Harmonizing Digital Contract Law

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Harmonizing Digital Contract Law – an Introduction

A. Contract Law in Transition to the Digital Age

Digitalization has brought about a profound change in contractual practice. This change affects both the objects and the methods of concluding and implementing contracts. In particular, contracts for the supply of digital products and services – and more generally: trade with data[1] – has gained outstanding importance for many branches of the economy. Contracts are increasingly prepared and concluded online and with the help of artificial intelligence. The conclusion of a contract "machine to machine" in the Internet of Things is no longer an exception, but common practice in business **1**

[1] Alberto De Franceschi and Reiner Schulze, 'Digital Revolution – New Challenges for Law: Introduction', in Alberto De Franceschi and Reiner Schulze (eds), *Digital Revolution – New Challenges for Law* (2019), 1 et seq.

dealings. Similarly, the use of artificial intelligence in the execution of contracts and in the enforcement of contractual claims, including the interruption or termination of contractual services, has become widespread (for example, through automated sanction mechanisms).[2] Even the resolution of conflicts between contracting parties has shifted significantly to online-based forms of communication using artificial intelligence.

2 In the European Union, legislation has for some time begun to respond to this far-reaching and profound change by adapting contract law to the new realities of the digital age.[3] In addition to legislative measures that some Member States have taken independently for their national law to varying degrees and with varying content, legal acts that the European Union has enacted in close succession in recent years have designed new contours of contract law with regard to the digital challenges.

3 The starting points for the emergence of this "digital law" of the Union were two documents presented by the European Commission after the failure of efforts to establish a "Common European Sales Law": the Communication on the "New Start" from 2014[4] and the "Digital Single Market Strategy"[5] that followed shortly thereafter. On their basis, addressing the challenges of the digital revolution has become the most powerful engine for the development of European Contract Law.[6]

4 Since then, the legislative development of contract law by the European Union has taken both paths: Regulations have created uniform law with regard to digital matters; and directives have harmonized Member States' law in this regard. Uniform law in the field of contract law has been created in particular by the regulations on geo-blocking, portability, online platforms and most recently by the private law parts of the Platform-to-Business Regulation[7], the Digital Markets Act[8] and the Digital Services Act.[9] The latter three have helped the EU to respond to one of the most important regulatory challenges posed by digitization with uniform law, namely the operation and use of internet platforms (as explained in more detail in the part of this volume on internet platform regulation).

5 At the same time, the harmonized law of the Member States has expanded considerably through a series of Directives, most of which provide for full harmonization. Among them, in addition to the Modernisation Directive[10], the "Twin Directives" from

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[2] Sebastian Lohsse et al., *Liability for Artificial Intelligence and the Internet of Things* (2019); Mark A Geistfeld et al., *Civil Liability for Artificial Intelligence and Software* (2023).

[3] Alberto De Franceschi and Reiner Schulze, above fn. 1, 1 et seq.

[4] Communication from the Commission of 16.12.2014, Commission Work Program for 2015, A new start, COM (2014) 910 final.

[5] 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] Reiner Schulze, 'European Private Law in the Digital Age – Developments, Challenges and Prospects', in André Janssen et al. (eds), *The Future of European Private Law* (forthcoming 2023).

[7] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186. See Friedrich Graf von Westphalen, 'Some major issues of EU Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services', in this volume.

[8] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265. See Philipp Fabbio, 'The Impact of the Digital Markets Act on Contract Law', in this volume.

[9] Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [2022] OJ L 277. See Hans Schulte-Nölke, 'The EU Digital Services Act and EU Consumer Law', in this volume.

[10] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the

2019 play a prominent role: the Digital Content and Digital Services Directive (DCD)[11] and the Sale of Goods Directive (SGD)[12].

These two Directives outline the contours for the harmonization of some of the most important areas of contract law in the age of digitization: the supply of digital content and digital services and the sale of goods including goods with digital elements. Their scope covers millions of contracts that consumers in the EU conclude every day, for example, to receive texts, films, music and all kinds of software on their computers and smartphones or to purchase goods of all kinds online or offline. In addition, the "Twin Directives" deserve special attention because they contain a number of innovative approaches that may become important for the future development of contract law at European and national level, also beyond their scope of application. **6**

In the following, therefore, a brief insight into some of these innovative approaches is given first, before an overview of the impact of both Directives on the contract law of the Member States follows. This overview of the impact is limited to a concise synopsis of more detailed country reports from the Member States of the EU,[13] which examine the impact of the "Twin directives" on the respective national law for all 27 Member States from the same nine points of view.[14] The summary overview below is intended only as an introduction to these country reports that are published in the following part of the volume, and is structured according to the same nine aspects (see p. 35) as these. **7**

B. Innovative Features of the "Twin Directives"

I. Conceptual Framework

It should not be underestimated that the "Twin Directives" make an innovative contribution to the adaptation of contract law to the changes brought about by digitization already through their definitions and their explanation of terms. For example, they contain the definitions of fundamental terms such as "digital content", "digital services", "goods with digital elements", "integration of digital content or digital environment" (Art. 2 DCD; Art. 2 SGD). The same applies to performance features for the supply of digital content and digital services and for the sale of goods with digital elements such as compatibility, functionality and interoperability (Art. 2 DCD; Art. 2 SGD). In addition, a number of terms are not explicitly defined in the Directives, but their factual content is determined, such as "supply of digital content or digital services" and "compliance with the obligation to supply" (Art. 5 DCD) or "continuous supply over a period of time", "single act of supply" and "series of individual acts of supply" (Art. 8 para. 2 DCD; Art. 7 para. 3 SGD). With regard to the relevance of such terms and definitions for the contracting, it must be taken into account that their potential scope of application is not necessarily limited to contracts currently covered by the "Twin Directives". Rather, the **8**

European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules [2019] OJ L 328/7.

[11] European Parliament and Council Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1.

[12] European Parliament and Council Directive (EU) 2019/771 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 [2019] OJ L 136/28.

[13] The country reports refer to the national provisions transposing the DCD and the SGD.

[14] Within the framework of the uniform structure printed in the appendix to this paper, however, the country reports set their own priorities according to the respective circumstances of the legal system concerned.

"Twin Directives" provide a conceptual framework in this respect that may also be useful for the future development of contract law at European and national level.[15]

II. Data as Counter-Performance

9 A striking innovative approach is also evident in the provisions on the scope of application of the DCD: the recognition of the importance of data as subject of performance and of counter-performance for modern contract law.[16] The relevant rule of Art. 3 para. 1 subpara. 2 DCD is of a more technical nature in the sense that it defines the scope of the directive. But it is based on the assessment that the provision of personal data has a similar value as the payment of a price. It expresses the significant role of data not only as a performance owed by the trader according to the respective contract, but also as a counter-performance on the part of the recipient of such a performance. Although the provision only applies to consumer contracts on digital content and digital services, it could also be substantially extended to many contracts of a different kind.[17] Some Courts in EU Member States have already accepted that contracts between social networks operators and consumers are onerous consumer contracts, to which the rules on unfair contract terms must apply.[18]

III. Supply of Digital Content

10 The DCD combines the rules on conformity with the contract with the provisions on the obligation to supply the digital content in a single set of rules (whereas the SGD, like the Consumer Rights Directive before it, does not include the obligation to deliver the good, but leaves this matter to the Consumer Rights Directive). This integration of both elements into one legal text clarifies the connection between the obligation to perform and the requirement of conformity with the contract within the contractual obligation regime.[19] Within this framework, Art. 5 para. 2 specifies the criteria for the compliance with the obligation to supply the digital content or the digital services. This can be a starting point to adapt the concept of "compliance with the obligation to perform" to the changes caused by digitization.

[15] Reiner Schulze, 'European Private Law in the Digital Age – Developments, Challenges and Prospects', in André Janssen et al. (eds), *The Future of European Private Law* (forthcoming 2023), II. 2. c) bb); Hans-Wolfgang Micklitz, 'The Full Harmonization Dream' (2022) Journal of European Consumer and Market Law 117 et seq.

[16] Sebastian Lohsse et al., *Data as Counter-Performance – Contract Law 2.0?* (2020); Herbert Zech, 'Data as a Tradable Commodity', in Alberto De Franceschi (ed), *European Contract Law and the Digital Single Market* (2016), 51 et seq.; Andreas Sattler, 'Informationelle Privatautonomie' (2022) 205 ff.; Jan Trzaskowski, *Your Privacy Is Important to U$ – Restoring Human Dignity in Data-Driven Marketing* (Ex Tuto, Copenhagen, 2021) pp 208–209.

[17] Reiner Schulze, 'European Private Law in the Digital Age – Developments, Challenges and Prospects', in André Janssen et al. (eds), *The Future of European Private Law* (forthcoming 2023), II. 2. c) cc).

[18] CA Paris, pôle 2, ch. 2, 12.2.2016, n° 15/08624, *Sté Facebook Inc. c/ M.*, JurisData n° 2016–002888, (2016) *CCE*, comm 33, note Loiseau; TGI Paris, 7.8.2018, n° 14/07300, *UFC-Que choisir c/ Twitter*, JurisData n° 2018–014706, (2018) *CCE*, comm 74, note Grégoire Loiseau; Autorità Garante della Concorrenza e del Mercato, 29 November 2018, PS 11112 <https://www.agcm.it/dotcmsdoc/allegati-news/PS11112_scorr_sanz.pdf> accessed 15 January 2023; the decision was later partially repealed (by excluding the aggressive character of the above described commercial practice) by Tribunale Amministrativo Regionale Roma-Lazio, 10 January 2020, no 261 <https://giustizia-amministrativa.it> accessed 15 January 2023 and later on by Consiglio di Stato, 29 March 2021, no 2631 <https://giustizia-amministrativa.it> accessed 15 January 2023.

[19] Reiner Schulze and Fryderyk Zoll, *European Contract Law* (2021), ch. 6, mn. 26 et seq.

IV. Adaptation of contractual obligation to digitization

11 The central provisions of the "Twin Directives" on conformity with the contract adjust the design of contractual obligations to the requirements of the digital age in various respects. Among other things, they lay down a number of corresponding performance features (such as the already mentioned compatibility, functionality etc.; Art. 7 and 8 DCD; Art. 6 and 7 SGD) and deal with the integration into the consumer's digital environment (Art. 9 DCD). In particular, the introduction of updating obligations constitutes an outstanding response to the challenges of digitization (despite the dispute of the legal nature of these obligations in detail[20]). Compared to the traditional sales law, these new provisions lead to a "dynamization" of contractual obligations to enable consumers to use digital content or digital services and goods with digital elements in accordance with its reasonable expectations. In addition, the differentiation between the "continuous supply over a period of time" and the "single act of supply or a series of individual acts of supply" is relevant for the conformity with the contract as well as for other matters (such as the burden of proof, the obligations in the event of termination and the modification; Art. 7 para. 3; 11, para. 3 SGD; Art. 8 para. 2, 3 and 4; 12 para. 2 and 3; 16 para. 1; 19 para. 1 DCD). It therefore forms a new structural element within the European contract law.[21]

V. Objectification of the Concept of Contract

12 The orientation of the "Twin Directives" towards standardised objective criteria for the conformity with the contract – such as the "fit for purpose-test" and the reasonable expectations of the consumer – has relativised the individual-subjective understanding of the contract even further than the previous legal acts. The inclusion of the objective criteria in Art. 2 CSD and the consideration of public declarations of preceding links in the contractual chain (Art. 2 CSD; now Art. 8 para. 1, lett. b DCD; Art. 7 para. 1, let. d SGD) had previously limited the traditionally prevailing view that the content of the contract is essentially determined by the corresponding declarations of intent of the parties.[22] Even further, the "Twin Directives" now establish the same ranking of the objective with the subjective criteria (Art. 8, lett. 1 DCD; Art. 7, lett. 1 SGD) to protect the consumer if the (subjective) criteria provided for in the respective contract are less favorable for him than the objective requirements established by the directive. With this equating of the subjective and objective criteria, the relativization of the traditional view reaches a new level.[23]

13 In a way, this objectification of the requirements for conformity with the contract can be seen in the broader context of the standardization of contracting. The idea of the individually negotiated contract no longer reflects the reality of mass production, mass

[20] Hans Schulte-Nölke, 'Digital obligations of sellers of smart devices under the Sale of Goods Directive 771/2019' in Sebastian Lohsse et al. (eds) *Smart Products* (2022), 47 et seq; Christiane Wendehorst, 'The update obligation – how to make it work in the relationship between seller, producer, digital content or service provider and consumer' in Sebastian Lohsse et al. (eds) *Smart Products* (2022), 63 et seq; André Janssen, 'The Update Obligation for Smart Products – Time Period for the Update Obligation and Failure to Install the Update' in Sebastian Lohsse et al. (eds) *Smart Products* (2022), 91 et seq.

[21] Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' (2019) 4 *ZEuP*, 695, 722.

[22] Reiner Schulze and Fryderyk Zoll, *European Contract Law* (2021), ch. 2 mn. 7 et seq., ch. 3 mn. 58.

[23] Reiner Schulze, 'European Private Law in the Digital Age – Developments, Challenges and Prospects', in André Janssen et al. (eds), *The Future of European Private Law* (forthcoming 2023), II. 2. b).

distribution and the corresponding mass contracting, which includes a "standardization" of both contract terms and customer expectations. This standardization was already well advanced in the 20th century. As a result of digitization, it can now be considered as the regular practice for concluding contracts on the internet, while the individual design of contract content and the process of concluding the contract became the exception. To this extent, the equality of subjective and objective criteria for conformity connects both: the concern to compensate for presumed structural asymmetries in the relationship between the contracting parties; and the adaptation of contract law to the considerably increased importance of mass contracting in contract practice.

VI. Remedies

14 Finally, only a few new accents can be highlighted here with regard to the remedies: According to Art. 14 para. 2 and 3 DCD, the trader now has the right to choose the means to bring digital products into conformity (whereas Art. 13 para. 2 SGD continues to retain the consumer's right of choice for the sale of goods, as did formerly Art. 3 para. 3 CSD). Moreover, unlike the former traditions in some Member States to bind the rescission from the contract to a judicial decision, it is now also explicitly stated that the right to terminate the contract is to be exercised by means of a statement to the trader (Art. 15 DCD; Art. 16 para. 1 SGD). It can therefore be assumed that the termination of the contract is conceived as a formative right ("*Gestaltungsrecht*") of the entitled party.[24]

15 However, the most important innovation in terms of contract termination is probably, that the DCD contains a comprehensive regime of the legal consequences of the termination of a contract including a number of new legal instruments. It sets out the mutual rights and obligations of trader and consumer (in contrast to most other provisions of the Directive which only deal with obligations of the trader and corresponding rights of the consumer). The new legal instruments of this regime take into account the importance of data as the subject of contractual obligations in the digital age with regard to the failure of contracts. For example, they provide the prohibition of the use of data, the right to retrieve data, the blocking of access to data and the obligation to delete data (Art. 16 and 17 DCD).

C. Impact on the Law of Member States

I. General Framework

16 The impact of these innovative approaches and the other provisions of the "Twin Directives" on the law of the Member States depends to a large extent on the general framework of implementation in the respective Member State. Above all, it can be crucial, in which code or legal act the Member State has transposed these Directives and whether their transposition has an impact on the structure of the existing general law of obligations and contracts and consumer law or other areas of law such as intellectual property law and data protection law.

17 As far as the general framework of implementation in the 27 Member States is concerned, however, a rather complex picture emerges. The approaches of the national legislators differ both in terms of "where" and "how" of implementation. With regard

[24] On rescission as a "formative right" see e.g. Renate Schaub, in: Gerhard Dannemann and Reiner Schulze (eds), German Civil Code I (2020), § 437, mn. 9.

to the "where" in the context of the national legislative acts, a large number of Member States have opted for the implementation of one or both of the Directives by new acts outside the existing codes (e.g. among many others Romania[25]; Croatia[26] and Malta[27] regarding the DCD). Some of them have transposed both directives together into one act (e.g. Bulgaria[28]; Hungary[29], combining an overarching general part with two separate chapters for sales of goods and for supply of digital content and digital services). However, a number of other Member States have preferred integration into an existing code for either or both of the Directives. Among these, most have chosen integration with the Consumer code (e.g. Bulgaria,[30] Finland,[31] France,[32] Italy[33] and Latvia[34]; Malta[35] only SGD), but some have incorporated the provision implementing both or one of the Directives into their Law of obligations Act (e.g. Estonia[36]; Croatia[37] only the SGD), into their Law on the Sale of goods (e.g. Denmark[38]) or into their Civil code (e.g. The Netherlands,[39] Germany,[40] and, to a large extent, Czech Republic[41]).

18 With regard to the "how" of implementation, there are considerable differences mainly from two points of view. Firstly, in contrast to the close adherence to the wording of the Directives in some Member States, other Member States have chosen a partial interweaving with some of their own national concepts (e.g. Germany by combining the criteria of the SGD for conformity with the contract with the traditional German concepts for material and legal defects in § 434 BGB).[42] Secondly, some Member States have strictly adhered to the scope of application of the Directives when transposing them (e.g. The Netherlands[43] and Hungary,[44] among others), while others have preferred an extended implementation of some of the provisions or principles of the Directives beyond the scope prescribed by European legislation (including France[45] and Germany[46]).

19 Against this background, a highly differentiated finding emerges with regard to framework conditions for the impact of the "Twin Directives" on the law of obligations in the respective jurisdiction. It suggests that favorable starting conditions for a relatively strong impact may exist as far as the implementation provisions are integrated into the overall framework of a Code of obligations or of a Civil code. Less favorable conditions for a significant influence on the national law of obligations beyond the scope of the Directives are likely to be assumed if the Directives are implemented in a separate legal act by almost verbatim reproduction, and the previously existing structure of the Code of

[25] See the country report on Romania, in this volume.
[26] See the country report on Croatia, in this volume.
[27] See the country report on Malta, in this volume.
[28] See the country report on Bulgaria, in this volume.
[29] See the country report on Hungary, in this volume.
[30] See the country report on Bulgaria, in this volume.
[31] See the country report on Finland, in this volume.
[32] See the country report on France, in this volume.
[33] See the country report on Italy, in this volume.
[34] See the country report on Latvia, in this volume.
[35] See the country report on Malta, in this volume.
[36] See the country report on Estonia, in this volume.
[37] See the country report on Croatia, in this volume.
[38] See the country report on Denmark, in this volume.
[39] See the country report on The Netherlands, in this volume.
[40] See the country report on Germany, in this volume.
[41] See the country report on Czech Republic, in this volume.
[42] See the country report on Germany, in this volume.
[43] See the country report on The Netherlands, in this volume.
[44] See the country report on Hungary, in this volume.
[45] See the country report on France, in this volume.
[46] See the country report on Germany, in this volume.

obligations or of the Civil code therefore remains unaffected. In addition to the transposition of the DCD in Estonia and some other countries, the German transposition offers a remarkable example of an obviously relatively far-reaching impact on the law of obligation in the case of integration into the Civil code. In particular, with this integration, the German legislature has adapted the systematics of the BGB to the changes of the digital age by inserting a new title on "Contracts on Digital Products" into the General Law of Obligations to implement the provisions of the DCD (§§ 327 et seq. BGB). Furthermore, it has not only changed the consumer sales law in the BGB in accordance with the SGD. Rather, it opted for extended implementation and revised some provisions of the General Sales Law according to the patterns provided in the Directive (in particular by adopting a large part of the criteria for conformity with the contract and the equation of these criteria with the subjective ones in General Sales Law to extend them to all sales contracts; § 434 para. 3 BGB).[47]

20 As for the impact of the "Twin Directives" on the structures of consumer law, this goes hand in hand with the impact on the law of obligations where the consumer law is incorporated into the Civil code. If in contrast the two directives or one of them has been incorporated into a consumer code (as in Finland,[48] Italy,[49] France[50] and Latvia,[51] among others), this incorporation should regularly lead to a corresponding extension of the national system of consumer law. However, the further impact on the conceptual structure of the national consumer law seems to differ in each Member State in these cases. It is likely to depend not least on the method of incorporation, particularly on the extent to which the incorporation into the consumer code is limited to a mere compilation or includes further interlocking.

21 Finally, as far as the references to legal areas other than the law of obligations and consumer law are concerned, based on the country reports, there do not appear to be any direct significant influences of the implementation of the "Twin Directives" on intellectual property law structures in the Member States. However, another aspect remains to be pointed out: In connection with the implementation of these Directives, some Member States have clarified the relationship between contract law and data protection with regard to the contractual consequences of a withdrawal of consent under data protection law (e.g. Estonia and Germany).[52]

II. Definitions and Scope of Application

22 As outlined with regard to the innovative feature of the "Twin Directives"[53] both Directives contain a considerable body of definitions and explanations of numerous terms that are fundamental to contracting in the digital age – from "digital content" to, for example, "continuous supply over a period of time". In the course of the implementation of the DCD and the SGD and according to the respective type of implementation, this body has passed into the Member States laws. It now forms a common pool of national contract laws in the EU. Certainly, it must be taken into account that some Member States have further developed individual definitions independently. But in doing so, they generally relied on the provisions of the Directives and have only created conceptual

[47] See the country report on Germany, in this volume.
[48] See the country report on Finland, in this volume.
[49] See the country report on Italy, in this volume.
[50] See the country report on France, in this volume.
[51] See the country report on Latvia, in this volume.
[52] See below V.2.
[53] Above II.1.