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THE "HARMONIZED" DIGITAL CONTENT AND SERVICE DIRECTIVE – IMPACT ON CONSUMER PROTECTION IN FINLAND AND THE RECOGNITION OF PERSONAL DATA AS COUNTER-PERFORMANCE

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.
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ABSTRACT

The highly debated Digital Content Directive, adopted in 2019, aims to harmonize the rules for the supply of digital content and services in the EU. This thesis contributes to the legal debate by providing comparative legal analysis on the transposition of the Directive in Finland. The three key research questions that the thesis answers are: firstly, how will the application and transposition of the Directive impact the level of consumer protection in Finland? Secondly, how will it impact the protection of consumers' personal data? Thirdly, how will it impact the coherence of Finnish and EU consumer law?

The Directive's impact is assessed in relation to the current level of consumer protection in Finland. Based on the analysis of national and EU law, decisions of the Finnish Consumer Ombudsman and the CJEU, this thesis argues that the Directive will increase the level of consumer protection in Finland, without threatening consumers' personal data protection rights. The Directive extends the period of reversed burden of proof and empowers consumers that provide personal data as counter-performance to rely on consumer protection rules, which are not currently provided under national law. The impact on the coherence of Finnish law is mixed. The transposition of the Directive will cause incoherence of Finnish law due to diverging rules between goods and digital content. The impact on coherence can be minimized at the national level, yet it might have a negative impact to the uniformity at the EU level caused by differing approaches adopted by Member States.

Keywords: digital content, data as counter-performance, consumer protection

LIST OF ABBREVIATIONS

B2B	Business-to-business
B2C	Business-to-consumer
BEUC	The European Consumer Organisation
CFI	Confederation of Finnish Industries
CJEU	Court of Justice of the European Union
CRD	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
CSD	Directive (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) 2017/2394and Directive 2009/22/EC, and repealing Directive 1999/44/EC
DCD	Directive (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
DCD-P	Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final - 2015/0287 (COD)
DSMS	Digital Single Market Strategy
EDPS	European Data Protection Supervisor

GDPR	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 (General Data Protection Regulation)
KSL	Kuluttajansuojalaki 20.1.1978/38
MS	European Union Member State(s)
UCPD	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

INTRODUCTION

The Directive 2019/770 on certain aspects concerning contracts for the supply of digital content was adopted in 2019 and it will enter into force in all European Union (EU) Member States (MS) in 2022.[1] It is one of the most contested pieces of EU legislation recently adopted.[2] The European Commission made a proposal for the Directive already in 2015 but it took almost four years of intensive negotiations to adopt this legislation.[3] As a result, the text of the Directive is a compromise between all EU MS and which is highly discussed and debated.[4] After the transposition deadline in the MS, it will become evident whether this achieved compromise will be sufficient to address the challenges that the Directive aims to tackle.[5]

In order to contribute to this debate, this thesis analyzes the Directive with the specific focus on the ongoing transposition and application of the Directive in Finland. The thesis focuses on two central issues: firstly, level of consumer protection and secondly, data protection. Accordingly, the main research questions of this thesis are: (1) How will the application of the Directive impact the level of consumer protection in Finland; (2) How will the protection of personal data of consumer be impacted by the application of the Directive; (3) How will the transposition of the Directive affect the coherence of Finnish and EU consumer law.

[1] Directive (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 L136/1, 22.5.2019, p. 1-27, (hereinafter DCD)

[2] Hoekstra, J. & Diker-Vanberg, A. (2019) The proposed directive for the supply of digital content: is it fit for purpose? *International Review of Law, Computer and Technology* 33:1, 101

[3] Sein, K. & Spindler, G. (2019) The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1, *European Review of Contract Law* 15 (3), De Gruyter, 258

[4] *Ibid.*, 259

[5] The Directive aims to tackle the challenges caused by differing national laws in EU MS. The differences national laws are perceived as trade barriers for businesses and it also discourages consumers due to the uncertainty. See Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM/2015/0634 final - 2015/0287 (COD), Explanatory memorandum, 2

Transposition of the Directive in Finland is a relevant and interesting case study as Nordic countries, including Finland have a strong consumer protection record.[6] The Directive, as it will be discussed in Chapter 1 is a maximum harmonization Directive.[7] Thus, certain elements in the Directive including issues that fall under the substantive scope of the Directive, such as the period of reversed burden of proof, available remedies and their hierarchy, must be uniformly regulated in all EU MS. Therefore, this could be especially problematic for EU MS with currently higher level of consumer protection in place[8], as they will not be allowed to adopt stricter, more consumer-friendly provisions.[9]

This thesis is based on a qualitative legal analysis. It focuses on the comparative legal analysis of Finnish and EU consumer protection laws as it applies to the supply of digital content and services. The analysis is based on the review of EU law and national legislations (EU and Finnish consumer law, legislative history, explanatory letters, impact assessment, proposals and compromises), case law of Finnish Consumer Ombudsman and decisions of the Court of Justice of the European Union as well as academic literature.

In order to analyze how the application of the Directive will impact the level of consumer protection in relation to the supply of digital content and services in Finland, this thesis discusses the overall purpose of the Directive (Chapter 1.1), the legal nature of the Directive (Chapter 1.3) and the scope of the Directive (Chapter 1.2). The main purpose of Chapter 1 is to analyze the issues that are covered by the Directive and the discretion and regulatory flexibility MS have in the application of the Directive.

Following this analysis, Chapter 2 focuses on one of the most innovative and legally significant provisions of the Directive, Article 3(1), which regulates personal data as counter-performance.[10] This provision should empower consumers and provide them legal protection when their personal data is used as a "payment" in exchange for a digital service.[11] Recognizing provision of personal data as counter-performance and being comparable to money has raised several concerns.[12] There

[6] Norio, J. (2019) *Johdatus kuluttajaoikeuteen*, Forum Iuris, Helsingin oikeustieteellinen tiedekunta, Unigrafia, 11
[7] DCD Art. 4
[8] DCD Art. 4
[9] Hoekstra & Diker-Vanberg (2019) *supra nota* 2, 109
[10] DCD Art. 3(1)
[11] DCD Recital 24
[12] R. Robert & L. Smith (2018) The proposal for a directive on digital content:
a complex relationship with data protection law, *ERA Forum* 19, 161

have been extensive debates on whether it is in direct conflict with data protection laws and fundamental rights.[13]

The impact of personal data being recognized as counter-performance and its possible conflict with fundamental rights personal data protection laws is examined by firstly, discussing the current situation in regards to consumers' rights in the case where counter-performance is not in the form of monetary payment in Chapter 2.2. Secondly, the impact on the level of consumer protection and the main issues risen during the Directive negotiations is considered in Chapter 2.3. Thirdly, the possible conflict between the Directive, data protection laws and fundamental rights is analyzed in chapter 2.4. The objective of Chapter 2 is to analyze the possibility of the aforementioned conflict and the effects on the position of consumers.

Chapter 3 focuses on the rights and obligations of the parties in the supply of digital content and service contracts. The main points of interest are the harmonized aspects of the Directive and its coherence with Finnish consumer law. Due to maximum harmonization, Finland is unable to adopt diverging and more consumer-friendly provisions. Thus, the EU level compromise might decrease the level of consumer protection in Finland.[14] Furthermore, adopting specific rules for a certain product or service can be detrimental to the conformity of the Finnish consumer law, as recognizing the applicable rules may become challenging.[15]

In order to evaluate the impact of the Directive to Finnish law, (Chapter 3.1) this thesis discusses the current Finnish law and whether there is a need for specific legislation for digital content from the Finnish perspective. Moreover, (Chapter 3.2) the Directive's impact on the level of protection in Finland is analyzed, as it applies to the supply of digital content and the effects of the Directive on the overall coherence of Finnish consumer legislation.

[13] *Ibid.*, 161
[14] Norio, J. (2019), *supra nota* 6, 11
[15] Finnish Consumer Ombudsman (2015) Contribution to Commission's questionnaire on contract rules for online purchases of digital content and tangible goods. Retrieved from: https://oikeusministerio.fi/hanke?tunnus=OM069:00/2017, 14.1.2020, 3

1 DIGITAL CONTENT DIRECTIVE – SCOPE AND HARMONIZATION

Digital Content Directive introduces specific rules for the supply of digital content and services. This chapter focuses on the aim and purpose of the Directive as well as to the scope and level of harmonization. The analysis of the scope is divided into personal and substantive scope. The Directive does not harmonize all aspects[16] of supply of digital content contracts and this chapter analyzes the impact of the aspects that were left unharmonized.

1.1 Directive on Contracts for the Supply of Digital Content and Digital Services

1.1.1 The aim and the rational of the Directive

The Directive 2019/7070 of the European Parliament and of the Council of May 20 2019 on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter DCD) will be applicable in 1st of January 2022.[17] As the EU legislative act is in the form of a Directive, it requires the MS to transpose it to national laws. MS are obligated to transpose the Directive into national law by 1st of July 2021.[18]

Rules for digital content were first introduced at the EU level in the Consumer Rights Directive 2011/83/EC (CRD).[19] Digital content was defined as data produced and supplied in digital form

[16] DCD Recital 12
[17] OJ 136, 22.5.2019, 1-27, the European Commission proposed the Directive 9th of December 2015. After three and half years of negotiations and after two compromises, the Directive was finally adopted in May 20 2019
[18] DCD Art. 24
[19] Consolidated text: 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, L304/64, 22.11.2011, 64-88, Art. 2 (11) (hereinafter CRD)

excluding digital content supplied on a tangible medium.[20] The main achievement in addition to the definition of digital content was the information requirements.[21] Under the CRD, the trader is under obligation to provide information regarding the interoperability, functionality and technical protection measures. Nevertheless, CRD does not provide rules for remedies or performance of the contract. Commission perceived that there was a gap in the consumer protection laws that needed to be corrected with a specific legislation that ensures that the supply of digital content and digital services are under the scope of national consumer laws.[22] Some EU MS such as United Kingdom and Netherlands had realized the gap in consumer protection and started to legislate the matter.[23] Commission was concerned that national legislations on the matter would lead to further divergences.[24] To address these issues and shortcomings, first in June 2015 the European Commission held a public consultation regarding specific rules for the supply of digital content[25] and second in December 2015, the Commission proposed two new Directives, Directive for the Supply of Digital Content[26] and Directive on Online and other Distance Sales of Goods.[27]

In 2015, the Commission published a research according to which 39% of businesses that sell online in their own Member State's territory do not engage in cross-border sales.[28] One of the main reasons was the differences in national contract laws.[29] It was estimated that the differences in contract laws caused a loss of four billion euros.[30] Flash Eurobarometer 396 Study[31] identified that

[20] CRD Recital 19
[21] CRD Article 5 (g & h)
[22] Commission (2015) Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content
COM/2015/0634 final - 2015/0287 (COD) Explanatory memorandum, 2 (hereinafter DCD-P)
[23] Beale, H. (2016) The future of European contract law in the light of the European Commission's proposals for Directives on digital content and online sales, IDP p. 8
[24] DCD-P, Explanatory memorandum, 2
[25] European Commission (2015) Public consultation on contract rules for online purchases of digital content and tangible goods, Retrieved from: https://ec.europa.eu/growth/content/public-consultation-contract-rules-online-purchases-digital-content-and-tangible-goods_en, 9.1.2020
[26] DCD-P
[27] Commission (2015) Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods
COM/2015/0635 final - 2015/0288 (COD) This proposal during the negotiation process was amended to include, online, distance and in-shop sales, see Amended proposal for a Directive of the European Union and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council COM/2017/0637 final - 2015/0288 (COD)
[28] Commission (2015) Flash Eurobarometer Study 396: Retailers' attitudes towards cross-border trade and consumer protection, 43
[29] *Ibid.*, 43
[30] The figure consists of not only from the expenses of the businesses that sell cross-border, but also from the lost opportunity of those businesses that refrain from cross-border sales. See Hoekstra & Diker-Vanberg (2019), *supra nota* 3, 101
[31] Commission (2015) Flash Eurobarometer Study 396, *supra nota* 28, 43

differences in national consumer protection and contract laws were one of the main obstacles to face in cross-border sales.[32] However, the European Commission's Economic Study on Consumer Digital Content Products identified that differences in consumer protection rules had lesser impact as barrier for cross-border trade than other barriers such as language and culture.[33] For example, language requirement may act as an obstacle for trader, as was deemed in a Finnish consumer dispute.[34] According to the Ombudsman decision, technical requirements of a video game given in a non-native language was a lack of conformity.[35] Language requirements acts as a barrier and it may prevent especially small and medium sized companies from engaging in cross-border sales, even with the uniform rules for digital content and services.[36]

DCD as a part of the EU Digital Single Market Strategy[37] (DSMS) aims to increase cross-border online commerce and remove trade barriers causing uncertainty in the markets[38]. In addition the objective of is to modernize the rules for cross-border supply of digital content and ensure high level of consumer protection.[39] Until the recent adoption of the DCD, rights and obligations relating to supply of digital content have not been regulated at the EU level.[40] The Directive aims to fill a legal gap in consumer acquis.[41] The Commission argued that national laws related to the supply of digital content are divergent, fragmented, under-developed and fail to meet the needs of technological advancements and new types of business models.[42] Similarly, general consumer and

[32] *Ibid.*, 41% of the retailers stated that differences of consumer laws act as a barrier, 39% differences in contract law, 43% higher risk of fraud and non-payment, 42% different tax regulations.
[33] ICF International (2015) Economic Study on Consumer Digital Content Products, European Commission, 136
[34] Kuluttajariitalautakunta, Case 1083/36/2016 (05.04.2017)
[35] *Ibid.*
[36] Harjunheimo, N. (2015) Confederation of Finnish Industries, Commission consultation on contract rules for online purchases of digital content and tangible goods, Retrieved from: https://oikeusministerio.fi/hanke?tunnus=OM069:00/2017, 14.1.2020, 2
[37] European Commission (2020) Shaping the Digital Single Market, Retrieved from: https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market, 9.4.2020
[38] Havu, K. (2017) The EU Digital Single Market from a Consumer Standpoint: How Do Promises Meet Means? *Contemporary Readings in Law and Social Justice* 9 (2), 150
[39] *Ibid.*, 151
[40] Grundmann, S. & Hacker, P. (2018) The Digital Dimension as a Challenges to European Contract Law – The Arhictecture, In: Grundmann, S. (Ed.) *European Contract Law in the Digital Age*, Intersentia, 10
[41] *Ibid.*
[42] Giliker, P. (2017) Adopting a Smart Approach to EU Legislation: Why Has It Proven So Difficult to Introduce a Directive on Contracts for the Supply of Digital Content? *EU Internet Law in the Digital Era: Regulation and Enforcement*, Springer, 301

contract laws have failed to provide the required level of certainty to both consumer and traders[43], especially in cross-border transactions.[44]

The Directive can be classified as targeted maximum harmonization Directive.[45] The Directive harmonizes only certain aspects in consumer contracts for the supply of digital content.[46] The Table 1 below, provides an overview of the issues that are harmonized and not harmonized by the Directive.

Table 1. Harmonized and unharmonized aspects of the Directive

Harmonized	**Comment**	**Not harmonized**
Scope of the Directive (Art. 4)	Applies to any B2C contract for supply of digital content or service. Method of payments: money and provision of personal data. Applies only to B2C contracts. Status of dual-purpose contracts not harmonized.	Legal nature of contracts. MS free to determine the type of contract (sales, service, rental, sui generis) (Art. 3(10))
Conformity criteria (Art. 6-10)	Subjective and objective requirements	Formation, validity and nullity of contracts (i.e. minor's ability to conclude contracts) (Art. 3(10))
Remedies (Art. 13-14)	Hierarchy of remedies	Trader's liability for damages (Art. 3(10))
Burden of proof (Art. 12)	One year reversed burden of proof	Sanctions for non-compliance (Art. 21)
Period of trader's liability (Art. 11)	Not fully harmonized (min. 2 years)	Specific remedies (hidden defects) (Recital 12)

Source: Directive 2019/770 OJ 136/1 22.5.2019, 1-27

As the Table 1 above clearly indicates not all aspects related to the supply of digital content are harmonized under the Directive.[47] The analysis in this section indicates that the Directive aims to

[43] Ramberg, C. (2018) Digital Content – A Digital CSEL II – A Paradigm for Contract Law via the Backdoor? In: Grundmann, S. (Ed.) *European Contract Law in the Digital Age*, Interentia, 319

[44] The Digital Content Directive addresses problems that specifically relates to consumer contracts for the supply of digital content. See Jacquemin, H. (2017) Digital Content and Sales or Service Contracts under EU Law and Belgian/French Law, *JIPITEC* 8(2017), 28

[45] Warburton, J. M. (2016) An Innovative Legal Approach to Regulating Digital Content Contracts in the EU, 7 (2016) *JIPITEC*, ,247

[46] Havu, K. (2019) Digital Single Market, digital content and consumer protection – critical reflections, In: Pihlajarinne, T., Vesala, J. & Honkkila, O. (Eds.) *Online Distribution of Content in the EU*, Edward Elgar, 173

[47] DCD

encourage businesses and consumers to take part in cross-border transaction regarding supply of digital content, while ensuring a high level of consumer protection.

1.2 Scope of the Directive

The Directive aims to remove barriers to trade and provide a high level of consumer protection but what is exactly covered by the Directive? This section focuses on the discussion of personal scope (i.e. who is covered) and substantive scope (what legal issues are covered) of the Directive.

1.2.1 Personal scope of the Directive

The core purpose of the Directive is to protect consumers.[48] Accordingly, the Directive applies exclusively to business-to-consumer (B2C) contracts[49] and excludes business-to-business (B2B) contracts.[50] The Directive allows MS to extend to the application of the Directive to B2B contracts.[51] As there are fewer mandatory rules in B2B contracts, adopting DCD rules would benefit smaller companies.[52] It would remove the challenge often faced by traders relating to distinguishing a consumer from a small business. Many small businesses are run from home, which can cause traders difficulty in determining whether they are supplying digital content or service to a consumer or a business.[53]

The scope of the DCD is set in Article 3.[54] The Directive applies to any contract concluded between trader and consumer where the trader supplies or undertakes to supply digital content and the consumer pays a price or provides personal data. Trader is defined in the Directive as any natural or legal person that acts for the purposes of its trade, profession, craft or business in relation to the

[48] DCD Recital 3
[49] DCD Art. 3(1)
[50] Which was one of the Commission's objectives under the Common European Sales Law proposal. Commission proposed the same set of rules for B2C and B2B contracts, where at least one of businesses is small or medium sized See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final - 2011/0284 (COD), Art. 7
[51] DCD Recital 16
[52] Beale, H. (2016) *supra nota* 23, 16
[53] *Ibid.*, 16
[54] DCD Article 3(1)

contracts covered in the DCD.[55] Consumer is a natural person that acts for purposes outside the person's business, trade, craft, or profession.[56]

An individual buying a software has the possibility of utilizing the digital content or service for professional purposes in addition to personal use. MS are free to determine the line between consumer and business in dual-purpose contracts.[57] Dual-purpose contract is disputed matter in consumer law, because the contract is concluded for both personal and professional purposes.[58] In EU law, the concept of consumer has two different approaches.[59] First, protective legal regime, where consumer is interpreted narrowly. This allows consumers to sue and be sued in the country where the consumer is domiciled.[60] In case of dual-purpose, the link to professional use must be minimal, almost non-existent.[61] In substantive consumer law regime, consumer is interpreted broadly and the decisive factor is predominant use.[62] If the use of the digital content for profession is limited and cannot be considered to be predominant, the buyer should be seen as consumer.[63]

As the Directive allows the MS to determine where to draw the line between consumer and business, it might give rise to differences in MS. Under Finnish Consumer Protection Act, a consumer is a natural person that buys a product or service mainly for other use than business or trade.[64] In comparison, Estonian Consumer Protection Act states that a consumer is a natural person who uses goods or services for purposes not related to their business or trade.[65] Finland allows a person to enjoy the consumer protection framework if the good or service is mainly but not necessarily completely for personal use. A similar direct interpretation of the Estonian definition is not possible. Thus, creating a clear difference between the definition of a consumer in these two MS, as Estonian law defines consumers in a stricter way compared to Finnish law.

Predominant use is not clearly defined in the Directive. Recital 17 states that in case of dual-purpose contracts, where the contract is partly within and partly outside the profession of the buyer,

[55] DCD Art. 2(5) 9
[56] DCD Art. 2(6)
[57] DCD Recital 17
[58] Manko, R. (2013) The notion of consumer in EU law, Library of the European Parliament, Library Briefing, p. 2
[59] Carvalho, J. M. (2019) Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771, Retrieved from: SSRN: https://ssrn.com/abstract=3428550, 19.11.2019, 6
[60] *Ibid.,*
[61] *Ibid.,*
[62] *Ibid.,*
[63] *Ibid.*
[64] Kuluttajansuojalaki 1:4 5.1.1994/16 (hereinafter: KSL)
[65] Estonian Consumer Protection Act § 2(1) RT I 2007, 56, 375, 12.12.2007

the professional use must be so limited that it cannot be considered predominant in context of the whole contract.[66]

The meaning of predominant use is important, because it is a deciding factor as to whether a person can rely on consumer protection rules. According to jurisprudence of the Court of Justice of the European Union (CJEU) the predominant use is assessed on a case by case basis. In the Gruber[67] case, the CJEU ruled that a person cannot rely on consumer special jurisdiction in Brussels Regulation unless the professional use is limited to be negligible in the whole context of the contract.[68] Advocate General Cruz Villalon's opinion in case C-110/14 was that if national courts are unable to determine whether the buyer is consumer or a business, the predominant use is assesses by taking account the whole contract.[69]

The Directive entitles MS to determine whether a person is a consumer in dual-purpose contracts. In practice, as MS approaches are highly different, it can lead to situations where a person is considered to be a consumer in one MS and a business in another.[70] The actual impact of the lack of EU wide definition of a consumer will become evident after the Directive is transposed into national laws. However, the divergent national approaches and the lack of harmonized EU definition of a consumer raises concerns about the achievable level of uniformity in supply of digital content and digital service contracts.

1.2.2 Substantive scope of the Directive

Digital content is defined as data supplied and produced in digital form, which includes video, audio, software and e-books.[71] Digital service covers social media sites, such as Facebook and cloud storage service, such as Dropbox among other services.[72]

The central elements of the substantive scope are the concept of payment, form of digital content and method of supply. The Directive applies to any contract for the supply of digital content and services, where the trader supplies digital content or services to the consumer and the consumer

[66] DCD Recital 17
[67] Court decision, 20.1.2005, Gruber, C464/01, EU:C:2005:446, para 54
[68] *Ibid.*, I-480
[69] Opinion of Advocate General Cruz Villalon on 23 April 25 Case-110/14 para 47
[70] Carvalho (2019) *supra nota* 59, 7
[71] DCD Recital 19
[72] *Ibid.*

pays or undertakes to pay a price.[73] The Directive applies to the supply of digital content or service when it is supplied to the consumer in digital form. Furthermore, the Directive pertains to the supply of digital content on a tangible medium such as CD or DVD, when the tangible medium serves exclusively as carrier of the digital content.[74]

One of the significant changes to the consumer acquis can be found in the second paragraph of Article 3. The Directive does not apply only to contracts for the supply of digital content against monetary payment but also when a consumer provides personal data in exchange for the content or service.[75] This provision is further discussed in Chapter 2.

Certain types of digital content and services are excluded for the scope Directive. The Directive does not apply to electronic communication services as defined in EU Directive 2018/1972 in addition to healthcare, gambling and financial services[76] Software offered on an open-source license where the consumer does not pay a price and the trader does not use the personal data provided by the consumer to any commercial purpose are not included in the scope.[77] Digital content provided by the public sector of the MS and digital content made available for the public as a part of performance in other way than signal transmissions are outside the scope of the Directive.[78]

The Directive does not apply to digital content which is embedded, interconnected or inter-related to a physical good when the good and digital content are provided under the same sales contract (goods with a digital element).[79] Goods with a digital element are excluded from the scope regardless whether the digital content is provided by the trader or by a third party. Nevertheless, Digital Content that is not an integral part, embedded or interconnected to a physical good but provided by the same trader is under the scope of the DCD. In these kinds of mixed contracts, DCD applies only to the digital content while the physical good is subject to the sale of goods rules.[80]

[73] DCD Art. 3(1)
[74] DCD Art. 3(3)
[75] DCD Art. 3(1)
[76] DCD Art. 3(5)
[77] DCD Art. 3(5)
[78] DCD Art. 3(5)
[79] DCD Art. 3(4)
[80] DCD Art. 3(6)

Sections 1.2.2.1 and 1.2.2.2 focuses on goods with a digital element and ancillary digital services. These two can be seen as the most significant and the most debated exclusions. The following sections will analyze the adopted and proposed solutions to these issues.

1.2.2.1 Goods with a digital element

Goods with a digital element are generally known as "smart goods". They are goods that need digital content to function. The most common types of goods with digital element are computers and smart phones. DCD defines goods with digital elements in Article 2(3) as digital content that is incorporated or an inter-connected part of a good to an extent that the absence of the digital element would mean that the physical goods is unable to perform its functions.[81] Goods with digital elements are excluded from the scope of the DCD and are instead regulated under the recently adopted Directive 2019/771[82] Directive 2019/771 (EU) of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (hereinafter CSD).

During the negotiations of the Directive, the classifications and rules applicable to goods with a digital element was one of the main obstacles.[83] Commission took the approach that digital content embedded and functioning as a part of the good should be subject to the rules on goods instead of digital content rules[84]. The Commission's approach was objected by academics, European Parliament and some MS. There were two possible solutions to resolve this dilemma. Either the same rules would be applied to the embedded digital content and the hardware or alternatively the DCD would apply to the digital element of the good.[85]

In the first and eventually adopted option, the Directive's rules are not applied to digital content, when the digital content is embedded, incorporated or inter-connected to a physical good.[86] However, CSD shall apply to goods accompanied with digital content, if the good cannot function without the digital element.[87] Due to this decision, the issue of differentiating to make it clear when

[81] DCD Art. 2(3)
[82] Directive 2019/771 (EU) of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ 136, 22.5.2019, 28-50 (hereinafter: CSD)
[83] Sein, K. (2017) What Rules Should Apply to Smart Consumer Goods? Goods with Embedded Digital Content in the Borderland Between Digital Content Directive and "Normal" Contract Law, *JIPITEC* 8(2017), 97
[84] DCD Recital 21
[85] Sein, K. (2017) *supra nota* 83, 97
[86] DCD Recital 21
[87] CSD Recital 15

the digital content is to be considered as a separate digital content and when a part of a physical good becomes problematic.[88] The Directive further clarifies that when in doubt, the digital content is presumed to constitute a digital element in good and be a part of the sales contract.[89]

In the second option, digital content rules would have applied to all digital content. Goods with digital element would be subject to two different sets of rules. The physical aspect would be regulated under goods rules and digital element under digital content rules.[90] It would have provided better and more precise rules for the digital content.[91] On the other hand, it could have caused an overly complex regime.[92] Nevertheless, this option would have eliminated the doubts whether digital content is digital element in a good or not.[93]

Goods with a digital element are under the scope of the CSD. It is said to be the "safety net" in protecting consumers in relation to goods with a digital element.[94] Metzger et al. emphasizes that the CSD is not applicable to the sale of goods where the counter-performance is not in the form of monetary payment.[95] The CSD does not take into account the possibility of a business plan where a trader sells goods with digital element against consumer's provision of personal data.[96] With the decreasing costs of electronic components and goods in addition to the rising value of personal data, it is not unreasonable to assume that companies could give "free" gadgets to consumer in exchange for their personal data.[97]

CSD allows MS to extend the application of the Directive to contracts that are excluded from the scope of the Directive.[98] This gives Finland and other MS the opportunity to eliminate the possible gap in the consumer protection rules. Extending the applicability to sales of goods where the counter-performance is personal data would not be a burden for national legislatures. Especially in context of CSD, it is possible to "borrow" DCD rules and extend the rules to sales contracts, where the counter-performance could be the provision of personal data.[99] Even though, it is not

[88] Sein, K. (2017) *supra nota* 83, 100
[89] DCD Art. 3(4)
[90] Sein, K. (2017) *supra nota* 83, 100
[91] *Ibid.*, 100
[92] *Ibid.*, 100
[93] Metzgrer, A., Efroni, Z., Mischau, L., Metzger, J. (2018) Data-Related Aspects of the Digital Content Directive, JIPITEC 9(2018), 99
[94] *Ibid.*, 98
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] CSD Recital 21
[99] Carvalho (2019) *supra nota* 59, 21

currently imperative to have such rules, it would be a beneficial precaution measure to have consumer protection provisions in place in regards to possible future business models.[100]

1.2.2.2 Ancillary digital services

Due to the broad definition of goods with digital element, certain kinds of digital content that could be interpreted to be a separate digital service are excluded from the DCD. Ancillary digital service is a digital service that is linked to a physical good.[101] Ancillary digital services, such as a smart phone application related to a fitness tracker, are instead under the scope of the CSD.[102] Under the DCD proposal, such digital services were interpreted to be under the scope of DCD due to the fact that an ancillary digital service is not embedded in the good itself.[103] A fitness tracker is usually accompanied with ancillary digital services. A fitness tracker collects personal data from an individual. In addition, the fitness tracker monitors the user's heart rate, how many steps they take in a day, how long they sleep and the quality of sleep. The tracker itself is able to display some of the data, however in order for the consumer to get the full experience, the smart phone application is required.[104] As the definition and the term of goods with embedded digital content was replaced with goods with digital element, smart phone application is interpreted to be inter-connected to the fitness tracker and supplied under the same sales contract.[105]

A fitness tracker, such as FitBit, consists of the physical good, integrated software and smart phone application. FitBit processes the acquired personal data. Applying DCD rules to the purchase of a FitBit would mean that the trader is liable for the physical good and the integrated software while FitBit as the provider would be liable for the smart phone application which is "paid" by the consumer's personal data.[106] The fact that a consumer can download the Fitbit application to his smart phone without owning the smart watch makes the situation more complex, since without the physical good, the smart phone application is subject to DCD rules.[107] This causes a situation where different rules apply to consumers depending on whether they own the smart watch or not.[108] Thus, it is unclear which rules apply when the consumer downloads the application prior to

[100] *Ibid.*
[101] DCD Recital 31
[102] CSD Art. 3(3)
[103] DCD-P Recital 11
[104] Sein, K. (2019) Connected Consumer Goods: Who is Liable for Defects in the Ancillary Digital Service? *Journal of European Consumer and Market Law* 1/2019, 15
[105] *Ibid.*
[106] *Ibid.*
[107] DCD Art. 3(1)
[108] Sein, K. (2019) *supra nota* 104, 15

purchasing the smart watch and there is no adequate solution provided in the DCD or CSD. The only options would be that the application remain to be subject to the DCD or alternatively becomes subject to CSD after the purchase of the smart watch. This creates a difficult legal problem that needs to be solved by the MS.

The adoption of the two Directives might turn out worse for consumer also in certain other situations. Traders are allowed, with an express agreement, to exclude digital content from physical goods that are usually supplied together.[109] Computers and smart phones are usually sold with a pre-installed operating system. If a consumer buys a computer without an operating system, they might need to rely on free and open-source operating systems, such as Linux. In case the operating system causes defects, consumers cannot rely on consumer protection. CSD is not applicable, because the computer was sold without an operating system and it is not under DCD, because free and open-source software is excluded from the scope.[110] According to Sein, courts have generally extended the defect in operating systems to be a defect in the physical good, because the good cannot function without an operating system.[111] This has been also the case when the operating system has been free and open-source.[112] It would seem that in this case the position of consumer is worse than before the two Directives.[113]

Based on the analysis of scope of the DCD, it is evident that the EU institutions had major difficulties in defining the scope of the Directive. The Directive applies only to B2C contracts but fails to solve the difficult question of dual-purpose contracts. Regarding goods with digital element and ancillary digital service, the European Parliament's preliminary approach was that the digital element should be subject to digital content rules.[114] After compromises, the adopted Directive does not apply to goods with a digital element and to an ancillary digital service. The aforementioned and adopted option ensures that one good is not subject to two sets of rules, which provides clarity in many cases. However, the Directive fails to clarify situations where a consumer downloads only the ancillary digital service that can be used independently and later purchases the physical product.

[109] CSD Recital 16
[110] DCD Art. 3(5f)
[111] Sein, K. & Spindler, G. (2019) *supra nota* 3, 275
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*, 269

1.3 Level of harmonization

This section focuses on the level of harmonization of the Directive. As previously stated, the Directive does not harmonize all aspects of regarding contracts for the supply of digital content. Based on the analysis in the previous sections, it is apparent that the scope of the Directive is capable of causing differences in MS (i.e. dual-purpose contracts).

Uniformity of contract law has been one of the European Commission's objectives since 2001.[115] Commons European Sales Law was proposed by the Commission in 2011, but it was ultimately withdrawn.[116]

The DCD is a so called targeted maximum harmonization Directive.[117] MS must refrain from adopting provision that would protect the consumers better or worse, unless the Directive specifically provides measures left for MS to decide.[118] The European Union adopted another maximum harmonization Directive along with the DCD. CSD which sets rules for in-shop, online and distance sales of consumer contracts.[119]

The adoption of the two Directives can be seen as the biggest step towards uniformity of contract law at the EU level.[120] Uniform contract laws are perceived as necessary for the EU DSMS adopted in 2015.[121] MS have been generally against such reforms,[122] as contract laws have been previously regulated in the MS to a great extent. Consumer law has been formerly regulated by some EU legislations, but not as extensively as in the DCD and CSD.[123] The scope of the Directive is harmonized to a minimum application, meaning that it applies only to B2C contracts, but MS can extend its application to B2B contracts.[124] Conformity criteria, remedies, burden of proof and trader's liability are harmonized by the Directive and these will be further analyzed in Chapter 3. Then again, trader's liability for damages and sanctions for non-compliance are not harmonized

[115] Hoekstra & Diker-Vanberg (2019) *supra nota* 2, 107
[116] Lehmann, M. (2016) Question of coherence. The Proposal on EU Contract Rules on Digital Content and Online Sales, *Maastrich Journal of EU and Comparative Law* 23:5, p. 773, CESL covered rules for supply of digital content, including everything from the formation of contract to the performance. CESL would have been optional instrument, which can be seen as its strength as well as weakness.
[117] Warburton (2016) *supra nota* 45, 247
[118] DCD Art. 4
[119] Hoekstra & Diker-Vanberg (2019) *supra nota* 2, 106
[120] *Ibid.*
[121] *Ibid.*
[122] *Ibid.*
[123] *Ibid.*, 107
[124] DCD Recital 16

by the Directive and are rather subject to national laws.[125] Sections 1.3.1 and 1.3.2 are analyzed in the light of the Commission's objective of uniformity.

1.3.1 Trader's liability for damages

Defective digital content might cause additional issues for consumer other than the content simply not working. Unsecure digital content can expose computers to an attack or software containing a virus, which can destroy data or make the.[126] The proposal for the DCD included in Article 14 a provision for trader's liability for damages[127], which stated that the trader is liable for economic damages caused by failure to supply and lack of conformity. However, the liability of the trader was limited to the damages caused to the consumer's digital environment.[128]

Moreover, Article 14 of the Proposal was heavily criticized[129], as it was uncertain at the time whether MS could maintain or adopt other types of trader's liability not related to the digital environment.[130] It was decided that damages provision was not part of the adopted Directive and it remains subject to national laws[131] and thus making the rules for liability of traders unharmonized between MS. As the Commission's main objective was to remove barriers to trade caused by differences in national laws, the Directive will not fully achieve it.[132]

Nonetheless, harmonizing the rules for damages would have been practically impossible to achieve. Currently, there is no political will among MS to unify damages rules.[133] Smart targeted harmonization would have been one eligible option, as it would have regulated only the real and relevant differences instead of the whole framework.[134] Full harmonization was not practically

[125] DCD Recital 73
[126] Howells, G. (2016) Reflections on Remedies for lack of conformity in light of the proposals of the EU Commisison on Supply of Digital Content and Online and Other Distance Sales of Goods, In: Franceschi, A. D. (Ed.) *European Contract Law and the Digital Single Market*, Intersentia, 159
[127] DCD-P, Art. 14
[128] *Ibid.*
[129] Loos, M. B. M. (2017) Not good but certainly content, The Proposals for European Harmonisation of Online and Distance Selling of Goods and the Supply of Digital Content, In: Clayes, I. & Terryn, E. (Eds.) *Digital Content and Distance Sales: New Developments at EU Level*, Intersentia, 34
[130] Sein, K. & Spindler, G. (2019) The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications - Part 2, *European Review of Contract Law*, Vol 15(4), De Gruyter, 383-384
[131] DCD Recital 73
[132] Machnikowski, P. (2017) Regulation of Damages on National or European Level. In: Schulze, R., Staydenmayer, D. & Lohsse, S. (Eds.) *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*, Hart Publishing/Nomos. 150
[133] *Ibid.*, 153
[134] *Ibid.*

possible and partial harmonization would have led to uncertainty caused by the objective of maximum harmonization.[135] In addition, it would have postponed the adoption of the Directive, which made it an undesirable option.[136]

1.3.2 Non-compliance with the Directive

According to the Economic Study on Consumer Digital Content Products[137], it is necessary to achieve clear rules for Supply of Digital Content Contracts. The focus on the study was on the available remedies and the access to remedies. According the Study[138], in 40% of cases of the defective digital content, such as cloud storage, anti-virus software and video games, consumers were not offered any kind of remedy. In less than five per cent of cases, the consumers were offered a replacement or an alternative. Compensation, refund or price reduction were offered only in two per cent of the cases.[139] It is important to notice that the remedies must be first available in national law and there must be an effective system that ensures that consumers have access to remedies.[140]

DCD provides MS an effective way to enforce the rules in the transposed Directive.[141] National law shall be applied in cases of non-compliance with the Directive. The Directive permits public bodies and their representatives, consumer organizations, professional organizations and non-profit bodies that have legitimate interest in consumer protection to enforce the Directive.[142]

The DCD achieves full harmonization for remedies, and it is based on hierarchy remedies.[143] However, the Directive does not harmonize the sanctions for non-compliance. Thus, the Commission's goal of harmonizing certain aspects of digital content contracts lacks depth, when sanctions are not harmonized.[144] The Directive aims to achieve fair competition and balance in the

[135] *Ibid.*
[136] *Ibid.*
[137] ICF International (2015) *supra nota* 33, 344
[138] *Ibid.*
[139] Behar-Touchais, M. (2017) Remedies in the Proposed Digital Content Directive: An Overview, *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*, Hart/Nomos, 133
[140] *Ibid.*, 134
[141] DCD Article 21
[142] Behar-Touchais, M. (2017) *supra nota* 139, 138
[143] Clayes, I. & Vancoillie, J. (2017) Remedies, Modification of Digital Content and Right to Terminate Long-Term Digital Content Contracts, In: Clayes, I. & Terryn, E. (Eds.) *Digital Content and Distance Sales: New Developments at EU Level*, Intersentia, 198
[144] Behar-Touchais, M. (2017) *supra nota* 139, 139

EU Single Market, however, allowing different approaches to sanctions for non-compliance in EU MS undermines the objective.[145]

MS may impose sanctions for non-compliance, but the types and amounts may vary depending on the MS. For example, French Consumer Code provides for criminal sanction, imprisonment and fines for non-compliance with consumer laws.[146] Finnish Consumer Protection Act does not have any reference to criminal sanctions.[147] Nonetheless, under Finnish law, businesses that do not comply with the consumer law will be given a warning, which is usually accompanied with a fine unless it is unreasonable.[148] Article 21 should have been used to impose fines for suppliers that are not compliant with the Directive's rules.[149] Fines for non-compliance of EU laws are not uncustomary for MS and such provision would have achieved higher level of harmonization.[150]

Therefore, the Commission's objective to eliminate trade barriers is not fully achieved. The rules are mostly clear and specific. However, based on the analysis in Chapter 1, the Directive will cause challenging situations regarding dual-purpose contracts, goods with digital elements and ancillary digital services that Member States' need to solve. Furthermore, when MS are left to individually solve these issues, it creates a threat to the Commission's objective of uniformity.

That being said, the Directive will increase certainty regarding supply of digital content in the big picture, as digital content and goods with a digital element are treated similarly in all MS. Thus, indicating that some uniformity will be achieved. Thus far most EU MS have not legislated this matter, however, it does not mean that they would not have. For example, United Kingdom adopted the Consumer Rights Act 2015 before the Commission's proposal.[151] The Directive tries to achieve uniformity and prevent further divergences in national laws.[152] The differences are already evident when comparing the approach between EU and United Kingdom. UK's Act did not recognize

[145] *Ibid.*
[146] *Ibid.*
[147] KSL 2:16, 29.8.2008, 16.12.1994/1259
[148] KSL 2:16 29.8.2008 & 3:2 16.12.1994/1259
[149] Behar-Touchais, M. (2017) *supra nota* 139, 139
[150] *Ibid.*, 138
[151] United Kingdom (2015) Consumer Rights Act 2015 1.1.2015, S.I. 2015/1630.
[152] DCD-P, Explanatory memorandum, 2

personal data as counter-performance.[153] Personal data as counter-performance will be discussed in Chapter 2. Due to the complexity of the issue, it is positive that it was legislated at EU level.

[153] Kelly, R. & Swaby, G. (2017) Consumer protection rights and "free" digital content, *Computer and Telecommunications Law Review* 23(7), 165

2 PERSONAL DATA AS COUNTER-PERFORMANCE

Substantive scope of the DCD was introduced and discussed in the Chapter 1.2.2 of the thesis. Chapter 2 will discuss the existing rules for supply of digital content where there is no monetary counter-performance, the new rules brought by the Directive and its compatibility with the data protection laws. The adopted Directive is the first EU legal instrument that explicitly recognizes provision of personal data as "counter-performance" in a contract.[154] Thus, making it one of the most significant changes that the DCD will bring under the scope of the EU consumer law. The term counter-performance was part of the DCD Proposal[155], but it was amended and removed from the adopted text.[156] Using the term counter-performance is nevertheless helpful to indicate that the consumer is in fact giving something in exchange for the content and service and that the product should not be considered free.[157] Personal data as counter-performance has its benefits from the consumer law perspective, but there is a potential conflict with fundamental rights.

2.1 Status and value of personal data

The right to the protection of personal data is one of the rights guaranteed by the Charter of Fundamental Rights of the European Union (Charter).[158] Article 8 of the Charter states that everyone has the right to protect their own personal data and that personal data must be processed fairly and on a legitimate legal basis. In addition, the Charter declares that everyone has the right to access the collected personal data of themselves and have it rectified.[159]

[154] Robert, R. & Smith, L. (2018) *supra nota* 12, 160
[155] DCD-P, Art. 3(1)
[156] DCD Art. 3(1)
[157] Robert, R. & Smith, L. (2018) *supra nota* 12 ,160
[157] EPDS (2018) Opinion 8/2018*: on the legislative package "A New Deal for Consumer"*, 9
[158] OJ C 326. 26.10.2013, 391-407, Art. 8
[159] *Ibid.*

The recognition of personal data as valid counter-performance in consumer supply of digital content and service contracts has raised concerns.[160] Terms such as "counter-performance" and personal data "actively given" were already removed from the text of the DCD due to received criticism.[161] The European Data Protection Supervisor (EDPS) was concerned that the wording of the Directive would indicate that personal data could be treated as a commodity.[162] Personal data is connected to fundamental rights and it should not be treated as a commodity or directly compared to money.[163] The Charter does not explicitly prohibit the trade of personal data or profiting from personal data of others. To elaborate, the Charter explicitly states that trade in body parts and profiting from the sales of body parts is prohibited.[164] The article 8 of the Charter further ensures the protection of personal data of individuals. However, the Charter does not mention the sale or trade of personal data. Therefore, an interpretation can be made that the trade in personal data and the treatment of personal data as an economic asset is not strictly prohibited under the Charter.[165]

The value of personal data is well recognized by the EU. Personal data does not have exact monetary value for the person itself. In other words, the person cannot exchange the personal data for any good they would like to "buy". For the companies that collect personal data and provide digital content and services, the data is extremely valuable. The collected data can be used as a way to promote their own business by targeted advertising or by selling the data to third parties.[166]

There is currently no accepted method for estimating the value of personal data.[167] According to the financial result per data record, Facebook made 12 dollars per each Facebook user in 2015.[168] Nonetheless, the value of personal data is difficult to determine, because the data is usually purchased as a whole and includes all the related costs.[169] The value and amount of personal data

[160] EDPS (2017) Opinion 4/2017: *On the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content*, 3
[161] *Ibid.*
[162] *Ibid.*, 7
[163] *Ibid.*
[164] EU Charter, OJ C 326. 26.10.2013, 391-407, Art. 3(2)
[165] Janecek, V. & Malgieri, G. (2020) Data Extra Commercium, In: Lohsse, S., Schulze, R. & Staudenmayer, D. (Eds.) *Data as Counter-Performance – Contract Law 2.0?* Forthcoming Hart/Nomos, 7
[166] Kelly & Swaby, *supra nota* 153, 170
[167] Hacker, P. (2020) Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive, In: Lohsse, S., Schulze, R. & Staudenmayer, D. (Eds.) *Data as Counter-Performance – Contract Law 2.0?* Forthcoming Hart/Nomos, 5
[168] *Ibid.*
[169] *Ibid.*, 6

is likely affect the consumer's expectations.[170] If the trader provides a low-end flashlight application and the consumer provides a large amount of personal data, it puts the consumer in significantly worse position.[171]

2.2 "Free" digital content and services before the Directive

The imbalance between consumers and traders is an ongoing situation and consumer protection rules seeks to even out the situation. The lack of specific legislation regarding counter-performance of personal data has caused a possible legal gap in consumer protection laws concerning digital content and services.[172] There has not been specific rules for digital content and service contracts where the counter-performance is not in the form of monetary payment.[173] In the past, this has not been a problem, but with the technological advancements, new types of business models have emerged.

Contracts without monetary counter-performance can be classified as gratuitous contract.[174] Gratuitous contracts are contracts where there is no specific or main counter-performance. Typical element to gratuitous contracts is that the trader is not liable for defects, unless the trader has acted in bad faith or has specifically declared to be liable for the defects.[175] In contrast, in a sales contract, the trader is liable for defects even without declaration and the consumer has a possibility to rely on remedies such as repair and right to compensation.[176] Applying this to the supply of digital content would essentially mean that traders that provide the content to consumer for "free", do not get anything with value in the transaction.[177] This is notion is false, as trader's receive valuable personal data from the consumers in the exchange. The existing legislation is not able to efficiently tackle the problems relating to the supply of "free" digital content and digital services.[178] The

[170] *Ibid.*, 8
[171] *Ibid.*
[172] DCD-P, Explanatory memorandum, 2
[173] *Ibid.*
[174] Narciso, M. (2017) 'Gratuitous' Digital Content Contracts in EU Consumer Law, Journal of European Consumer and Market Law 5/2017, 198
[175] *Ibid.*, 199
[176] KSL 5:18 5.1.1994/16
[177] Spindler, G. (2016) Contracts For The Supply of Digital Content and basic approach – Proposal of the Commission for a Directive on a contract for the supply of digital content. *European Review of Contract Law*, 12(3), De Gruyter. 289
[178] Narciso, M. (2017) *supra nota* 174, 200

existing EU legislation provides some level of protection relating to supply of "free" digital content but as the discussion below will show, the existing rules are not clear and sufficient enough.

Consumer Rights Directive 2011/83/EC does not specifically require payment in supply of digital content contracts.[179] Thus, it allows an interpretation that it applies to contracts for supply of digital content where there is no monetary counter-performance. Commission's guidelines for the Directive supports this interpretation.[180] The Directive applies for example to a contract for a free smart phone application. However, the Directive and its guidelines completely fail to mention the provision of personal data as counter-performance. The Directive stipulates pre-contractual information requirements and withdrawal rights but it does not have rules regarding remedies or performance of the contract.[181]

Unfair Commercial Practice Directive (UCPD) can be seen to have provided some level of protection to consumer that have provided personal data in exchange for "free" digital services. Consumers could enjoy protection under UCPD if the service is advertised as free and if it can be seen as a B2C transaction.[182] UCPD applies when there has been a transactional decision.[183] UCPD however, implies that there has to be a potential economic loss related to the transaction. The Court of Justice of the European Union has interpreted UCPD broadly and considers that a transactional decision does not have to include intention to pay with money.[184] Because personal data has been recognized to have economic value, its exchange includes a transactional decision.[185] The UCPD also protects consumers when the digital content or service is advertised as free and the consumer is not aware that the digital content or service is provided in exchange for personal data.[186] The trader must provide the necessary information to the consumer about the nature of the transaction.[187] For example, the trader must inform the consumer that the digital service is provided

[179] *Ibid.,* 201
[180] European Commission (2014) DG Justice Guidance document concerning 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, 8
[181] Narciso, M. (2017) *supra nota* 174, 199
[182] *Ibid.,* 201
[183] 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, Art. 2(k) (hereinafter UCPD)
[184] Narciso, M. (2017) *supra nota* 174 ,201
[185] *Ibid.*
[186] UCPD Annex I (20)
[187] Narciso, M. (2017) *supra nota* 174, 201

against the user's personal data and the personal data is used in targeted advertisement or sold to third parties.[188]

Finnish Consumer Protection Act does not mention provision of personal data as counter-performance. It is stated that a trader offers consumer products to consumers against consideration.[189] Consideration is not defined in the Act. The intention is to include monetary payment as well as the exchange of physical goods.[190] It does not take into account the difficulty of placing an economic value on personal data.

The existing EU law for digital content and services "paid" with personal data provides a little protection, but it is not sufficient. Existing rules ensures fair terms and fair advertisement. Digital content provided against personal data are not and should not be treated as free. Therefore, DCD ensures that contracts where the counter-performance is provision of personal data cannot be interpreted as gratuitous anymore.[191]

2.3 Provision of personal data as counter-performance

The provision of digital content and services in exchange for the provision of personal data has become increasingly relevant during the internet era.[192] However, there has not been any clear rules regarding this kind of transaction.[193] Article 3(1) paragraph 2 of the DCD covers contracts where the trader supplies or undertakes to supply digital content or services and the consumer "pays" with personal data. Personal data which is collected and processed by the trader exclusively for supplying the digital content or the trader collects the data to fulfill a legal requirement are excluded from the Directive's scope. The exclusion is under the condition that the data is not processed further for any other purpose.[194]

[188] *Ibid.*
[189] KSL 1:5 5.1.1994/16
[190] Peltonen, A. & Määttä, K. (2015) *Kuluttajansuojaoikeus*. Helsinki: Talentum Pro, 262
[191] Sein, K. & Spindler, G. (2019), *supra nota* 3, 265
[192] Richter H. (2018) The Power Paradigm in Private Law: Towards a Holistic Regulation of Personal Data, In: Bakhoum, M. et al. (Eds). *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach*, 538
[193] *Ibid.*, 538
[194] DCD Recital 25

The scope of the Directive was narrowed during the drafting phase. Previously, the Directive's scope included personal and any other data.[195] Any other data was not defined and it was eventually removed from the adopted Directive. The Directive Proposal required active provision of personal data by the consumer.[196] The adopted Directive is applicable when the consumer provides or undertakes to provide personal data in exchange for digital content or service.[197] Provision of personal data indicates activity, but the Directive does not emphasize it further.[198]

The Directive does not apply when for example metadata is collected through cookies, unless it is considered a contract under national law.[199] However, the Directive Proposal did not give a clear answer regarding data, that is "passively" provided by the consumer. For example, an IP-address is always collected as a part of cookies and an IP-address is recognized as personal data in the GDPR.[200] DCD does not harmonize situations where the service provider collects personal data with cookies. Consequently, the decision whether these should be considered a contract is left up to MS while they transpose the Directive into national law.[201]

2.3.1 "Free" digital services

Digital services provided to consumers without payment of monetary price has been under scrutiny in EU institutions. The Directive formally recognizes the social practice, that has existed for years.[202] It is easy to argue, that when consumers do not actually pay with money, they should not be entitled to the same rights as paying consumers. Individuals cannot directly make money with their personal data, but businesses can. Therefore, the differentiation between methods of "payment" should not impact the rights of consumer.

"Free" digital services include for example, social media sites such as Facebook, search engines such as Google and hosting platforms such as Dropbox. These types of businesses share the

[195] DCD-P, Art. 3(1)
[196] DCD-p Art. 3(1)
[197] DCD Art. 3(1)
[198] Kull, I. (2019) Supply of Digital Content and Digital Service in Return for Providing Personal Data. Directive (EU) 2019/770 of the European Parliament and of the Council, *Juridica*, Iuridicum, Tartu, 582
[199] DCD Recital 25
[200] Drechsler, L. (2018) Data as Counter-Performance: A new way forward or a step back for the fundamental right of data protection? A data protection analysis of the proposed Directive on certain aspects for the supply of digital content, *Jusletter IT* 22, 3
[201] Metzger, A. (2020) A Market Model for Personal Data: State of the Play under the New Directive on Digital Content and Digital Services, In: Lohsse, S., Schulze, R. & Staudenmayer, D. (Eds.) *Data as Counter-Performance – Contract Law 2.0?* Forthcoming Hart/Nomos, 4
[202] Metzger, A. (2017) Data as Counter-Performance: What Rights and Duties do Parties Have? 8(2017) *JIPITEC*, 2

common business model.[203] Their revenue comes from personal data processing, related advertisements and from selling the data to third parties.[204] With targeted advertisements businesses can expect that their advertisements are displayed to people that will most likely have the interest to buy the advertised product or service. Personal data is collected, used and analyzed to show the consumers the kind of advertisements that correspond the interests of the consumer the best way possible.[205] Due to the processed personal data, advertisements can be directed to certain group of people.[206] As a result, businesses achieve better success rater for advertisers, which then leads to higher revenues.

The current relationship between the "free" digital service provider and the consumer is divided in two parts.[207] There are two separate legal transactions between the parties.[208] Facebook providing the service to the consumer is a legal transaction, which gives the consumer "free" access to the service. The consumer's consent to the processing of personal data is considered a separate legal transaction.[209] Because of the lack of a specific contract where main counter-performance is recognized, the consumer has very limited access to contractual remedies in cases of lack of conformity.[210] Provision of personal data and paying with money are both considered to be valid counter-performances under the DCD. Having said that, they cannot be directly compared to each other, resulting in the available remedies in consumer contract dependent on the form of counter-performance.[211]

2.3.2 Level of protection and provision of personal data

Needless to say, that the remedies available for consumer providing personal data in exchange for digital content cannot be exactly the same as for the consumer paying with money[212]. One obvious problem relating to the availability of remedies is that price reduction is not a possible when the counter-performance is personal data.[213] However, the fact that one of the remedies is not

[203] *Ibid.*
[204] Kelly & Swaby, *supra nota* 153, 167
[205] Metzger (2017) *supra nota* 202, 2
[206] Kim, T., Barasz, K., John, L. K. (2018) Why Am I Seeing This Ad? The Effect of Ad Transparency on Ad Effectiveness, Oxford Journal of Consumer Research 2018 Vol 45:5, 4
[207] Metzger (2017) *supra nota* 202, 2
[208] *Ibid.*
[209] *Ibid.*
[210] *Ibid.*
[211] Alves, M. A. (2019) Directive on certain aspects concerning contracts for the supply of digital content and digital services & the EU data protection legal framework: are worlds colliding*? UNIO – EU Law Journal* Vol 5, No. 2, 42
[212] Sein, K. & Spindler, G. (2019), *supra nota* 130, 376
[213] *Ibid.*

applicable is compensated in the Directive. Consumers that provide personal data to get access to digital content or service have a lower threshold for terminating their contract.[214] Article 14(6) states that consumers that pay with money are not entitled to terminate the contract, if the lack of conformity is minor.[215] Although it is the trader's obligations to prove that the defect is indeed minor.[216] Then again, when the counter-performance is provision of personal data, the contract can be terminated even when the defect is minor.[217] The purpose of this differentiation in remedies between methods of "payment" is to ensure that the level of protection is as equal as possible between monetary payment and personal data as counter-performance.[218]

2.4 Digital Content Directive and personal data protection

It is a positive thing that consumer rights are extended, but it may bring new kinds of challenges. This section analyzes whether the data protection laws and the DCD are potentially in conflict. Personal data protection has a great importance to European Union and the new General Data Protection Regulation (GDPR)[219] has been in the center of it.[220]

Provision of personal data for digital content or service is not a completely new notion. As stated in Chapter 1.1, CRD covers supply of digital content contracts where the consumer does not pay in money.[221] CRD does not currently apply to "free" digital services, but the CRD's scope will be extended to cover "free" digital services.[222] These digital services where the consumer provides personal data in order to use it are erroneously called and treated as free. Currently, users of these free digital services cannot rely on consumer law remedies and rights.[223]

[214] *Ibid.*, 378
[215] DCD Art. 14(6)
[216] *Ibid.*
[217] DCD Recital 67
[218] Sein, K. & Spindler, G. (2019) *supra nota* 130, 378
[219] 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 (General Data Protection Regulation) (hereinafter GDPR) GDPR has been in force since 25th of May 2018.
[220] EDPS (2018) *supra nota* 157, 12, GDPR was adopted to protect the individual's fundamental rights and the risk that personal data is seen a comparable to money might have a hindering effect.
[221] European Commission (2014) DG Justice Guidelines, *supra nota* 180, 8
[222] 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. 18.12.2019, 7-28
[223] EDPS (2018) *supra nota* 157, 11

Social media sites, cloud storage services and email accounts are the most common types of "free" digital services,[224] as users of these service are not usually required to pay money for the service[225]. However, some service providers, such as cloud storage providers, have an additional payable version as well as the "free" version.[226] Commission's intention is to ensure that consumers that use free services are entitled to the same level of consumer protection as consumer that pay for digital services.[227] The new rules ensures also that all digital service providers must fulfill the same requirements, which removes differentiation between business models.[228] The extension of consumer protection rules to free digital services will increase the level of consumer protection and provides more equal field for businesses. [229] However, the premise that personal data is seen as a type of currency and an alternative for monetary payment may have negative implications.

The Directive was proposed without consulting the European Data Protection Supervisor (EDPS). In 2017, the Council of the European Union requested the EDPS's opinion. The EDPS recognized the value and market for personal data but had concerns about recognizing personal data as counter-performance.[230] EDPS considered that personal data protection is a fundamental right and it should not be made comparable to money or be a part of commercial transactions.[231] Consumers do not necessarily understand what they are agreeing to when they are providing their personal data and if consumer can choose to pay with money or to provide personal data it can be problematic.[232] For consumer it might seem that either he pays something or he pays nothing, but in reality, he is either paying with money or "paying" with personal data.[233] Robert & Smith analyzed the EDPS's argument to mean that "those who do not have an alternative currency than their personal data to pay for a service will likely make this sacrifice; consumers should not be encouraged to bargain one of their fundamental rights."[234]

[224] Metzger (2017) *supra nota* 202, 2
[225] EDPS (2018) *supra nota* 157, 11
[226] Dropbox (2020) Subscription plans, Retrieved from: https://www.dropbox.com/individual/plans-comparison, 6.5.2020.
[227] DCD Recital 8
[228] Robert, R. & Smith, L. (2018) *supra nota* 12, 161
[229] *Ibid.*, 161
[230] EDPS (2017) *supra nota* 160, 7
[231] *Ibid.*
[232] *Ibid.*
[233] Robert, R. & Smith, L. (2018) *supra nota* 12, 164
[234] *Ibid.*, 161

There is no case law from the Court of Justice of the European Union (CJEU) that specifically addresses the right to data protection and commercial use of personal data.[235] Google Spain Case C-131/12[236] was as exemplary case concerning the relationship between economic use of personal data and personal data protection. The decision demonstrated that the personal data protection rights can limit the economic use of personal data, yet does not totally exclude it.[237] Thus, commercial use of personal data cannot be totally excluded only because of its status as fundamental right.[238] The decision is useful in context of personal data being recognized as counter-performance in the light of EDPS's argument

GDPR is largely present in contracts for the supply of digital content and services where the counter-performance is personal data. The trader should have a legal basis for the processing of personal data and must follow the principles of GDPR.[239] The basis for processing should be one or more of the legal bases stated in the article 6(1)[240] of the GDPR[241].

The basic idea and applicability of DCD article 3(1) paragraph 2 is the consent from the consumer.[242] The consumer and in data protection context, the data subject must have given their consent for the processing in order for the processing to be lawful.[243] It is important to distinguish the consumer's will to be a part of the contract more specifically and the will to consent for data processing. The trader must get a clear indication[244] from the consumer to be subject to data processing in order for it to be lawful.[245] In Case C-673/17 it was deemed that a pre-ticked box on a website giving consent for personal data processing did not constitute as valid consent.[246] The trader must also comply with article 7(4) of the GDPR which is needed to assess whether the

[235] Versaci, G. (2018) Personal Data and Contract Law: Challenges and Concerns about the Economic Exploitation of the Right to Data Protection, *European Review of Contract Law* 14:4, De Gruyter, 387
[236] Court decision 12.5.2014, Google Spain, C-131/12, EU:C:2014:317
[237] Versaci, G. (2018) *supra nota* 235, 385
[238] *Ibid.*
[239] Dove, E. S. (2018) The EU General Data Protection Regulation: Implications for international Scientific Research in the Digital Era, *The Journal of Law, Medicine & Ethics* 46(4), 1016
[240] GDPR article 6(a-f) The processing is lawful if the data subject has given his consent for it, the processing is necessary for the performance of a contract, it is necessary to comply with legal obligation, for vital interest of the person or legitimate interest
[241] Carvalho (2019) *supra nota* 59, 9
[242] Metzger (2020) *supra nota* 201, 6
[243] GDPR Article 6(1a)
[244] GDPR defines consent as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her", GDPR article 4(11)
[245] EDPS (2018) *supra nota* 157, 15
[246] Court decision 1.10.2019, Planet 49, C-673/17, EU:C:2019:801, para 63

consent was actually freely given.[247] If the contract performance is conditional to the consent and the consent is not necessary for the performance of the contract, it is presumed that the consent is not actually freely given.[248] It seems that tying the contract and consent together is always prohibited under GDPR rules, which takes precedence over DCD.[249] However, the wording in the GDPR Article 7(4) "utmost account shall be taken" when evaluating whether the consent was freely given provides flexibility.[250]

2.4.1 Validity of contract and minors

The Commission's objective of harmonized contract law was discussed in Chapter 1. Basic elements such as validity and formation of a contract are not harmonized by the Directive. In the context of "free" services this lack of harmonization can cause differences in EU MS, which then leads to uncertainty in both consumer and traders.

The validity of contracts has a great importance especially in relation to cases where the consumer are often minors, such as social media.[251] In German law, the validity of a contract concluded by a minor is dependent on the parent's approval.[252] The exception in German and also in Finnish contract law is that minors can conclude a contract with low value, which are often called contacts made with "pocket money".[253] In Finnish consumer disputes, a minor buying 70 euros worth of clothes has been considered a valid contract , while a minor buying a laptop is not.[254] Moreover, according to the GDPR[255], personal data of a minor can be processed based on the child's consent if the child is at least 16 years old. If the child is under 16, parent's approval is required.[256]

Under Finnish law, persons under 18-years old are not fully competent to engage in a contractual relation.[257] The issue here is whether personal data as counter-performance can be treated as an

[247] GDPR Article 7(4)
[248] Metzger (2020) *supra nota* 201, 6
[249] DCD Recital 37
[250] Metzger (2020) *supra nota* 201, 6
[251] Metzger (2017) *supra nota* 202, 4
[252] *Ibid.*, 4
[253] *Ibid.*
[254] Laki24 (2020) *Alaikäisen oikeudet tehdä oikeustoimia,* Retrieved from: https://www.laki24.fi/alaikaisen-oikeudet-tehda-oikeustoimia/, 19.4.2020.
[255] GDPR Art. 8(1)
[256] MS are allowed to determine a lower age than the GDPR's age 16, but it cannot be lower than 13. See GDPR Art 8(1)
[257] Laki Holhoustoimesta 1:2 1.4.1999/442

ordinary transaction comparable to "pocket money"?[258] Finland used the possibility given to diverge from the GDPR and set the age limit to 13 years instead of 16 years.[259] If a 13-year-old can consent to data processing under the rules of GDPR, does it mean that minors at least 13 years old can take part in a contractual relations where a digital service is provided against provision of personal data?

Whether making a Facebook account and providing personal data as counter-performance could be considered as a low-value contract of daily-life?[260] Alex Metzger[261] uses German law as an example for minor's competence to give consent and to conclude a contract. In Germany the age of consent for data processing is 16. As many digital content and service contracts are concluded by minors without approval from their parent, it can cause a situation where the consent for the processing is valid, but the contract is void due to the minor's lack of competence.[262] Under German Law minors from ages 7 to 18 need parent's approval unless the contract concluded is only beneficial for the minor, meaning that there is no legal detriment.[263] "Free" digital services such as Facebook are not and should not be interpreted as free and only beneficial, as there is a clear counter-performance in the form of provision of personal data, which means that the transaction is not purely for the benefit of the consumer.[264]

Transactions where the consent is valid but the contract is possibly void leads to uncertainty. As the validity of contract is legislated under national laws, MS need to take into account the validity of digital service contracts concluded by a minor where the counter-performance is provision of data.[265] It needs to be clear, when parent's approval is needed and how it is monitored. If a contract is concluded by a minor who is not competent to conclude a contract and they do not have an approval from a parent the contract will be void.[266] The consent for the processing can be still valid, but it can be withdrawn at any time.[267] The lack of clear rules for this situation causes problems to arise. Furthermore, the Commission's objective of uniformity is undermined when MS adopt different approached. The logical solution would be to adopt a measure where a minor

[258] Saarnilehto, A. & Annola, V. (2018) *Sopimusoikeuden perusteet*, Helsinki: Alma Talent, 28
[259] Tietosuojalaki 2:5 5.12.2018/1050
[260] Macenaite, M. & Kosta, E. (2017) Consent for processing children's personal data in the EU: following in US footsteps?, *Information & Communications Technology Law*, 26(2), 172
[261] Metzger (2020) *supra nota* 201, 10
[262] *Ibid.*, 6
[263] *Ibid.*, 10
[264] *Ibid.*
[265] *Ibid.*, 11
[266] *Ibid.*
[267] GDPR Article 7(3)

is competent to consent to data processing without parent's approval, as well as they would be also competent to conclude a contract where counter-performance is provision of personal data.[268] This would however lead to differences in MS, because in Finland the age of consent for data processing is 13 and in Germany it is 16.

2.4.2 Invalid consent and the right to withdraw consent

The DCD explicitly states that GDPR takes precedence over the said Directive.[269] When a consumer provides data in exchange for a digital service, GDPR and DCD work together to protect the consumer/data subject's rights. If the trader violates GDPR rules and principles, it does not prevent the application of the DCD.[270] The trader could take advantage of the invalid consent and make a profit, while the consumer would not be protected under DCD. Rightfully, the GDPR and DCD are not in conflict when it becomes to applicability. Worst case scenario would be that the consent given by the consumer does not fulfill the requirements under the GDPR and simultaneously DCD would not be applicable.[271]

Article 7(3) of the GDPR states that data subject can withdraw the given consent at any time and for any reason.[272] It means that withdrawing consent is also applicable in contracts for the supply of digital content and services, where the counter-performance has been provision of personal data and the consumer has previously given their consent to. Nevertheless, withdrawing consent does not make the contract invalid.[273] The DCD does give a solution on what happens in a situation when consent is withdrawn. When there is no longer a "counter-performance" from the consumer's side in place, the national contract laws will most likely give the trader a possibility to terminate the contract.[274]

Even though personal data should not be treated only as an economic asset, it cannot be denied that personal data has its place in the commercial world. Data protection and personal data as an economic asset can work side by side. There have been arguments that this would be detriment to human dignity and data subjects and as consumers would lose their right to control their own

[268] Metzger (2020) *supra nota* 201, 11
[269] DCD Recital 48
[270] Metzger (2020), *supra nota 201*, 6
[271] *Ibid.*
[272] GDPR Article 7(3)
[273] Metzger (2020), *supra nota* 201, 7
[274] *Ibid.*

personal data when they contract it to traders.[275] Consumers have always the right to withdraw the consent, as the right cannot be waived by a contractual term.[276] This makes the consent-based processing very weak.[277] When withdrawal is possible at any time, the personal data seen as "counter-performance" is not that threatening from the personal data protection perspective.[278]

Personal data being recognized as counter-performance increases the rights and protection of consumers. Before the transposition of the DCD, consumers are not properly protected in case of the supply of "free" digital content and services. The Directive recognized the social practice and business model of digital content and service being provided against users' personal data. This recognition was criticized by the EDPS, due to its possible conflict with data protection laws as well as fundamental rights.[279] Nonetheless, the adoption of the Directive is not a threat to the right to personal data protection. Based on the case law of CJEU, the fundamental right of data protection can limit the economic use of personal data, but it does not completely exclude it.

However, certain aspects lack clear rules regarding provision of personal data as counter-performance. It is up to MS to legislate whether collection of cookies or metadata from the consumer's device constitutes a contract. Another issue that can cause discrepancies between MS is the minors' ability to conclude contracts where the counter-performance is provision of personal data. Logical solution would be to tie the ability to be a part of a contract to the ability to consent to data processing under GPDR. However, under German law minors cannot conclude contracts without parent's approval if it is not only for the benefit of the minor consumer. Under Finnish law, minors can conclude contracts of normal daily life with "pocket money" without parent's approval. It remains uncertain whether provision of personal data can be treated as comparable to "pocket money". If the MS would tie the ability to conclude contracts to the ability to consent for data processing, it would lead to further differences between MS.

[275] Drechsler, L. (2018) *supra nota* 200, 7
[276] *Ibid.*
[277] *Ibid.*
[278] *Ibid.*
[279] EDPS (2017) *supra nota* 160, 7

3 THE IMPACT OF THE DIRECTIVE AND FINNISH CONSUMER LAW

This Chapter analyzes the Directive's impact on the level of consumer protection and its coherence with Finnish consumer law. The real impact and changes are naturally caused by the Commission's objective of uniformity discussed in Chapter 1. In this Chapter, the main focus and analysis is directed to the harmonized aspects of the Directive. Chapter 3.1 introduces the current rules under Finnish law applicable to supply of digital content and evaluates whether there is need for the specific rules. In Chapter 3.2, the thesis discusses the rights and obligations of the parties. The Directive is likely to bring clarity, but the required EU-wide compromise might have a negative impact to the level of consumer protection in Finland and to the coherence of Finnish consumer legislation.

3.1 Supply of digital content under Finnish law

The applicable law in Finland to B2C contracts is Kuluttajansuojalaki 20.1.1978/34 (KSL) The Act is general in a sense that is covers all types of consumer contracts.[280] In contrast, EU consumer law is comprised of several and separate legal acts.[281] Finnish consumer law consists of national legislation as well as EU legislations.[282] In the past, most EU consumer legislations have been in the form of minimum harmonization Directives, which ensures minimum level of protection in all EU MS.[283] These Directives allowed MS to adopt stricter, more consumer-friendly provisions.[284]

[280] Norio, J. (2019) *supra nota* 6, 12
[281] *Ibid.*
[282] *Ibid.*
[283] *Ibid.*, 11
[284] *Ibid.*

Finnish current level of consumer protection is considered to be strong.[285] There have been cases where maximum harmonization Directives have negatively impacted the level of consumer protection in Finland.[286] For example, before the adoption of the Consumer Rights Directive, the trader was automatically liable for the postal costs regarding distance sales when the consumer returned the goods.[287] After the adoption, the trader was liable only if they had declared it.[288]

DCD regulates a matter that has not been regulated in Finland. Finland does not have specific rules for digital content and services, which means that general consumer legislation must be applied by analogy. Supply of digital content is mostly considered to be a service, which means that KSL 8[289] is applied. Goods rules of KSL 5[290] are not suitable, because digital content and service do not include transfer of ownership rights.[291] Under Finnish law digital content needs to be supplied digitally[292], and the supply with a tangible medium is considered to be sale of goods.[293] As digital content is supplied digitally, online and distance sale rules are applicable. Chapter 6[294] of KSL covers information requirements and withdrawal rights.[295]

The objective of the Commission is to ensure that the EU consumer law is digital-proof.[296] Digital content and services have caused problems in EU MS.[297] The problems lie in the definition of consumer products.[298] Finland has not faced similar problems due to the broad definition. In Finnish law, consumer product is defined as goods, services, other commodities and benefits.[299] Thus, the law does not exclude digital content. During the reformation of Finnish Consumer Protection Act in 1994, the objective was to include all types of commodities that are an object of

[285] *Ibid.*
[286] *Ibid.*
[287] *Ibid.*
[288] KSL 6:17 30.12.2013/1211
[289] KSL Chapter 8 covers rules for the provision of services, see KSL 8 5.1.1994/16
[290] KSL Chapter 5 covers rules for the sale of goods, see KSL 5 5.1.1994/15
[291] Laine, J. (2010) Report Finland, In*: Digital content services for consumers Comparative analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content services,* Amsterdam: University of Amsterdam, 8
[292] The method of supply can be making the content available for download, streaming or other similar method, see KSL 6:8 (3) 30.12.2013/1211
[293] Peltonen, A. & Määttä, K. (2015) *supra nota* 190, 420
[294] Chapter 6 of KSL covers rules for the online and distance sale of goods, see KSL 6 30.12.2013/1211
[295] KSL 6:9 & 6:14, 30.12.3013/1211
[296] Helberger, N., Borgerius, F. Z. & Reyna, A. (2017) The Perfect Match? A Closer look at the relationship between EU Consumer Law and Data Protection Law, *Common Market Law Review* 54, Kluwer Law International, 1436
[297] Peltonen & Määttä (2015) *supra nota* 190, 420
[298] *Ibid.*
[299] KSL 1:3 5.1.1994/16

a transaction between traders and consumers.[300] The broad definition of consumer products ensures that the legislation is flexible and able to cope with the technological developments.[301]

3.1.1 The need for legislation

The analysis in this chapter is based on the contributions of Finnish Consumer Ombudsman (Ombudsman) and Confederation of Finnish Industries (CFI) towards the EU level discussion for the need of specific EU legislation for the supply of digital content[302] as well as secondary literature.

Digital content contracts are generally more complex than "ordinary" service or sale of goods contracts, which implies that some level of clarification of the applicable rules is needed at the EU level.[303] Digital content contracts are regulated at the EU level to certain extent but for example, remedies are still subject to national laws.[304] Contracts for the supply of digital content have been generally treated as services and Chapter 8 of Finnish Consumer Protection Act has been applied by analogy[305], which mean that basic rules and principles are applied to a specific and unlegislated matter.[306]

According to the Ombudsman, consumer law should be technology neutral[307]. Therefore, overly specific rules should be avoided. Digital content is not the only type of commodity that is associated with problems relating to available and suitable remedies.[308] Instead of adopting a new legal instrument, the Ombudsman preferred the option of amending the existing EU legislations.[309] Finnish companies have not faces large-scale problems resulting from the unharmonized national laws.[310] The current law might not be as well suited for new types of consumer products, but

[300] Peltonen & Määttä (2015), *supra nota* 190, 49
[301] *Ibid.*, 50
[302] In 2015, before the Commission's proposal for the Digital Content and Service Directive, the Commission initiated a public consultation questionnaire. Several Finnish authorities and organizations gave their opinion about the need for specific digital content legislation.
[303] Finnish Consumer Ombudsman (2015) Contribution to Commission's questionnaire on contract rules for online purchases of digital content and tangible goods, 3
[304] *Ibid.*
[305] *Ibid.*
[306] Yuriy Mata (2018) Legal analogy as a tool of overcoming gaps in the legislation, *Visegrad Journal of Human Rights*, 4(1). 76
[307] Finnish Consumer Ombudsman (2015) *supra nota* 15, 3
[308] *Ibid.*, 3
[309] *Ibid.*, 4
[310] Harjunheimo (2015) *supra nota* 36, 2

adjusting the existing minimum harmonization Directives would have been an adequate response.[311]

CFI[312] argued that the supply of digital content should be regulated at the EU level only if there is a significant reason for it. One of the Commission's argument for the Directive was that differences in national laws acts as a barrier to trade.[313] CFI stated that they are not aware of Finnish companies having faced problems relating to differences in contract laws.[314] CFI argued that the main barriers for cross-border trade are language requirements and the ability of minors to conclude contracts.[315] Even though, Finland does not have specific rules for supply of digital content, such as conformity criteria, remedies and burden of proof, the common understanding is that the consumers are well protected.[316] Based on the arguments of the two contributors, there was no true need for DCD in Finland. Rather amending the existing EU consumer legislation would have been better solution.

3.2 Rights and obligations

This chapter analyzes the Directive's impact to the level of protection and coherence of Finnish consumer law. The analysis is linked to the discussion of harmonization and uniformity in Chapter 1. The analysis is this chapter is focused on the harmonized aspects of the Directive.

3.2.1 Conformity with the contract

When is digital content or service is not in conformity? Is it enough that the digital content is what has been agreed in the contract? The Directive's conformity criteria consist of two types of requirements, subjective and objective.[317] Subjective criteria covers what has been agreed in the contract and objective covers what the consumer may reasonably expect. Finnish Consumer Law states that the supplied commodity must be what was agreed, fit for its purpose, be what the trader has promised and match the consumer's reasonable expectations.[318] However, Finland does not

[311] Finnish Consumer Ombudsman (2015), *supra nota* 15, 5
[312] Organization that supports the private sector companies and businesses in Finland. It tries to create a better and more competitive market for Finnish companies not only in Finland and Europe but also globally
[313] DCD-P, Explanatory memorandum, 2
[314] Harjunheimo (2015) *supra nota* 36, 2
[315] *Ibid.*
[316] *Ibid.*, 3
[317] DCD Art. 7 & 8
[318] KSL 8:12 4.1.1994/16

have such criteria designed for digital content and services, which may cause difficulties taking into account the subject's complexity.[319]

The requirements in the Directive ensure higher level of certainty regarding conformity with the contract.[320] The premise is the same. It needs to correspond to the contract provisions and consumer expectations. The Directive goes further than current Finnish law by ensuring compatibility, installation, updates and security.[321] The Directive takes well into account the specific needs of digital content and services regarding conformity.[322]

These changes are welcomed by consumers. When for example a consumer buys shoes, and there is lack of conformity that trader can be liable for, the lack of conformity must have existed at the time of supply.[323] To elaborate, the quality of the shoes does not change after the supply, the lack of conformity exists or does not exist. Unlike other consumer product, digital content such as software can and probably will change after the supply, as software is frequently updated. Even though the aim is to improve the software, it can sometimes cause unexpected bugs or defects. Moreover, failure to update can also lead to lack of conformity.[324] The trader's liability extends to lack of conformity caused by update or failure to update even when the defect did not exist the time of supply.[325]

Digital content or service needs to be updated if it is agreed in the contract or if the consumer can reasonably expect it.[326] It is invalid to state in a contract that digital content or service is updated once a year if the consumer may reasonably expect more frequent updates.[327] Furthermore, possible security threats caused by the content or service require immediate actions.[328] Security is important part of digital content and services. Insecurity is a lack of conformity, but its enforcement is problematic.[329]

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[319] Finnish Consumer Ombudsman (2015) *supra nota* 15, 3
[320] Carvalho, J. M. (2019) Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 and 2019/771. *Journal of European Consumer and Market Law*. 8(5), 194
[321] DCD Art. 8(1b) & 8(2)
[322] Cauffman, C. (2019) New EU rules on business-to-consumer and platform-to-business relationships, *Maastricht Journal of European and Comparative Law* 26(4) p. 478
[323] Sein, K. (2017) *supra nota* 83, 103
[324] DCD Recital 44
[325] DCD Art. 8(2)
[326] Sein, K. & Spindler, G. (2019) *supra nota* 130, 370
[327] *Ibid.*
[328] *Ibid.*, 369
[329] *Ibid.*

The first step to resolving any lack of conformity is the notification by the consumer. Consumers must be able to show that there is a lack of conformity in the service.[330] An average consumer rarely has the knowledge regarding different threats in the online environment, which makes enforceability of the lack of conformity difficult in practice. The Directive does not set out any standards for this type of situation and it would have been unreasonable to go that into much details.[331] The applicable standards are left to MS to legislate, and at this point, most MS do not have proper standards in place to deal with these issues.[332] It means that insecurity of digital content will be often become evident to the consumer the damage has already happened.[333]

The lack of conformity can result from material or legal defect.[334] In addition to the aforementioned material defects, DCD covers also legal defects. Legal defects can arise for example from violation of third-party rights. However, the Directive does not properly address issues relating to intellectual property rights.[335] If a consumer's use of digital content or service is limited based on trader's IP right violation, it is a lack of conformity.[336] In such cases, the consumer is entitled to use the available remedies, unless national law provides for the rescission or nullification of the contract.[337]

In a Finnish Consumer Dispute[338], Microsoft updated the consumer's operating system to Windows 10 without the consumer's consent and without a contractual right to update it. The consumer's computer did not work properly after the update. Ombudsman stated that Microsoft should pay compensation to the consumer[339], as the lack of conformity was caused by the actions of the operating system provider instead of not the trader who had sold the computer to the consumer. The Directive does not regulate consumers' right to make a claim against third parties and it is further regulated in national law.[340] A computer with an operating system is a good with digital element. It seems to complicate things, when the trader or seller of the computer is liable

[330] Straetsmans, G. & Meys, S. (2017) The New Proposals for Directives concerning Digital Content and Online/Distance Sales, In: Clayes, I., & Terryn, E. (Eds.) *Digital Content and Distance Sales: New Development at EU Level*, Intersentia, 327
[331] *Ibid.*
[332] Sein, K. & Spindler, G. (2019), *supra nota* 130, 369
[333] *Ibid.*
[334] Carvalho (2019) *supra nota* 59, 4
[335] Lehmann, *supra nota* 116, 757
[336] DCD Art. 10
[337] DCD Art. 10
[338] Kuluttajariitalautakunta, case 2878/32/2016, 13.05.2019.
[339] *Ibid.*
[340] DCD Recital 13

for the operating system.[341] It brings uncertainty whether the lack of conformity claim should be directed towards to the trader or the provider. New versions of Windows operating system are viewed as new products, which further complicates things when assessing whether the new versions should be considered a supply of digital content under DCD or whether it is still subject to CSD as a digital element of a good. A trader cannot be held liable for not providing upgraded and new operating system.[342] Therefore, the liability for the operating system should be on the provider after the upgrade.[343]

3.2.2 Burden of proof

Burden of proof is an important aspect in contractual disputes. Burden of proof rules determine that which party needs to prove, for example that a defect existed or did not exist at the time of supply. In B2B contracts, the burden of proof is generally on the party claiming the breach of contract. Consumer law has a more protective framework and the burden of proof is reversed to the trader for a certain period of time. This relates to the discussion in chapter 1.2.1 and dual-purpose contracts. Depending on whether the buyer is classified as a consumer or a business has a major impact on the rights of the buyer.

Under the DCD, the burden of proof is on the trader for the time period of one year from the supply for possible defects that existed at the time of supply.[344] The one-year limit concerns only single act (i.e. e-book) and series on single act of supplies.[345] It is presumed that the defect existed at the time of the supply, if the lack of conformity appears within one year of the supply.[346] The trader needs to prove otherwise, if they disagree with the claim. In addition, the trader bears the burden of proof in cases where the consumer claim that the digital content has not been supplied.[347]

The Commission's original Proposal did not set any time limit for the reversed burden of proof.[348] It would have caused a long period, where the trader would need to prove that the lack of conformity did not exist at the time of the supply. Even though digital content and services are not

[341] Sein, K. & Spindler, G. (2019), *supra nota* 3, 276
[342] CSD Recital 30
[343] Sein, K. & Spindler, G. (2019), *supra nota* 130, 370
[344] DCD Art. 12(1)
[345] DCD Art. 12(2)
[346] DCD Art. 12(2)
[347] Ciacchi, A. C. & Van Schnagen, E. (2017) Conformity under the Draft Digital Content Directive: Regulatory Challenges and Gaps, In: Schulze, R., Staudenmayer, D. & Lohsse, R. (Eds.), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*, Hart/Nomos, 122
[348] DCD-P, Art. 9

subject to wear and tear like "ordinary" goods are, the burden imposed on traders would have not been in balance.[349] If it was not limited, it could have caused a situation where a trader would have to prove that the digital content was supplied defect-free several years after the supply.[350]

Concerning continuous supply of digital content and services the burden of proof is on the trader for the whole period of contract.[351] It does not cover only defects that existed at the time of supply, but any defect during the contractual relationship. Given the characteristics of digital content, fairly frequent updates are necessary.[352] It is possible that after an update, the content is no longer in conformity with the contract. Thus, the burden of proof is on the traders, as they must prove that the lack of conformity is not caused by the digital content or its update.[353]

The reversed burden of proof does not apply if the trader proves that the lack of conformity is caused by the incompatibility of the consumer's digital environment with the provided content or service.[354] In order for this exclusion to apply, the trader must have clearly informed the consumer about the compatibility requirements.[355] The Directive requires that consumers must cooperate with the trader in these situations. Moreover, the burden of proof is shifted to consumer in case the consumer refuses to cooperate with the trader.[356]

Under Finnish law the period of reversed burden of proof is six months.[357] Evidently, the extension to the period of reversed burden of proof will have a positive impact to the level of consumer protection in Finland. However, the extension to one year might not be enough. Ombudsman admitted in 2015 that the six months reversed burden of proof is not enough for digital content.[358] If Finland would have acted on the issue independently, there is a possibility that the period of reversed of burden of proof would have been longer.[359] The Commission's original proposal did

[349] Lehmann, *supra nota* 116, 760
[350] *Ibid.*
[351] DCD Art. 12(3)
[352] DCD Recital 47
[353] DCD Art. 12(3)
[354] DCD Art. 12(4)
[355] DCD Recital 42
[356] DCD Art. 12(5)
[357] KSL 5:15 13.12.2001/1258
[358] Finnish Consumer Ombudsman (2015) *supra nota* 15, 16
[359] *Ibid.*

not set any specific time limit, but instead gave the MS the option to set a time limit of their own choosing.[360]

Statement in the Council by Portugal, France, Italy, Romania and Cyprus stated that if the period of reversed burden of proof is limited to one year, it hinders consumer protection in these MS, as they currently have rules for longer period of reversed burden proof.[361] Taking into account that the trader is liable for lack of conformity at least two year after the supply, taking into consideration the complexity of digital content and services, there was a missed possibility to enhance consumer protection. It should be a pre-condition in supplying digital content and services that the reversed burden of proof is unlimited.[362] It can be difficult for the trader to carry the burden of proof, however, it is close to impossible for the consumer to determine whether the lack of conformity existed at the time of the supply or after the supply.[363] BEUC also argued that it would most likely violate IP rights if the consumer tried to identify the lack of conformity in the digital content.[364]

CSD provides period of reversed burden of proof for the period of one year, but allows MS to extend it to two years.[365] Regarding continuous supply of goods with digital element the reversed burden of proof is valid for the whole period of time.[366] However, DCD does not allow MS to extend the period of reversed burden of proof, which can be detrimental to the coherence of Finnish and EU consumer law. If Finland decides to use the possibility to extend the period of reversed burden of proof regarding goods to two years, it will result in uncertainty. Regarding the discussion of fitness trackers and ancillary digital services in Chapter 1, the adoption of the two Directives establishes a system where the applicable rules can change during the contractual relationship.[367] If a consumer downloads only the digital service, the period of reversed burden of proof is one year.[368] When the consumer ultimately buys the smart watch, the digital service can be interpreted as ancillary digital service under same contract, and thus subject to CSD rules[369]. As Ombudsman stated, the consumer law should be clear and technology neutral.[370] These two Directives provide

[360] DCD-P, Recital 43
[361] Council of the European Union (2017) Statement 10080/1/17 REV
[362] The European Consumer Organisation, BEUC (2018) Digital Content Directive: Key Recommendations for the trialogue negotiations. BEUC-X-2018-003 – 22.01.2018, (hereinafter: BEUC), 4
[363] *Ibid.*
[364] *Ibid.*
[365] CSD Art. 11(2)
[366] CSD Art. 11(3)
[367] Sein, K. & Spindler, G. (2019) *supra nota* 3, 273
[368] DCD Art. 12(2)
[369] Sein, K. & Spindler, G. (2019) *supra nota* 3, 273
[370] Finnish Consumer Ombudsman (2015) *supra nota* 15, 3

longer period of reversed burden proof, which increases the protection of consumers. However, these changes cause unnecessary incoherency of consumer legislation, which can indirectly harm consumers.

3.2.3 Trader's liability for non-conformity and consumers' obligation to notify

The period of trader's liability for lack of conformity is not fully harmonized. Traders is liable for lack of conformity that exists at the time of supply for at least a period of two years from the supply and for the whole term of contract in case of continuous supply of digital content or services.[371] Therefore, the Directive adopted an approach that is dependent on the contract type.[372] Second paragraph of Article 11(2) states that if MS have a specific time period for the trader's liability, the period cannot be less than two years. Finland does not currently have a set time period for trader's liability, which does not provide as much certainty, but instead it provides flexibility.[373] From the consumer perspective it might be better to not have a fixed time period for trader's liability, as the types of digital content and services may vary significantly.

The Directive takes into account the typical elements of digital content such as updates which are often needed to ensure that the digital content stays in conformity. In regards of continuous supply contracts of digital content, the trader is under obligation to ensure the functionality of the content including obligation to provide updates.[374] Regarding the single act supplies, the reference to Article 8(2) of the DCD has major importance. The trader is not only liable for defects that exists at the time of supply, but also for lack of conformity caused by any updates.[375] Anti-virus software might work and be defect-free at time of the supply, but lack of conformity may result from failure to update or alternatively a faulty update.[376] Under Finnish law the trader's liability for non-conformity is based on the consumer expectation principle. The trader is liable for the time period that the consumer may reasonably expect the specific digital content or service to stay in conformity.[377] Finnish law can be interpreted to include updates, but the lack of specific provision increases uncertainty.

[371] DCD Art. 11 (2)
[372] DCD Art. 11
[373] KSL 8:12 4.1.1994/16
[374] Sein, K. & Spindler, G (2019), *supra nota* 130, 385
[375] DCD Art. 11(2)
[376] Helberger, N., Loos, M. B. M, Guibault, L., Mak, C. & Pessers, L. (2013) Digital Content Contract for Consumer, *Journal of Consumer Policy* 36, 53
[377] KSL 8:12 5.1.1994/16, Applying services provision by analogy

The Directive has no significant impact to Finnish law in relation to the period of trader's liability. Important aspect is that the Directive takes explicitly into account not only lack of conformity that exists at the time of supply, but also lack of conformity resulting from updates or failure to update.[378] Under Finnish law, consumers are under obligation to notify the trader about lack of conformity within reasonable time.[379] The Directive prohibits MS to adopt or maintain such an obligation.[380] It would first seem that it increases the level of consumer protection, when the consumer's obligation is removed, as it gives unlimited time to notify the trader about the non-conformity. However, it is likely to increase uncertainty, when taking into consideration the whole consumer legislation.[381]

Under Finnish consumer law, consumers lose their right to claim remedies, if they do not notify the trader within reasonable time from the moment they became aware of the lack of conformity.[382] The obligation to notify is not regulated in the DCD. Instead, it explicitly prohibits MS to adopt or maintain such an obligation.[383] Its effect on consumers' position is two-fold. On one hand, it means that consumer does not lose the right to claim lack of conformity after the reasonable time has passed, which is usually interpreted to be two months.[384] On the other hand it makes the consumer legislation more complex, when the rules differ between types of consumer products, which is completely logical. Goods, services and now digital content have their own specific characteristics that needs to be taken into account in consumer legislation. However, the rules should be similar to the extent that is reasonable and practical. When considering only digital content rules, the removal of the time period to notify of non-conformity is likely to strengthen the consumer's position, as it gives consumer unlimited to notify. When considering consumer protection law as a whole and the average consumer, it is not preferable that the rules differ in unnecessary places. Finnish Parliament's Financial Committee stated that the missing obligation to notify is a letdown, but admitted that it will not significantly impact the level of consumer protection.[385] Furthermore, Finland is able to maintain the obligation to notify relating to goods and goods with digital element.[386] However, it can be difficult determine whether DCD or CSD

[378] DCD Art. 8(2)
[379] KSL 8:16 5.1.1994/16
[380] DCD Recital 11
[381] Sein, K. & Spindler, G. (2019), *supra nota* 130, 375
[382] KSL 8:16 5.1.1994/16
[383] DCD Recital 11
[384] KSL 5:16 5.1.1994/16
[385] Eduskunta (2017) *Talousvaliokunnan lausunto TaVL 33/2017 vp – U 25/2015 vp*, Retrieved from: https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/TaVL_33+2017.aspx, 15.1.2020
[386] CSD Art. 12

rules are applicable in a specific case, especially in the context of ancillary digital services.[387] In the worst case scenario the consumer loses his right to claim remedies due to misunderstanding the need to notify within reasonable time.

3.2.4 Remedies

The DCD will not bring significant changes to the available remedies for digital content and services in Finland, as there is already in place a hierarchy of remedies.[388] Withholding payment is the primary remedy in Finland for failure to supply and lack of conformity, even though the Directive does not regulate it.[389] The main focus is directed towards the remedies set out in the Directive which are specific performance, price reduction and termination.[390]

The Directive's primary remedy in failure to supply is specific performance.[391] The consumer must allow the trader a second chance to rectify the issue.[392] If the trader fails repeatedly, the consumer is entitled to terminate the contract.[393] A consumer is entitled to terminate the contract immediately if the trader fails to deliver the content on a predetermined time agreed by both parties[394] or alternatively if the trader has declared to the consumer or it is clear from the circumstances that digital content will not be supplied.[395] The Directive does not define how it is determined evident that digital content will not be supplied. Under Finnish law, the consumer is entitled to terminate the contract immediately if it is evident that service, in this case digital content, will be supplied later than the consumer can reasonably expect.[396] The threshold for late supply seems lower than no delivery at all, which allows to conclude that the change will slightly decrease the consumer's rights.

The Commission's original proposal had only one remedy for failure to supply: termination of contract.[397] It was criticized heavily as it does not provide any flexibility. BEUC proposed that in case of failure to supply, the trader would be required to ask for the consumer's acceptance for the

[387] Sein, K. & Spindler, G. (2019), *supra nota* 130, 375
[388] KSL 8:18 & 8:19 5.1.1994/16
[389] DCD Recital 15
[390] DCD Art. 13(1) & 14(1)
[391] DCD Art. 13(1)
[392] DCD Art. 13(1)
[393] DCD Art. 13(1)
[394] DCD Art. 13(2a)
[395] DCD Art. 13(2b)
[396] KSL 8:9 5.1.1994/16
[397] DCD-P, Art. 11

late supply.[398] Consumer would have the possibility to allow late supply or instead terminate the contract. BEUC argued that the obligation for consumer to contact the trader and ask for the supply is an unreasonable burden for a disappointed consumer.[399] This option would have provided sufficiently clear rules and in many cases, the consumer would probably allow the second chance.[400] Furthermore, the solution would not be too burdensome on the traders, as the failure to supply is caused in the end by the trader. Only negative consequence would have been the diverging rules between different types of consumer commodities in Finland.

Remedies for lack of conformity follows a similar hierarchy than failure to supply. The primary remedy is performance, secondary are price reduction and termination.[401] The primary remedy is to bring the digital content into conformity. The method is not categorically defined due to the versatility of digital content.[402] These remedies are in line with the current Finnish law.[403] Consumers possess the right to have the digital content brought into conformity.[404] Consumer are not obligated to allow a second chance to the trader to rectify the issues if the lack of conformity is serious.[405] Consumer may then rely on the secondary remedies of immediate price reduction or termination of the contract.[406] Consumers are additionally entitled to rely on secondary remedies if the defects exist after the trader's second chance.[407] It is important to point out that the defect does not need to be the same in the original claim and after the second chance was given.[408] It would be unreasonable for consumer to be required to allow the traders to fix every defect that a rises, without being entitled to the option of price reduction or termination.[409]

Traders do not have an obligation to bring the content into conformity, if it is impossible or would impose unreasonable costs taking into account the value of the content and the type of lack of conformity.[410] If the lack of conformity is minor or the consumer wishes to continue the use of it,

[398] BEUC (2018) *supra nota* 362, 5
[399] *Ibid.*
[400] *Ibid.*
[401] DCD Art. 14(1)
[402] Carvalho (2019), *supra nota* 59, 18
[403] KSL 8:18 & 8:19 5.1.1994/16
[404] DCD Art. 14(1)
[405] DCD Art. 14(4d)
[406] DCD Art. 14(4d)
[407] DCD Art. 14(4c)
[408] Sein, K. (2019) Legal Remedies of the Consumer in the New Directive concerning Contract for Digital Content and Digital Services, *Juridica* 8/2019, Iuridicum, Tartu, 572
[409] *Ibid.*
[410] DCD Art. 14(2)

the consumer may rely on proportional price reduction.[411] In the case that the lack of conformity is not minor, the consumer may terminate the contract at will.[412] When the content is "paid" with personal data, consumers may terminate the contract even when the lack of conformity is minor as was previously stated in Chapter 2.[413]

Regarding contracts where the counter-performance is personal data, it is often the case that the only available remedy is termination.[414], as fixing the lack of conformity in software often imposes relatively high costs on the trader. Even without any law in place, consumers can delete content, such as smart phone apps, when it is not working.[415] The real impact of the Directive is that the trader can be held liable for damages caused by the provided digital content and digital services.[416]

Applying law by analogy is a solution, but not the best one in every case. Based on the analysis in this chapter, Finnish consumer law can provide sufficient protection in the supply of digital content contracts. What it lacks, is regulating a solution to the issue of "free" digital services discussed in Chapter 2. Current Finnish consumer legislations is comprehensive and clear, yet the Directive's specific rules for digital content and services will increase the protection of consumer in several ways. Conformity criteria will be better suited for the complexities of digital content, the hierarchy of remedies will be clear and flexible when it needs to be. Due to the fact that Finland had not prepared specific legislation for digital content, one can only speculate whether Finland would have adopted more consumer-friendly provisions, such as longer period of reversed burden of proof, compared to the Directive. The aspect that raises concern is the coherence or incoherence of Finnish consumer law after the transposition of the Directive. It is largely left to MS to make sure that the transposition of DCD and CSD does not cause ambiguity in certain cases. The possible differences in the period of reversed burden of proof and differences in the obligation to notify of a defect are issues that need to be solved at MS level. The problematic areas are related to the scope of the Directive. Digital content and goods with digital element share a lot of similar qualities, yet are subject to differing rules. MS need to find a balance with what aspects they value the most when transposing the Directive into national law.

[411] DCD Art. 14(5)
[412] DCD Art. 14(6)
[413] DCD Art.14(6)
[414] Sein, K. & Spindler, G. (2019), *supra nota 3, 265*
[415] *Ibid.*
[416] *Ibid.*

CONCLUSION

The adoption of the Directive 2019/770 on certain aspects concerning contracts for the supply of digital content is a major milestone in the EU law. Based on the comparative legal analysis of the current Finnish consumer protection law and forthcoming rules of the DCD on the supply of digital content and services, this thesis argues that the transposition of the DCD in Finland will bring significant changes to the Finnish consumer law. Specifically, returning to the three main research questions of this analysis it may be concluded that (1) the application of the Directive will further increase the level of consumer protection in Finland; (2) the protection of personal data of consumers will not be negatively impacted by the applications of the Directive; and (3) the transposition of the Directive will have mixed impact to the coherence of Finnish and EU consumer law.

First, in relation to the Directive's impact on the level of consumer protection in Finland. Based on the analysis of rights and obligations in Chapter 3.2 and the provision of personal data as counter-performance in Chapter 2.3, several aspects regarding contracts for the supply of digital content will have a positive impact to the level of consumer protection in Finland. Therefore, the maximum harmonization character and EU-wide harmonization is not detrimental to the level of consumer protection currently enjoyed. The conformity criteria set in the Directive is better suited for digital content, as it takes into account its typical elements, such as updating requirements and security. Current Finnish law does not explicitly mention them, which increases uncertainty. Moreover, the period of reversed burden of proof is extended from the current six months to one year. This extension will have a direct positive impact to the position of Finnish consumers. Moreover, the Directive's acknowledgement of the social practice of providing digital services in exchange for consumers personal data was evaluated in Chapter 2. The recognition of personal data as counter-performance will empower consumer and provide legal protection in situations where the service is not paid with money and instead with personal data, which is a beneficial development compared to the current Finnish law.

Second, the analysis of the impact of the Directive on the personal data protection of consumers, chapter 2, indicates that there is no direct conflict with the Directive and existing personal data protection laws and fundamental rights. Thus, personal data as recognized counter-performance is not a threat to the fundamental rights of personal data protection. Based on the analysis of the EU Charter and CJEU case law, economic use of personal data can be limited, yet not completely excluded from commercial use only because of its status as a fundamental right. Therefore, it can be concluded that personal data can be a valid counter-performance in a contractual transaction.

While GDPR takes precedence over the Directive, these two legal acts are not in conflict. These acts are compatible to ensure the rights of the consumers as well as their personal data protection. The applicability of the GDPR and the Directive are not dependent on each other. The violation of one of the acts does not derive the other in applicable. It can be concluded that the recognition of personal data as counter-performance will impact beneficially the level of consumer protection in Finland, without threatening the right to personal data protection.

Third, in relation to the coherence between national and EU law consumer protection. Adopting varying rules for different types of goods and services can result in the recognition of the applicable rules becoming more challenging. Based on the analysis of Chapter 1 regarding scope, Chapter 2 regarding validity of contracts and Chapter 3 regarding MS possibility to adopt diverging rules for goods, this thesis argues that the impact of the Directive to the coherence of Finnish and EU law is mixed. The Directive will most likely cause incoherence in Finnish law due to diverging specific rules. Based on the analysis in Chapter 1 and 3, as the rules regarding digital content, digital element of a good as well as ancillary digital services are diverging, it is likely to cause uncertainty in consumers. If it is too difficult for consumer to know the applicable rules, the legislation becomes too complex.

The transposition of the Directive gives MS an option to adopt diverging rules for digital element of a good compared to digital content, which can harm the position of consumers. Diverging rules can be adopted regarding the period of reversed burden of proof and consumers' obligation to notify non-conformity. In one hand, the diverging rules provide better protection for consumers when there is a longer period of reversed burden of proof for goods with a digital element. On the other hand, the unnecessarily diverging rules increases uncertainty in consumers if it is difficult to know the applicable rules. Moreover, based on the analysis in Chapter 1, regarding dual-purpose contracts and predominant use, the Directive fails to assert these issues. The lack of clear rules provides for different approaches in EU MS, which can be detrimental to the coherence at the EU

level. Based on the analysis of Finnish and Estonian law, it is possible that a buyer is considered to be a consumer in one MS and a business in another.

Furthermore, the varying rules are caused by the Commission's objective of uniformity. DCD does not allow MS to extend the period of reversed burden of proof or to maintain an obligation for a consumer to notify within a reasonable time. If the DCD would have allowed MS as much freedom as the CSD, the contested issues of the DCD would have been minimized. Furthermore, it is probable that the Directive will not achieve the extent of uniformity and coherence at the EU level that it set out to achieve. As an example, trader's liability for damages, which is often the only available remedy in the supply of low-value digital content was left unharmonized. The Directive's objective to eliminate the barriers to trade without infringing too far into national contract law, is not fully achieved, as the formation and validity of contracts remains subject to national laws. For example, ability of minors to conclude a contract remains a hindrance for cross-border supply of digital content and services, as MS have adopted different approaches.

In practice, Finland can overcome some of the aforementioned challenges by adopting similar rules for the digital element of a good and digital content. Finland should refrain from using the CSD's option of extending the period of reversed burden of proof to two years. While the extension would evidently increase the level of consumer protection regarding goods, it would decrease the level of certainty. Furthermore, when considering the consumer protection law as a whole, the best option is to have as similar and coherent rules as possible regarding all goods and services. However, as Finland was predominantly against the removal of the consumer's obligation to notify the lack of conformity, it is not likely that Finland would remove the same obligation regarding goods. This difference in rules is not an insurmountable problem. However, in individual cases it can result in consumers losing their right to claim remedies due to the misunderstanding of consumers regarding the legal nature of the contract.

In conclusion, the impact of the Directive is mainly positive. The level of protection will increase, consumers' rights will be extended and the EU level uniformity will be achieved to a certain extent. The transposition of the Directive is still ongoing in Finland and other EU MS. After the transposition deadline, it will become evident how uniform the rules are at the EU level and how well Finland is able to maintain the coherency of their consumer law.

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