

# LIABILITY FOR LEGAL DEFECTS OF DIGITAL CONTENT AND DIGITAL SERVICES FROM THE SLOVENIAN LAW PERSPECTIVE

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*Digital content and digital services provided to consumers are often subject to third-party rights that may restrict the consumer's use of the content or service. Under the Digital Content and Services Directive, Member States must provide consumers with remedies for lack of conformity if third-party rights prevent or limit the use of digital content or services in a manner contrary to the supply contract. Remedies for legal defects are defined analogously to the lack of material conformity of digital goods and services. However, the wording does not clarify the consumers' rights in situations where they can still access the digital content or service but cannot do so without infringing third-party rights. Although the Directive aims for full harmonisation, it permits Member States to retain national rules that allow for the nullity or rescission of contracts in cases of legal defects. This paper examines which rules under Slovenian law of obligations may come into play.*

*Key words: digital content; digital services; legal defects; third-party rights; remedies*

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## 1. INTRODUCTION<sup>1</sup>

Digital content and digital services are typically protected by copyright and other intellectual property (IP) rights, which may restrict the lawful use of the content or service in question.<sup>2</sup> These rights often do not belong to the trader supplying the content or services to consumers as end-users but are instead held by third parties, such as software developers or film producers.<sup>3</sup> The presence of third-party rights is usually not apparent at the time of contract formation or performance but may become evident later if the rightsholder invokes their rights to prohibit the user from using the digital content or to compel the trader to discontinue providing the digital service. In such instances, third-party rights can be described as a legal defect of the digital content or service.

Whereas property rights in tangible goods are transferred to consumers through a sales contract, IP rights concerning digital content and services are generally only licensed to end-users.<sup>4</sup> This arrangement creates a trilateral relationship involving the trader who supplies the digital content or service, the consumer as the end-user, and the rightsholder as the licensor.<sup>5</sup> To avoid legal defects, traders supplying digital content and services must ensure that the terms of the end-user licensing agreement (EULA) offered by the rightsholder permit usage that aligns with their contract with the consumer.<sup>6</sup>

The Digital Content and Services Directive (DCSD)<sup>7</sup> requires EU Member States to provide consumers with remedies for lack of conformity in cases

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<sup>2</sup> Spindler, G., *Digital Content Directive and Copyright-Related Aspects*, JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, vol. 12, no. 2, 2021, p. 112.

<sup>3</sup> Metzger, A., § 327g *Rechtsmangel*, in: Krüger, W. (ed.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch: Band 3: Schuldrecht - Allgemeiner Teil II*, 9th edn., C. H. Beck, München, 2022, para. 7.

<sup>4</sup> Rosenkranz, F., *Article 10: Third-party rights*, in: Schulze, R.; Staudenmayer, D. (eds.), *EU Digital Law: Article-by-Article Commentary*, C. H. Beck – Hart – Nomos, Baden-Baden, 2020, p. 185.

<sup>5</sup> Metzger, *op. cit.* (fn. 3), para. 1.

<sup>6</sup> Oprysk, L., *Digital Consumer Contract Law without Prejudice to Copyright: EU Digital Content Directive, Reasonable Consumer Expectations, and Competition*, GRUR International, vol. 70, no. 10, 2021, p. 943.

<sup>7</sup> 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, Official Journal, L 136, 22 May 2019.

where third-party rights prevent or limit the use of digital content or services. This paper explores whether the existence of third-party rights that render the use of digital content or services unlawful can constitute a legal defect even in the absence of a claim by the rightsholder. Since the Directive is based on the principle of full harmonisation, its provisions are largely transposed verbatim into Member States' legislation.<sup>8</sup> However, Member States are allowed to retain alternative remedies, such as nullity of the contract or rescission for legal defects, for example, under a legal warranty against eviction. This paper examines which remedies might apply under the new Slovenian Consumer Protection Act (ZVPot-1)<sup>9</sup>, adopted in 2022, as well as under the general rules of Slovenian law of obligations.

## 2. CONFORMITY OF DIGITAL CONTENT AND DIGITAL SERVICES

The Consumer Sales Directive (CSD)<sup>10</sup>, adopted in 1999, was the first legal instrument to harmonise EU Member States' consumer contract law concerning traders' legal guarantees for goods sold to consumers. Rather than defining defects of goods, the Directive relied on the concept of conformity.<sup>11</sup> The seller's primary obligation was to deliver goods in conformity with the contract of sale (Article 2(1) CSD), and the seller was liable to the consumer for any lack of conformity present at the time of delivery that became apparent within two years (Article 3(1) CSD). The conformity criteria under the CSD were designed to protect consumers from material defects that affected the physical quality or functionality of the goods, rather than from third-party claims restricting the buyer from using the goods according to their general or specifically agreed purpose. The Directive left the regulation of consumers' remedies against legal defects to the Member States.<sup>12</sup>

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<sup>8</sup> Renko, J., *Nova ureditev potrošnikovih pravic v primeru dobave digitalnih vsebin in storitev*, Pravni letopis, 2022, p. 163.

<sup>9</sup> Zakon o varstvu potrošnikov, Uradni list RS, no. 130/2022.

<sup>10</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7. 7. 1999.

<sup>11</sup> Colombi Ciacci, A.; Schagen, E. van, *Conformity under the Draft Digital Content Directive: Regulatory Challenges and Gaps*, in: Schulze, R.; Staudenmayer, D.; Lohsse, S. (eds.), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*, Hart – Nomos, Baden-Baden, 2017, p. 102.

<sup>12</sup> Miščenić, E., *Protection of consumers on the EU Digital Single Market: Virtual or Real One?*, in: Vighianisi Ferraro, A.; Jagielska, M.; Selucká, M. (eds.), *The influence of*

The CSD did not address the conformity of digital content. Article 1(2)(b) CSD defined consumer goods as tangible movable items, thereby excluding digital products from the scope of the Directive. As online distribution of e-books, digital music, films, and smartphone apps became widespread, legal scholars debated whether remedies for non-conformity of goods available under national laws could apply to digital goods by analogy.<sup>13</sup> The lack of clear legal remedies for consumers in the digital realm became a notable lacuna in European consumer law. The European Commission addressed this issue in the Digital Single Market Strategy<sup>14</sup> in May 2015 by announcing a legislative initiative on harmonised rules for the supply of digital content and online sales of goods. The initiative culminated in the adoption of the DCSD and the Sale of Goods Directive (SGD)<sup>15</sup> in May 2019.

The two directives are designed to complement each other.<sup>16</sup> The SGD, which replaced the earlier CSD, addresses the sale of tangible goods to consumers. Rather than extending the rules on tangible goods to their digital counterparts, the DCSD introduced specific rules for two new legal categories in the electronic domain: digital content and digital services. “Digital content” is defined as data produced and supplied in digital form. “Digital service” means a service that enables the consumer to create, process, store, or access data in digital form, or one that allows the sharing of or any other interaction with data uploaded or created by the consumer or other users of the service.<sup>17</sup>

The DCSD applies to the supply of digital content or services, whether online, as a download or in cloud storage, or on a tangible medium (e.g., DVDs,

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*the European Legislation on National Legal Systems in the Field of Consumer Protection*, Wolters Kluwer Italia – CEDAM, Milano, 2017, p. 236; Rosenkranz, *op. cit.* (fn. 4), p. 186.

<sup>13</sup> E.g., Damjan, M., *Varstvo potrošnikov pri pogodbah o dobavi digitalnih vsebin*, Podjetje in delo, vol. 38, no. 6–7, 2012, p. 1462.

<sup>14</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final, 6 May 2015.

<sup>15</sup> 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) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, Official Journal, L 136, 22 May 2019.

<sup>16</sup> See Recital 13 SGD and Recital 20 DCSD; Morais Carvalho, J., *Directive (EU) 2019/770 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services*, in: Lodder, A. R.; Murray, A. D. (eds.), *EU Regulation of E-Commerce: A Commentary*, 2nd edn., Edward Elgar, Cheltenham – Northampton, 2022, p. 335.

<sup>17</sup> Recital 19 DCSD provides numerous examples of digital content and digital services.

CDs, USB sticks, and memory cards), provided the medium serves solely as a carrier of the digital content.<sup>18</sup> The SGD, on the other hand, covers the sale of goods with digital elements (e.g., preinstalled operating systems or apps, or digital services like data processing).<sup>19</sup> Unlike the CSD, these new legislative acts are based on the principle of full harmonisation, which means that Member States may not provide higher or lower levels of consumer protection than those provided for in the respective Directive, thereby promoting uniform consumer protection across the EU.<sup>20</sup> Both Directives retain the concept of conformity with the contract as the basis for trader liability to the consumer in the event of material defects, though conformity is now defined through subjective and objective criteria tailored to the distinction between tangible goods and digital content and services.<sup>21</sup>

Subjective requirements for conformity derive from the specific agreement between the trader and consumer. The digital content or services supplied must match the description, quantity, and quality agreed upon in the contract; possess the functionality, compatibility, and interoperability required by the contract; be fit for the agreed purpose; include any accessories, instructions, and assistance as stipulated; and be updated as specified (Article 7 DCSD). The subjective conformity standard allows traders to supply “beta” versions of digital content if consumers are informed beforehand that the content is still in development and may contain functional defects.<sup>22</sup>

Objective requirements for conformity apply cumulatively with subjective requirements.<sup>23</sup> In addition to meeting contractual provisions, digital content or services must be fit for purposes for which digital content or services of the same type would normally be used; have quality and performance features (including

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<sup>18</sup> Morais Carvalho, *op. cit.* (fn. 16), p. 338.

<sup>19</sup> Recital 13 SGD; Renko, *op. cit.* (fn. 8), p. 165.

<sup>20</sup> Behar-Touchais, M., *Remedies in the Proposed Digital Content Directive: An Overview*, in: Schulze, R.; Staudenmayer, D.; Lohsse, S. (eds.), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps*, Hart – Nomos, Baden-Baden, 2017, p. 130.

<sup>21</sup> The approach of the CSD to conformity standards was neither entirely subjective nor objective. Staudenmayer, D., *Article 6: Conformity of the digital content or digital service*, in: Schulze, R.; Staudenmayer, D. (eds.), *EU Digital Law: Article-by-Article Commentary*, C. H. Beck – Hart – Nomos, Baden-Baden, 2020, p. 109.

<sup>22</sup> Colombi Ciacchi; Schagen, *op. cit.* (fn. 11), p. 112; Staudenmayer, *op. cit.* (fn. 21), p. 114.

<sup>23</sup> Subjective and objective conformity criteria apply cumulatively, offering additional protection for consumers, who often do not read standard terms and conditions. Staudenmayer, *op. cit.* (fn. 21), p. 115.

functionality, compatibility, accessibility, continuity, and security) that the consumer could reasonably expect; include any accessories and instructions the consumer might reasonably expect; and conform with any trial or preview version provided before contract conclusion (Article 8 DCSD). These characteristics are implicitly part of the contract, as they are commonly associated with digital content or services.<sup>24</sup>

The conformity criteria for digital content and services reflect the interdependence of hardware and software. Traders must ensure that consumers are informed of and supplied with updates necessary to maintain the conformity of digital content or services. Unlike traditional goods, digital content and services must remain conforming throughout their expected lifespan, not just at the time of delivery.<sup>25</sup> Conformity requirements also consider that digital content or services must be correctly integrated into the consumer's hardware and software environment to work properly (Article 9 DCSD).

While the concept of conformity does not directly address legal defects of digital content or services<sup>26</sup>, it plays a central role in the defining legal defects under Article 10 DCSD, which addresses "Third-party rights". When third-party rights restrict or limit the use of digital content or services contrary to the subjective and objective requirements for conformity, the consumer is entitled to the remedies for lack of conformity specified in Article 14 DCSD.

### 3. THE NOTION OF LEGAL DEFECTS

#### 3.1. Violation of third-party rights

Unlike tangible goods, various types of digital content, as well as the software used to provide digital services, are often subject to third-party rights, particularly IP rights (however, any right that can be invoked against the consumer – including contractual obligations or public-law restraints – can qualify as a third-party right under Article 10 DCSD).<sup>27</sup> For instance, e-books, digital music, and films are subject to copyright held by their respective authors, publishers, or producers. Apps and other software may be protected by copyright (the

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<sup>24</sup> Morais Carvalho, *op. cit.* (fn. 16), p. 352.

<sup>25</sup> Article 7(3) SGD includes a similar obligation to provide updates for goods with digital elements.

<sup>26</sup> Article 6 DCSD does not include the absence of legal defects in the obligation of the trader. Staudenmayer, *op. cit.* (fn. 21), p. 117.

<sup>27</sup> Rosenkranz, *op. cit.* (fn. 4), p. 189; Metzger, *op. cit.* (fn. 3), para. 6.

computer code), trademarks (names and logos), and patents (algorithms) held by their developers. Traders providing digital content or services to consumers must obtain the appropriate licences from rightsholders to supply the content or service to end-users. In the absence of such authorisation, the activity may be unlawful, allowing the rightsholder to prohibit it, which would prevent the trader from providing the content or service in conformity with the consumer contract and render copies of digital content already received by the consumer unlawful.

Despite the somewhat misleading title of Article 10 DCSD<sup>28</sup>, the mere existence of a third-party right in relation to the digital content or service does not suffice to constitute a legal defect under this Article. This is reasonable, as IP rights on digital content are generally retained by their owners and only licensed to end-users. The moral component of copyright is inalienable and remains with the author in any case.<sup>29</sup> Licensing restrictions imposed by the rightsholder are transferred through the chain of transactions to the consumer as the end-user, who must accept the terms of the EULA.<sup>30</sup> The EULA specifies – and often limits – how the consumer is entitled to use the digital content or service.<sup>31</sup> The trader is not required to provide the digital content or service free of third-party rights but rather in a manner that permits the consumer to use it in line with the contract. Article 10 DCSD seeks to ensure that the legal relationship between the consumer and the rightsholder is aligned with the contract between the consumer and the trader.<sup>32</sup>

The conformity criteria in Articles 7 and 8 DCSD define which restrictions in the form of licensing terms the consumer must accept.<sup>33</sup> For a legal defect to be established under Article 10 DCSD, three conditions must be met:

- The existence of a third-party right in relation to the digital content or service,
- A violation of this third-party right by the supply or use of the digital content or service,
- The imposition of legal restrictions preventing or limiting the use of the digital content or service in accordance with the contract.

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<sup>28</sup> Oprysk, *op. cit.* (fn. 6), p. 950.

<sup>29</sup> Rosenkranz, *op. cit.* (fn. 4), para. 187.

<sup>30</sup> Spindler, *op. cit.* (fn. 2), p. 112.

<sup>31</sup> Metzger, *op. cit.* (fn. 3), para. 4.

<sup>32</sup> Rosenkranz, *op. cit.* (fn. 4), p. 185.

<sup>33</sup> Staudenmayer, *op. cit.* (fn. 21), p. 114.



Since the use consistent with subjective and objective requirements for conformity would violate the third-party right, a legal restriction is imposed on the consumer or trader that prevents the performance of the contract. Conversely, no legal defect arises where the consumer can lawfully use the digital content or service in line with the subjective and objective requirements for conformity, even if the trader has infringed upon a third-party right related to the digital content or service.<sup>34</sup>

### 3.2. Restrictions imposed by the rightsholder

The term “restriction” should be interpreted broadly to encompass any legal or factual constraint on the consumer.<sup>35</sup> Under IP law, the rightsholder can compel the trader to cease infringing IP rights and to discontinue offering the digital content or service, or can prohibit the consumer from using the digital content or service in a manner that infringes upon IP rights.<sup>36</sup> Access to such legal recourse for any IP right is guaranteed by Article 44(1) of the TRIPS Agreement<sup>37</sup>, which requires courts to have the authority to order a party to desist from infringement. The EU’s Computer Programs Directive (CPD)<sup>38</sup>, for example, requires Member States to provide suitable remedies against anyone who circulates a copy of a computer program, knowing or having reason to believe that it is an infringing copy, or who possesses such a copy for commercial purposes (Article 7 CPD).

If the trader has not properly cleared all the necessary rights, the rightsholder may obtain an injunction prohibiting the trader from providing the digital service or a specific function of the service for which the consumer has already paid, such as cloud storage, online document conversion, or video streaming. An injunction might also prohibit the trader from supplying the consumer with updates for the digital content, as required by the contract – one of the subjective conformity requirements explicitly mentioned in Article 7 DCSD. The rightsholder is more likely to initiate legal action against the trader providing the

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<sup>34</sup> Metzger, *op. cit.* (fn. 3), para. 2.

<sup>35</sup> Rosenkranz, *op. cit.* (fn. 4), p. 191.

<sup>36</sup> Recitals 53 and 54 DCSD.

<sup>37</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement, Geneva, 6 December 2005.

<sup>38</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, Official Journal, L 111, 5 May 2009.



digital content or service rather than the consumer using it for private purposes. However, such action cannot be ruled out entirely, as the consumer cannot rely on rights associated with the use of a legitimate copy of the digital content.

The burden of proof provision in Article 12 DCSD does not apply to issues of legal conformity.<sup>39</sup> This means that a consumer seeking remedies against the trader must prove the existence and violation of third-party rights, as well as the resulting limitations on the contractual usability of the digital content.<sup>40</sup>

### 3.3. End-user licences

Rightsholders can impose additional constraints on consumers through restrictive end-user licensing terms for digital content or services. For instance, a EULA can prohibit the consumer from using certain features or functionalities of the digital content or digital service in certain territories, or limit their use to non-commercial purposes or a set number of devices.<sup>41</sup> Such restrictions can be enhanced through digital rights management (DRM) technologies, which prevent the consumer from using digital content contrary to EULA conditions.<sup>42</sup> As noted in Recital 53 DCSD, such a restriction could cause the digital content or service to breach the objective requirements for conformity if it affects usual features of the digital content or service that the consumer can reasonably expect, unless expressly excluded in the contract.

It is important to note that the contract for the supply of digital content is separate from the licence to use this content. The former is concluded between the trader and the consumer, whereas the latter is concluded between the rightsholder and the consumer as the end-user. The requirement to consent to a EULA is not, in itself, a legal defect of the consumer contract if the terms of the licence correspond to the requirements for conformity of the content. However, if the licence restricts the use of digital content to a single device, while the supply contract imposes no such limitation, this constitutes a legal defect.<sup>43</sup> Subjective standards of conformity are particularly relevant here, as they allow the trader to include such pre-existing legal limitations in the contract, thereby

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<sup>39</sup> Rosenkranz, *op. cit.* (fn. 4), p. 188.

<sup>40</sup> *Ibid.*, p. 198.

<sup>41</sup> Metzger, *op. cit.* (fn. 3), para. 4.

<sup>42</sup> Spindler, *op. cit.* (fn. 2), p. 117.

<sup>43</sup> Metzger, *op. cit.* (fn. 3), para. 12.

precluding them from being considered legal defects.<sup>44</sup> However, such limitations on the usability of the digital content should be explicitly stated in the supply contract, rather than expressed by a vague reference to EULA terms.<sup>45</sup> For instance, consumers could expressly accept such restrictions by ticking a box, pressing a button, or activating a similar function on the trader's website when purchasing digital content.<sup>46</sup> In any case, the digital content must also meet the objective criteria of conformity.<sup>47</sup>

Article 3(5)(f) DCSD specifically excludes from the Directive's scope contracts for software offered under free and open-source licences, where consumers do not pay a price nor provide personal data as counter-performance.<sup>48</sup> This exclusion aligns with Article 3(1) DCSD, which limits the application of the Directive to commercial transactions in which the consumer either pays a price or provides personal data.<sup>49</sup>

### 3.4. Mere illegality

Additional restrictions resulting from third-party rights violations may be imposed by the affected rightsholder through judicial recourse or licensing terms. However, IP rights apply regardless of whether the rightsholder enforces them. If the rightsholder's permission has not been obtained, and no statutory exceptions apply, the provision of the digital content or service may violate the exclusive right, meaning the consumer cannot access the digital content or service lawfully. Under the general rules of Slovenian law of obligations, this situation would qualify as a legal defect (Article 488 of the Obligations Code – OZ<sup>50</sup>). However, the wording of Article 10 DCSD does not clarify whether consumers have any remedies available in the absence of action by the rightsholder.

When digital content is protected by copyright, the legality of its use on any digital device is contingent on the legality of the digital copy. Any use of digital content on an electronic device or its transmission over an electronic network requires ephemeral reproduction in system memory. According to Article 5 CPD

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<sup>44</sup> Colombi Ciacchi; Schagen, *op. cit.* (fn. 11), p. 112.

<sup>45</sup> Rosenkranz, *op. cit.* (fn. 4), p. 193; Oprysk, *op. cit.* (fn. 6), p. 951.

<sup>46</sup> Recital 49 DCSD. *Cf.* Renko, *op. cit.* (fn. 8), pp. 172–174.

<sup>47</sup> Spindler, *op. cit.* (fn. 2), pp. 118–119.

<sup>48</sup> The personal data provided by the consumer may be processed by the trader solely to enhance the security, compatibility, or interoperability of that specific software.

<sup>49</sup> Recital 78 DCSD; Morais Carvalho, *op. cit.* (fn. 16), pp. 344–347.

<sup>50</sup> Obligacijski zakonik, Uradni list RS, no. 83/2001 (as amended).

and Article 5(1) of the Infosoc Directive<sup>51</sup>, transient or incidental reproduction of a computer program or any other copyright work in system memory is only permitted if the copy of the work was lawfully acquired.<sup>52</sup> Therefore, a consumer who obtains a copy of the digital content from a trader but subsequently learns that the trader may have violated a third-party right cannot be certain whether their use of the digital content is lawful, even if the rightsholder has not requested cessation of use or the acceptance of additional licensing terms. Inaction by the rightsholder does not constitute consent to potentially infringing use. An ambiguous situation regarding third-party rights may cause ongoing uncertainty for the consumer, particularly as the rightsholder could assert their rights against the consumer after the limitation period for the consumer's remedies against the trader has expired.<sup>53</sup>

Under Article 10 DCSD, the restriction constituting a legal defect must "result from a violation of any third-party right that prevents or limits the use of the digital content or digital service". IP law itself prohibits consumer from using digital content or services in ways that infringe IP rights, so the mere existence of such a right could be interpreted as a restriction that constitutes a legal defect. However, the examples provided in Recitals 53 and 54 of the Directive indicate restrictions actively imposed by the rightsholder in response to rights violations. This suggests that mere illegality of the consumer's use due to the existence of a third-party right would not constitute a legal defect if the third party does not interfere with the performance of the consumer contract.

The Slovenian transposition, in Article 77 ZVPot-1, repeats, *mutatis mutandis*, the provision of Article 10 DCSD without clarifying the issue of legal defects in cases of rightsholder inaction. This contrasts with the approach of the German legislature, which integrated rules on the conformity of digital content and services into the general framework of liability for material and legal defects of performance in the German Civil Code (BGB). Article 327g BGB explicitly states that a digital product (covering both content and services) is free from legal defects when the consumer can use it in accordance with the subjective and objective conformity requirements without infringing third-party rights. Metzger explains that the potential for infringement through consumer use is

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<sup>51</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal, L 167, 22 June 2001.

<sup>52</sup> See Recital 13 CPD. Metzger points out that consumer acceptance of a EULA is not necessarily required to obtain a lawful copy of the digital content: Metzger, *op. cit.* (fn. 3), para. 10.

<sup>53</sup> Rosenkranz, *op. cit.* (fn. 4), p. 192.

sufficient to constitute a legal defect. For example, if a EULA prohibits the use of digital content on more than one device, contrary to the terms of the consumer contract, this would constitute a legal defect under German law, even if the consumer only uses the content on a single device.<sup>54</sup> It remains to be seen whether such an interpretation will be widely accepted as consistent with the wording of Article 10 DCSD.

### 3.5. Legal defects under the Common European Sales Law

A directive's legislative prehistory can be a useful tool in its interpretation. The Commission introduced the legislative package containing the DCSD and the SGD as successors to the more ambitious proposal for the optional Common European Sales Law (CESL), which had been withdrawn.<sup>55</sup> However, the approach towards legal defects in these two documents is notably different. Article 102 CESL addresses third-party rights or claims concerning tangible goods and digital content. The basic requirement is that the goods must be free from, and the digital content must be cleared of, any right or not obviously unfounded claim of a third party. This means that the trader's obligation under the contract for the supply of digital content includes the duty to either obtain all necessary rights to the content or secure an appropriate licence that can be transferred to end-users. The provision aims to ensure the undisturbed possession and use of digital content.<sup>56</sup>

While the DCSD offers consumers remedies for legal defects only when a violation of third-party rights leads to restrictions incompatible with the conformity requirements, the CESL requires the trader to actively ensure that no unsettled third-party rights or claims exist on the digital content supplied to the consumer. Rather than relying on the absence of third-party claims, the trader must take action to minimise the likelihood of such claims arising, thereby increasing the consumer's legal certainty.

However, Article 102 CESL sets two important limitations on the trader's liability. First, obviously unfounded claims by third parties do not count. Second,

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<sup>54</sup> Metzger, *op. cit.* (fn. 3), para. 9.

<sup>55</sup> Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, 11 October 2011.; Colombi Ciacchi; Schagen, *op. cit.* (fn. 11), p. 101; Renko, *op. cit.* (fn. 8), p. 163.

<sup>56</sup> Zoll, F., *Article 102: Third party rights or claims*, in: Schulze, R. (ed.), *Common European Sales Law (CESL): Commentary*, C. H. Beck – Hart – Nomos, Baden-Baden, 2012, pp. 482–483.

the trader is only responsible for clearing rights or claims that they knew or could be expected to know about at the time of the contract's conclusion. This limitation acknowledges the complexity of clearing rights on digital content compared to tangible goods. Computer programs, including smartphone apps, may contain thousands of lines of code, each of which could potentially infringe copyright if copied from elsewhere. Additionally, any algorithm implemented in the code could correspond to an algorithm that is part of a patented software-implemented invention.<sup>57</sup> A single app could potentially infringe hundreds of copyrights and patents. Therefore, it is sensible to limit the trader's liability to third-party rights that they should reasonably expect at the time the contract is concluded.

The DCSD appears to take this limitation a step further by granting consumers remedies only when third-party rights have been violated and this results in additional restrictions preventing the proper performance of the contract. The comparison with the corresponding provision of the CESL suggests that this change in wording was a deliberate choice.

#### 4. REMEDIES FOR THE LACK OF CONFORMITY

Rather than providing specific remedies for legal defects, the DCSD entitles consumers to use remedies for the lack of conformity if a violation of third-party rights results in a restriction that prevents or limits the use of digital content or services.<sup>58</sup> Remedies for lack of conformity are set out in Article 14 DCSD, which follows the hierarchy of remedies already established in the CSD.<sup>59</sup> The consumer is entitled to have the digital content or service brought into conformity unless this is impossible or would impose disproportionate costs on the trader.<sup>60</sup> The trader can remove the legal defect by reaching an agreement with the rightsholder, for example, by obtaining an appropriate licence. Alternatively, if the third-party right pertains only to certain parts of the computer code or a specific function of the program, the trader may replace that part of the digital

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<sup>57</sup> Gomulkiewicz, R. W., *Legal Protection for Software: Still a Work in Progress*, Texas Wesleyan Law Review, vol. 8, no. 3, 2002, p. 445.

<sup>58</sup> Renko, *op. cit.* (fn. 8), p. 173.

<sup>59</sup> Mišćenić, *op. cit.* (fn. 12), p. 237; Morais Carvalho, *op. cit.* (fn. 16), p. 358.

<sup>60</sup> See the discussion on impossibility and disproportionate costs in Gsell, B., *Article 14: Remedies for lack of conformity*, in: Schulze, R.; Staudenmayer, D. (eds.), *EU Digital Law: Article-by-Article Commentary*, C. H. Beck – Hart – Nomos, Baden-Baden, 2020, pp. 252–256.

content, where technically possible (e.g., via an over-the-air update), thereby avoiding the violation of third-party rights. In any case, the legal defect must be resolved within a reasonable time, free of charge, and without any significant inconvenience to the consumer, taking into account the nature of the digital content or service and the purpose for which the consumer acquired it.

More often than not, traders will not be able simply to request the rightsholder to waive the EULA or other restrictions arising from third-party rights.<sup>61</sup> If the trader fails to bring the digital content or digital service into conformity, the consumer is entitled to a proportionate reduction in the price or to terminate the contract. The price reduction must be proportional to the decrease in the value of the digital content or service compared to the value it would have had if it were in conformity. If the digital content or service is supplied over a period of time, the price reduction applies only to the period during which the digital content or service was not in conformity.

Since a price reduction is not possible when digital content or services are provided in exchange for consumer's personal data without monetary payment (Article 3(1) DCSD), the consumer's only "second level" remedy in such cases is the termination of the contract.<sup>62</sup> However, where a price has been paid, the consumer can terminate the contract only if the lack of conformity is not minor. The trader bears the burden of proof as to whether the restrictions arising from the violation of third-party rights can be considered minor. If the contract is terminated, the trader must fully reimburse the consumer, except for periods during which the continuously supplied digital content or service was in conformity (Article 14(6) DCSD).<sup>63</sup> After the termination of the contract, the consumer must refrain from using the digital content or service and from making it available to third parties (Article 17(1) DCSD).

The Directive allows Member States to decide whether consumers' remedies for lack of conformity are subject to limitation periods. However, such limitation periods should not prevent consumers from exercising their rights while the trader is liable for a lack of conformity.<sup>64</sup> Thus, national limitation periods should not be less than two years from the time of supply of the digital content or service, and they should last as long as the digital content or service is to be supplied continuously under the contract (Article 11(2) and (3) DCSD). Accordingly, Slovenian legislation (Article 116 ZVPot-1) provides that the

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<sup>61</sup> Spindler, *op. cit.* (fn. 2), p. 115.

<sup>62</sup> Gsell, *op. cit.* (fn. 60), p. 262.

<sup>63</sup> Renko, *op. cit.* (fn. 8), p. 177.

<sup>64</sup> Recital 58 DCSD.

trader is liable for any lack of conformity present at the time of supply or that becomes apparent within two years of the supply of digital content or services. If the contract provides for the continuous supply of digital content or services over time, the trader is liable for any lack of conformity that occurs or becomes apparent at any time during that period.

## 5. OTHER NATIONAL RULES

As an alternative to applying remedies for lack of conformity to legal defects of digital content and services, Article 14 DCSD allows Member States to retain national rules that provide for the nullity or rescission of the contract, for example, for breach of legal warranty against eviction.<sup>65</sup> In both cases, invalidity must apply to the contract as a whole rather than to specific provisions.<sup>66</sup> Oddly, Slovenian legislation chose to repeat this provision of the Directive almost verbatim, instead of referring to specific national rules.

Article 115 ZVPot-1 states that in the case of a legal defect, the consumer is entitled to remedies for lack of conformity of the digital content or service unless another law stipulates the nullity or rescission of the contract for the supply of digital content or a digital service due to a violation of third-party rights. Neither the law itself nor its preparatory materials<sup>67</sup> indicate which other laws might be applicable. No other legislation contains specific provisions dealing with remedies for the non-conformity of digital content or digital services. If any such *lex specialis* were to be adopted in the future, it could explicitly exclude the applicability of remedies under ZVPot-1, rendering such a reference unnecessary. Therefore, the reference to other laws providing for the nullity or rescission of the contract likely refers to the general rules of contract law, which also apply to contracts for the supply of digital content and services.

Under Article 35 OZ, a contract is null and void if the subject of the obligation is impossible or impermissible. However, both impossibility and impermissibility must exist in absolute terms for this provision to apply.<sup>68</sup> This is not the case with third-party rights, as it is always possible for the trader to obtain permission from the rightsholder and avoid violating their rights. Therefore, the rules on non-performance and defective performance of contractual obligations

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<sup>65</sup> Morais Carvalho, *op. cit.* (fn. 16), p. 348.

<sup>66</sup> Rosenkranz, *op. cit.* (fn. 4), p. 197.

<sup>67</sup> Predlog Zakona o varstvu potrošnikov, EVA: 2015-2130-0005, 12 July 2022.

<sup>68</sup> Kranjc, V., 35. člen: Ničnost pogodbe zaradi predmeta, in: Juhart, M.; Plavšak, N. (eds.), *Obligacijski zakonik s komentarjem: I. knjiga*, GV Založba, Ljubljana, 2003, p. 285.



apply, particularly the provisions on legal defects of performance, which apply to all bilateral contracts.<sup>69</sup>

Article 100 OZ states that each contracting party is liable for legal defects in their performance and must protect the other party from third-party rights and claims that would exclude or narrow the other party's rights. Rather than lay down general remedies for defective contractual performance, the OZ prescribes that its provisions on the seller's liability for factual and legal defects in goods sold should apply *mutatis mutandis* to these debtor's obligations in general. Since rules regarding sales contracts are intended for tangible goods, they must be appropriately adapted when applied to other types of contractual performance.<sup>70</sup>

Under Article 488 OZ, the seller is liable if a third party holds any right on the goods sold that excludes, reduces, or restricts the buyer's rights, provided the buyer was not informed of the third-party right and did not consent to receive the goods encumbered by it. Based on the legal text, it can be concluded that the very existence of a third party's right constitutes a legal defect.<sup>71</sup> Upon learning of the third-party right, the buyer can demand that the seller release the goods from such a right or claim within an appropriate period. If the seller fails to comply and the goods are taken from the buyer, the contract is rescinded *ex lege* (Article 490(1) OZ). Automatic rescission of the contract is the type of national-law remedy referred to in the final part of Article 10 DCSD. Although it is difficult to imagine a third-party rightsholder physically taking digital content from the consumer, a functionally equivalent result could be achieved by remotely triggering a DRM system that prevents the user from further accessing the digital content, leading to automatic rescission. On the other hand, the legal warranty against eviction does not apply to digital services, which cannot be "taken away" in the same sense.

Another provision for contract rescission in the case of legal defects is the buyer's option to withdraw from the contract under Article 490(1) OZ. The buyer must first request that the seller remove the legal defect from their performance. If the seller fails to do so within an appropriate period, the buyer may withdraw from the contract if the legal defect is of such a nature that it frustrates the

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<sup>69</sup> Plavšak, N., 100. člen – *Odgovornost za stvarne in pravne napake*, in: Juhart, M.; Plavšak, N. (eds.), *Obligacijski zakonik s komentarjem: 1. knjiga*, GV Založba, Ljubljana, 2003, p. 548.

<sup>70</sup> Plavšak, N., 488. člen – *Pravne napake*, in: Juhart, M.; Plavšak, N. (eds.), *Obligacijski zakonik s komentarjem: 3. knjiga*, GV Založba, Ljubljana, 2004, p. 254.

<sup>71</sup> Možina, D., *Kršitev pogodbe*, GV Založba, Ljubljana, 2006, p. 410.

purpose of the contract.<sup>72</sup> This provision can also apply to contracts for the provision of digital content or services.

On the surface, the mechanism of remedies available to consumers<sup>73</sup> under Slovenian law of obligations is almost identical to those for lack of conformity under Article 14 DCSD. However, the possibility for consumers to withdraw from the contract due to legal defects in digital content or services seems to be somewhat broader under Slovenian law, as this remedy is available regardless of whether the third-party right prevents or limits the use of the digital content or service. The consumer may withdraw from the contract whenever the trader fails to comply with their request to release the content from third-party rights or claims. As with the definition of legal defects under German law, a question may arise as to whether such a broadening of the scope of legal defects is compatible with the principle of full harmonisation.<sup>74</sup> In practical terms, however, the difference is negligible, as withdrawal under the OZ is only possible if the legal defect is of such a nature that it prevents the party from achieving the purpose of the contract. This provision reflects the principle that a contract should be upheld if possible (*favor contractus*) and conditions the right to terminate on the gravity of the breach.<sup>75</sup> In most cases, this requirement brings the situation back to that outlined in Article 10 DCSD: the remedy is only available where third-party rights prevent or limit the use of the digital content or service in accordance with the contract. Therefore, the “national” right of withdrawal provides no obvious advantages for consumers compared to the remedies under the DCSD.

## 6. CONCLUSION

The DCSD aims to fully harmonise the rules on liability for legal defects in digital content and services supplied to consumers across the Digital Single Market. Since third-party rights frequently apply to digital content and services, the focus is on ensuring their compatibility with the conformity requirements for digital content or services, rather than guaranteeing the absence of third-party rights, as is generally expected for tangible. It is likely that most disputes concerning legal defects in digital content and services will revolve around the issue

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<sup>72</sup> *Ibid.*, pp. 260–261.

<sup>73</sup> The provisions of the OZ also apply to B2B contracts, but this discussion is limited to the scope of the DCSD, which only concerns B2C contracts.

<sup>74</sup> See Gsell, *op. cit.* (fn. 60), p. 262.

<sup>75</sup> Možina, *op. cit.* (fn. 71), p. 410.

of compatibility of the licensing terms under which these are made available to the consumer with the contracts for their supply.

Compared to the proposed CESL rules, the DCSD appears to have reduced the level of consumer protection against “dormant” legal defects. Rather than requiring the trader to clear all third-party rights in advance, the DCSD holds the trader liable only when specific restrictions on the use of digital content or services are imposed on the consumer due to a violation of third-party rights. This creates legal uncertainty for consumers who discover that their use of digital content or services may be unlawful, but no action has been taken against them by the rightsholder. Nevertheless, this solution can be viewed as a reasonable recognition of the fact that the state of IP rights on digital content and services is often so complex that fully clearing all rights in advance is practically impossible.

Due to the full harmonisation principle, the DCSD rules on liability for third-party rights concerning digital content and services should be applied uniformly across all Member States. However, Article 14 DCSD, which permits the use of national rules for rescission or nullity as remedies for legal defects, appears to give Member States some leeway to expand the concept of legal defects in digital content and services for the purpose of using these national remedies. This is the (unintentional) outcome of the Slovenian implementation of the DCSD in ZVPot-1, which, by referencing the general rules of contract law, allows consumers to withdraw from the contract whenever the trader fails to address their request to release the content from third-party rights or claims. This remedy is available regardless of whether the violation of third-party rights has resulted in a restriction on the use of digital content or service (as required by Article 10 DCSD), provided the consumer can prove that the legal defect frustrates the purpose of the contract.

The dual standard for legal defects in digital content and services under Slovenian law is inconsistent, particularly since a stricter remedy (rescission) is tied to a broader concept of legal defects. A more coherent approach would be to interpret all remedies for third-party rights concerning digital content or services in line with the conditions defined in Article 10 DCSD.<sup>76</sup> European legislators, however, should reflect on the question of whether the option of recourse to additional national remedies, which weakens the internal consistency of the harmonised rules for digital content, is truly necessary to protect consumers in the Digital Single Market.

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<sup>76</sup> Such an interpretation could be supported by the wording of Article 10 DCSD, which allows for the use of national provisions of nullity or rescission of the contract “in such cases” – i.e., the cases defined in Article 10 DCSD.

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Sažetak

Matija Damjan\*

**ODGOVORNOST ZA PRAVNE NEDOSTATKE DIGITALNOG  
SADRŽAJA I DIGITALNIH USLUGA IZ PERSPEKTIVE  
SLOVENSKEG PRAVA**

*Digitalni sadržaj i digitalne usluge koji se pružaju potrošačima često su podložni pravima trećih strana koja mogu ograničiti potrošačevu uporabu tog sadržaja ili usluge. Prema Direktivi o digitalnom sadržaju i uslugama, države članice moraju potrošačima osigurati pravna sredstva u slučaju neusklađenosti ako prava trećih strana onemogućavaju ili ograničavaju služenje digitalnim sadržajem ili uslugama na način koji je suprotan ugovoru o isporuci. Pravna sredstva za pravne nedostatke definirana su analogno nedostatku materijalne usklađenosti digitalnih dobara i usluga. Međutim, izričaj Direktive ne pojašnjava prava potrošača u slučajevima kada im je i dalje omogućen pristup digitalnom sadržaju ili usluzi, ali to mogu činiti samo kršeći prava trećih strana. Iako Direktiva teži punoj harmonizaciji, dopušta državama članicama zadržavanje nacionalnih pravila koja omogućuju ništetnost ili raskid ugovora u slučajevima pravnih nedostataka. Ovaj rad ispituje koja pravila slovenskog obveznog prava mogu doći do primjene.*

*Ključne riječi: digitalni sadržaj, digitalne usluge, pravni nedostatci, prava trećih strana, pravna sredstva*

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