ Since the adoption of the Consumer Rights Directive in October 2011, most of them have remained applicable (with the exception of directive 97/7/EC, which was repealed). In these directives, the *ratio legis* for the protection measures lies specifically in the weak position of a consumer entering into a relationship with a supplier, a seller or a trader (acting in their commercial or professional capacity).³⁰ The

European Legislator assumes that consumers mainly suffer from a lack of knowledge as regards legal or factual data related to the agreements and do not have the same bargaining power as the other party to the contract.

Union, see H. SCHULTE-NÖLKE (ed.), *EC Consumer Law Compendium – Comparative Analysis*, Universität Bielefeld, 2008, 845 p.

25 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *O.J.*, L 95 of 21 April 1993, p. 29-34 (hereafter, “directive 93/13/EEC on unfair contract terms”).

26 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), *O.J.*, L 149 of 11 June 2005, p. 22-39 (hereafter, “directive 2005/29/EC on unfair commercial practices”).

27 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *O.J.*, L 171 of 7 July 1999 (hereafter, “directive 1999/44/EC on sales of consumer goods”).

28 Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *O.J.*, L 144 of 4 June 1997 (hereafter directive 97/7/EC on distance contracts). See also the directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (*O.J.*, L 271 of 9 October 2002, p. 16-24) could also be mentioned. In any case, it will not be analysed further (the paper will not focus on digital content that could be considered as financial services).

29 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *O.J.*, L 178 of 17 July 2000, p. 1-16 (hereafter, “directive 2000/31/EC on electronic commerce”).

30 On the weakness of a contractual party, see F. LECLERC, *La protection de la partie faible dans les contrats internationaux (Etude de conflits de loi)*, Brussels, Bruylant, 1995; M. FONTAINE, «La protection de la partie faible dans les rapports contractuels (Rapport de synthèse)», J. GHESTIN and M. FONTAINE (eds), *La protection de la partie faible dans les rapports contractuels. Comparaisons franco-belges*, Paris, L.G.D.J., 1996, p. 616 et seq.; Ch. BOURRIER, *La faiblesse d'une partie au contrat*, Louvain-la-Neuve, Bruylant, 2003; H. JACQUEMIN, *Le formalisme contractuel. Mécanisme de protection de la partie faible*, Brussels, Larcier, 2010. See also the Case Law of the European Court of Justice: “the system of protection introduced by the

18 To ensure a high level of protection for consumers, protection rules have been enacted such as: right of withdrawal; information duties; formal requirements; prohibition of unfair contract terms or unfair commercial practices; and conformity requirements and guarantees. The main objectives are to ensure informed consent and to prevent any potential fraud or abuse by the professional of the consumer’s inherently weaker position, before the conclusion of, at the moment of, or during the performance of the contract.

19 In the context of digital content, the weakness of the consumer mainly arises out of the object of the contract – a digital content – with the potential lack of knowledge due to the fact that it is a technological item (with issues of interoperability or geo-blocking, for instance). Furthermore, the consumer could be surprised to download an app on their smartphone free of charge, and then to be requested to carry out an integrated purchase, with the payment of a price, in order to benefit from all its functionalities (this is very usual for most games). The consumer could also suffer from a lack of knowledge of their rights, related to the termination of the contract or the portability of their data. Some issues are already addressed by the provisions of the Consumer Rights Directive especially dedicated to digital content (see in particular the information duties). Considering that the current legal framework did not address the other abovementioned weaknesses appropriately, additional protection measures are prescribed by the Proposal.

20 It is also usual that for most digital contents provided to the consumers, the terms and conditions governing their provision can only be accepted or refused (it is a so-called “adhesion contract” – “*contrat d’adhésion*”). The average consumer is therefore the weaker contract party (compared

Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms” (E.C.J., 26 October 2006, C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675, point 25; see also E.C.J., 27 June 2000, aff. C-240/98 à C-244-98, *Oceano Grupo*, point 25; E.C.J., 4 June 2009, aff. C-243/08, *Pannon GSM Zrt*, point 22; E.C.J., 6 October 2009, aff. C-40/08, *Asturcom Telecomunicaciones SL*, points 29-31; E.C.J., 9 November 2010, aff. C-137/08, *VB Pénzügyi Lizing Zrt.*, points 46-48; E.C.J., 15 March 2012, aff. C-453/10, *Pereničová et Perenič*; E.C.J., 3 October 2013, aff. C-59/12, *BKK Mobil*, point 35 or E.C.J., 3 September 2015, aff. C-110/14, *Horățiu Ovidiu Costea*, point 18).

to a professional) because they cannot negotiate the contract nor impose their own terms. In these circumstances, the professional party to the contract can take advantage of the consumer's weak position to impose unfair contract terms (unbalanced liability exemptions for instance) or use unfair commercial practices (misleading acts or omissions and/or aggressive commercial practices). Accordingly, directives were adopted to regulate and prohibit these practices (directives 93/13/EEC and 2005/29/EC) but their efficiency could be discussed.

- 21 The majority of aforementioned directives, as well as the Proposal, *only* apply to B2C relationships.³¹ Nevertheless, in some cases, contract relationships could be established between consumers (C2C). Most EU protection rules are not applicable in that case. The general contract law, however remains applicable in each Member State (information requirements, good faith, consent, rules of proof, etc.)³² Nevertheless, in most cases these rules do not take into account the specific difficulties of the contracting parties. In the meaning of such rules, the parties are indeed supposed to be on an equal playing field, although it is far from the case in practice (in most cases, the rules are therefore not sufficient to protect consumers).
- 22 Some parties to the contract could also suffer from additional difficulties, compared with the average consumer. These may result from their age, mental or physical disability. Many children under the age

31 Directive 2000/31/EC on electronic commerce has a broader scope. It applies to B2B (when the service provider and the recipient of the service are not acting for purposes which are outside their trade, business or profession) and to B2C relationship (when the service provider is acting in the course of his trade, business or profession and the recipient of the service is an individual consumer). The definition of "service provider" does not prohibit a consumer from providing an information society service; for instance, any natural person could sell on their blog some goods found in their attic, for private purposes. In any case, taking into account the concept of "service" and the duties required by Articles 10 and 11 of the directive, it may be argued that the European legislator has not considered that the service provider could be a consumer. Indeed, it appears out of proportion to require that the seller (in this example) must provide the recipient of the service, information on the "different technical steps to follow to conclude the contract" (art. 10, § 1, a), "acknowledge the receipt of the recipient's order without undue delay and by electronic means" (art. 11, § 1) or "makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order" (art. 11, § 2). Hence, those articles of the directive on electronic commerce only apply in B2C and B2B relationships.

32 On the application of general contract law to C2C relationships on online auction websites, Ch. RIEFA, "La protection des consommateurs sur les plates-formes de courtage en ligne: point de vue d'outre-manche", *Revue européenne de droit de la consommation - European Consumer Law Journal*, 2005/4, p. 336-340.

of 18 (sometimes much younger) are connected to the internet, in blogs, social networks or apps. They are recipients of all kinds of publicity and contracts could be concluded by minors (to play games on a mobile device for instance). We can only regret that very few rules within the European legal framework take into account this specific problem.³³ Regarding legal minors specific (lack of experience, uninformed consent, and possible abuses by the other party), more explicit rules should be adopted.³⁴

C. Articulation with concepts used under the EU horizontal framework protecting consumers

- 23 The concepts used in the directives protecting consumers shall be taken into account when determining whether these regulations are applicable or not. In the provisions dedicated to the scope "*ratione materiae*" of the regulations, reference is made to the concepts of "products", "goods", "services", "sales contracts", or "service contracts". It is therefore important to establish how far the "digital content" or the "contract with the object of digital content" shall also be included in such concepts or not. It is important in order to assess the global consistency of the concepts used within the EU legal framework to protect consumers. At the same time, it could also highlight some potential issues resulting from the application of various regulations. This issue shall not be exaggerated, as it is already addressed by Article 4 (7) of the Proposal: "if any provision of this Directive conflicts with a provision of another Union act governing a specific sector or subject matter, the provision of that other Union act shall take precedence over this Directive".

I. Digital content and the concepts of "product", "goods" and "service"

- 24 In the Unfair Commercial Practice Directive, the broad concept of "product" is used: it means "any goods or service including immovable property, rights and obligations".³⁵ Digital content under the Consumer Rights Directive or under the Proposal

33 See Art. 5 (3) and point 28 of Annexe I of directive 2005/29/EC on unfair commercial practices.

34 On the protection of minors, see M. DEMOULIN, «Les mineurs et le commerce électronique: besoin de protection ou d'autonomie?», *Journal des Tribunaux*, 2007, p. 105 et seq.; A. NOTTET, «Mineurs et téléphonie mobile», *Revue Générale de Droit Civil*, 2008, p. 239 et seq.

35 Art. 2 (c) of the Unfair Commercial Practices Directive.

shall normally be considered as a “product” (whether falling under the meaning of “service” or under the meaning of “rights and obligations”). It means that this directive, prohibiting misleading and aggressive business-to-consumer commercial practices shall be observed when such practices are related to digital content.

- 25 For the purpose of the directive 1999/44/EC on sales of consumer goods, “consumer goods” shall mean “any tangible moveable item [...]”.³⁶ Accordingly, immovable or intangible items are not covered by the directive. With reference to our study, it is necessary to determine whether digital contents can be considered as tangible or not. No definition of “tangible item” is provided in the legal provisions. Discussion usually focused on software’s inclusion in (or exclusion from) the scope of the directive. Among legal scholars, there is no unanimously accepted solution. In the opinion of some, it is a tangible item,³⁷ while others make a distinction between the software executed at a distance (for instance, through the internet), which would be intangible and the software recorded on a physical medium (hard disk, CD-ROM, etc.), which would be tangible.³⁸
- 26 The concepts of “goods” and “services” are used in the Consumer Rights Directive. “Goods” means “any tangible movable item”.³⁹ “Services” are not defined by the directive but they should normally have the meaning provided by Article 57 of the Treaty on the Functioning of the European Union. Pursuant to Recital 19 of the directive, “if digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this directive”. What about the digital content not supplied on a tangible medium (for instance supplied online through streaming)? Unfortunately, no answer is given by the Recitals (or the articles) of the directive. Regarding the residual

character of the concept of “service”, it is reasonable to opine that the digital content not supplied on a tangible medium should be considered as a service.

- 27 As a result, following the interpretation made to the provisions of the Consumer Rights Directive and the directive 1999/44/EC on the sales of consumer goods, digital contents supplied on a tangible medium are goods (and fall within the scope of the corresponding provision applicable to goods in both directives), while digital contents not supplied on a tangible medium are services (and only fall within the scope of the Consumer Rights Directive, in the provisions applicable to the services).⁴⁰

II. Digital content and the concepts of “sales contract” and “service contract”

- 28 Under the Consumer Rights Directive, “sales contracts” means “any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services”,⁴¹ and “service contracts” means “any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof”.⁴² It must be stressed that in both definitions, the payment of a price is a *sine qua non* condition, in order to qualify the contract accordingly. Following the Recital 19 of the Consumer Rights Directive, “similarly to contracts for the supply of water, gas or electricity, where they are not put for sale in a limited volume or a set quantity, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this directive, neither as sales contracts nor as service contracts”.
- 29 As summarised in the DG Justice Guidance Document, a distinction is made, under the directive, between four kinds of contracts: (1) sales contracts; (2) service contracts; (3) contracts for the supply of digital content which is not supplied on a tangible medium; and (4) contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume of set quantity or of district hearing.⁴³

36 Art. 1 (2)(a) of the directive.

37 M. TENREIRO and S. GÓMEZ, “La directive 1999/44/CE sur certains aspects de la vente et des garanties de biens de consommation”, *Revue européenne de droit de la consommation*, 2000, p. 12.

38 L. SERRANO, «Article 1^{er}. Champ d’application et définitions», M.C. BIANCA, S. GRUNDMANN and S. STIJNS (dir.), *La directive communautaire sur la vente - Commentaire*, Brussels, Bruylant, Paris, L.G.D.J., 2004, p. 130. See also Ch. BIQUET-MATHIEU, «La garantie des biens de consommation - Présentation générale», *La nouvelle garantie des biens de consommation et son environnement légal*, Brussels, La Charte, 2005, p. 64-65 (who considered that software or audio/video recordings «sold» on a physical medium are tangible items and admitted that the question was controversial as concerns downloading).

39 Art. 2 (3) of the Consumer Rights Directive (“with the exception of items sold by way of execution or otherwise by authority of law ; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity”).

40 See below for a discussion on this point.

41 Art. 2 (5) of the Consumer Rights Directive.

42 Art. 2 (6) of the Consumer Rights Directive.

43 DG Justice Guidance Document, op. cit., p. 5.

- 30 Accordingly, some provisions of the directive refer to the “contracts for the supply of digital content which is not supplied on a tangible medium”. They deal with: consumer information for contracts other than distance or off-premises contracts;⁴⁴ information requirements for distance and off-premises contracts;⁴⁵ the starting point of the right of withdrawal period;⁴⁶ the penalty in the case of supply of digital content in breach of information duties;⁴⁷ and the exception, under conditions, from the right of withdrawal.⁴⁸ Article 17 of the directive also stipulates that Articles 18 (on delivery) and 20 (on passing of risks) shall not apply to such contracts, while Articles 19 (on fees for the use of a means of payment), 21 (on communication by telephone) and 22 (on additional payment) apply to them.
- 31 No reference is made to the “contracts for the supply of digital content which is supplied on a tangible medium”. As the digital content supplied on a tangible medium is considered as a good, it is probably considered by the European Legislator that the contract for the supply of such item is a “sales contracts”, in the meaning of the Consumer Rights Directive (governed by the corresponding provisions).
- 32 It must be pointed out that under Belgian Law, the distinction between these four kinds of agreements was not implemented in the legal framework, more precisely in Books VI and XIV of the Code of Economic Law (where the Consumer Rights Directive is transposed). The Belgian legislator is indeed of the opinion that the “supply of digital content which is *not* supplied on a tangible medium” shall be considered as “service contracts”.⁴⁹ Accordingly, when determining the starting point of the right of withdrawal’s period, no reference is made to this kind of agreement (this is however not really an issue, seen as the starting point – the conclusion of the agreement – is similar, in the directive, for both kinds of agreements).⁵⁰ The concept is however used in the list of exceptions from the right of withdrawal.⁵¹

44 Art. 5 (2) of the Consumer Rights Directive.

45 Art. 6 (2) of the Consumer Rights Directive.

46 Art. 9 (2) (c) of the Consumer Rights Directive.

47 This is the case when “(i) the consumer has not given his prior express consent to the beginning of the performance before the end of the 14-day period referred to in Article 9; (ii) the consumer has not acknowledged that he loses his right of withdrawal when giving his consent; or he trader has failed to provide confirmation in accordance with Article 7(2) or Article 8(7)” (Art. 14 (4) (b) of the Consumer Rights Directive).

48 Art. 16 (m) of the Consumer Rights Directive.

49 *Doc. Parl.*, Ch. Repr., sess. ord. 2012-2013, n° 3018/001, p. 16.

50 Art. VI.47 of the Belgian Code of Economic Law.

51 Art. VI.53, 13, of the Belgian Code of Economic Law.

- 33 It could be considered that the Belgian legislator has breached its duties of transposition of the Consumer Rights Directive, being agreed that it is a maximal harmonisation directive.⁵² Although the protection rules prescribed by the directive shall also be applicable to the digital contents considered as services, the main differences lie in the exclusion of some digital contents from such protection rules (contrary to the directive). Indeed, the concept of “digital content” shall also apply to data or services where the counter-performance is not the payment of a price in money. However, the contract on such data cannot be considered as a service contract since the payment of a price is a requirement to qualify it as such (see above, the definition of “service contracts” under the Consumer Rights Directive). It means for instance that, when the consumer has downloaded free apps on his mobile phone, they cannot benefit from the protection rules applicable to distance contracts under the Belgian legal framework, while it should normally benefit from them under the Consumer Rights Directive.

III. Weakness of the current legal framework – corrected under the Proposal?

1. Current legal framework

- 34 As understood under the current legal framework at the EU level (and even more at the Belgian level for instance), the concept of digital content on one hand, and the other concepts used in the horizontal framework protecting the consumer on the other hand, raise some issues. First of all, the legal framework is very complex since various concepts must be articulated together: products, digital contents, goods, services, digital content supplied on a tangible medium, digital content not supplied on a tangible medium, sales contract, service contract, and (contract on the) supply of digital content not supplied on a tangible medium. In addition, the concepts are structured on the Russian Doll Model: the digital content is a sort of “goods” or “services”, themselves considered as a sort of “products”; the contracts on the supply of digital contents are sort of “sales contracts”; and contracts for the supply of digital content not supplied on a tangible medium constitute an autonomous category of contracts or, under Belgian Law, are qualified as service contracts. Although it is not an insular solution in Law, it means that lawyers shall make a distributive application of the protection measures. First, they shall apply the specific rules dedicated to the digital content

52 Art. 4 of the Consumer Rights Directive.

and then, depending on the digital content at stake, the general rules on goods, services, sales contract or service contract. In the provisions related to the right of withdrawal, it should be easier with a set of rules applicable to digital contents, next to another set of rules applicable to services and goods. In addition, a distinction is made whether the digital contents is supplied on a tangible medium or not.⁵³

- 35 In the first case, it is considered as a goods (subject to a sales contract), with the correlative application of the protection measures prescribed by the directive 1999/44/EC on the sales of consumer goods and the specific rules regarding the right of withdrawal (with determined starting point and exception from the right of withdrawal). As soon as this digital content is subject to a sales contract (requiring payment), it means that the digital contents provided for free – i.e. without any payment – are excluded from the protection measures related to the right of withdrawal. This issue should however remain theoretical; namely, when no payment was made, the consumer can terminate the agreement easily without penalty or risk of non-reimbursement. In the other case, it is considered as a service (subject to a contract for the supply of digital content not supplied on a tangible medium), out of the scope of the directive 1999/44/EC on the sales of consumer goods and with other rules regarding the right of withdrawal. It means nevertheless that digital contents shall benefit, in that case, from the protection measures related to the right of withdrawal.
- 36 Such discrimination is not justified at all. Even less so since the content as such is equivalent in both cases – i.e the same software or film, regardless of whether it is downloaded online or supplied on a CD-ROM delivered by traditional mail. Furthermore, when considering that the digital content supplied on a tangible medium is a good subject to a sales contract, a confusion arises between the medium, protected by classical property rights (real right implying *usus, fructus* and *abusus*), and the content, usually protected by copyrights and on which the consumer does not have similar rights (only a limited right to use).
- 37 The current situation is summarised in the table below:

	Goods	Sales contract	Service	Service contract	Contract for the supply of digital content not supplied on a tangible medium
Digital content supplied on a tangible medium	YES	YES	NO	NO	NO
Digital content <u>not</u> supplied on a tangible medium	NO	NO	YES	NO (except under Belgian Law)	YES

2. Strengths of the Proposal and remaining issues

- 38 Hopefully various issues of the current legal framework, as described above (see point C.III.1.) are addressed in the Proposal. There is no discrimination regarding whether digital content was supplied on a tangible medium or not – both shall benefit from equivalent protection measures, regarding conformity requirements or termination of the agreement. The legal framework is therefore consistent for all kinds of digital contents. Furthermore, it is clearly stated that the legal framework shall apply no matter the counter-performance as the supply of the digital content is the payment of a price or the processing of personal data or other data. The legal framework remains very complex because no modification is made to the Consumer Rights Directive. This directive should however be amended in order to include the new definition of “digital content” prescribed by the Proposal.
- 39 Discussions could also arise with regard to the digital content embedded in goods (which should occur frequently in the near future, with the development of artificial intelligence and automatisation). In case of defect, which set of rules is applicable? The rules applicable to goods or the rules applicable to digital contents (should the proposal be adopted)? This point is currently under discussion before the Council,⁵⁴ where three options were proposed: (i) application of “goods rules” to the embedded digital content; (ii) split approach with respective application of “goods rules” to goods and application of the Proposal to the embedded digital content; and

⁵³ For an analysis of this topic (the distinction between physical medium or other provision means, and the content – data base, software, etc. –, as well as the qualification of each element), see S. DUSOLLIER, *Droit d'auteur et protection des œuvres dans l'univers numérique*, Brussels, Larcier, 2007, p. 398 *et seq.*; E. MONTERO, *La responsabilité civile du fait des bases de données*, Namur, PUN, 1998, p. 238 *et seq.*; A. LUCAS, “La responsabilité civile du fait des ‘choses immatérielles’”, *Etudes offertes à Pierre Catala – Le droit privé français à la fin du XX^e siècle*, Paris, Litec, 2001, p. 816 *et seq.*

⁵⁴ Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) - Policy debate, ST 14827 2016 INIT - 2015/0287 (OLP).

(iii) application of the Proposal to both goods and embedded digital content, “with an exception giving the supplier the possibility to prove that the defect lies in the hardware of the good, in which case the ‘goods rule’ would be applied when remedying such a defect”. From a strictly legal point of view, option ii) is the most accurate. It could however engender difficulties when determining whether the defect is related to the digital content or to the goods where it is embedded. Option iii) should in this context ensure a higher level of protection to the benefit of the consumers, being agreed that whenever possible, the rules applicable to goods and to digital contents should be equivalent.

D. Articulation with other relevant concepts under (classical) Civil Law

- 40 Rules related to the general theory of contract law are prescribed by the French Civil Code of 1804⁵⁵ – also called the Napoleon Code – as well as by the Belgian Civil Code.⁵⁶ They deal, among others, with the requirements to the validity of the contract, the effect of the contract (between the parties and towards third parties), and with the sanctions, should there be a breach by a party of its contractual duties. Only few modifications have been brought to these provisions since 1804 and both legal frameworks (French and Belgian) remained similar (although distinctions resulting from the respective case law of both countries could not be excluded). Amendments were made recently in France with the adoption of a new set of legal provisions that came into force on 1st October 2016.⁵⁷
- 41 In both Civil Codes, some provisions mostly unchanged since 1804, are also applicable to the so-called named agreements (“contrats nommés”), i.e. the agreements which for a specific legal framework is provided by the Code. Regarding the aim of the present paper, we will only focus on the sales contract⁵⁸ (“vente”) and on the contract of enterprise⁵⁹ (“louage d’ouvrage et d’industrie”). It must be stressed that most rules were drafted, in 1804 considering the usual object of such agreements at that time – the sale or the construction of buildings and other immovable goods. Regarding the sales contract, the legal framework is somewhat

elaborate, with provisions on the requirements of the sales (who is allowed to buy or to sell? What can be sold?), the duties of the seller (conform delivery,⁶⁰ warranty for hidden defects,⁶¹ and warranty for quiet possession⁶²) the duties of the buyer (mainly paying the price) and the termination of the agreement. The chapter on the “contract of enterprise” is very poor, with only few provisions (mostly out-dated). Attention must nevertheless be paid to the Case Law, that has provided some useful interpretation of the rules, and has applied them in other contexts (notably in the context of IT Contracts and Information and Communication Technologies).

- 42 These rules related to the general theory of contract law and the named agreements of the Civil Code shall only be applicable provided that a specific legal provision does not further exist (should there be any inconsistency between the general rule of the Civil Code and a specific rule prescribed by an Act, the specific rule shall prevail). Furthermore, most of these rules are not mandatory and the parties are therefore allowed to derogate to them by contract (which is usually the case). Essentially, they can be seen as a toolkit used by the Parties when elaborating their *sui generis* agreements.
- 43 The qualification of “software” is a good example (it can indeed be considered as digital content). Discussions usually arise when deciding whether the contract on such software must be considered as a sales contract or as another kind of contract (for instance, a contract of enterprise or a *sui generis* contract).⁶³ A distinction is usually made between “standard software” and “custom software”, designed upon request of the client. The contract on custom software, where a right to use – a license – is granted to the client, is usually qualified under Belgian and French Law as a contract of enterprise (being agreed that, regarding the tangible medium used to supply the software, the contract is considered as a sales contract). Regarding the “standard software”, there is not any consensus among legal scholars and there is not any clear judgement stating in a sense or in the other. Some authors consider that it is indeed somewhat disputable to refer to a “sales contract” when – except for the tangible medium used to supply it – the client is only granted a right to use the

60 «Obligation de délivrance conforme».

61 «Garantie des vices cachés».

62 «Garantie d’éviction».

63 On this topic, see E. MONTERO, *Les contrats de l’informatique et de l’internet*, Brussels, Larcier, 2005, p. 72 et seq. ; J. HUET, “De la ‘vente’ de logiciel”, *Etudes offertes à Pierre Catala - Le droit privé français à la fin du XX^e siècle*, Paris, Litec, 2001, p. 799 et seq.; M. VIVANT et al., *Lamy Droit du Numérique*, Paris, Kluwer, 2016, n. 719 et seq. ; A. LUCAS, J. DEVEZE et J. FRAYSSINET, *Droit de l’informatique et de l’internet*, Paris, P.U.F., 2001, p. 488 et seq.; Ph. LE TOURNEAU, *Contrats informatiques et électroniques*, 7^e éd., Paris, Dalloz, 2012, p. 203 et seq.

55 See Art. 1100 et seq. of the French Civil Code.

56 See Art. 1101 et seq. of the Belgian Civil Code.

57 Ordonnance n° 2016-131 of 10 February 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.

58 Art. 1582 et seq. of both Civil Codes.

59 Art. 1779 et seq. of both Civil Codes.

software (a license). This right to use is governed by copyright law, which is different from the classical property law applicable to tangible items. On the other hand, the “standard software” already existed before the conclusion of the agreement; as a result, the IT provider did not carry out any task in order to elaborate the software (as it should normally be the case in a contract of enterprise).

- 44 As far as most rules applicable to sales contracts and to the contract of enterprise are not mandatory, parties remain free to determine their respective rights and duties (and they usually do so with some reference to rights and duties prescribed to the sales contract and to the contract of enterprise). Under French and Belgian Law, the freedom of contract is indeed a key principle. In this context, and being agreed that neither the qualification of sales contract, neither the qualification of contract of enterprise is 100% satisfactory, the most appropriate qualification is probably a “*sui generis* agreement”, where the parties freely decide the rights and duties of each other.
- 45 A Judgement rendered by the Court of Appeal in Luxembourg is, in this context, very interesting.⁶⁴ The dispute was about the breach in the delivery of a standard software. The operation was qualified “sales” by the Parties and the Court consecrated such qualification, with this important comment: the buyer of such an item will not have the same rights and duties than a buyer of any movable tangible item (subject to a right of property); in the case of the standard software, a right to use will be granted to the client, subject to copyright Law. In fact, the sole practical interest of a qualification process is the application of the material protection rules associated to such qualification. On this point, the Court added that the rights and duties of the parties are roughly the same,⁶⁵ no matter the qualification (sales, contract of enterprise, etc.).⁶⁶
- 46 With the Proposal, the consumer receiving a software, whether standard or custom, shall benefit from the protection measures (conformity, termination, etc.) and the remedies established by the directive (should it be adopted). The discussion on the qualification as a sales contract or as a contract of enterprise will become useless. In that sense, the Proposal will contribute to the simplification of the legal

framework, and with a higher level of protection to the benefit of the consumers. Between professionals, however, the contract law rules prescribed at the national level shall remain applicable. Incidentally, under French Law, it is highly probable that the implementation of the Proposal will be made in the Code of Consumer Law. New provisions of the sale of consumer goods were indeed included in this Code of Consumer Law (Art. L217-1 *et seq.*), which is consistent regarding the scope of the provisions (B2C).

- 47 Contrariwise, in order to implement the directive 1999/44/EC on sales of consumer goods into national Law, the Belgian legislator has introduced the new legal provisions in the Civil Code, in the chapter consecrated to the sales contract (Art. 1649bis *et seq.* of the Belgian Civil Code). Other legal provisions protecting consumers – prohibition of unfair commercial terms or unfair commercial practices, for instance – are included in the Code of Economic Law and it would sound logical that the Proposal shall be implemented into this Code. An even better option could be the elaboration of a Code of Consumer Law under Belgian Law, where all these rules protecting consumers could be brought together, including the provisions implementing the directive 1999/44/EC on sales of consumer goods.

E. Conclusion

- 48 Digital contents are currently defined and regulated by the Consumer Rights Directive (information duties and specific provisions on the right of withdrawal). Various issues arise out of the articulation between the concept of “digital content” and other relevant concepts of the Consumer Rights Directive, such as “goods”, “services”, “sales contract”, and “service contracts”. Digital contents supplied on a tangible medium shall indeed be considered as goods (and the contract on such content as “sales contract”), when digital contents not supplied on a tangible medium shall be considered as “services” (and the contract on such content as a “contract for the supply of a digital content not supplied on a tangible medium”). Such differences are a source of futile complexity, and they could give rise to unjustified discrimination.
- 49 The Proposal offers satisfactory answers to many of the issues resulting from the conceptual legal framework applicable to the digital contents (there is no distinction whether it is supplied on a tangible medium or not, application to digital contents supplied with personal data or other data as counter-performance, etc.), although some difficulties will remain.
- 50 Regarding the articulation with the classical concepts

64 C.S.J. Luxembourg, 5 February 2003, DAOR, 2003/67, p. 47, note H. JACQUEMIN.

65 Some differences could however be highlighted.

66 The Court states that «*les obligations des parties (obligation de délivrance, de garantie des vices, de conseil et d'information du côté du fournisseur, et obligation de collaborer et de payer le prix convenu du côté de l'utilisateur) sont essentiellement les mêmes que le contrat soit qualifié de vente, de bail (acquisition d'une licence) ou encore de contrat de vente complétée par un contrat d'entreprise*».

of “sales contract” or “contract of enterprise”, we do not expect major issues. Most of these rules are not mandatory and, when a claim is brought before the courts in order to discuss the qualification of a digital content (a software) under these categories, there is not any unanimity among legal scholars and within case law. The existence of a specific legal framework protecting consumers should simplify the analysis, as the application the Contract Law rules shall not be necessary anymore (except in B2C and C2C relationships).

- 51 In terms of next steps, we are of the opinion that all these provisions protecting consumers, especially in the recent proposals made by the Commission, should be included in a single legal instrument (a Code of Consumer Law, for instance), where the higher level of consistency and harmonization is ensured between the legal frameworks (without any unjustified discrimination between the conformity for goods or digital content, simplified information duties, etc.).