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AI REGULATION IN B2C CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND SERVICES

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Summary

Abstract

This paper examines whether, and to what extent, artificial intelligence systems and algorithms fall within the scope of the European directives providing specific rules for digital content and services (Directives (EU) 2011/83, 2019/770 and 2019/771). When the answer is positive, the protection measures prescribed by the legal framework for the benefit of consumers (mainly information duties and legal guarantee) are presented, before establishing whether they allow to effectively address the challenges raised by AI in B2C contracts.

Résumé

Dans la présente contribution, on détermine si, et dans quelle mesure, les systèmes d'intelligence artificielle et les algorithmes tombent dans le champ d'application des directives européennes prévoyant des règles spécifiques pour les contenus et les services numériques (directives (UE) 2011/83, 2019/770 et 2019/771). Lorsque la réponse est positive, on présente les mesures de protection mises en place au bénéfice des consommateurs (principalement l'obligation d'information et la garantie légale), avant d'établir si elles permettent de répondre efficacement aux défis posés par l'IA dans les relations B2C.

Introduction

Artificial Intelligence (AI) and algorithms (1) are increasingly used by traders in their relationships with consumers.

In this contribution, the term AI is used as defined in Article 3(1) of the European Union (hereafter "UE") Proposal of AI Act, (2) where an "artificial intelligence system" means "a system that is designed to operate with elements of autonomy and that, based on machine and/or human-provided data and inputs, infers how to achieve a given set of objectives using machine learning and/or logic- and knowledge based approaches, and produces system-generated outputs such as

(1) AI, AI systems and algorithms are used interchangeably in this contribution.

(2) Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial intelligence Act) and amending certain Union legislative Acts, COM(2021) 206 final, in the most recent version, dated 6 December 2022 (available on https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=consil:ST_15698_2022_INIT).

content (generative AI systems), predictions, recommendations or decisions, influencing the environments with which the AI system interacts." The main key features of this definition are autonomy and input data.

AI can be used in multiple ways, for instance it can be implemented in the IT systems of the vehicles, to provide driving assistance or other means tending towards a greater autonomy. Algorithms are also used by online platforms, such as social networks or online marketplaces (to provide personalised/targeted content, advertising or listings to the users and remove illegal content, good or services), as well as in dedicated apps or services. In the financial sector, they contribute to assess the creditworthiness of the consumers applying for a loan or the risk profile of the insured persons; they may also provide investment suggestions or counsel. Legal Tech (3) services available online may provide consumer with "legal" guidance in simple cases (cancelled flight, divorce, *etc.*) or with draft agreements (*e.g.* rental contract). Communication tools relying on AI are also more and more numerous on websites, where chatbots provide information to consumers or address their requests.

In most examples, related to big data environment, algorithms are necessary to process the large volume of (personal) data.

The scope of this contribution is limited to the contracts where digital content or service, including AI systems, are provided by traders to consumers.

At the EU level, substantial rules exist to protect consumers when they access or use digital content and services: on one hand, Directive 2011/83/EU on consumer rights (4) (hereafter, "CRD"), as modified by the so-called "Omnibus" Directive, (5) on the other hand, Directive 2019/770/EU on certain aspects concerning contracts for the

(3) On this topic, H. JACQUEMIN and J.-B. HUBIN, "L'intelligence artificielle: vraie ou fausse amie du justiciable? Enjeux du recours à l'IA par les avocats, les assureurs et les legaltechs", *Le juge et l'algorithme: juges augmentés ou justice diminuée?*, Brussels, Larcier, 2019, pp. 75-104.

(4) Directive (EU) 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive (EU) 93/13/EEC and Directive (EU) 1999/44/EC of the European Parliament and of the Council and repealing Council Directive (EU) 85/577/EEC and Directive (EU) 97/7/EC of the European Parliament and of the Council, *OJ*, L 304 of 22 November 2011.

(5) Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, *OJ*, L 328 of 18 December 2019.

supply of digital content and digital services (6) (hereafter, "Directive (EU) 2019/770") and Directive 2019/771/EU on certain aspects concerning contracts for the sale of goods (7) (hereafter, "Directive (EU) 2019/771"). (8)

In Belgium, these directives were implemented in book VI of the Code of Economic Law (for CRD) and in the old Civil Code (for Directives 2019/770 and 2019/771). In France, they were transposed in the Consumer Code ("*Code de la consommation*").

In these directives, the *ratio legis* for the protection measures lies specifically in the weak position of consumers entering into a relationship with sellers or traders while acting in their commercial or professional capacity. (9) The European legislator considers that consumers mainly lack knowledge of the legal or factual data related

(6) Directive (EU) (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, *OJ*, L 136 of 22 May 2019.

(7) Directive (EU) (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive (EU) 2009/22/EC, and repealing Directive (EU) 1999/44/EC, *OJ*, L 136 of 22 May 2019.

(8) On the proposals of the Commission, the directives and their implementation into the Belgian and French legal framework, see S. Geiregat and R. Steennot, "Proposal for a directive on digital content. Scope of Application and Liability for a Lack of Conformity", *Digital Content and Distance Sales*, Brussels, Intersentia, 2017, pp. 95 et seq.; S. Jansen and S. Stijns, "La directive nouvelle est arrivée: conformiteitsbegrip, overmacht, kennisgeving, termijnen en remedies in de richtlijn consumentenkoop 2019/771/UE", *D.C.C.R.*, 2020/128, pp. 3 et seq.; S. Meys, "Consumentenbescherming geüpdated: de nieuwe Richtlijn Digitale Inhoud en Digitale Diensten", *D.C.C.R.*, 2020/127, pp. 31 et seq.; G. Fruy and G. Schultz, "La nouvelle directive en matière de vente aux consommateurs (2019/771) est arrivée: quel est son champ d'application et quels critères prévoit-elle pour la conformité des biens vendus?", *in Vers des relations entre entreprises plus équilibrées et une meilleure protection du consommateur dans la vente de biens et la fourniture de services numériques?*, Brussels, Larcier, 2021, pp. 82 et seq.; S. Stijns and S. Jansens, "La nouvelle Directive en matière de vente aux consommateurs (2019/771) est arrivée: quoi de neuf en matière de délais and de remèdes?", *in Vers des relations entre entreprises plus équilibrées etune meilleure protection du consommateur dans la vente de biens et la fourniture de services numériques?*, Brussels, Larcier, 2021, pp. 124 et seq.; A. Cassart, F. Loriaux and A. Cruquenaire, "La Directive 2019/770/UE du 20 mai 2019 relative à certains aspects concernant les contrats de fourniture de contenus and de services numérique", *in Vers des relations entre entreprises plus équilibrées et une meilleure protection du consommateur dans la vente de biens et la fourniture de services numériques ?*, Brussels, Larcier, 2021, pp. 210 et seq.; R. Steennot, "Het toepassingsgebied van de nieuwe garantieregelingen voor goederen, digitale inhoud en digitale diensten", *D.C.C.R.*, 2022, pp. 3 et seq.; H. Jacquemin, "La conformité des biens, des contenus numériques et des services numériques, l'articulation des délais et la modification des éléments numériques", *D.C.C.R.*, 2022, pp. 25 et seq.; F. Van den Abeele and B. Tilleman, "Remedies in de nieuwe consumenten(koop)recht: een (her)nieuw(d) getrapt system", *D.C.C.R.*, 2022, pp. 59 et seq.; B. Keirsbilck, "Verhaalsrechten", *D.C.C.R.*, 2022, pp. 103 et seq.

(9) 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)", *in* J. Ghestin and M. Fontaine (eds), *La protection de la partie faible dans les rapports contractuels.*

to the agreements and do not have the same bargaining power as the other party to the contract. To ensure a high level of protection for consumers, (10) protection rules have been enacted: right of withdrawal, information duties incumbent on traders, formal requirements or conformity requirements and guarantees. The main objectives are to ensure informed consent and to prevent any potential fraud or abuse due to the consumer's inherently weaker position, before the conclusion of, at the moment of, during and after the performance of the contract.

Since these EU texts are maximal harmonisation directives, (11) this article mainly refers to them. National regulations will be mentioned when they deviate from the EU legal framework; in other words, when Member States are entitled to prescribe different provisions.

Digital content or services may also be governed by other regulations, either horizontal or sector specific, in the field of contract law, tort law, intellectual property law or electronic communications, for instance. Some of them share common purposes with the consumer protection directives, such as to prevent any lack of conformity or, if not possible, to provide remedies to the consumers. This is particularly the case for rules on product safety (12) or the recent proposals at the EU level on liability for defective products (13) and on AI liability (14) that are particularly relevant in the AI context. Regarding the limited scope of this contribution, they will not be analysed. (15)

The object of the paper is to determine whether AI systems provided to consumers (either standalone AI or embedded AI) are governed by the EU legal framework applicable to digital content and digital services and, if so, whether the protection measures are sufficient to address the issues raised by AI in B2C relationships.

Comparaisons franco-belges, Paris, LGDJ, 1996, pp. 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.

(10) Art. 38 of the Charter on fundamental rights.

(11) Art. 4 of the CRD, Art. 4 of the Directive (EU) 2019/770 and Art. 4 of the Directive (EU) 2019/771.

(12) Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, *OJ*, L 11 of 15 January 2002. Under Belgian Law, see book IX of the Belgian Code of Economic Law; under French Law, see book IV (Art. L411-1 et seq.) of the Consumer Code.

(13) Proposal for a directive of the European Parliament and of the Council on liability for defective products, COM(2022) 495 final.

(14) Proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive), COM(2022) 496 final.

(15) See in this book the contribution of M. CANNARSA, "Private Enforcement in Consumers and AI-Related Disputes – The Perspective of Liability Regimes", pp. 247 et seq.

For this purpose, the scope of the CRD and of the Directives (EU) 2019/770 and 2019/771 will be presented to determine whether they may apply to AI systems (Section I). Then, the substantial rules prescribed by these directives will be examined: information duties (Section II), legal guarantee (Section III) and the case of the modification of the digital content or service (Section IV). (16)

I. KEY CONCEPTS AND SCOPE OF THE APPLICABLE LEGAL FRAMEWORK VIS-À-VIS AI SYSTEMS

To determine whether AI systems fall within the scope of the CRD and of the Directives (EU) 2019/770 or 2019/771, (17) attention must be paid to the key concepts used in these texts, to define their personal and material scope. The personal scope is similar in these three texts, covering the relationship between consumers and sellers or traders. (18) The material scope of each directive differs, however.

The Directive (EU) 2019/770 applies to the provision of digital content and digital services. "Digital content" was already defined by the CRD. It means "data which are produced and supplied in digital form." (19) The new concept of "digital service" means "(a) a service that allows the consumer to create, process, store or access data in digital form; or (b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer

(16) On the same topic, see also FPS Economy, *Study on Potential Policy Measures to Promote the Uptake and the Use of AI in Belgium in Specific Economic Domains*, 2022, pp. 70 et seq., available at: https://economie.fgov.be/fr/publications/study-potential-policy; M. HO-DAC and E. THELISSON, "Le consommateur européen face à l'intelligence artificielle – Quel cadre réglementaire au sein du marché unique numérique?", *in* M. COMBET (ed.), *Le droit européen de la consummation au XXIe siècle*, Brussels, Bruylant, 2022, pp. 103 et seq.

(17) Both Directives 2019/770 and 2019/771 were highly anticipated, as the application of the Directive 1999/44/EC on sales of consumer goods to digital content or service was quite unlikely (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*, PUN, 2010, pp. 41-57). For the purpose of this directive, "consumer goods" were defined as "any tangible moveable item […]." Accordingly, immovable or intangible items were not covered by the directive. No definition of "tangible item" is provided in the legal provisions. Discussions mainly focused on whether to include or exclude softwares in the scope of the directive (being agreed that similar discussions could also occur with regard to AI). Thanks to the new legal framework, there is no more legal uncertainty as to the inclusion of digital contents and services.

(18) The definitions of "seller" and "trader" are the same (Art. 2, pt 2, of the CRD, Art. 2, pt 5, of the Directive (EU) 2019/770 and Art. 2, pt 3, of the Directive (EU) 2019/771).

(19) Art. 2, pt 1, of the Directive (EU) 2019/770.

or other users of that service." (20) AI systems are not expressly mentioned in these definitions but to the author's understanding, they should normally fall under the scope of the Directive. In fact, in most cases, the object of the agreement concluded between the trader and the consumer will not be an AI system as such ("standalone AI" (21)). The consumer will be supplied with digital content or services (social network or legal tech, for instance), where AI systems are used to supply the content or provide the service and are integrated into them (as other digital elements, such as database, software, API, *etc*. – "embedded AI"). AI could also be considered as a service that allows some interaction with data in digital form uploaded by the consumer or other users of that service, and, accordingly, as a digital service as such.

Pursuant to Article 3(5) of the Directive (EU) 2019/770, it does not apply to various kinds of contracts that may be particularly relevant with regard to AI: healthcare (c), gambling services (d) or financial services (e). It means that the consumer who is a party to such digital contracts which include algorithms, will not benefit from the protection rules applicable to other digital services. In these matters, sector specific regulations, which may include consumer protection rules, will need to be observed. The exclusion from the scope of the Directive (EU) 2019/770 prevents from any potential overlap between the texts. The fragmentation of the legal framework could however have a negative impact on the level of protection of the consumers, since the measures prescribed by these sector specific regulations could provide a lower level of protection to the benefit of the consumers.

Directive (EU) 2019/771 is applicable to sales contracts, where the seller transfers (or undertakes to transfer) the ownership of goods to a consumer. (22) The concept of "goods" means "any tangible movable

(20) Art. 2, pt 2, of the Directive (EU) 2019/770. Some examples are provided by Rec.19 of this Directive: "this Directive should cover, inter alia, computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, and also digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media. As there are numerous ways for digital content or digital services to be supplied, such as transmission on a tangible medium, downloading by consumers on their devices, web-streaming, allowing access to storage capabilities of digital content or access to the use of social media, this Directive (EU) should apply independently of the medium used for the transmission of, or for giving access to, the digital content or digital service."

(21) The very famous ChatGPT provided by OpenAI may be considered as standalone AI (the object of the agreement is indeed the AI product as such).

(22) Art. 2, pt 1, of the Directive (EU) 2019/771.

items," which is classical, as well as "goods with digital elements," which is a newly introduced element. This last notion means "any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions." The Directive therefore covers tangible elements and the digital content or service included or inter-connected with goods. (23) An autonomous vehicle – where AI applications are integrated – sold to a consumer will therefore fall within its scope and will be subjected, accordingly, to rules on conformity of goods and remedies in the event of a lack of such conformity. (24) However, if the same vehicle were subject to a private leasing agreement, the consumer would not benefit from the legal guarantee (because the owner of the vehicle is the leasing company, not the consumer).

For the application of both Directives (EU) 2019/770 and 2019/771, a contract needs to be concluded between a trader (or a seller) and a consumer. Legal guarantee therefore does not apply to algorithms used by the trader at the precontractual stage (to provide targeted advertising, ranking of products or chatbot, for instance). It is also important to stress that, according to the definition of a "sales contract," (25) a price needs to be paid by the consumer. This is also true when digital content or services are supplied to consumers. However, the consumers will also benefit from the protection rules laid down by the Directive 2019/770 when no price is paid but personal data are provided by the consumer. By derogation, the Directive will not be applicable "where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose." (26) Social media services provided to consumers

(23) See however the exceptions mentioned in Art. 3(4) of the Directive (EU) 2019/771.

(24) For example because the vehicle is involved in a car accident and the expertise points out some bugs in the functioning of the AI, falling in the material scope of the Directives (EU) 2019/771.

(25) Art. 2, pt 1, of the Directive (EU) 2019/771. Under the CRD, the definition is slightly different: "any contract under which the trader transfers or undertakes to transfer ownership of goods to the consumer, including any contract having as its object both goods and services" (Art. 2, pt 5, of the CRD, as amended by the Omnibus Directive). The reference to the payment of a price was removed, to ensure that the directive will remain applicable when personal data are provided by the consumers. It must be noted, however, that such hypothesis remains very rare in practice (unlike services provided online, goods are rarely sold with data in return).

(26) Art. 3(1) of the Directive (EU) 2019/770.

without payment (at least in the "free version") are therefore subject to this new legal framework: the provider will indeed process personal data of its users to allow targeted advertising or other services relying on data. Even if it is free for the consumers, the activities will generate important revenues for the provider. This business model is very common in the digital environment.

The material scope of the CRD is broad. "Digital content" (27) and "digital service" (28) fall within the scope of the directive, as well as "goods" (29) (or sales contracts) and "services" (30) (or service contracts). When the trader provides digital content (not supplied on a tangible medium) or digital service and the consumer does not pay any price but provides personal data, (31) the CRD is also applicable. (32) However, a wide range of contracts are excluded from its scope (for example, healthcare, gambling, financial services, *etc.*). (33)

To conclude this Section, most AI systems provided to consumers should normally fall under the scope of the CRD and of the Directives (EU) 2019/770 or 2019/771. It means that the measures adopted to ensure a high level of protection to the benefit of consumers shall normally be applicable. With some exceptions, it will also be the case when the consumer provides or undertakes to provide personal data to the trader, and no matter AI is supplied on a standalone basis or embedded in goods or in other services. In various contracts nonetheless, where AI is commonly used (healthcare or financial services, for instance), the CRD and the Directive 2019/770 will not be applicable (which could give rise to a lack of protection for the consumers).

(27) Art. 2, pt 11, of the CRD (reference is made to the definition prescribed by the Directive (EU) 2019/770).

(28) Art. 2, pt 16, of the CRD (reference is made to the definition prescribed by the Directive (EU) 2019/770).

(29) Art. 2, pt 3, of the CRD (reference is made to the definition prescribed by the Directive (EU) 2019/771, including "goods with digital elements").

(30) This concept is not defined in the CRD. Moreover, services (except for digital services) are not subject to the legal guarantee.

(31) "Except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content which is not supplied on a tangible medium or digital service in accordance with this Directive (EU) or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose."

(32) Art. 3(1a) of the CRD.

(33) Art. 3(2) of the CRD. It is similar in the Directive (EU) 2019/770 (see above).

The next part focuses on the legal framework – and the substantial rules – applicable to digital content and the digital services (*i.e.* the Directive (EU) 2019/770 and the CRD) and to goods with digital elements (*i.e.* the Directive (EU) 2019/771 and the CRD).

II. Information duties prescribed by the CRD vis-à-vis AI systems

The consumers' weak position is mainly due to their lack of knowledge of the factual and legal data of the relationship. To guarantee informed consent, information duties are therefore imposed on the trader. More precisely, in this case, the information asymmetry is mainly caused by the object of the agreement (digital content or service). Indeed, such new technologies may be very complex and, therefore, most consumers could not understand how they work or be aware of the risks at stake.

Since 2011 and the recent modification by the Omnibus Directive, some provisions of the CRD are especially geared towards digital content and digital service contracts, including most AI embedded or standalone systems (see below, Section I).

Before the consumer is bound by a contract (or any corresponding offer), (s)he shall be provided with information on the "functionality, including applicable technical protection measures, of goods with digital elements, digital content and digital service", as well as on "any relevant compatibility and interoperability of goods with digital elements, digital content and digital services that the trader is aware of or can reasonably be expected to have been aware of." (34) The concepts of "functionality," (35) "compatibility" (36) and "interoperability" (37) are defined by the directive.

Functionality means "the ability of the digital content or digital service to perform its functions having regard to its purpose." This is an open criterion, that needs to be construed on a case-by-case basis.

(34) Art. 5(1)(g) and (h), of the CRD (for any contract other than a distance or an off-premises contract) and Art. 6(1)(r) and (s), of the CRD (for distance and off-premises contract).

(35) Art. 2, pt 20, of the CRD, where reference is made to point (11) of Art. 2 of Directive (EU) 2019/770.

(36) Art. 2, pt 19, of the CRD, where reference is made to point (10) of Art. 2 of Directive (EU) 2019/770.

(37) Art. 2, pt 21, of the CRD, where reference is made to point (12) of Art. 2 of Directive (EU) 2019/770.

For instance, autonomy is expected from the digital service including AI. One question is whether the risks generated by AI, especially with regard to machine learning and the black box phenomenon, need to be communicated to consumers pursuant to this requirement. In any case, such information may be required in accordance with the information duty related to "the main characteristics of the goods or services" (38) or, by virtue of Article 6 of the UCPD, (39) which prohibits misleading actions in relation to "the main characteristics of the product, such as its availability, benefits, *risks*, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or *the results and material features of tests or checks carried out on the product*" (emphasis added).

Information duties currently prescribed by the CRD – in conjunction with UCPD – may be useful in the context of AI systems. Although there is no express reference to AI in the legal provision, the open criterions should allow the consumer to be informed of the use of AI by the provider and the resulting risks, if any. Specific information duties should however be welcome, to ensure a higher level of legal certainty. (40)

III. Legal guarantee for AI systems

The legal guarantee ensures that, in the case of a lack of conformity affecting the goods with digital elements or the digital content and services, the trader/seller is liable and consumers can benefit from

(38) Art. 5(1)(a) of the CRD (for any contract other than a distance or an off-premises contract) and Art. 6(1)(a) of the CRD (for distance and off-premises contract). By virtue of this provision, the professional should also provide consumers with information on the use of AI systems as such.

(39) 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'), *OJ*, L 149 of 11 June 2005.

(40) Specific information duties, dedicated to AI, are prescribed by the AI Act Proposal, with regard to high-risk AI system (*cf*. Art. 13) and other categories of AI systems (*cf*. Art. 52: "providers shall ensure that AI systems intended to interact with natural persons are designed and developed in such a way that natural persons are informed that they are interacting with an AI system, unless this is obvious from the point of view of a natural person who is reasonably well-informed, observant and circumspect, taking into account the circumstances and the context of use").

the remedies prescribed by the legal framework. As explained above, those digital components are often featured by (or equipped with) AI technologies.

A. *Conformity requirements*

The first step is to determine whether the goods conform with the sales contracts (41) and the digital content or services meet the requirements prescribed by the legal framework. (42)

This will not be the case if the trader or the seller fail to comply with one of the four subjective requirements for conformity or of the four objective requirements for conformity, laid down in Directives (UE) 2019/770 and 2019/771.

The *subjective* requirements for conformity are closely related to the specific will of the parties (the trader or the seller on one hand, the consumer on the other hand), as set forth in the agreement or the contractual documents. For instance, the functionality, compatibility, interoperability or any other specifications of the AI algorithms included in the digital services may be described in the contract or in a service level agreement (SLA). This could lead that the seller or the trader to communicate as little information as possible, to prevent any lack of conformity relying on the subjective criterion. Such a strategy would probably not work, since, as mentioned before, suppliers are also subject to various information duties, especially relating to functionality, compatibility and interoperability of the digital content and service (*cf.* Section II).

The *objective* requirements for conformity refer to the usual standards and norms to which the goods and the digital contents or services are usually subjected. In particular, they must "be fit for the purposes for which digital content or digital services of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards (43) or, in the absence of such technical standards, applicable sector-specific industry codes of conduct." For instance, the violation of Article 22 of the GDPR (right not to be subject to a decision based solely on automated processing, including profiling) by an AI system included in a digital service

(41) Art. 5 of the Directive (EU) 2019/771.
(42) Art. 6 of the Directive (EU) 2019/770.
(43) *Cf.* Art. 40 of the AI Act Proposal.

may be considered as a lack of conformity. It should also be the case when some requirements prescribed by the AI Act Proposal were not fulfilled, especially with regard to high-risk AI systems. (44)

The digital content or service also needs to "be of the quantity and possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which the consumer may reasonably expect." (45) For instance, a consumer may reasonably expect that a social media will not be affected by a security breach or that a conversational bot will not provide illicit content (resulting from a bug of the AI system).

There is however no lack of conformity, should the consumer be informed that a particular characteristic of the goods (including, if applicable, digital elements and AI system), of the digital content or digital service (including AI systems) deviates from the objective requirements for conformity. (46) The information needs to be provided at the time of the conclusion of the agreement and the consumer needs to expressly and separately accept the deviation. (47) This exception was mainly introduced in the context of the sale of vintage goods (an old phone, for instance) that no longer work and which are purchased for decorative purposes only. (48) In the context of AI using machine learning, (49) the question arises as to whether a particular characteristic could be related to the unexpected or unpredicted output of the system (resulting from the so-called black-box phenomenon (50)). Recitals of the Directives stress that the purpose of the exception is to ensure "sufficient flexibility" in the rules. (51) However, considering that it is an exception of strict interpretation, and that the deviation should exist at the time of conclusion of the

(44) Art. 8 et seq. of the AI Act Proposal.

(45) Various elements may be considered in order to assess the expectations of the consumer, such as "any public statement made by or on behalf of the trader, or other persons in previous links of the chain of transactions."

(46) Art. 8(5) of the Directive (UE) 2019/770 and Art. 7(5) of the Directive (UE) 2019/771.

(47) *Ibid.*

(48) *Cf.* Rec. 36 of the Directive (EU) 2019/771 – with a reference to the sale of second-hand goods – and Rec. 49 of the Directive (EU) 2019/771.

(49) B. Frenay, "Démystifier le machine learning", *RDTI*, 2018/70, pp. 5 et seq.

(50) It is closely related to the topic of explainability of AI. *Cf.* A. De Streel, A. Bibal, B. Frénay and M. Lognoul, "Explaining the Black Box: when Law Controls AI", Brussels, CERRE, 2020, available at: https://researchportal.unamur.be/en/publications/b8607484-c23d-4233-9262-f658e3cb6fac.

(51) Rec. 36 of the Directive (EU) 2019/771 – with a reference to the sale of second-hand goods – and Rec. 49 of the Directive (EU) 2019/771.

contract, it could be argued that it is not applicable to unexpected or unpredicted outputs. Indeed, when the contract is concluded, such an output does not exist yet and consumers cannot agree with a deviation that they are unaware of. The seller/trader should therefore not be entitled to limit its liability in case of an unexpected lack of conformity resulting from the black box phenomenon.

B. *Updates*

In the digital environment, updates play a key role, including for AI systems. They aim to correct security breaches or any bugs in the software or algorithms. They could also contribute to adapt the AI systems to the latest market standards or to any new legal or technical requirements.

Only updates "necessary to keep the digital content or digital service in conformity" are mandatory. (52) The period of time for which the updates must be provided to the consumers is settled by the directives, depending on whether the contract provides for a continuous supply over a period of time or not. In the first case (supply over a period of time), updates need to be provided for the period during which the digital content or digital service is supplied under the contract. (53) It means that, when the contract is concluded for a fixed term (1 year subscription, for instance, to get personalized training session on my smartwatch) or for an undetermined period (registration to a social network, for instance), the updates must be made available as long as the agreement is in force (which is in the interest of the consumers). On the contrary, if the contract provides for a single act of supply, the updates must be supplied for the period of time that the "consumer may reasonably expect, given the type and purpose

(52) Art. 8(2) of the Directive (EU) 2019/770 and Art. 7(3) of the Directive (EU) 2019/771. Traders or seller remain obviously free to provide updates that are not necessary (in order to implement new functionalities, for instance). In practice, it could be difficult to make a clear distinction between updates that are necessary or not (being agreed that both kinds of updates could be provided to the consumers in the same release). It must be pointed out that, under French Law, some rules were also adopted with regard to updates that are not necessary (*cf.* Art. L224-25-26 of the Consumer Code).

(53) Art. 8(2)(a) of the Directive (EU) 2019/770 and, with regard to the goods with digital elements, Art. 7(3)(b) of the Directive (EU) 2019/771. In that last case, the period is slightly different: updates must indeed be supplied at least during two years (continuous supply until two years) or, "where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract."

of the digital content or digital service and taking into account the circumstances and nature of the contract." (54) Some discussion (and corresponding legal uncertainties) will probably arise, to determine the reasonable expectations of the consumers. (55)

The consumers need to be informed about the updates. They remain free to install them or not, bearing in mind that if they do not, the trader or seller "shall not be liable for any lack of conformity resulting solely from the lack of the relevant update." (56)

It must be stressed that, regarding the goods with digital (here, AI) elements, the duty to provide the updates is on the seller of the good. Nevertheless, in practice, the seller of the goods will not necessarily be its producer, or the supplier of digital content or service integrated or interconnected with such good. Reference should also have been made to the actual provider of the digital content or service, to ensure that the digital elements, including AI, are effectively updated.

C. *Duration and burden of proof*

Pursuant to the applicable legal framework on guarantee, various deadlines must be taken into account (duration of the legal guarantee and burden of proof; limitation period; (57) obligation to notify (58)) but, with regard to the limited scope of this paper they will not be covered in detail here.

Regarding the duration of the legal guarantee and the burden of proof, a distinction must be made between the digital content and service (whether integrated or interconnected with goods or not) provided (i) for a single act or (ii) for continuous supply over a period of time. With regard to AI, the continuous supply over a period of time should normally be the most relevant.

(54) Art. 8(2)(b) of the Directive (EU) 2019/770 and, with regard to the goods with digital elements, Art. 7(3)(a) of the Directive (EU) 2019/771.

(55) *Cf.* also Rec. 47 of the Directive (EU) 2019/770.

(56) This exclusion of liability is subject to the following requirements: (a) the trader or the seller "informed the consumer about the availability of the update and the consequences of the failure of the consumer to install it; and (b) the failure of the consumer to install or the incorrect installation by the consumer of the update was not due to shortcomings in the installation instructions provided to the consumer" (Art. 8(3) of the Directive (EU) 2019/770 and Art. 7(4) of the Directive (EU) 2019/771).

(57) Art. 11(2) and (3) of the Directive (EU) 2019/770 and Art. 10(4) and (5) of the Directive (EU) 2019/771.

(58) Art. 12 of the Directive (EU) 2019/771. There is not any similar obligation in the Directive (EU) 2019/770).

(i) Where a contract provides *for a single act of supply or a series of individual acts of supply* of digital content or services, pursuant to the Directive (EU) 2019/770, the guarantee period cannot be less than two years from the time of supply. (59) The Member States were however entitled to enact longer guarantee periods than two years (which would be particularly relevant for sustainability purposes). However, under Belgian Law and French Law, the duration of the legal guarantee is only two years. (60)

Following Article 12(2) of the Directive (EU) 2019/770, "the burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader for a lack of conformity which becomes apparent within a period of one year from the time when the digital content or digital service was supplied."

With regard to digital content or service integrated or interconnected with goods, the legal framework is slightly different. The duration of the legal guarantee is also two years, but the burden of proof is advantageous to the consumer, which is a pretty good point, especially in the context of AI systems. Indeed, pursuant to the Directive (EU) 2019/771, "any lack of conformity which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity." (61) The Member States were however entitled to prescribe a period of two years for this presumption of the anteriority of the lack of conformity. (62) French and Belgian legislator made that choice. (63) It means that the consumer of an AI system embedded in goods (and provided through a single act of supply) will normally be protected of any lack of conformity during two years.

(ii) Where the contract provides for continuous supply of digital content or service *over a period of time*, the duration of the legal guarantee is the period of time during which the digital content or digital service is to be supplied under the contract. (64)

(59) Art. 11(2) of the Directive (EU) 2019/770.

(60) Art. L-224-25-12 of the French Code of Consumer Law; Art. 1701/1, § 8, of the Belgian old Civil Code.

(61) Art. 11(1) of the Directive (EU) 2019/771.

(62) Art. 11(2) of the Directive (EU) 2019/771.

(63) Art. L-217-7 of the French Consumer Code (24 months); Art. 1649*quater*, § 4, of the Belgian old Civil Code.

(64) Art. 11(3) of the Directive (EU) 2019/770. Please see also Art. L-224-25-12 of the French Code of Consumer Law; Art. 1701/8, § 3, of the Belgian old Civil Code.

During that period, the burden of proof as to whether the digital content or digital service, including AI systems, is in conformity falls on the trader. (65)

Once again, the rules are slightly different when the digital content or the digital service is integrated or interconnected with goods. The burden of proof also relies on the trader (here, the seller) (66) but the duration may be different (and calculated such as for the supply of updates). Pursuant to Article 10(2) of the Directive 2019/771, "in the case of goods with digital elements, where the sales contract provides for a continuous supply of the digital content or digital service over a period of time, the seller shall also be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within two years of the time when the goods with digital elements were delivered. Where the contract provides for a continuous supply for more than two years, the seller shall be liable for any lack of conformity of the digital content or digital service that occurs or becomes apparent within the period of time during which the digital content or digital service is to be supplied under the sales contract."

It is particularly advantageous for the consumer of AI systems: since the legal guarantee is calculated on the duration of the agreement and the burden of proof is on the trader during two years or even more, depending on the duration of the agreement, the consumer should be well protected from any lack of conformity.

D. *Remedies*

In the case of a lack of conformity, the remedies must be exercised by consumers in two steps.

First, they have the right to have the goods, the digital content or digital service brought into conformity. (67) From a practical point of view, it means that, either a release needs to be made available, or new version of the game, software or app which may include AI systems. With regard to goods (and subject to some exceptions), a choice must be made between repair or replacement. (68)

(65) Art. 12(3) of the Directive (EU) 2019/770.
(66) Art. 11(3) of the Directive (EU) 2019/771.
(67) Art. 14 of the Directive (EU) 2019/770.
(68) Art. 13 and 14 of the Directive (EU) 2019/771.

At a second stage, and especially when the abovementioned remedy is impossible or would impose disproportionate costs on the seller or the trader, (69) the consumer is entitled to a proportionate reduction of the price or the termination of the agreement. (70)

Regarding the possible loss resulting from the lack of conformity of the AI (for instance, a car accident with personal injuries or a wrong translation giving rise to a wrong decision), such remedies will probably be seen by the consumer as insufficient. With these remedies, the focus is placed on the goods, the digital content or the digital service as such. However, the damages suffered by the consumer and resulting from the lack of conformity could go far beyond such elements.

Hopefully, in any case, complementary damages may also be obtained, to repair the loss resulting from the lack of conformity. The agreement concluded between the seller or the trader and the consumer will probably include specific provisions to limit or exclude the liability of the trader. These clauses are not illicit, as long as they do not derogate from imperative legal provisions or are not considered as unfair contract terms, pursuant to the Directive 93/13. (71) For example, the terms which have the object or effect of "excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier" (72) will be regarded as unfair in all cases. It means that, although the terms and conditions of the trader or the seller prescribe a liability cap (specific amount or fees paid during the last 12 months, for instance) or exclude indemnification for indirect damages, the clause will not be applicable in the event of death or personal injury resulting from the lack of conformity imputable to the AI system.

(69) In the context of AI, some discussions could occur, to determine whether disproportionate costs are imposed (or not) and how they may be evaluated.

(70) Art. 14-18 of the Directive (EU) 2019/770 and Art. 13 and 15-16 of the Directive (EU) 2019/771.

(71) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ*, L 95 of 21 April 1993.

(72) Art. 3 and Annex I of the Directive (EEC) 1993/13.

IV. Modifications of the digital content or digital service including AI systems

Article 19 of the Directive (UE) 2019/770 deals with the modification of the digital content or digital service. Unfortunately, there is not any corresponding provision in the Directive (EU) 2019/771, for digital elements incorporated or interconnected with the goods.

Any modification of the digital content or service – "beyond what is necessary to maintain the digital content or digital service in conformity" – is subject to four conditions: valid reason provided by the agreement; no additional cost for the consumer; clear and comprehensible information about the modification and additional information when it negatively impacts the consumer.

If the modification negatively impacts the consumer, the consumer has the right to terminate the agreement. But the consumer will not be entitled to terminate the agreement when the negative impact is only minor or when the consumer is able to continue using the digital content or service without the modification.

Since the consumer will have to continue using the modified digital content or service (including AI system) or terminate the agreement (although (s)he actually wanted to keep it without any modification), it is a derogation to the Belgian Civil Code principle of so-called "*convention-loi*." (73) Although one may easily understand that, on the trader's side, it will be very difficult to manage different versions of the digital content or service, it is disputable since the consumer will not be really free to accept or reject the modification. It must also be pointed out that, depending for instance on the device (especially when it is a smartphone) used by the consumer, the installation of the modification may have serious impact on its functionalities.

Conclusions

The new legal framework on digital content and services brings AI and algorithms into the legal guarantee and other protection measures when they are included in digital content and services (interconnected or integrated in goods or not). Consumers will therefore be better protected.

(73) Art. 5.69 of the Belgian Civil Code.

Some gaps or legal uncertainties still exist however which are due in particular to the fragmentation of the legal framework (with two directives); discussions surrounding whether the element should be considered as a digital content, a digital service or a digital element interconnected or incorporated in goods; the complexity of the new rules, especially with regard to the calculation of the duration applicable to the updates or the legal guarantee, and the lack of efficiency of some remedies.

Moreover, the legal framework governs the relationship between a trader/seller and a consumer and prescribes duties on the former. In most cases, however, the trader/seller is not the one who designed and manufactured the product and, accordingly, it is not necessarily the professional who is in the best position to prevent the lack of conformity, provide the relevant information or offer the most effective remedies.