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The Turkish Approach Regarding Regulating Digital Content and Digital Services

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Abstract

Digital material is an established aspect of our everyday lives. Digital content providers are meeting an increasing number of requirements for education, entertainment, and communication from society. However, the use of digital content has posed a challenge to legal frameworks that are based on traditions, since a consumer transaction is frequently a mix of both goods and services. In the absence of an effective legal framework, it would be difficult to provide solid protection to consumers while trying to find a balance between them and other market participants. Currently, there are not any specific provisions related to digital content or digital services in the Turkish consumer legislation. In this paper, there will be recommendations for Turkish legislation on how digital content and digital services should be regulated.

A. General Introduction Regarding Digital Content and Digital Services

The legal transaction on the internet goes into two divisions as offline and online electronic commerce (E-Commerce) legal transactions.¹ Offline E-Commerce transactions, which is also called indirect legal transactions, is the parties drawing up a contract online, but carrying out the conventional obligations such as the delivery of a book, toy, clothes, the discharge of services, the payment of sales takes place in a more traditional way, which is offline.² Therefore, the sale of a tangible possession online will always constitute an indirect E-Commerce transaction and the delivery of tangible possessions related to the providing of a service, for example, the physical delivery of a plane ticket bought through the internet, therefore, will create an indirect E-Commerce transaction.

In contrast to this, in the act of parties, not only drawing up a contract but also conveying all the conventional obligations through the internet, in other words online discharging is a matter of E-Commerce transactions which is called online legal transactions.³ Here, the goods or services are directly available on the internet as digitised, but the drawing of contract and discharge of it takes place online. Such online legal transaction is possible for the goods without physical existence, like services exclusively online. The delivered good or the provided service needs to be digital or digitalised, like the sale of a computer program that is uploaded to the buyer's hardware through the internet, film, music,

¹ Ümit Gezder, 'Elektronik Ticaret Hukukî İşlemlerinin Ayrimi – Dijital İçerik Ve Hukukî Niteliği' (2016) 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.

² Ibid.

³ Ibid.

or electronic book will require an online legal transaction.⁴ Internet database contracts are one of the most typical examples of online legal transactions.

The ever-growing technology creates a great potential for direct E-Commerce by fastening the transportation of data and the time of uploading including sound, visual online.⁵ Therefore today, we can obtain a computer program or software that will be installed on our computers or an album of an artist in a few different ways.

The first way to do this would be the traditional one. In other words, we can go to the store that sells these products physically and buy this software or music that is inserted into a CD. Another way would be buying these CDs by drawing up a contract through internet devices and the traditional mail delivery. The delivery of the mentioned products is done traditionally, which means the computer software or the music albums is delivered to us via tangible possessions. These are indirect E-Commerce legal transactions.⁶ Another way is drawing up the contract for this software or music album, as in the second section, taking place online but the data in the CDs would be sent and uploaded to our computers. These are direct E-Commerce legal transactions.⁷ Hence, digital content such as computer software, videos, and sound recordings can be delivered by either tangible data carriers or by electronic communication devices.

The great transformations in trade brought on by computer technology result in various legal problems. Faster networks and technically more developed devices have made the commerce of digital content through distance selling contracts more impactful.⁸ Digital material, such as computer software, music, and movies, can now be subject to online electronic commerce legal transactions owing to advances in computer technology that have sped up data transport and reduced loading times.⁹ The shift from delivering digital content mainly on tangible mediums such as CD's, to delivering the content as downloads created various legal problems in Turkey as it did on an international level too.

⁴ Ibid.

⁵ Janja Hojnik, 'Technology Neutral EU Law: Digital Goods Within The Traditional Goods/Services Distinction' (2017) 25 International Journal of Law and Information Technology.

⁶ Ümit Gezder, 'Elektronik Ticaret Hukukî İşlemlerinin Ayrımı – Dijital İçerik Ve Hukukî Niteliği' (2016) 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.

⁷ Ibid.

⁸ Joshua M. Warburton, 'An Innovative Legal Approach To Regulating Digital Content Contracts In The EU' (2016) 7 Journal of Intellectual Property, Information Technology and Electronic Commerce Law.

⁹ Ibid.

Currently, there are not any specific provisions related to digital content or digital services in the Turkish consumer legislation. Even though Turkish legislation generally has an aim to harmonise European Union Directives into Turkish law, especially the Directive on the Digital Content and Digital Services is yet to be harmonised. In addition to this, there is only the definition of the digital content in the Regulation on Distance Selling Contracts, with reference to the Law on the Protection of Consumer, numbered 6502. This would be understood as the provisions of the relevant Law might be applied to all of the digital content and digital services. There are several questions and issues that might come across here.

The first and the most important thing to question might be regarding conformity standards and remedies. Digital content and digital services are a new type of commodity for the whole of the World. However, states often base their codifications on the same distinction, whether there is a good or there is a service in the case.¹⁰ As a result, digital content or digital services generally cannot find their absolute place in this codification system.

Secondly, this unclear system might lead to a bigger problem which should be the aim of Turkish codification, which is the protection of the consumer. If there is an ambiguity about the conformity standards and the remedies that can be accessed by the consumers' in the case of lack of conformity, protecting the consumer is going to be difficult. This would also affect the economic market regarding digital content and digital services since the consumers would get afraid easily while purchasing.

Although, defining explicit criteria for conformity is not easy due to various reasons like digital content and digital services' nature and their constant change in the market. Because of these reasons, there should be explicit provisions related to digital content and services.

In this paper, first of all, the main problems that come with digital content and digital services will be examined. The ambiguity regarding the legal status of digital products, the challenges of having an effective legal framework related to this topic, not having a universal standard for the essential features of the digital content and services, the complex nature of the digital content and services, and the difficulty that might arise while defining a conformity test in legal systems for these products can be given as main examples to the various problems. Secondly, the approach of the European Union will be

¹⁰ Dominika Bezakova, 'Consumer Rights Directive And Its Implications For Consumer Protection Regarding Intangible Digital Content' (2013) 7 Masaryk University Journal of Law and Technology.

analysed. This analysis will be based on the background and the current directives of the European Union regarding digital content and digital services. Especially the subjective and objective requirements for conformity and remedies for lack of conformity will be emphasised. Thirdly, the Turkish approach regarding the topic will be examined. The background of the legislation related to digital products and the current regulations will be told, with emphasis on the conformity standards and remedies in the case of lack of conformity. Lastly, the paper will be concluded by the recommendations for how this topic should be regulated in Turkey.

B. The Main Problems Related to Digital Content and Digital Services

Goods, as a rule, are discussed under two branches as tangible and intangible goods.¹¹ In the true sense of the word, tangible goods are things that have a physical existence, are felt or occupant. Intangible goods are things that do not have a physical existence, are not felt or occupant. Since the term good is both natural and legal, what is considered a good will be decided by the national legal system.¹²

The shift from tangible commodities to intangible things is probably one of the most noticeable aspects of digital marketplaces.¹³ Instead of producing and selling a physical book at a bookshop, the same book may now be accessible in electronic form and made available for download. Music may be purchased in the form of physical CDs as well as intangible MP3 files.

However, the legal status of digital material is still not clear. Although intangible digital content or services share many characteristics with tangible ones, they do not fit well with the traditional consumer law framework since many rules are designed for tangibles.¹⁴ Countries frequently use consumer sales provisions in the event of a lack of conformity in digital content and they apply the provisions either directly or through extending the reach of sales law rules.¹⁵

An effective legal framework is required to ensure that the digital content or services that customers buy meet their expectations such as safety and high level of quality, that digital content is provided under

¹¹ Ümit Gezder, 'Elektronik Ticaret Hukukî İşlemlerinin Ayrimi – Dijital İçerik Ve Hukukî Niteliği' (2016) 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.

¹² Ibid.

¹³ Marco Loos and others, 'The Regulation Of Digital Content Contracts In The Optional Instrument Of Contract Law' (2011) 6 European Review of Private Law.

¹⁴ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

¹⁵ Joshua M. Warburton, 'An Innovative Legal Approach To Regulating Digital Content Contracts In The EU' (2016) 7 Journal of Intellectual Property, Information Technology and Electronic Commerce Law.

fair conditions, and that they can enforce their rights, even in different jurisdictions, if there is a conflict.¹⁶ Therefore, consumer law plays an essential role in promoting the digital economy by informing consumers about their rights and ensuring that these rights are appropriate and effective.

For example, if there are not any legal conformity standards, every time a new contract is signed, the customer and the merchant would have to agree on the features of the digital content and services.¹⁷ This is ineffective since it would waste time and money. Moreover, since the quality of most things sold can only be determined after using them, it would make the agreement extremely difficult.

Currently, there is no universal standard for what constitutes the essential features in terms of digital content. There is also no consensus on the degree of functionality that consumers are entitled to demand.¹⁸ What a customer may do with a book or music is mainly determined by the usage rules for digital material in general. A presentation of the digital content's capabilities, qualities, and features may affect the consumer's expectations. Similarly, if the digital material does not match the descriptions supplied by the trader or is not properly packed or labelled, it will not be in compliance with the contract.¹⁹

The fast creation of new forms of digital material is one significant factor contributing to the lack of widely agreed quality standards. However, the fact that newer, higher-quality digital material has been available on the market does not mean that previously available digital content is now regarded as inadequate.²⁰

In addition to these, different sorts of compliance issues can be discovered regarding digital content and services. These can be classified mainly into three groups. First, there can be difficulties with functionality or accessibility; secondly, there are issues with poor quality; and finally, there are flaws, and other security and safety risks.²¹ It should be emphasised, that some issues might be categorised in more than one of the groups. For example, if a software includes a fault, posing a security risk, this situation would be categorised as both a security and a quality issue.

¹⁶ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

¹⁷ Christian Twigg-Flesner, 'Conformity Of Goods And Digital Content/Digital Services' [2020] Esther Arroyo Amayuelas & Sergio Cámara Lapuente (dirs.), *El Derecho privado en el nuevo paradigma digital*.

¹⁸ Janja Hojnik, 'Technology Neutral EU Law: Digital Goods Within The Traditional Goods/Services Distinction' (2017) 25 *International Journal of Law and Information Technology*.

¹⁹ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

²⁰ Marco Loos and others, 'The Regulation Of Digital Content Contracts In The Optional Instrument Of Contract Law' (2011) 6 *European Review of Private Law*.

²¹ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

Access issues are at the top of the list of difficulties customers have encountered with digital material.²² Accessibility problems come in a variety of forms. There can be difficulties with technical access, such as the ability to listen, play, and view digital material on various types of devices. In this context, device compatibility and technical formats are important as much as the problem of convergence, which refers to the capacity to send and receive the same material using diverse systems such as satellite, cable, or the Internet.²³ Moreover, problems of security and safety form a huge worry, especially in the internet world, where viruses and other destructive technologies may move quickly. Because online services require an Internet connection, they are vulnerable to external assaults, yet customers have little control over this.

Another problem regarding the topic is since not all of the digital material is available entirely online or via mobile networks, various digital content mix the features of product sales and service supply.²⁴ Software sales might include the sale of a physical copy of the programme while offering an online update service and a remote software help service.

Determining whether or not digital material falls within the category of goods or services is a critical problem in the context of consumer law. Music, books, movies, and software can be supplied on physical media like a CD or via electronic methods. It has been claimed, particularly in German doctrine, that the medium in which digital material is contained plays an important role in determining whether the content is tangible or intangible.²⁵ For example, if a movie is on a DVD it would be determined as tangible, while the same movie downloaded over the Internet would be intangible. It's difficult to apply this criterion to a wide range of digital materials that are neither good nor pure service. When defining the purchase of an internet-based game with a weekly subscription, the installation software, for example, might be classified as a digital item, while the subscription could be classified as a service. There is an obvious service element also in the case of how anti-virus software must be updated on a regular basis to be effective.²⁶

Following that, the topic of how long the digital content must be effective and accessible should be addressed. Consumers will be able to upgrade their digital content on a regular basis to keep up with

²² Ibid.

²³ Ibid.

²⁴ Janja Hojnik, 'Technology Neutral EU Law: Digital Goods Within The Traditional Goods/Services Distinction' (2017) 25 International Journal of Law and Information Technology.

²⁵ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

²⁶ Ibid.

such changes, ensuring that they can continue to utilise the digital material.²⁷ If the parties have agreed to such updates and they are not supplied, this will be considered a breach of contract.

It's difficult to tell whether types of digital material are sufficiently tangible from the view of consumer contract law to fall within the definition of good and thus be eligible for such remedies in the event of non-conformity.²⁸ It's possible that the classification will have to be done by a case-by-case approach since not every piece of digital content constitutes a good or service.

In contrast to this, the fact that digital content is not considered good does not mean that consumer sales laws do not apply to it. Some nations, such as France, broadened the scope of legislation by making it relevant to categories other than goods, such as digital material, which can be interpreted as rights, services, or a sui generis thing.²⁹

Despite the fact that contract categorisation regarding digital content and services is difficult, legal systems often do not vary in their ways while determining lack of conformity in the case of digital materials. In most legal systems, the question of whether digital material meets the buyers' reasonable expectations is resolved from an objective view.³⁰ This implies that the conformity test can be applied in the same way as it has been for traditional goods. Overall, this test seems to be able to accommodate the variations between different contracts related to digital content, just like the test is flexible enough to be used for diverse commodities like toys, food, automobiles, or furniture.³¹

Applying consumer protection rules to digital content is a complex and contentious topic. On the one hand, the digital sector has underlined the distinctions between digital content and tangible commodities. Digital products are constantly changing and their functionality is highly dependent on the technical context in which they operate. Consumers, on the other hand, should be able to anticipate a comparable degree of protection, notwithstanding the fact that their legitimate interests and expectations may differ.³²

²⁷ Jozefien Vanherpe, 'White Smoke, But Smoke Nonetheless: Some (Burning) Questions Regarding The Directives On Sale Of Goods And Supply Of Digital Content' (2020) 28 *European Review of Private Law*.

²⁸ *Ibid.*

²⁹ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

³⁰ *Ibid.*

³¹ *Ibid.*

³² Marco Loos and others, 'The Regulation Of Digital Content Contracts In The Optional Instrument Of Contract Law' (2011) 6 *European Review of Private Law*.

To sum up, a balanced approach should be taken, taking into consideration the interests of both consumers and the digital sectors. Market actors should not approach customers with undeveloped technology. Furthermore, customers' equipment should not be exposed to new vulnerabilities as a result of the design of digital material, and systems should allow customers to define their own rules and degrees of security for their own devices.³³ These considerations must be reflected in digital consumer law, which must reflect the concerns of digital consumers as well as the problems that emerge in the application of current consumer law.

C. The European Union Perspective Regarding The Digital Content and Digital Services

C.1. The Background of the Regulation Related to the Digital Content and Digital Services in the European Union

Consumer law in Europe is mainly organised on the division between goods and services.³⁴ Many European consumer regulations make this difference, with separate legal implications linked to a consumer contract depending on whether the purchase is for a good or service. Because consumer law is historically focused on preserving fair and standardised consumer expectations, such "de-standardization" has normative consequences.³⁵

Consumer protection in regard to digital content purchased may be dependent on whether it is classified as a good or service and this contradiction may cause legal confusion because of the many legal ramifications linked to consumer transactions involving products or services. Part of the ambiguity stems from the lack of uniformity in the definitions of commodities and services, both at the national and international levels.

For example, in the German Doctrine, the corporeal criterion is brought forward to qualify as property. This corporeal criterion brings a restriction between property and service in the drawing of a contract that is conducted electronically. If there is a combination of property and service, the decision will be given according to their presence in the case.³⁶ According to the common opinion in the German Doctrine, if digital content is sold via tangible data carrier such as a CD, there is a sale of a product.³⁷

³³ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ümit Gezder, 'Elektronik Ticaret Hukukî İşlemlerinin Ayrimi – Dijital İçerik Ve Hukukî Niteliği' (2016) 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.

³⁷ Ibid.

But a problem occurs if the software is sold via the internet and without a tangible data carrier. Because corporeal criterion does not help in this situation. In this case, it is pointed out that corporeal criterion is not a determinant and on the grounds of this, the acceptance of electricity as good is being shown.³⁸

Furthermore, the fact that a contract is classified as a service does not give a specific answer as to which regulations would apply since the rules of services have been undeveloped.³⁹ Despite the fact that principles of contract law generally include provisions that might serve as the foundation for a comprehensive system of services, these provisions are often relatively unevolved. Service contract regulations are, in general, a patchwork of laws created by the courts or lawmakers.⁴⁰

The European Commission's 2014–2019 goals include completing the so-called "Digital Single Market," which envisions a market in which products and services can flow freely and online activities can be conducted safely and smoothly.⁴¹ The Commission's objectives in this area included making electronic commerce simpler. A variety of legislative measures have been launched at the European Union level over the years in order to attain these aims.⁴²

Two new directives were signed as a result of these goals on the 20th of May in 2019 called "Directive (EU) 2019/771 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"⁴³ and "Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services".⁴⁴ By July 1, 2021, the European Union Member States must have converted both Directives into their national legislation. The new regulations are planned to go into effect on January 1, 2022.

³⁸ Ibid.

³⁹ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

⁴⁰ Ibid.

⁴¹ Jozefien Vanherpe, 'White Smoke, But Smoke Nonetheless: Some (Burning) Questions Regarding The Directives On Sale Of Goods And Supply Of Digital Content' (2020) 28 European Review of Private Law.

⁴² Ibid.

⁴³ 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.

⁴⁴ 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.

According to article 3 of the new Consumer Sales Directive (2019/771), the rules are applicable to sales contracts and contracts for the supply of goods to be manufactured and produced.⁴⁵ In contrast to this, the scope of application for the Directive 2019/770 is the supply of digital content and services.⁴⁶

The Directive on the supply of digital content and digital services intends to harmonise several essential components of business-to-consumer contracts by contributing to the effective functioning of the economy while ensuring consumer protection.⁴⁷ To do this, The Directive tries to level up legal certainty for both businesses and customers.⁴⁸ The responsibility to supply digital content or service, the conformity of these with the contract, remedies in the circumstances of lack of conformity, the methods for enforcing the remedies, and the adjustment of digital content or service are among the important parts that have been harmonised.⁴⁹

Even though the legal status of contracts on the delivery of digital content and services is left to the discretion of the Member States, they must establish a standard regime for the execution of the supply obligation.⁵⁰ Member States will also have freedom in terms of the legality of goods, damages, contract validity, formation, effects, or nullity, contract termination consequences, and some aspects of the contract such as where the seller must fulfil his obligations. Member states are also able to set longer time limitations for the seller's responsibility than those set forth in the Directives.⁵¹

Both Directives provide a clearer explanation of the standards to be utilised in determining compliance with the contract.⁵² Since technology constantly advances forward, it is believed that new directives should be in a future-proof way.⁵³

C.2. Current Legislation Regarding the Digital Content and Digital Services in the European Union

The European Commission has made significant efforts to modernise many fields of European law under the banner of the Digital Single Market in order to prepare the domestic market to embrace

⁴⁵ Article 3 of the Directive 2019/771.

⁴⁶ Article 3 of the Directive 2019/770.

⁴⁷ Article 1 and 4 of the Digital Content Directive 2019/770.

⁴⁸ Recital 3 and 6 of the Directive 2019/770.

⁴⁹ Article 1 of the Digital Content Directive 2019/770.

⁵⁰ Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 And 2019/771' [2019] SSRN Electronic Journal.

⁵¹ Ibid.

⁵² Caroline Cauffman, 'New EU Rules On Business-To-Consumer and Platform-To-Business Relationships' (2019) 26 Maastricht Journal of European and Comparative Law.

⁵³ Recital 10 and 19 of the Digital Content Directive 2019/770.

different problems created by evolving technologies.⁵⁴ Consumer law was one of those areas that were in need of modernising.

The European Commission has decided to proceed with the directives intended to improve the existing provisions on the sale of goods contracts by addressing the new type of goods such as products with digital features meanwhile establishing a new legal structure for the delivery of digital content and services.⁵⁵ As a result of these studies, “The Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services” and “The Directive (EU) 2019/771 concerning contracts for the sale of goods” published in the Official Journal of the European Union on 22 May 2019.⁵⁶

When digital content is included in or related to a moveable asset, it is subject to the Consumer Sales Directive (Directive 2019/771); in other circumstances, it is subject to the directive on the supply of digital content and digital services (Directive 2019/770).⁵⁷ The Directive on the supply of digital content and digital services is not applicable to digital content and services that are embedded in or interconnected with goods that have digital features or are offered as a part of a sales contract for such goods.⁵⁸

According to Article 2 of the Digital Content Directive, digital content is “data which are produced and supplied in digital form” while digital services are defined as “a service that allows the consumer to create, process, store or access data in digital form” or “a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service.”⁵⁹

It's worth noting that this Directive also applies to contracts using a physical copy that's employed solely to transport digital material such as music CDs.⁶⁰ Directive 2019/770 also applies in the case of a customer downloads a song from iTunes, signs a contract with Netflix to have access to the company's content, or signs a contract with a journal to receive daily digital editions of a newspaper through e-mail.⁶¹

⁵⁴ Jorge Morais Carvalho and Martim Farinha, 'Goods With Digital Elements, Digital Content And Digital Services In Directives 2019/770 And 2019/771' (2020) 2 *Revista de Direito e Tecnologia*.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Article 3 and 4 of the Directive 2019/771.

⁵⁸ Article 3 of the Digital Content Directive 2019/770.

⁵⁹ Article 2 of the Digital Content Directive 2019/770.

⁶⁰ Article 3 of the Directive 2019/770.

⁶¹ *Ibid.*

Even though, the Digital Content Directive lacks a definition of supply, Article 5 outlines what a seller must do to meet the responsibility to deliver digital material. To provide it, the seller must make the digital content, or any method for accessing it, available to the buyer or to a physical or virtual location designated by the buyer for this purpose.⁶²

Both in terms of structure and substance, the standards for tangibles and digital content and services are remarkably similar in the new Directives. Also, The Consumer Rights Act of 2015 in the United Kingdom used a similar strategy. The concept of conformance is developed like a part of the sale of products, while transactions for the delivery of digital content have certain unique characteristics.⁶³ As a result, digital material may demand a more customised requirement than a significantly modified version that applies to goods.

However, due to digital content and service's nature, the topic of lack of conformity involves legal flaws. When evaluating non-conformity, the usual purpose concept refers to a criterion against which the consumer's intended use of the object is assessed.⁶⁴ For example, Recital 32 of the directive 2019/771 mentions that goods should have the durability that has been waited from the nature of them to provide the conformity such as the need for regular maintenance or reasonable inspection.⁶⁵ The issue with digital content is that a standard does not exist yet due to a variety of factors' contributions. To begin with, digital content contracts are a new concept and this industry is primarily determined by its technical environment and ongoing quick improvements.⁶⁶ Moreover, there are several forms of digital material and a high degree of product variety. Furthermore, the consumer's expectations will be shaped by previous experiences with traditional items, by comparing them to the digital material being purchased.⁶⁷ For example, buyers are accustomed to playing a CD on different platforms, thus they expect to play downloaded digital material on various platforms too. As a result, consumers have come to anticipate certain traditional characteristics from digital items.

It's difficult to tell whether the digital content fulfils the consumer's reasonable expectations since quality standards are unclear. Regardless of the lack of universally applicable objective criteria for

⁶² Article 5 of the Directive 2019/770.

⁶³ Christian Twigg-Flesner, 'Conformity Of Goods And Digital Content/Digital Services' [2020] Esther Arroyo Amayuelas & Sergio Cámara Lapuente (dirs.), *El Derecho privado en el nuevo paradigma digital*.

⁶⁴ Article 7 and 8 of the EU Directive 2019/770.

⁶⁵ Recital 32 of the Directive 2019/771.

⁶⁶ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

⁶⁷ *Ibid.*

quality, it will be obvious if the digital content's quality does not meet the contract's requirements.⁶⁸ Quality issues typically emerge when digital content is of low visual or audio quality owing to technological flaws, or when digital content is corrupted, resulting in poor quality.

To begin with Article 6 of the Digital Content Directive, the trader is required to comply with both subjective and objective standards, and any lack of conformance originating from inappropriate integration of digital material is treated under lack of conformity.⁶⁹ The reference to 'without prejudice to Article 10' in article 6 aims to take into account the contract law systems that see third party right violations as contract nullity owing to the inability of fulfilling it.⁷⁰

According to article 7 of the Digital Content Directive, the subjective requirement applies to digital material or services that are expressly mentioned in the agreement between the buyer and the seller, such as where the customer has specified a purpose for the digital product is necessary.⁷¹ Regardless of what may be specified in the contract, each directive has objective criteria and they should be fulfilled in every transaction.⁷²

Objective conformity provisions begin in Article 8 and the first aspect of the objective criteria is that the digital material is appropriate for the purposes for which it is typically used.⁷³ Article 8 of the Digital Content Directive is similar to Article 7 of the Sale of Goods Directive in that it requires digital material to be of the amount, quality, and performance attributes that are usual for digital content or digital services of the same sort and that the customer can reasonably expect.⁷⁴

Although objective criteria for digital content and services cannot be easily determined because of the nature of products, several characteristics and performance aspects have been adapted to digital material and services as well. Functionality, compatibility, accessibility, continuity, and security are the five criteria that can be found in the article.⁷⁵ While determining this, questions like whether different contract types under national laws should be examined or whether the criteria should only be assessed

⁶⁸ Article 7 of the Directive 2019/770.

⁶⁹ Article 6 of the Directive 2019/770.

⁷⁰ Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 *European Review of Contract Law*.

⁷¹ Article 7 of the Directive 2019/770.

⁷² Article 8 of the Directive 2019/770.

⁷³ Christian Twigg-Flesner, 'Conformity Of Goods And Digital Content/Digital Services' [2020] Esther Arroyo Amayuelas & Sergio Cámara Lapuente (dirs.), *El Derecho privado en el nuevo paradigma digital*.

⁷⁴ Article 8 of the Directive 2019/770 and Article 7 of the Directive 2019/771.

⁷⁵ Article 8 of the Directive 2019/770.

on the basis of products such as the reasonable expectations of consumers raises.⁷⁶ However, it should not have been forgotten that states are free to decide on the type of relevant contracts and this might lead to different outcomes.⁷⁷ For example, a state may define a cloud service as a service, while another state may label it as a rental contract.

In the Digital Content Directive, neither accessibility nor continuity is described. It's reasonable to infer that accessibility refers to a user's ability to access digital content, such as when it's only available online and not loaded on their device.⁷⁸ Similarly, continuity will refer to a customer's opportunity to reach digital material at any time within the contract duration.⁷⁹

If the customer was entitled to continuous access, or if the digital material is not delivered within the performance timeframe, it is considered non-performance.⁸⁰ When a consumer is unable to access digital material or use it for its intended aim, the question of whether this constitutes non-conformity emerges. When consumers access digital material, they may expect it to work smoothly. In this regard, it is important to highlight that when digital material does not function as expected, it is considered non-conforming to the contract.⁸¹

To be compatible with conformity standards, digital content and services frequently need upgrades.⁸² Some are required to keep the digital material running and to address security concerns, while others are optional. The updating responsibility for one-off contracts continues for a reasonable amount of time and even in some situations, there might not be any need for updates such as buying digital pictures.⁸³ Article 8 of the Digital Content Directive recognises the importance of updates by requiring the seller to provide updates to the client.⁸⁴ In terms of the time during which the seller is bound by this duty, Article 8 reflects Article 7 of the Sale of Goods Directive if the digital material is provided by a single act. Article 8 of the Digital Content Directive states that if digital material is to be given constantly over a period of time, the seller's responsibility continues for the duration of that term,

⁷⁶ Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 *European Review of Contract Law*.

⁷⁷ *Ibid.*

⁷⁸ Christian Twigg-Flesner, 'Conformity Of Goods And Digital Content/Digital Services' [2020] Esther Arroyo Amayuelas & Sergio Cámara Lapuente (dirs.), *El Derecho privado en el nuevo paradigma digital*.

⁷⁹ *Ibid.*

⁸⁰ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

⁸¹ *Ibid.*

⁸² Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 *European Review of Contract Law*.

⁸³ *Ibid.*

⁸⁴ Article 8 of the Directive 2019/770.

which may be unlimited but is frequently based on subscription terms.⁸⁵ Since digital content and services are frequently supplied in a continuous manner over a term rather than as a one-time act like goods, Article 8 of the Digital Content Directive stipulates that the digital product must be in conformity through all of the contractual period.⁸⁶

There is not a direct obligation for customers to update their digital goods or services in the Digital Content Directive. According to Recital 47 of the Directive, consumers are free to choose whether they will update or not.⁸⁷ Although, according to the directive, customers cannot request remedies if they did not update their digital products within a reasonable time if the traders warned them about the legal outcomes.⁸⁸ Due to this, it can be said that even the directive does not talk about this obligation explicitly, it shows indirectly.

Another difficult question to answer is whether digital material may be labelled non-conforming if it was appropriate for use at the time of transmission but quickly became obsolete owing to technological advancements. The primary focus must be that the digital material may be accessed using a standard operating system and software at the time the contract is signed.⁸⁹ Any lack of conformity that exists during the time of supply of the products shall be a responsibility of the buyer, however, this responsibility shall be limited to a specific time for demonstrating the lack of conformity.⁹⁰ This limit is two years in the new Consumer Sales Directive⁹¹, which involves products with digital features, as well as in Digital Content Directive, but only if the relevant contract allows only a single act of supply or a series of individual acts of delivery.⁹² If the sides agreed to a regular supply for a set length of time, the seller is responsible if the lack of conformity that is discovered during that time.⁹³

In addition to these, the type of security standards that should be involved in contracts has not been defined by the Digital Content Directive. Since the majority of Member States have yet to establish dependable standards, this aspect is not expected to become clear relatively soon.⁹⁴ However,

⁸⁵ Ibid.

⁸⁶ Article 11 of the Directive 2019/770

⁸⁷ Recital 47 of the Directive 2019/770.

⁸⁸ Article 8 of the Directive 2019/770.

⁸⁹ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

⁹⁰ Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 And 2019/771' [2019] SSRN Electronic Journal.

⁹¹ Article 10 of the Directive 2019/771.

⁹² Article 12 of the Directive 2019/770.

⁹³ Article 11(3) of Directive 2019/770.

⁹⁴ Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 European Review of Contract Law.

the customer must have installed the existing updates about security that have been supplied by the trader to request remedies in the case of a security breach.⁹⁵ Additionally, the trader cannot be held responsible for risks related to security that emerge over time as a result of changes in the digital environment.⁹⁶ For example, the consumer may install new software which leads to a security breach.

Polish Supreme Court has stated that in determining whether there is a lack of conformity with digital content, it is necessary to consider technical specifications, while also examining factors that would render the digital content unfit for its intended aim, or lowering its effectiveness or value.⁹⁷ This proves that applying the traditional conformity test is not simple at all since, in contrast to tangibles, it is unclear what the buyer may anticipate from digital products.

If there is a lack of conformity with the digital content or service, the customer should have the right to bring the relevant content or service into conformity, receive a price reduction, or terminate the contract.⁹⁸ Bringing into conformity for digital content and services should be without any charge, happen in a reasonable time period, and it should not bring any inconvenience to customers.⁹⁹ The main criteria for the reduction of price and contract termination are bringing goods into conformity should be unavailable or using primary remedies should not give a positive result, or there should be trader's declaration about the refusal of bringing goods into conformity.¹⁰⁰

The provisions about remedies in the Digital Content Directive are based on the Consumer Sales Directive's core structure.¹⁰¹ Both Directives include a hierarchy for remedies, with the first step being to bring digital content or services into compliance, followed by the consumer's right to a proportionate price reduction or contract termination.¹⁰² The key distinction in the topic of remedies between the two Directives is the Digital Content Directive excludes repair and replacement from the list of options for bringing digital content or services into conformity.¹⁰³ However, the notion is questionable since it is understood that repair and replacement are only appropriate for goods.

⁹⁵ Article 8 of the Directive 2019/770.

⁹⁶ Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 *European Review of Contract Law*.

⁹⁷ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

⁹⁸ Article 14 of the Digital Content Directive 2019/770.

⁹⁹ Articles 13 of Directive 2019/771 and article 14 of Directive 2019/770.

¹⁰⁰ Articles 13 of Directive 2019/771 and article 14 of Directive 2019/770.

¹⁰¹ Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 *European Review of Contract Law*.

¹⁰² Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 And 2019/771' [2019] SSRN Electronic Journal.

¹⁰³ Articles 13 of Directive 2019/771 and article 14 of Directive 2019/770.

For example, when a contract is terminated, a problem develops in terms of the outcomes. In most European Union legal systems, the contracting parties are required to repay the advantages derived from the execution of an obligation that has already occurred.¹⁰⁴ Digital items would have to be returned to the source of these regulations were followed. However, because of the nature of digital material, this will be impossible to accomplish. The customer may be asked to remove the data from his or her machine, but it will be difficult to verify whether or not she has done so.

The aim of the Article 14 which is about the remedies for lack of conformity¹⁰⁵ of the Digital Content Directive can be defined as balancing the responsibilities of the sides. For example, price reduction should be done in a proportionate way. However, this cannot be easily applied when there is a regular delivery of digital content or service like a weekly subscription to a video streaming service. According to the Directive, price reduction should be applied to the term of time when digital content or service had lacked conformity.¹⁰⁶ Therefore, if digital content or service lacked conformity for a month, the price reduction will be calculated for that month exclusively.

The seller might choose a certain method while bringing the digital content or service into conformity, such as updating them or providing the consumer with a fresh copy.¹⁰⁷ However, if bringing them into conformity will cost an unreasonable amount to the seller, the consumer cannot request it.¹⁰⁸ This could generally take place in the case of low-value applications since re-creating them would lead to unreasonable costs.

However, the Digital Content Directive does not involve any provisions regarding limitation terms for remedies for lack of conformity that happened in the contract period and it does not refer to any national provisions either.¹⁰⁹ Therefore, when there is a contract for a longer amount of time, it is possible that consumers may be able to request remedies even if the lack of conformity happened at the start of the contract.

¹⁰⁴ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

¹⁰⁵ Article 14 of the Directive 2019/770.

¹⁰⁶ Article 14 of the Directive 2019/770.

¹⁰⁷ Recital 63 of the Directive 2019/770.

¹⁰⁸ Article 14 of the Directive 2019/770.

¹⁰⁹ Karin Sein and Gerald Spindler, 'The New Directive on Contracts for Supply of Digital Content and Digital Services – Conformity Criteria, Remedies and Modifications – Part 2' (2019) 15 *European Review of Contract Law*.

As long as the contract is in force, remedies for any defect must be available to the consumer and due to the full harmonizing character of the Digital Content Directive, the Member States cannot limit it in their national law either.¹¹⁰

D. Turkish Legislation Related to the Digital Content and Digital Services

Digital content consumption has become embedded in the lives of digital consumers from all ages, professions, and levels of experience in Turkey like it did all around the world. Consumers' demands for education, information, communication and entertainment are being met by an increasing number of digital services such as online gaming, the purchase of e-books, music downloads, subscriptions to podcasts, and streaming services.¹¹¹

Even though the advantages of electronic commerce are undeniable, it should not be forgotten that completing a contract without the customer and the seller meeting face to face and without knowing any relatively important information about the products and services creates potential risks such as products or services not having the claimed quality, damaged, and not delivering the items on time.¹¹²

Due to this, participating effectively in digital marketplaces needs trust and confidence, particularly among buyers.¹¹³ Consumers will embrace the digital market only if they believe that services are secure, for example, if they are virus-free, satisfy their expectations, and if they can trust that their legitimate interests and rights are protected.

In this part of the paper, the focus will be on the legislation in Turkey regarding digital content and services. This focus will be based on the background and the current version of the legislation. Especially, the provisions about consumer rights, the remedies, and the conformity standards will be examined. After this, the recommended regulation for Turkey related to digital content and services will be discussed.

¹¹⁰ Ibid.

¹¹¹ Dominika Bezakova, 'Consumer Rights Directive And Its Implications For Consumer Protection Regarding Intangible Digital Content' (2013) 7 Masaryk University Journal of Law and Technology.

¹¹² Şükran İnce and İzel Kibar, 'Distance Contracts In E-Commerce' [2019] GSI Articleletter.

¹¹³ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

D.1. The Background of the Legislation in Turkey Related To Digital Content and Digital Services

Most contracts are now created over the Internet as a result of its increased use and growth. Therefore, they are generally distance selling contracts.¹¹⁴ This contract type is regulated under the Law on the Protection of Consumer numbered 6502 and the related Regulations in Turkish law.¹¹⁵

The first Turkish Consumer Protection Law was passed in 1995, in response to the creation of a Customs Union between the European Union and Turkey, which required Turkey to adjust its legislation in numerous fields.¹¹⁶ The earliest edition of the legislation, enacted in 1995, addressed the sale of consumer products.¹¹⁷ However, it needed an amendment since the provisions for sale contracts were not applicable to consumer transactions such as there was no right to repair, and the limitation period was just a year.¹¹⁸

Since the implementation of consumer law is a responsibility of the Ministry of Industry and Trade, which did not collaborate with the Ministry of Justice during the process, there was not a debate over if consumer protection clauses should be integrated into the Code of Obligations or if there should be a special regulation, even though it is much needed.¹¹⁹ The Consumer Protection Law has been seen as a regulatory legal structure, with the Ministry of Industry and Trade handling the majority of the details.¹²⁰ Although the legislative process gained speed because of how the process has been handled, this did not lead to correct developments from the consumer protection perspective, since it contradicts the aim of compiling all consumer regulations in one code. Moreover, the prescriptions raised administrative law issues, such as the hierarchy of norms.¹²¹

By the revision that took place in 2003, there had been important changes in the consumer protection law.¹²² With the amendment, harmonisation with the European Union Directive 1999/44 was recommended.¹²³ Although, the success was minimal. For example, Turkish legislators attempted to impose strict responsibility for damaged items although they have failed. The tortious claim for damages

¹¹⁴ Şükran İnce and İzel Kibar, 'Distance Contracts In E-Commerce' [2019] GSI Articleletter.

¹¹⁵ Law on the Protection of Consumer (no. 6502).

¹¹⁶ Yeşim M. Atamer and Hans W. Micklitz, 'The Implementation of the EU Consumer Protection Directives in Turkey' (2009) 27 Penn State International Law Review.

¹¹⁷ Article 4 of the Consumer Protection Law, 1995.

¹¹⁸ Yeşim M. Atamer and Hans W. Micklitz, 'The Implementation of the EU Consumer Protection Directives in Turkey' (2009) 27 Penn State International Law Review.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Law amending the Law on Consumer Protection, No. 4822

¹²³ Yeşim M. Atamer and Hans W. Micklitz, 'The Implementation of the EU Consumer Protection Directives in Turkey' (2009) 27 Penn State International Law Review.

of a person hurt by a damaged good was mistaken with the buyer's claims deriving from non-conforming products.¹²⁴ Moreover, the customer had the right to sue the seller for personal harm or damage to products.¹²⁵ This was the only provision in the code that was about the product responsibility. Many issues were addressed in the Regulation, which has been widely criticised since strict responsibility may only be imposed by law, not regulation.¹²⁶

One of these issues were digital content and digital services. Only the Regulation on Distance Selling Contracts, with a reference to the Law on the Protection of Consumer, has a definition of digital material. This is considered to mean that the relevant Law's provisions may be applied to all digital content. The problems that might arise due to this regulation and how it should have been regulated will be discussed later.

In addition to consumer law, there had been regulations regarding E-commerce. E-Commerce includes legal transactions with or in the Network which is closed computer networks or open forms of networks such as the internet.¹²⁷ The only important factor for it is to be considered as E-Commerce, is the electronic communication devices themselves that regulate legal transactions.

According to Article 2 of the Law on Electronic Commerce effectuated in 2015, electronic commerce is defined as "all the online financial and commercial actions that take place without meeting physically but happening electronically."¹²⁸ This description is repeated in article 4 of the Regulation on Electronic Commerce.¹²⁹ E-Commerce Law has not described "electronically" specifically. However, Article 2 describes this as "...Taking place electronically via devices such as telephones, call centres, fax, dialer program machines, smart sound recording systems, electronic mail, short message services...".¹³⁰

It is seen that the Law on E-Commerce considers felicitously E-Commerce as only taking place on a network with Article 2's definition of Electronic commerce. According to Article 4 of the Regulation

¹²⁴ Article 4 of the Consumer Protection Law.

¹²⁵ Ibid.

¹²⁶ Yeşim M. Atamer and Hans W. Micklitz, 'The Implementation of the EU Consumer Protection Directives in Turkey' (2009) 27 Penn State International Law Review.

¹²⁷ Ümit Gezder, 'Elektronik Ticaret Hukukî İşlemlerinin Ayırımı – Dijital İçerik Ve Hukukî Niteliği' (2016) 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.

¹²⁸ Article 2 of the Law on the Electronic Commerce.

¹²⁹ Article 4 of the Regulation on Electronic Commerce.

¹³⁰ Article 2 of the Law on the Electronic Commerce.

on E-Commerce, on the other hand, electronic media is defined as “the media where the data are collected as digitised, processed, stored, and delivered.”¹³¹

D. 2. Current Legislation in Turkey Related to Digital Content and Digital Services

Due to the rise in communication facilities, the use and spread of the Internet, and the application of marketing techniques to these, there had been a need for new regulation for distance selling contracts. The broad requirements of framing in the previous legislation highlighted the need for implementing innovative laws about distant contracts and resulted in the “Regulation on the Procedures and Principles of the Application of Distance Selling Contracts” and later, “Regulation on the Distance Selling Contracts”.¹³²

The current consumer law rules are based on the Law on the Protection of the Consumer numbered 4077 which regulated the distance selling contracts for the first time in Turkish legislation history. Distance selling contracts are covered under Article 48 of the Law on the Protection of Consumer. Article 48 establishes general rules about distance selling contracts such as the execution and delivery, the duty of preliminary notice, as well as the right of withdrawal.¹³³ Moreover, if contracts are established by the remote communication tools, without the seller and consumer being physically present at the same time, they are defined as distance selling contracts.¹³⁴ The term “remote communication tools” is defined under article 4 of the Regulation of the Distance Selling Contracts. Any instrument or setting, such as a radio, letter, phone, e-mail, television, or the internet, that allows two people to form a contract without having to meet in person can be called under these tools.¹³⁵

Article 2 of the Law on the Protection of Consumer states that the relevant code applies to all goods and services transactions to which the consumer is a party.¹³⁶ The goods have been defined in a wider concept in Article 3 to mirror the European Union provisions. Since the amendment, commodities include also intangible products. However, the Law still does not define the term movables. Tangible items, along with forces of nature that can be legally held are covered under Article 762 of the Turkish Civil Code.¹³⁷ As a result, it is important to remember that the Law on the Protection of Consumer covers

¹³¹ Article 4 of the Regulation on the E-commerce.

¹³² Yeşim M. Atamer and Hans W. Micklitz, 'The Implementation of the EU Consumer Protection Directives in Turkey' (2009) 27 Penn State International Law Review.

¹³³ Article 48 of the Law on the Protection of Consumer.

¹³⁴ Ibid.

¹³⁵ Article 4 of the Regulation of the Distance Contracts.

¹³⁶ Article 2 of the Law on the Protection of Consumer.

¹³⁷ Article 762 of the Turkish Civil Code.

the rules of services such as gas, water, and electricity. Intangible items designed to be used in electronic media are considered as goods under Article 3.¹³⁸ The code includes sound, image data, and software but does not provide a complete list. By providing this flexibility, the legislators aimed to create a safe environment for consumers in this way.¹³⁹

Digital content was regulated explicitly in the Regulation on the Distance Selling Contracts on the grounds of Law no. 6502, the Law on the Protection of Consumer whose purpose was to adapt the European Union Consumer Rights Directive into Turkish law.¹⁴⁰ In the relevant Regulation's Article 4, digital content is described as all kinds of digitally served data such as computer programs, applications, games, music, video, and text.¹⁴¹

Since the European Union Directives include not only tangible possessions but also digital content, digital content's legal nature also needs to be defined within Turkish law, due to the fact that the Directives are trying to be adapted.

In Turkish law, a regulation has been made without putting it out clearly whether the digital content is presented with a tangible data carrier or not. Whether the qualification made here is accurate or not will be decided by looking at the criteria required for qualification as a commodity.¹⁴²

To qualify the digital content that is not presented in a tangible data carrier, for example, software, the suitability of the related criteria needs to be presented. In an opinion in the Turkish doctrine, the classification of digital content as a property or a service should be conducted through every single product's respective character.¹⁴³

After the amendments in law that took place in 2003, defective goods and services were addressed in separate articles in the new regulation. Defective goods can be found in articles 8-12 of the Law on the Protection of Consumer while defective services are regulated in articles 13-16.¹⁴⁴ The

¹³⁸ Article 3 of the Law on the Protection of Consumer.

¹³⁹ Yeşim M. Atamer and Hans W. Micklitz, 'The Implementation of the EU Consumer Protection Directives in Turkey' (2009) 27 Penn State International Law Review.

¹⁴⁰ Ümit Gezder, 'Elektronik Ticaret Hukukî İşlemlerinin Ayrimi – Dijital İçerik Ve Hukukî Niteliği' (2016) 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.

¹⁴¹ Article 4 of the Regulation on the Distance Contract.

¹⁴² Ümit Gezder, 'Elektronik Ticaret Hukukî İşlemlerinin Ayrimi – Dijital İçerik Ve Hukukî Niteliği' (2016) 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi.

¹⁴³ Ibid.

¹⁴⁴ Article 8-16 of the Law on the Protection of Consumer.

existence of a defective performance will be determined according to the moment when the goods are delivered to the consumer.¹⁴⁵

Article 8 primarily emphasizes that the defective performance is a violation of the contract; therefore, it has been accepted that a defective performance will exist if the goods do not have the characteristics agreed in the contract at the time of delivery, or if they do not comply with the sample or model agreed by the parties or do not have the characteristics that they should have objectively.¹⁴⁶

With the regulation made in article 8, some criteria are given in terms of determining whether a good is defective. Accordingly, goods containing material, legal or economic deficiencies that do not meet the purpose of use of their equivalents, reduce or eliminate the benefits that the consumer reasonably expects, have been deemed defective.¹⁴⁷

In contrast to this, the definition of defective service is made in Article 13 of the new Law. According to this article, the defective service refers to services that are inconsistent with the contract because it does not start within the period specified in the contract or does not have the characteristics that are agreed by the parties and should be objectively owned.¹⁴⁸

According to Turkish law, the defect of a commodity can be of two types. As well as being responsible for the availability of the qualities that the seller has previously stated and promised to the consumer in relation to the goods; the seller is also responsible for the defects that must be present in the goods because of their nature and, if not, removes or restricts the possibility of benefiting from the goods, even if the seller has not made such a promise.¹⁴⁹ Even though there had not been an explicit description of the subjective and objective criteria like there is in the European Union Directives, it can be argued that they are expressed implicitly.

In the case of lack of conformity, the consumer has the right to ask for remedies. The seller has to supply the digital content or services in a way they are meeting the requirements for conformity.¹⁵⁰ In the lack of specific legal remedies, consumers will have to rely on remedies that are available under

¹⁴⁵ Article 9 of the Law on the Protection of Consumer.

¹⁴⁶ Article 8 of the Law on the Protection of Consumer.

¹⁴⁷ Article 8 and 13 of the Law on the Protection of Consumer.

¹⁴⁸ Article 13 of the Law on the Protection of Consumer.

¹⁴⁹ Article 8 and 13 of the Law on the Protection of Consumer.

¹⁵⁰ Jorge Morais Carvalho, 'Sale of Goods and Supply of Digital Content and Digital Services – Overview of Directives 2019/770 And 2019/771' [2019] SSRN Electronic Journal.

consumer law or general contract law in the event of non-performance of a contract for the delivery of digital material.¹⁵¹

The consumer's rights in the case there is a lack of conformity is regulated in Article 11 of the new Law. According to this, the consumer's elective rights due to defective goods are "terminating the contract by declaring that they are ready to return what is sold", "detaining the sold and requesting a reduction in the sale price at the rate of defects", "requesting free repair of the sale at the expense of the seller if it does not require excessive expenses" and lastly "requesting that the sale be replaced with a one without a defect if possible".¹⁵² In the continuation of the same provision, it is regulated that the consumer can claim compensation in accordance with the provisions of the Law of Obligations, along with these four different rights.

In distance selling contracts that are concluded without face-to-face interaction, the consumer does not have the chance to inspect the quality and characteristics of the items.¹⁵³ This difficulty can be seen clearly with the digital content and digital services since they are also new in the market and they require different regulations due to their different nature from traditional goods and services.

Consumers are given an automatic right to withdraw in order to correct the imbalance that resulted from the lack of face-to-face communication. In distance selling contracts, the right to withdraw is a popular way to safeguard customer interests.¹⁵⁴ Rules relating to the right to withdraw, on the other hand, have been claimed to be in accordance with the needs of business life. As a result, laws governing the right to withdraw should be construed in a way that strikes a balance between consumer protection and economic need.¹⁵⁵

According to Article 9 of the Regulation of the Distance Selling Contracts, the customers have the right to withdraw from a distance selling contract after 14 days without giving an explanation or facing a penalty.¹⁵⁶ The 14 day period begins on the day the contract is signed for the service contracts, while in contracts for goods, it begins on the day that the items are delivered.¹⁵⁷

¹⁵¹ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

¹⁵² Article 11 of the Law on the Protection of Consumer.

¹⁵³ Nafiye Yücedağ Göztepe, 'Mesafeli Sözleşmelerde Tüketicinin Cayma Hakkı (Consumer'S Right To Withdrawal In Distance Selling Contracts)' (2016) 27 Türkiye Adalet Akademisi Dergisi.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Article 9 of the Regulation of the Distance Contracts.

¹⁵⁷ Ibid.

Both the customer and the seller have responsibilities while using the withdrawal right. According to Article 12 of the Regulation of Distance Selling Contracts, the seller has to give back all of the payment within 14 days from the notice of withdrawal request at once and without any charge, also take the product from the customer.¹⁵⁸ In contrast, the consumer has to send the relevant products to the seller within 10 days from the notification of withdrawal has been sent.¹⁵⁹

The exceptions of the right of withdrawal are regulated under the article 15 of the Regulation on the Distance Selling Contracts. Regarding digital content and services, according to article 15, the services performed instantly and electronically or the contracts for goods delivered instantly to the consumer are also covered by the exception.¹⁶⁰ Under this provision, digital content obtained mainly from the electronic environment is included in the scope of the exception.

The regulations regarding the right of withdrawal in distance contracts in Turkish Law are generally in compliance with the regulations in the European Union Directives. However, in some aspects, the regulations in Turkish Law are separated from the Directives. One of these topics is the right of withdrawal.

The regulation regarding the right of withdrawal in the Regulation on Distance Selling Contracts is significantly different from the European Union Directive regulating the same issue. In the Regulation on Distance Selling Contracts, what is not covered has been stated¹⁶¹, but under what conditions digital products obtained from electronic media will be excluded has not been regulated. According to the European Union Directive, the right of withdrawal regarding digital content shall not be exercised if the performance is made with the explicit consent of the consumer given in advance and therefore has an acceptance that it cannot exercise the right of withdrawal.¹⁶² If the consumer makes a claim for immediate performance and gives consent that he will lose the right of withdrawal, he loses the right when digital content begins to be downloaded.

It can be seen that, although the consumer does not lose the right of withdrawal, the obligation of paying a price is subject to very severe conditions under the European Union Directive. However, due to the regulation of the topic in Turkish law, it might be argued that it is not appropriate for the consumer

¹⁵⁸ Article 12 of the Regulation of Distance Contracts.

¹⁵⁹ Article 13 of the Regulation of Distance Contracts.

¹⁶⁰ Article 15 of the Regulation on the Distance Selling Contracts.

¹⁶¹ Ibid.

¹⁶² Nafiye Yücedağ Göztepe, 'Mesafeli Sözleşmelerde Tüketicinin Cayma Hakkı (Consumer'S Right To Withdrawal In Distance Selling Contracts)' (2016) 27 Türkiye Adalet Akademisi Dergisi.

to be completely stripped from the right of withdrawal without any conditions in terms of contracts related to digital content obtained from the electronic environment.¹⁶³

E. Recommended Regulation Regarding the Digital Content and Digital Services for Turkey and Conclusion

The area of consumer protection is very dynamic. Especially in sales methods, there is a constant change and new types of sales are emerging. For example, 20 years ago, online sales did not have a very significant share of total sales, but today they have become one of the most important types of transactions.¹⁶⁴ Today, digital material is an established aspect of our everyday lives, and it is becoming more so. Digital content providers are meeting an increasing number of requirements for education, entertainment, and communication from society.¹⁶⁵

Ever since the 1980s, the use of digital content has posed a challenge to legal frameworks that are based on traditions.¹⁶⁶ The regulation of these new areas has been one of the main reasons for the change in the law since the impact of technology advancement on consumer law is huge, due to its ability to disrupt traditional interactions between the market participants.¹⁶⁷ However, the boundary between whether a transaction is an online sale of goods or digital content or a providing of services is becoming increasingly unclear.¹⁶⁸ A consumer transaction is frequently of a mixed nature and this leads to several problems.

Even in national markets, the legislation governing the distribution of digital material has to be clarified. Few states have explicit laws on digital content contracts, and the legal situation is sometimes ambiguous. Are these contracts to be considered as sales, despite the fact that no actual goods are delivered? Should they be regarded as if they were service contracts? Or are they completely unique? Therefore, buyers and businesses in many States have a difficult time understanding the legislation.¹⁶⁹

¹⁶³ Ibid.

¹⁶⁴ Murat Aydoğdu, '6502 Sayılı Tüketicinin Korunması Hakkında Kanun'un Getirdiği Yeniliklere Genel Bakış, Sözleşmeye Aykırılık, Ayrıplı İfa Kavramlarına Getirdiği Farklı Yaklaşım Ve Bu Konudaki Önerilerimiz' (2013) 15 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi.

¹⁶⁵ N. Helberger and others, 'Digital Content Contracts For Consumers' (2012) 36 Journal of Consumer Policy.

¹⁶⁶ Benjamin Hayward, 'What's In A Name: Software, Digital Products, And The Sale Of Goods' (2016) 38 Sydney Law Review 441.

¹⁶⁷ Joasia Luzak, 'Digital Age: Time To Say Goodbye To Traditional Concepts' [2018] Journal of European Consumer and Market Law.

¹⁶⁸ Ibid.

¹⁶⁹ Hugh Beale, 'The Future Of European Contract Law In The Light Of The European Commission'S Proposals For Directives On Digital Content And Online Sales' (2017) 0 IDP Revista de Internet Derecho y Política.

Moreover, there are several sorts of compliance issues that might be detected with digital content and services. The majority of complaints are often about issues with accessibility, functionality, and compatibility, as well as the quality of digital material and security and safety concerns.

In order to address these issues, the new contract law package, which includes “The Directive on Contracts for the Supply of Digital Content and Digital Services” as well as the new “Consumer Sales Directive”, was enacted at the European Union level, after more than three years of study.¹⁷⁰ The Digital Content Directive of the European Union addresses the moment in which digital products must be delivered¹⁷¹ and the remedies¹⁷² for situations such as late delivery, lack of conformity, and the seller's rights. In contrast to this, The Digital Content Directive does not address how to define a transaction involving the delivery of digital material, or if such contracts should be classified as sales, service, or sui generis.¹⁷³ However, identifying the classification of such a transaction would not affect the establishment of a conformity requirement, but it might impact other rights and obligations at the domestic law level.

The separation between subjective and objective conformance criteria is an obvious evolution in the Digital Content Directive.¹⁷⁴ According to Recital 25 of the Sale of Goods Directive, these conformity criteria are necessary to clarify what a customer might anticipate from the products and what the supplier is responsible for if there is a lack of conformity.¹⁷⁵ The objective compliance criteria under the Directive has a flexible characteristic, especially when it comes to assessing what traits and features a customer may reasonably anticipate from digital material.¹⁷⁶ This flexible feature of the objective criteria will be a valuable and essential path for domestic courts to consider when deciding whether digital content fulfils the objective standards in a case.

Since its introduction, the former Consumer Protection Law, numbered 4077, has played an important role in Turkish consumer law. However, numerous modifications to this law were required. To achieve this aim and to harmonise with the European Union law, different studies were carried out in

¹⁷⁰ Karin Sein and Gerald Spindler, 'The New Directive On Contracts For The Supply Of Digital Content And Digital Services – Scope Of Application And Trader'S Obligation To Supply – Part 1' (2019) 15 *European Review of Contract Law*.

¹⁷¹ Article 5 and 11 of the Directive 2019/770.

¹⁷² Article 6 to 13 of the Directive 2019/770.

¹⁷³ Recital 12 of the Directive 2019/770.

¹⁷⁴ Article 7 and 8 of the Directive 2019/770.

¹⁷⁵ Recital 25 of the Directive 2019/771.

¹⁷⁶ Christian Twigg-Flesner, 'Conformity Of Goods And Digital Content/Digital Services' [2020] Esther Arroyo Amayuelas & Sergio Cámara Lapuente (dirs.), *El Derecho privado en el nuevo paradigma digital*.

order to transfer the European Union consumer protection legislation to Turkish domestic law.¹⁷⁷ As a result of this, the new Law on the Protection of Consumer No. 6502 was passed.¹⁷⁸ Even though in its latest state, this law and its relevant regulation have such important gaps to regulate still. Digital content and digital services can be given as an example to these areas.

The definition of defective goods has been described in Article 8 of the new Law. According to this, defective goods refer to the goods that do not have the characteristics, that are not suitable for the sample or model agreed in the contract, or should have objectively and therefore are against the contract, at the time of delivery to the consumer.¹⁷⁹

The consumer's rights against the seller in case of lack of conformity are regulated under article 11 of the new Law on the Protection of Consumer. According to this article, the consumer may choose to terminate the contract, request a reduction in the price, request a free repair, or replace it with another product if it is possible.¹⁸⁰

Repair or replacement, price reduction, and contract termination are all options for remedies under the European Union Directives and Turkish legislation. The question is whether these are sufficient in the context of digital content and if new particular remedies for digital content should be introduced, or whether these general remedies should be adapted to digital content. It is recommended that no particular norm for the various remedies should be established.

However, repairing or replacing digital content may not be sufficient to remedy the specific issues. In some cases, it may just be impossible to provide the customer with exactly what he requested. Other remedies, such as damages, price reductions, or contract cancellation, may be available in these instances. Despite the fact that national consumer and contract law provisions provide numerous remedies for non-performance of contractual commitments or lack of conformity, the peculiarities of digital material appear to make its applicability to this category challenge. Due to this, special rules may be stated for certain specific concerns.

¹⁷⁷ Murat Aydođdu, '6502 Sayılı Tüketicinin Korunması Hakkında Kanun'un Getirdiđi Yeniliklere Genel Bakış, Sözleşmeye Aykırılık, Ayıplı İfa Kavramlarına Getirdiđi Farklı Yaklaşım Ve Bu Konudaki Önerilerimiz' (2013) 15 Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi.

¹⁷⁸ Mehmet Akçaal and Alper Uyumaz, '6502 Sayılı Tüketicinin Korunması Hakkında Kanunun Bazı Hükümlerine (M. 1-16) İlişkin Bir İnceleme' (2013) 4 İnönü Üniversitesi Hukuk Fakültesi Dergisi.

¹⁷⁹ Article 8 of the Law on the Protection of Consumer.

¹⁸⁰ Article 11 of the Law on The Protection of Consumer.

By examining both the Digital Content Directive and Turkish consumer law, even though there are numerous gaps regarding the topic, it can be stated that distinguishing between digital products and services does not help the resolution of present legal challenges, and focusing on this distinction obscures the actual issues with digital content contracts.

The requirements that apply to sales contracts are ideally suited for use in digital content contracts. The rules on conformity and remedies can be used with very slight modifications. As a result, the difference between digital products and services is impractical, and a future legislative instrument may overlook it. To avoid the creation of new legal concepts for digital content, it is proposed that the rules created for sales contracts be used, with amendments made where required and extra regulations introduced where necessary.

Even if special regulations for digital content were created, it would result in them, being classified as a different type with its own legal framework. Even though this method has the benefit of allowing regulations to be adjusted to the unique requirements of digital content contracts, it creates a self-contained regime that poses a challenge in terms of developing new legal ideas and hence poses a danger of legal ambiguity.¹⁸¹

Although, the recommended approach would allow the provisions that govern the sale of goods to be applied to digital material without imposing the conventional idea of commodities as tangible items while allowing adjustments for the unique nature of digital content.¹⁸² Furthermore, it offers the option of not applying the laws governing the sale of goods if such restrictions would be unsuitable. This approach has the benefit of not stretching the notion of products, making it better suited to taking into account the unique demands that arise from the intangible nature of digital material. One disadvantage might be that it is not always clear to what extent certain rules apply, given the character of digital material, which could cause courts to reject or change a regulation that was designed to deal with tangible items.

However, one point, in particular, might be the regulation of the right of withdrawal. It is obvious that the potential use of a right of withdrawal needs special consideration. In Turkish law, the exceptions of the right of withdrawal are regulated under article 15 of the Regulation on Distance Selling Contracts.¹⁸³

¹⁸¹ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

¹⁸² Ibid.

¹⁸³ Article 15 of the Regulation on Distance Selling Contracts.

The exemption covers services done instantaneously, as well as contracts for items provided immediately to the customer. It can be said that digital content and digital services are included in the scope of the exemption under this paragraph. Due to this, it is seen that the consumer can easily lose the right of withdrawal in the contracts related to the supply of digital content or services and this leads to the cases where the consumer is sometimes left unprotected even though he or she is actually in need of protection.

The current conformity test overall appears to be appropriate for use with digital content, and it is generally employed in legal systems regardless of whether the contract is designated as a sales one or not. The test should be viewed as a dynamic notion in this regard. On a case-by-case basis, what constitutes regular usage of digital content will have to be determined.

However, this is not to say that applying the test to digital content is going to be easy. Because of the new and complex nature of digital content, the many different types, and the high level of product variations, the most troublesome aspect is that it is unclear what the buyer may reasonably expect from the digital content and that objective criteria to determine whether the expectations have been fulfilled.

The goal of conformity standards should be establishing basic quality and fitness criteria that items must fulfil without the need for negotiation. As a result, a requirement must encompass a wide range of digital content and services, finding the right balance between establishing detailed criteria while keeping flexibility due to the nature of the digital content.¹⁸⁴

The length of time that digital content must be suitable for use is another controversial topic. Customers will frequently upgrade their digital content to keep up with changes, ensuring that they may continue to utilise it. Even if the parties have not agreed on such upgrades, it is maintained that the consumer must be able to utilise the content for a reasonable amount of time. Non-conformity may also be defined as when the typical goal of digital content is for it to be utilised for a specific length of time, but owing to technical advancements, this is no longer effective within that period of time. A clearer provision regarding this obligation might protect the consumer better by telling them what to expect about digital content or service's active period. On the other hand, limiting the seller's update obligation to a specific time frame would also be beneficial for both the consumer and the seller.

¹⁸⁴ Christian Twigg-Flesner, 'Conformity Of Goods And Digital Content/Digital Services' [2020] Esther Arroyo Amayuelas & Sergio Cámara Lapuente (dirs.), *El Derecho privado en el nuevo paradigma digital*.

The customer may anticipate that the digital content they get will not have security flaws that may allow viruses to infect other devices or applications. Similarly, after a period of time on the market, the buyer may reasonably expect that almost all defects have been addressed, implying that when a defect restricts the consumer from using the digital content, the digital content will not be in compliance with the contract. Like it has been recommended with the update obligation, security flaws should be mentioned expressly in the legislation too.

When the business's responsibility is ongoing, the customer may expect the company to preserve the digital material in compliance with the contract. In this way, the situation is comparable to a lease arrangement, where the lessor is obligated to keep the leased items in compliance with the contract during the term of the contract. It is important to include an explicit clause mandating the seller to preserve the digital content in compliance with the contract. In contrast to this, despite the fact that the consumer has no legal obligation to do the updates regularly, it appears that the seller may expect the customer to maintain her digital content up to date and to enable the remedy of found defects and weaknesses through updates.¹⁸⁵ Due to this, a clear provision regarding the updates would benefit the expectations of both the seller and the consumer.

To conclude, in both European and Turkish consumer contract law, the categorization of digital material as goods or services is unclear. There is no clear approach to the concept of "goods" or the classification of digital material. Also, there is a tendency to regard the two categories of contracts for goods and service contracts as different, implying that contracts must fit into one of the categories or the other. Furthermore, interpreting a contract for the sale of standard software as a service contract may jeopardise consumer protection.¹⁸⁶ The consumer may be afforded less protection than if the contract were classified as one for the sale of goods. The approach that classifies ordinary digital content as a service appears to confuse the delivered item with the delivery method.¹⁸⁷ Downloading of digital products, in which the consumer receives the ability to use in a manner similar to physical ownership of a commodity, should be considered as goods for the purposes of implementing the sales contract rules. In terms of consumer protection, the manner in which a product is purchased should not matter.

¹⁸⁵ Natali Helberger and Lucie Guibault, 'Comparative Analysis, Law & Economics Analysis, Assessment And Development Of Recommendations For Possible Future Rules On Digital Content Contracts' (University of Amsterdam 2012).

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

The inadequacy of legislation to defend the rights is due to a lack of experience with what customers may typically anticipate in digital material, rather than the distinction between products and services. Consumer law is mainly based on consumer expectations, which are not present in the case of digital material. However, digitisation allows for new product diversity as well as a number of ways to market, and price for digital content. States should provide greater clarity of fair consumer expectations in digital material. Turkish legislators should consider not just economic and consumer interests when establishing that standard, but also social reasons and public interest concerns.

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