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Harmonizing Digital Contract Law

The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms

A Handbook

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edited by

Alberto De Franceschi
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Preface

"Harmonizing Digital Law" has become a crucial task for European and national legislation in view of the challenges of the "digital revolution" for the European Union and for its Member States. The implementation of the 2019 "Twin Directives" on the sale of goods and the supply of digital content and services represents one of the most important steps on this path so far. In addition to the harmonization of Member States law, the emergence of a uniform law of the EU is becoming more and more important with regard to the challenges of digitization, as recently shown in particular by the Internet Platform Regulation.

In view of these changes at European and national level, 40 legal scholars from all Member States of the European Union have come together in this volume to examine the impact of European legislation on the development of private law in Europe. 27 country reports present the impact of the Twin Directives in the Member States on the basis of common questions. A number of other contributions analyse the overarching features of harmonization, the contours and effects of legal unification with regard to the Internet Platform Regulation, and the further perspectives of EU legislation in face of digital and sustainability challenges.

This volume was prepared by a conference in Ferrara on 9 and 10 June 2022, where the authors of the contributions could exchange their thoughts and coordinate their work. It was no easy undertaking that, following this meeting, the large number of participants completed the Country reports and other contributions for the volume in synchrony and ensured the timely publication. We would like to express our sincere thanks to all authors for this great cooperation.

We would also like to thank the University of Ferrara and its staff for making the conference possible in a way that was impressive for all involved, as well as Nomos Verlag and in particular its responsible editor Matthias Knopik for their commitment to the production of the volume.

Ferrara and Münster, March 2023 *Alberto De Franceschi and Reiner Schulze*

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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.

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[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

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] **11**

V. Objectification of the Concept of Contract

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] **12**

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 **13**

[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]).

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]). **18**

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 **19**

[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.

variations on a common European basis. For example, in German law the generic term "digital products" combines the terms "digital content" and "digital services" from the DCD. For the definition of this generic term, however, § 327 para. 1 and 2 BGB refers to the definitions of the two individual terms covered by it as designed in art. 2 para. 1 and 2 DCD.[54] A similar solution was chosen by the Austrian legislator, by introducing the generic term "digital performance".[55]

23 As regards the subjective scope of application it is noteworthy that Denmark has introduced a special intermediary rule,[56] which states that if two natural/private persons engage in a contract through an active professional intermediary, the contract between the two persons is regarded as a consumer contract and therefore the buyer profits of the consumer protection rules. Also other Member States (e.g. Italy[57] and Portugal[58]) introduced special rules regarding the contractual role and liability of online platforms.

24 Moreover, with regard to the impact of the "Twin Directives", it has already been addressed that the relevance of the definitions of these Directives is not necessarily limited to the scope of the national provisions transposing them. Rather, they can also serve as a model for future legislation in neighboring fields (for example, if a Member State wants to create rules for contracts between traders concerning data). Even if the legislator does not act, they can provide inspiration for case law and contractual practice on how to conceptualise the relevant situations in such neighboring fields. This potential impact of the terms and definitions of the Directives outside the current legislation of the Member States is difficult to assess in detail, but could reach far beyond the direct effect of the transposition provisions.

25 As regards the general scope of the provisions transposing the Directives, a number of Member States have limited this scope to the extent provided by Art. 3 DCD and Art. 3 SGD (for example, as mentioned, among many others The Netherlands[59]), while other Member States have opted for a broader transposition[60] (so-called "gold plating"). This extension may concern a single rule of the Directives, a set of their rules, or a principle underlying one of their rules. An outstanding example of such an extension – besides the application of a number of provisions of the SGD beyond consumer law in Germany – is the establishment of the principle arising from Art. 3 para. 1 subpara. 2 DCD regarding the provision of data by the consumer in France. Since the implementation of the Directive, the French Code de consommation contains provisions on such counter-performance in non-monetary form also for contracts outside the scope of Art. 3 DCD.[61] Another example is the broad Latvian reform of time limits, which extended the solutions provided in the "Twin Directives" also beyond business to consumers contracts.[62] This "gold plating" in some of the Member States indicates that in principle a considerable part of the provisions of the Directives can also be a model for future national legislation beyond the scope of application defined by the European legislator (provided that the relevant national legislature has the corresponding intention). Likewise, in the absence of national legislation, it can be considered as a source of inspiration for case law and

[54] See the country report on Germany, in this volume.
[55] See the country report on Austria, in this volume.
[56] See the country report on Denmark, in this volume. See also Marie Jull Sørensen, 'Digitale formidlingsplatforme – formidlingsreglen i dansk forbrugerret', *Ugeskrift for Retsvæsen*, U.2017B.119, 2017, pp. 119–127.
[57] See the country report on Italy, in this volume.
[58] See the country report on Portugal, in this volume.
[59] See the country report on The Netherlands, in this volume.
[60] Above III.1.
[61] See the country report on France, in this volume.
[62] See the country report on Latvia, in this volume.

contractual practice in such areas (similar to what has just been mentioned for the impact of the definitions in the Directives).

26 Furthermore, the country reports show that the transposition of the "Twin Directives" in some Member States – but by no means in all – has triggered or intensified a lively discussion on the further development of contract theory in the light of the changes caused by digitization, in particular on the patterns for the classification of contract types and on the understanding of the contractual synallagma with regard to the role of data as counterperformance. At present, however, the status of such considerations arising in the context of the transposition of the Directives seems to vary considerably between Member States. It therefore remains to be seen whether a Union-wide discourse on the new challenges for the theory of the Treaty will develop and which aspects will come to the fore.

D. Conformity with the Contract

I. The implementation of subjective and objective criteria for conformity

27 The provisions of the Twin Directives on conformity with the contract appear to have had considerable influence on the development of the law in the Member States, particularly with regard to the subjective and objective requirements of the conformity with the contract for the sale of goods and the supply of digital content and services. This influence may extend to the basic concepts in this area, as is particularly evident in Ireland. There, as a result of the implementation of the Directives, a displacement of traditional common law concepts in favour of the Directive's conceptualisation of conformity with the contract can be observed.[63]

28 But also in the other Member States a far-reaching impact of the Directive can be seen in particular through the establishment of two requirements in national contract law: the duty to inform and supply the consumer with updates, which is provided for in both Directives both as a subjective and as an objective requirement of conformity[64] (Art. 7 lett. d and Art. 8 para. 2 DCD; Art. 6 lett. d and Art. 7 para. 3 SGD); and durability, which is laid down as an objective requirement for goods in Art. 8 para. 1 lett. d SGD. Neither of these requirements was regulated, at least in this explicit form, in the contract law of most Member States, but were only introduced in the course of the transposition of the Directives. The only exceptions to this are the provisions contained in § 7 of the newly created Austrian Consumer Warranty Act (VGG) on the obligation to update digital services and goods with digital elements. Pursuant to § 1 para. 3 VGG, these also apply to B2B contracts. However, since this provision is unilaterally mandatory only in favour of consumers according to § 3 VGG, the provisions on the updating obligation can be waived in the case of a B2B transaction.[65] The Austrian Supreme Court of Justice has so far rejected an analogous application of consumer law provisions to B2B transac-

[63] See the country report on Ireland, in this volume.

[64] See above II.4.

[65] Explanatory Notes on the Government Draft of the GRUG (No. 949 of the Supplements to the Stenographic Protocols of the National Council of the XXVII Legislative Period), 15; Kristin Nemeth, in: Johannes W. Flume et al. (eds), *VGG* (2022), § 7, mn. 38; Christiane Wendehorst, 'Die Regelungen des VGG zu digitalen Leistungen unter besonderer Berücksichtigung der Aktualisierungspflichten' in Peter Bydlinski (ed), *Das neue Gewährleistungsrecht* (2022), 49 (69 et seqq).

tions as well – except for individual cases in which there was a pronounced imbalance between the contracting parties.[66]

This also applies to the provisions which were introduced into national law to supplement the provisions on the update duty with regard to the liability exemption for the case in which the consumer fails to install an update and with regard to the modification of the contract in the case of upgrades on the basis of Art. 8 para. 3 and Art. 19 DCD.[67] These provisions now form common core components of consumer contract law in the states in the European Union. **29**

For the implementation of these two and further requirements, which the "Twin Directives" provide for conformity with the contract, and the supplementary provisions just mentioned, two basic forms can be recognised (in each case with variations in single Member States). On the one hand, a number of Member States have introduced these requirements into their national law within the framework of a literal or almost literal adoption of the relevant provisions of the Directives on conformity with the contract, for example France with regard to a large part of the provisions of the DCD and the SGD on conformity.[68] In this respect, they have directly transferred the structure and terminology used by the Directives with regard to conformity with the contract to national law (be it as a supplement to a corresponding structure and terminology already in use in the respective national law for other matters; be it as a new approach for the respective national law).[69] In this way, the model of the Directives for conformity with the contract, including its new components of update and durability requirements, has directly shaped the structure and terminology of national contract law in the scope of application of the transposition provisions in a number of Member States. **30**

On the other hand, Member States have tried to adapt the provisions of the Directives on the requirements for conformity with the contract to already existing structures of national contract law and to integrate them into their own national terminology. This effort to combine the requirements of the Directives with their own national tradition is evident, for example, when the traditional concepts of "material defects" and "legal defects" are used in national sales law to determine conformity with the contract. The subjective and objective requirements of the Directives for conformity with the contract can be understood from this perspective as prerequisites for ensuring that the digital products or the goods are "free from material defects or from legal defects". **31**

On this basis, German legislation in particular comes to a far-reaching integration of new requirements (such as the durability of the good) into an already existing structure and terminology of national sales law. These requirements are laid down in § 434 BGB as prerequisites for the good being "free from material defects". Accordingly, § 435 BGB adapts the implementation of Art. 9 SGD to the concept of "legal defects". However, this integration into a pre-existing structure may be accompanied by an extension of the scope of application of SGD requirements beyond consumer sales to contracts between other parties, if this corresponds to the pre-existing structure and terminology of na- **32**

[66] RIS-Justiz RS0065288; RS0065327; OGH 11.08.2020 – 4 Ob 71/20z – *VbR* 2020, 213 (213 et seq.). For more details see the country report on Austria in this volume.

[67] Several criticisms have been raised in this regard. See e.g. the country reports on The Netherlands and Italy, in this volume.

[68] However with terminological modifications with regard to "subjective conformity" and "normal features", with an extended definition of updates etc.; for more details see the country report on France in this volume.

[69] The latter for example in Bulgaria, where, however, the close adherence to the Directives was combined with a few terminological accents of their own as the replacement of "subjective" criteria of conformity by "individual" criteria.

tional law (as shown in German law by § 434 BGB).[70] Also in Austria, the lack of durability of an item sometimes triggers warranty obligations under general law of obligations: Even before the implementation of the "Twin Directives", the Austrian Supreme Court of Justice ruled that it was generally expected in legal transactions that a brand-new motor vehicle engine would remain functional for more than two years.[71] Thus, the Austrian Supreme Court of Justice assumed that a certain functional life of an object can be considered as a usually presupposed characteristic within the meaning of § 922 para. 1 ABGB, for which liability is assumed under warranty law.[72]

33 The impact of the requirements laid down by the Directive on national law is thus veiled by the integration into the structures of national law; however, it can in fact affect national law far beyond the scope of application provided for by the Directive itself. Moreover, the combination of the traditional concept of "material defects" with the patterns of the Directive could lead to a further development of the conceptualisation of national law for the new matter of the supply of digital content and digital services, in that the new concept of "free of product defects" has been created for this matter to implement the provisions of the DCD on conformity with the contract.[73] In this conceptual respect, too, the most recent EU legislation has thus prompted an adaptation of national law to the changes brought about by digitisation, even if the Member State concerned has not fully adopted the conceptual structure of the Directives with regard to conformity with the contract.

II. Measures to Improve Sustainability and the Circular Economy

34 Measures to improve environmental sustainability and the circular economy were discussed in most Member States in the course of the implementation process of the Twin Directives, but in the end not taken. A positive exception in this regard is e.g. Spain, where the legislator has provided for generous after-sales services and availability of spare parts (Art. 127 *bis* TR-LGDCU). Discussions mainly focused on extending the warranty period beyond the minimum required by the SGD, on introducing an obligation to provide information on the minimum durability of goods and a direct consumer claim against the manufacturer or importer.[74] The reasons given for not implementing the other measures included the need to avoid excessive additional burdens for companies and expected initiatives of the EU in the area of sustainability in the future.[75]

III. Modification of Digital Content or Digital Service

35 While the DCD regulates in Art. 19 the modification of Digital Content or Digital Service, no specific provision in this regard is contained in the SGD and in the Member States' implementing provisions. This in regrettable, especially considered the circumstance that the modification of digital content may significantly affect the functioning of

[70] In German law, this extension concerns durability and a number of other performance features provided for in the SGD, but not the updating requirement; see the country report on Germany, in this volume.

[71] OGH 23.04.2015 – 1 Ob 71/15w – Zak 2015, 256 (256 et seq.).

[72] See for more details the country report on Austria, in this volume.

[73] See country report on Germany, in this volume, with regard to § 327 d BGB.

[74] See e.g. the country report on Austria, in this volume.

[75] See for the latest developments in this regard: EU Commission, 'Sustainable Product Policy and Ecodesign', at <https://single-market-economy.ec.europa.eu/industry/sustainability/sustainable-product-policy-ecodesign_en> accessed 15 January 2023.

goods with digital elements. It is desirable that the solutions contained in the DCD regarding the modification of Digital Content will be extended to the SGD. Though the abovementioned lack could theoretically be remedied by an intervention of the Member States' legislators, maximum harmonization may hinder that.

IV. The interruption of long-term supply of digital content or digital services

Regarding the case of interruption of a continuous supply of digital services, some Member States (e.g. Ireland and Lithuania), inspired by Recital 51 DCD, addressed the problem of short-term interruptions in relation to continuous supply contracts. Accordingly, the Irish legislator stated in s. 52 para. 4 Consumer Rights Act 2022 that where during such a continuous contract there is a short-term interruption of the supply which having regard to the type and purpose of the digital content or digital service and the circumstances and nature of the contract, is more than negligible, or which recurs, there is deemed to be a lack of conformity giving rise to remedies under the proposed legislation.[76] **36**

E. Liability of the Trader

The impact of the provisions of the "Twin Directives" on the liability of the trader is essentially the same as has just been summarised for conformity with the contract. The implementation of these provisions has led to the fact that in the Member States there are now regulations for the liability of the trader which did not previously exist in such a specific way in most national laws. These rules concern consumer contracts for the supply of digital content and digital services and consumer sales contracts for goods and in particular for goods with digital elements; and in some Member States they also extend to contracts between other parties. **37**

The Directives have thus had the effect that contractual liability in the law of the Member States has developed on a common basis in important areas in view of changes resulting from digitalization. This development has, however, taken quite different forms in the individual countries. The basic pattern is on the one hand the almost unbroken adoption of the terminology and structure of the Directives and on the other hand the extensive adaptation to the terminology and structures of the respective national law (similar to conformity with the contract). For example, some Member States have first laid down the liability of the trader in general terms in a basic standard along the lines of Art. 11 DCD and Art. 10 SGD, before the remedies of the consumer are laid down in subsequent provisions along the lines of Art. 13 et seq. DCD and Art. 13 ff. SGD. In contrast, other Member States have dispensed with such a separate regulation of liability in a separate standard. In these latter legal systems, the liability of the trader results implicitly from the provisions on the consumer's rights in the event of a lack of conformity with the contract (or in other terminology: in the event of a defect of the good or the digital product).[77] Unlike most other Member States, Portugal has used the possibility provided by Recitals 23 of SGD and 18 of DCD, stating that the online marketplace **38**

[76] Recital 51 DCD: "[…] Short-term interruptions of the supply of digital content or a digital service should be treated as instances of lack of conformity where those interruptions are more than negligible or recur […].

[77] E.g. in Germany §§ 327 i, 327 m; 437, 439 ff. BGB.

provider that, acting for purposes related to its activity, is a contractual partner of the trader that provides the good, the digital content or the digital service is jointly liable for the lack of conformity.[78] The decisive criterion for the liability of the online marketplace provider is the predominant influence on the contract concluded between consumer and trader. Such solution was significantly influenced by the ELI Model Rules on Online Platforms.[79]

39 However, much more than the different approaches to the transposition of the Directives' provisions on liability, the considerable differences in national provisions surrounding the transposition of the Directives could lead to problems with regard to the objective of European legislation "to achieve a genuine digital single market, increase legal certainty and reduce transaction costs, in particular for small and medium-sized enterprises".[80] In particular, the persisting differences in national laws regarding the consequences of a failure to deliver or to supply with respect to obstacles such as impossibility or *force majeure* and the effects of a serious change in circumstances could affect the willingness to engage in cross-border transactions. For example, for the change of circumstances in some Member States an adaptation of the contract and in special cases even the right to revoke the contract is provided for, but with different conditions in detail in the respective Countries,[81] while in other Member States there is no such regulation at all. The almost unlimited possibility for the Member States to determine the reasons for the exclusion of contractual obligations (e.g. change of circumstances or impossibility) in their own way relativises the duty to supply provided for in Art. 5 DCD.[82]

40 The lack of harmonisation of such neighbouring matters must therefore be taken into account as a factor that is likely to reduce the impact of the Directives on the harmonisation of contractual liability in sales law and in the supply of digital content and digital services in contractual practice.

F. Remedies

I. Repair and replacement

41 As already after the implementation of Directive 1999/44/EC, national legal systems provide the primacy of the creation of a defect-free condition through repair or replacement.

42 The exact role and competences of the judge in case a consumer invokes the 'wrong' remedy is disputed in some Member States.[83] In this regard it is necessary to consider, also concerning the implementing rules of DCD and SGD, the *CJEU Duarte* decision, according to which national legislation shall not preclude the national court hearing the dispute to grant of its own motion an appropriate reduction in the price of goods which are the subject of a contract of sale in the case where a consumer who is entitled to

[78] See the country report on Austria, in this volume. Cf. the country report on Italy, in this volume.

[79] European Law Institute, 'Model Rules on Online Platforms', <https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/online-platforms> accessed 15 January 2023. See Christoph Busch et al., "An Introduction to the ELI Model Rules on Online Platforms" (2020) 2 *EuCML*, 61.

[80] Recital 3 DCD.

[81] See for example in more detail for France and Germany Claude Witz, 'Störung des vertraglichen Gleichgewichts im neuen französischen Schuldrecht', in Florian Bien and Jean-Sébastien Borghetti, *Die Reform des französischen Vertragsrechts* (2018), p. 119 et seq.

[82] Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' (2019) 4 *ZEuP*, 695, 707, 723.

[83] See in particular the country report on Belgium, in this volume.

such a reduction brings proceedings which are limited to seeking only rescission of that contract and such rescission cannot be granted because the lack of conformity in those goods is minor, even though that consumer is not entitled to refine his initial application or to bring a fresh action to that end.[84]

Most national legislators chose not to provide for fixed periods that could generally be considered reasonable for repair or replacement, although the Directives allow to do so. Therefore, it will be up to the national judge to determine the reasonableness of the period for repair or replacement. As for exceptions to that approach, some Member States (e.g. Portugal[85] and Slovenia[86]) provided that the period for repair or replacement shall not exceed 30 days. Furthermore, the Portuguese legislator expressly exempted from this regime situations where the nature and complexity of the goods, the seriousness of the lack of conformity and the effort necessary for the repair or replacement justify a longer period, while in Slovenia the reasonable time limit may be further extended by a maximum of 15 days if it is necessary for the completion of repair or replacement.[87] In other Countries (e.g. Sweden[88]) the consumer normally would be entitled to resort to the secondary remedies only after two failed attempts. **43**

To the lists provided for in DCD and SGD, the Portuguese law adds as grounds for the possibility of exercising the remedies to price reduction and termination of the contract the manifestation of a new lack of conformity. In Romania the trader is obliged to bring the digital content or digital service into compliance, within a period not exceeding 15 calendar days from the moment the trader was informed of the non-compliance and which is expressly agreed upon with the consumer, without causing significant costs or significant inconveniences to the consumer.[89] **44**

Repair and replacements have to be executed "without costs" for the consumer. In particular, the SGD "codified" the achievements of the Court of Justice of the European Union, in particular in the judgements *Quelle*,[90] regarding the normal use made of the replaced goods during the period prior to their replacement (Art. 14, para. 4 SGD) and *Putz/Weber*,[91] regarding the costs of installation and removal of the non-conforming goods (Art. 14, para. 3 SGD). This development has to be welcomed and marks a good example of a virtuous interplay between case law and legislation. The implementation provisions in some Member States (e.g. Austria) explicitly provide that the trader has to bear also shipping and transport costs,[92] others also including in this notion labour, materials which may be necessary to bring the good into conformity with the contract (e.g. Bulgaria).[93] Also the German legislator rightly provided that the seller must bear all expenses required for the purpose of cure, including transport (§ 439 para. 2 BGB). If the buyer has installed the defective good in another good in accordance with its nature and purpose of use or has affixed it to another good, the seller is also obliged within the scope of cure to reimburse the buyer for the expenses necessary for removing the defec- **45**

[84] CJEU 3 October 2013, C-32/12, *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA*.

[85] See the country report on Portugal, in this volume.

[86] See the country report on Slovenia, in this volume.

[87] Art. 82 (2) CPA-1.

[88] See the country report on Sweden, in this volume.

[89] See the country report on Romania, in this volume.

[90] CJEU, 17 April 2008, C-404/06, *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände*.

[91] CJEU, 16 June 2011, C-65/09 and C-87/09, *Gebr. Weber GmbH v Jürgen Wittmer* and *Ingrid Putz v Medianess Electronics GmbH*. See also CJEU 23 May 2019, C-52/18, *Christian Fülla v Toolport GmbH*.

[92] See the country report on Austria, in this volume.

[93] See the country report on Bulgaria, in this volume.

tive thing and for the installation or affixing of the repaired or newly delivered thing free of defects (§ 439 para. 3 BGB). Specifically for consumer sales, it is also stipulated that in these two situations the consumer can demand advanced payment from the trader (§ 475 para. 4 BGB).[94]

46 By implementing the Twin Directives, some Member States entitled the buyer (or a third party on his behalf) to repair the defective good at the seller's expense if the seller abusively refuses to heed the consumer's choice (e.g. France)[95] or if the buyer has claimed repair from the seller but the seller has failed to do so within a reasonable period (see e.g. Estonia).[96]

EU Member States did not introduce specific rules on the place of repair and replacement nor on the transport costs: answers to these questions will therefore have to be found under the general law of obligations and contracts, taking into account the guidelines given by the CJEU in the *Fülla* case.[97]

47 The place of performance and subsequent performance continues to be determined according to the traditional rules of national law, which have not been changed in way of implementation. Even if the place of repair is therefore in principle to be determined according to the general rules on the place of performance, it must however be taken into account that the consumer must not suffer any "considerable inconvenience" (cf. Art. 14 para. 1 SGD). It must therefore be examined in each individual case whether this limit is exceeded, for example, if the way to the work takes unusually long when repairing a car.

II. Right of withdrawal, right to termination and price reduction

48 Both "Twin Directives" provide that the consumer shall exercise the right to terminate the contract by means of a statement to the trader expressing the decision to terminate the contract (Art. 15 DCD and Art. 16 SGD). This required some Member States (e.g. Austria) to adapt their warranty law, which previously stated that the right to price reduction or termination of the contract had to be asserted in Court.[98] In other Member States (e.g. France) this was already possible before the implementation of the twin Directives. Until the 2016 reform of the French general contract law, the *Code civil* did not accept termination by notice and termination normally had to be pronounced by the judge. The 2016 reform introduced termination by notice, however, so that there is now no discrepancy between the *Code de la consommation* and the *Code civil* in that respect.[99] In Germany, the consumer may terminate the contract if the trader does not immediately fulfil his due obligation to supply the digital product in response to a request by the consumer (§ 327 c, para. 1 *BGB*). In addition to this right of the consumer, which corresponds to Art. 13 DCD, § 327 c (2) *BGB* provides that the consumer may claim damages and compensation for futile expenses according to the general provisions of the German law of obligations.[100]

[94] See the country report on Germany, in this volume.

[95] Such regulation in national law is explicitly allowed under recital 54 SGD. See the country report on France, in this volume.

[96] See the country report on Estonia, in this volume.

[97] CJEU, Case C-52/18, 23 May 2019, *Christian Fülla v Toolport GmbH*.

[98] See e.g. the country report on Austria, in this volume.

[99] See the country report on France, in this volume.

[100] See the country report on Germany, in this volume.

III. The restitutions

49 After the cancellation of the contract or after the price reduction, the trader must refund the payments using the same means that were originally used (Art. 16 DCD and Art. 18, para. 2 SGD). Regarding the beginning of this 14-day period some Member States (e.g. Austria) do not refer to the day on which the trader is informed of the consumer's decision to terminate the contract, but to the time of receipt of the declaration of termination.[101]

Some EU Member States explicitly regulated the contractual consequences of consumer's withdrawal of consent to the processing of personal data. E.g. the Estonian legislator clarified that withdrawal of consent by the consumer should not be considered a breach of contract and does not entitle the trader to exercise any remedies against the consumer. The same provision excludes the trader's claim for damages in case of withdrawal of consent.[102] Worth mentioning is the solution provided by the Greek legislator, according to which, in case of termination the value of the data provided by the consumer should be calculated and reimbursed. The problem of calculation of the value of personal data will also arise when the recipient chooses to invoke the right to ask for a (proportionate) reduction of the price.[103] An attempt to regulate this issue was made – but in the end did not find concretization in the implementing rules of the DCD – by the Latvian legislator: the later withdrawn proposal provided that if after the consent's withdrawal the consumer still uses digital content (services) but no longer wants to remunerate the trader with personal data, he assumes duty to pay in money.[104] In any case, the calculation of the amount of money may be cumbersome.

IV. Hierarchy of Remedies and Environmental Sustainability

50 Stimulating consumers to require repair should encourage sustainable consumption and could contribute to greater durability of products (cf. Recital 48 SGD). While doctrinal and parliamentary[105] debate took place with regard to the opportunity to prioritize repair over replacement in way of implementation of the SGD, no Member State did adopt an explicit solution in this sense, although this has been subject to criticism in several Countries.[106] According to Art. 13 SGD, the consumer may choose between repair and replacement, unless the remedy chosen would be impossible or, compared to the other remedy, would impose costs on the seller that would be disproportionate. Some Member States provide the same rule for cases, which fall outside the scope of application of the SGD.[107] The French legislator did promote repair when implementing the SGD, by introducing an additional guarantee period in case the consumer opts for that remedy (see art. L-217–13 *Code de la Consommation*).[108] An interesting solution was chosen in Hungary, where – besides the contractual warranty regime – there is in place an additional extracontractual, statutory and mandatory remedy (for repair or replace-

[101] See the country report on Austria, in this volume.
[102] See more details in the country report on Estonia, in this volume.
[103] See the country report on Greece, in this volume.
[104] See the country report on Latvia, in this volume.
[105] See e.g. the country report on Belgium, and in particular the Belgian federal action plan for circular economy 2021–2024 <https://emis.vito.be/sites/emis/files/articles/91/2021/PAF%2016%20dec%202021_NL%20Clean%5B1%5D.docx> accessed 15 January 2023.
[106] See e.g. the country reports on Austria and Belgium, in this volume.
[107] See the country reports on Austria and Germany, in this volume.
[108] See the country report on France, in this volume.

ment) on the consumers' side directly against the producer, independent of any European law-making and harmonisation, according to which the consumer may demand – within two years after the latter placed the product on the market – that the producer repairs the product's defect, or, if repair is not possible within an appropriate time limit without causing harm to the consumer's interests, replace it.[109]

At the EU level there is also an ongoing lively discussion on the possibility of a 'circular replacement' (i.e. by a repaired, refurbished or remanufactured good) under the SGD.[110] Following the aforementioned developments, it is desirable and foreseeable that in the near future the EU legislator will amend the SGD in order to prioritize repair.[111]

V. Premature obsolescence of goods and the relationship with the internal rules on unfair commercial practices

51 In order to fight premature obsolescence of goods, no specific rules were adopted in way of implementation of the "Twin Directives".[112] Nevertheless, the consumer may have the right to damages according to tort law, challenge the validity of the contract because of error, complain non conformity because of lack of durability, or terminate the contract because of *laesio enormis*.[113]

Misleading actions or omissions regarding the expected lifespan of a product may also configure an unfair commercial practice,[114] an act of unfair competition or a breach of product safety rules.[115] National case law highlights fundamental criticisms concerning the effectiveness of current European consumer and market law. First of all, they raise serious doubts concerning the aptitude of the existing heterogeneous penalties laid down in way of implementation of the UCPD for effectively tackling the challenge of planned obsolescence, especially regarding goods with digital elements. And, furthermore, they raise the question of how consumer (contract) law could be

[109] See the country report on Hungary, in this volume.

[110] See Elias Van Gool and Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) *EuCML* 2021 (136) 145–146. See more in the country report on Belgium, in this volume.

[111] See European Commission, 22 March 2023, Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828, COM(2023) 155 final; Evelyne Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) *European Review of Private Law* 851–873; Eva-Maria Kieninger, 'Recht auf Reparatur ("Right to Repair") und Europäisches Vertragsrecht' (2020) ZEuP 264–278. See also Susanne Augenhofer, 'ELI's Response to the European Commission's Public Consultation on Sustainable Consumption of Goods – Promoting Repair and Reuse' (2022) *European Law Institute*, 2022; BEUC, 'Sustainable Consumption of Goods – Promoting the Right to Repair and Reuse' <https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-034_public_consultation_on_right_to_repair.pdf> accessed 15 January 2023; Elias Van Gool, Anaïs Michel, Bert Keirsbilck and Evelyne Terryn, 'Reply to the Public consultation as Regards the Sustainable Consumption of Goods – Promoting Repair and Reuse Initiative' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en> accessed 15 January 2023.

[112] Elias Van Gool and Anais Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) *EuCML* (136) 144–145; Bert Keirsbilck, Evelyne Terryn, Anaïs Michel and Ivano Alogna, 'Sustainable Consumption and Consumer Protection Legislation', available at < https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/648769/IPOL_IDA(2020)648769_EN.pdf> accessed 15 January 2023.

[113] See the country report on Austria, in this volume.

[114] See e.g. the country reports on Italy and Latvia, in this volume.

[115] See the country report on Austria, in this volume.

improved in order to react to and prevent the above-mentioned phenomenon in the future.[116]

Facing the growing role of the servitized economy, suppliers are incentivized to build products for long-term durability, minimize maintenance needs, and reuse and recycle components.[117] The rules contained in the SGD about durability and the duty to update may stimulate the transition towards a "servitization of sales law". This gives the chance of a longer duration through maintenance through the Internet of Things and remote control. At the same time, it entails a risk of premature obsolescence through digital disruption, which requires the adoption of effective instruments to counteract such a negative phenomenon.

VI. Transfer of the rights against the initial seller from the initial consumer to a subsequent buyer

Member States did not provide the automatic transfer of the rights against the initial seller from the initial consumer to a subsequent buyer. Nevertheless, an assignment of warranty claims is in principle possible according to the national law of most Member States.[118] As regards business to consumer contracts, the provisions on unfair terms play an important role. When implementing the Twin Directives, e.g. the German legislator did not create additional standards to regulate the relationship between the initial seller and a subsequent buyer. However, irrespective of their implementation, a new provision came into force shortly before, which restricts the exclusion of assignments by general terms and conditions (§ 308 No. 9 *BGB*). This is mainly aimed at facilitating legal tech business models. It remains to be seen whether it will also have an impact on assignments from an initial consumer to a subsequent buyer in the case of the digital products under consideration here.[119] In any case, regarding the right of distribution of a copy of a computer program and in the event of the resale of a user license entailing the resale of a copy of a computer program downloaded from the copyright holder's website, the CJEU *UsedSoft*[120] will be relevant. **52**

G. Commercial Guarantees

Regarding commercial guarantees, EU Member States did mainly choose to merely reproduce the wording of both Directives. A specific mention deserves the solution chosen by the Irish legislator, according to which where a commercial guarantee is provided to a consumer in relation to goods under a sales contract, and during the period of the guarantee the goods are acquired by another consumer, that other consumer is entitled to rely on the guarantee against the guarantor under s. 40 Consumer Rights Act or the trader (seller) under s. 41 Consumer Rights Act, as if they were the original consumer.[121] **53**

[116] See the country report on Italy, in this volume.

[117] Arie Van Hoe and Guillaume Croisant (eds), 'Droit et durabilité – Recht en duurzaamheid' (Larcier, Bruxelles, 2022).

[118] See e.g. the country reports on Austria and Latvia, in this volume.

[119] See the country report on Germany, in this volume.

[120] CJEU, Case C-128/11, 3 July 2012, *UsedSoft*.

[121] See the country report on Ireland, in this volume.

H. Time Limits

I. The implementation of the provisions on time limits for the trader's liability

54 The "Twin Directives" attribute a wide discretionality to the Member States in determining the time limits.[122]

As in particular regards the sale of goods, longer liability periods and a longer period of reversed burden of proof could enhance durability and at the same time enhance sustainability and a circular economy. Most EU Countries did not choose for longer liability periods than the minimum periods provided for in the Twin Directives (for some exceptions, see e.g. Cyprus[123], Spain,[124] Portugal,[125] Romania[126] and Sweden[127]), mostly for the purpose of not causing extra burdens for traders and for the risk to fragment the internal market. Other Member States did not adopt a specific regulation in that regard, so the general rule of the law of obligations finds application (e.g. Finland, which provides a time limit of 10 years[128] or Ireland, where a time limit of 6 years applies[129]).

55 Some Member States provided that the prescription period shall not be completed until the expiry of a period of two months from the time when the lack of conformity was discovered (e.g. Greece[130], Italy[131]). Other countries (e.g. Italy) expressly stated that the consumer, who is defendant before a Court for the performance of the contract, may however always ask for repair or replacement, price reduction or termination.[132]

56 Discussions are still ongoing with regard to the opportunity to extend the legal guarantee period for specific categories of goods, which could have contributed to the promotion of goods with a longer lifespan, but such provision was finally not adopted.[133] On a general note, it would have been reasonable to make the provision of updates dependent on the durability foreseen for each type of good.[134]

57 Concerning second-hand goods, Art. 10 para. 6 SGD allows Member States to permit parties to contractually reduce the legal guarantee period to a minimum of one year. Some Member States (e.g. Belgium,[135] Czech Republic,[136] Hungary,[137] Italy,[138] Lithua-

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[122] See e.g. Beate Gsell, 'Time limits of remedies under Directives (EU) 2019/770 and (EU) 2019/771 with particular regard to hidden defects' in Esther Arroyo Amayuelas and Sergio Cámara Lapuente, *El derecho privado en el nuevo paradigma digital* (Madrid 2020), 101 ff.

[123] See the country report in Cyprus, in this volume.

[124] See the country report on Spain, in this volume.

[125] See the country report on Portugal, in this volume.

[126] See the country report on Romania, in this volume.

[127] See the country report on Sweden, in this volume.

[128] See the country report on Finland, in this volume.

[129] See the country report on Ireland, in this volume.

[130] See the country report on Greece, in this volume.

[131] See the country report on Italy, in this volume.

[132] See the country report on Italy, in this volume.

[133] See the country report on Belgium, in this volume.

[134] See European Parliament Resolution of 25.11.2020 (P9 TA(2020)0318. 2020/2021(INI), paragraph 7(a): "corrective updates – i.e. security and conformity updates – must continue throughout the estimated lifespan of the device, according to product category".

[135] See the country report on Belgium, in this volume.

[136] See the country report on Czech Republic, in this volume.

[137] See the country report on Hungary, in this volume.

[138] See the country report on Italy, in this volume.

nia,[139] Luxembourg,[140] Romania[141] and Slovenia[142]) decided to use the SGD's option, allowing the parties for a reduction up to one year. In Portugal the period may be reduced to up to one and a half year, with exception of reconditioned goods, which are considered new goods.[143] Some others (e.g. France[144], Malta[145]) kept in that regard the legal guarantee period of two years.

Furthermore, some Member States extended the period of reversal of the burden of proof for goods (which is now e.g. of two years in Belgium,[146] Cyprus[147] and Spain[148]), going beyond the minimum of one year as provided for by the SGD, thereby bringing a significant enhancement in consumer protection. **58**

II. Suspension and interruption

The SGD did not regulate the conditions under which the liability period or limitation period can be suspended or interrupted. Member States were, therefore, free to provide for the suspension or interruption of the liability period or limitation period, for example in the event of repair, replacement or negotiations between the seller and the consumer with a view to an amicable settlement.[149] **59**

In way of implementation, some Member States (e.g. Belgium,[150] Croatia,[151] Malta[152] and Portugal[153]) expressly provided that the legal guarantee period shall be suspended during the period required for the repair or replacement of the good or in the event of negotiations between the seller and the consumer with a view to an amicable settlement. In particular, the Portuguese legislator provided that the deadline is suspended for the duration of the out-of-court settlement of the consumer dispute between the consumer and the trader or producer. This deserves to be welcomed also because of the educational nature of the reference, informing the consumer of the existence of faster, cheaper, and more effective ways of resolving the dispute compared to the courts. Particularly detailed is the provision introduced by the Spanish legislator, whereby, further to the aforementioned suspension, the seller/trader is liable within one year after the delivery of the good or the supply of the digital content or service if the same lack of conformity appears again.[154] **60**

Other countries provide that in case of replacement or repair of the good, the 2-year time limit starts running again.[155] **61**

In other Member States (e.g. France), liability is extended for six months when the good has been repaired pursuant to the legal guarantee of conformity. Besides that, if the consumer chooses to have the good repaired, but the seller does not do so, a new liability **62**

[139] See the country report on Lithuania, in this volume.
[140] See the country report on Luxembourg, in this volume.
[141] See the country report on Romania, in this volume.
[142] See the country report on Slovenia, in this volume.
[143] See the country report on Portugal, in this volume.
[144] See the country report on France, in this volume.
[145] See the country report on Malta, in this volume.
[146] See the country report on Belgium, in this volume.
[147] See the country report on Cyprus, in this volume.
[148] See the country report on Spain, in this volume.
[149] Recital 44 SGD.
[150] See the country report on Belgium, in this volume.
[151] See the country report on Croatia, in this volume.
[152] See the country report on Malta, in this volume.
[153] See the country report on Portugal, in this volume.
[154] See the country report on Spain, in this volume.
[155] See the country report on Estonia, in this volume.

period attached to the replaced good shall begin to run for the consumer. This provision applies from the day the replaced good is delivered to the consumer.[156] Other countries (Portugal) provide that the repaired or replaced good shall benefit from an additional "guarantee" period of six months for each repair or replacement, up to a maximum of four repairs or replacements.[157]Such choices should be appreciated, as they are suitable to both better protect consumers, and to stimulate a longer lifespan for the purpose of sustainability and the circular economy.

III. The obligation to notify

63 According to Art. 12 SGD, Member States had the option to maintain or introduce provisions stipulating that, in order to benefit from the consumer's rights, the consumer has to inform the seller of a lack of conformity within a period of at least 2 months of the date on which the consumer detected such lack of conformity. Some Member States maintained (e.g. Estonia,[158] Hungary,[159] Malta,[160] The Netherlands,[161] Slovenia[162] and Sweden[163]) or introduced (e.g. Belgium[164] and Latvia[165]) such notification duty, while others refrained from doing so (e.g. Bulgaria,[166] Greece,[167] Germany,[168] Ireland,[169] Luxembourg[170] and Romania[171]) or even erased the previous "obligation" which was already contained in the implementing provisions of the CSD (e.g. Denmark,[172] Italy[173] and Spain[174]). Other Member States (e.g. Finland) simply provide that notification should be made within a reasonable time after the defect was discovered or ought to be discovered.[175]

I. Right of Redress

64 The rules on the right of redress contained in Art. 20 DCD and in Art. 18 SGD can be derogated by an agreement between the seller and the producer and/or other person or persons liable in the chain of commercial transactions. This may significantly reduce the chances of the final seller to be restored from the consequences of the lack of conformity.

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[156] See the country report on France, in this volume.
[157] See the country report on Portugal, in this volume.
[158] See the country report on Estonia, in this volume, where nevertheless the Author underlines that "the different rules on notification obligation may lead to confusion in the case of a good with digital elements: depending upon whether sales rules or digital content rules are applicable in a given case, a consumer may or may not be obliged to notify the defect within two months".
[159] See the country report on Hungary, in this volume.
[160] See the country report on Malta, in this volume.
[161] See the country report on The Netherlands, in this volume.
[162] See the country report on Slovenia, in this volume.
[163] See the country report on Sweden, in this volume.
[164] See the country report on Belgium, in this volume.
[165] See the country report on Latvia, in this volume.
[166] See the country report on Bulgaria, in this volume.
[167] See the country report on Greece, in this volume.
[168] See the country report on Germany, in this volume.
[169] See the country report on Ireland, in this volume.
[170] See the country report on Luxembourg, in this volume.
[171] See the country report on Romania, in this volume.
[172] See the country report on Denmark, in this volume.
[173] See the country report on Italy, in this volume.
[174] See the country report on Spain, in this volume.
[175] See the country report on Finland, in this volume.

In order to reduce the risk of abuses in this regard, the Belgian legislator introduced an 'enhanced' right of redress, according to which where the seller is liable towards the consumer because of a lack of conformity, he shall be entitled to enforce remedies against the producer or any other contractual intermediary in the transfer of ownership of the consumer goods based on their contractual liability with regard to the goods, without any clause limiting or excluding liability being opposable to him.[176] A similar 'enhanced' right of redress is now also set out in the Belgian implementing provisions of the DCD.[177] Furthermore, the German legislator introduced a limitation period of six months for claims for reimbursement of expenses in the case of the sale of digital products and of two years in the case of the sale of goods (§§ 327 u para. 2 and 445 b BGB). The reversal of the burden of proof in the relationship of the last trader continues in the relationships of the previous links in the business chain to each other (§§ 327 u para. 3 and 478 para. 1 BGB). The preceding link in the business chain cannot rely on deviating agreements to the detriment of the following ones (§§ 327 u para. 4 and 478 para. 2 BGB with further specifications).[178] Recent Spanish case law on *Dieselgate*[179] has accepted that consumers can claim contractual damages from the manufacturer, on the understanding that this is a basic consumer right that could be frustrated by the difficulty of claiming them from a seller who could be insolvent.[180] Portuguese law grants a right of redress both to the trader vis-à-vis the producer or other "person at earlier stages of the contractual chain" and to the online marketplace provider *vis-à-vis* the trader.[181]

J. Relationship with other remedies and enforcement

I. In particular: right to withhold the payment

Some member States (e.g. Germany,[182] Ireland,[183] Italy,[184] Latvia,[185] Romania[186] and Spain[187]) explicitly introduced in way of implementation of the "Twin Directives" a dedicated right to withhold payment. For example, in Germany the consumer has a right to withhold payment according to § 273 BGB if the consumer has a due claim against the trader from the legal relationship from which he is obliged to pay (for example, the due claim for delivery of the good or for supply of the digital product). In addition, the consumer can refuse the payment on the basis of § 320 para. 1 BGB under the conditions that he owes the payment from a mutual contract and that he is not obliged to perform in advance.[188] Furthermore, the Irish legislator provided that the part of the price with- **65**

[176] Article 1649sexies OCC, as implementing the SGD. See Bert Keirsbilck, 'Verhaalsrechten' (2022) DCCR (103) 118–127. See also Elias Van Gool and Anaïs Michel, 'The New Consumer Sales Directive 2019/771 and Sustainable Consumption: A Critical Analysis' (2021) *EuCML* (136) 143.

[177] Article 1701/16 OCC. See Bert Keirsbilck, 'Verhaalsrechten' (2022) DCCR (103) 118–127. See more on this in the country report on Belgium, in this volume.

[178] See the country report on Germany, in this volume.

[179] STS of 11.07.2021 (RJ 2020752); STS of 23.07.2021 (RJ 20213583).

[180] See the country report on Spain, in this volume.

[181] See the country report on Portugal, in this volume.

[182] See the country report on Germany, in this volume.

[183] See the country report on Ireland, in this volume.

[184] See the country report on Italy, in this volume.

[185] See the country report on Latvia, in this volume.

[186] See the country report on Romania, in this volume.

[187] See the country report on Spain, in this volume.

[188] See the country report on Germany, in this volume. In detail on the requirements of these provisions Reiner Schulze, in: Gerhard Dannemann and Reiner Schulze (eds), *German Civil Code I* (2020), § 273,

held by the consumer should be proportionate to the decrease in the value of the digital content or digital service received by the consumer that does not conform with the contract compared with the value the digital content or digital service would have if it were in conformity with the contract.[189] Furthermore, the Italian SGD implementing rules (Art 135-*bis*, para. 6 Consumer Code) provide then that the consumer shall have the right to withhold payment of any outstanding part of the price or a part thereof until the seller has fulfilled the seller's obligations under the SGD.[190]

II. Enforcement and penalties

66 In implementing Art. 19 SGD and Art. 21 DCD, some Member States (e.g. Belgium) did enable either public bodies, consumer organizations or professional organizations to take action, partly as a consequence of a broad implementation of the Directive 2019/2161/EU (so called Omnibus Directive).[191] In this regard, Art. 2 para. 6 of the Omnibus Directive provides that Member States shall ensure that when penalties are to be imposed in accordance with Article 21 of Regulation (EU) 2017/2394 (regarding coordinated actions for widespread infringements with a Union dimension), they include the possibility either to impose fines through administrative procedures or to initiate legal proceedings for the imposition of fines, or both, the maximum amount of such fines being at least 4 % of the trader's annual turnover in the Member State or Member States concerned, and this only for the directives amended by the Omnibus Directive.[192] There is no EU requirement to introduce such fines for infringements of the Twin Directives, nor for purely domestic infringements. The Belgian legislator has however chosen for a wider application of such fines to guarantee a coherent national sanctioning system.[193]

67 Also the French legislator introduced a fine, which may be imposed on the trader who obstructs in bad faith the implementation of the guarantee of conformity applying to contracts for the sale of goods or to contracts for the supply of digital content or services. The imposition of the fine can be requested before the court by the Ministry of Finance, consumer associations, the public prosecutor or the consumer himself. The amount of the fine 'can be no higher than 300,000€', but it can be increased, in proportion to the benefit derived from the illegal practices, to 10 % of the trader's average annual turnover, based on the last three annual turnovers known at the date of the decision. Another civil sanction provided by the French legislator consists in enhanced refunds.[194]

68 The solution chosen by the Belgian and the French legislator shall be welcomed. In order to enhance the effectivity of consumer rights, and, inter alia, to enforce the durability of goods and fight premature obsolescence, the abovementioned rule contained in Art. 2 para. 6 of Directive EU 2019/2161 should be extended beyond the scope of application of art 21 of Regulation EU 2017/2394, thereby including all unfair behaviours and not only the cases in which there is a reasonable suspicion that a widespread infringe-

mn. 6 et seq.; Max Oehm, in: Gerhard Dannemann and Reiner Schulze (eds), *German Civil Code I* (2020), § 270, mn. 6 et seq.

[189] Consumer Rights Act 2022, s. 32(2) and s. 69(2).

[190] See the country report on Italy, in this volume.

[191] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 1993/13/EEC and Directives 1998/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

[192] Directives 98/6/EC, 2005/29/EC, 2011/83/EU and 1993/13/EEC.

[193] See the country report on Belgium, in this volume.

[194] See the country report on France, in this volume.

ment or a widespread infringement with a Union dimension is taking place. Rather than fixing an amount of money as the highest possible penalty, a link to the annual turnover would allow the trader's size, market power and – above all – market impact to be taken into account. This would avoid both "over"- and "undersanctioning".

On a general note, in many EU Member States limited access to justice is still a relevant problem in consumer contracts. In spite of the fact, that EU has tried to force Member States to develop alternative dispute settlement bodies for the settlement of consumer disputes, there is still much to do in this regard in order to improve consumer's rights in practice. **69**

K. Conclusions

In a final overview of the implementation of the "Twin Directives", a considerable impact on the law of the Member States can already be seen. The effects on the structure, concepts and principles of Member States law range from the displacement of basic common law contract law concepts in favour of EU contract law concepts in Ireland to the expansion of the system of the law of obligations in a number of continental European countries and from the extended adoption of the understanding of personal data as consideration to the incorporation of the Directives' criteria for contractual conformity into the general law of sales in some Member States (to recall just a few of the examples). **70**

However, the extent and forms of the impact differ significantly from one Country to another. For example, some Member States have introduced principles and terms from the Directive that were already in use in other national laws due to previous legislation. Some Member States have also limited themselves to taking over the provisions of the Directives mostly verbatim, while other Member States have further developed the terminology of the Directives and/or have adapted them and previously existing concepts of national law to each other, in particular in the context of an integration into the national Consumer code, the Law of obligation act or the Civil code. **71**

Furthermore, the wide discretionality for the Member States to determine the reasons for the exclusion of contractual obligations (e.g. change of circumstances or impossibility) in their own way and to set the time limits reduces the harmonization effect.[195] The lack of harmonisation of such neighbouring matters must therefore be taken into account as a factor that is likely to reduce the impact of the Directives on the harmonisation of contractual liability in sales law and in the supply of digital content and digital services in contractual practice. **72**

Finally, it should be borne in mind that an overview only of the Member States' legislation transposing the Directives can by no means give a complete picture of the impact of the Directives on the development of national law. Rather, in addition to the influence that can already be clearly identified, other components must also be taken into account. For example, the nature and extent of the influence in the respective Member State depends not least on the role the new provisions will play in contractual practice and in the judicial application of the law (the "law in action"). Furthermore, it remains questionable to what extent the objectives of the legislation (such as strengthening the internal market and reducing transaction costs in cross-border trade) can be achieved sufficiently in view of the regulatory deficits of harmonization, for example with regard to B-B contracts on the supply of digital content and digital services, or neighbouring **73**

[195] Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' (2019) 4 *ZEuP*, 695, 707, 723.

matters such as the impossibility of the supply of digital content and digital services and the change of circumstances.

74 Two other components of the impact on the national laws are also difficult to assess. However, they can indicate a greater influence than it appears at first glance if one only looks at the current implementation legislation. On the one hand, the Directives and the national transposition provisions contain numerous models that can also guide future legislation in the Member States in areas that have not been regulated so far. This concerns not only fundamental terms and definitions in the area of the distribution of goods with digital elements and the supply of digital content and services – or in general: trade with data. Rather, these provisions also contain a number of regulatory models that can be used beyond their scope of application, for example, for updating obligations and other requirements of contractual conformity or for the obligations of the parties after termination of the contract. This potential of the Directives and the transposition provisions for further legal development will come into play to the extent that the legislation of the Member States in the future will take into account the need to adapt further matters, in particular business to business legal relations, to the changes brought about by digitalization, and in doing so will strive for coherence with the provisions that have now emerged. On the other hand, it should not be overlooked that the Directives and their transposition provisions can also have effects beyond their scope of application independently of legislative measures. In particular, their conceptual and regulatory models can serve as a source of inspiration for the private shaping of law (for example, through contractual agreements, general terms and conditions or codes of conduct) and for the judicial resolution of conflicts in areas where no or no sufficiently detailed legislation on trade in data and related matters exists. Even if such "creeping effects" of implementation are difficult to detect, their importance for contractual practice should not be underestimated.

75 Such rather subtile components should be considered in addition to the effect that the "Twin directives" have already had immediately and clearly recognizable through the adoption of implementing legislation in the Member States to get a full picture of their impact. Therefore, if one takes them into account, despite the aforementioned regulatory shortcomings, there are good reasons to assume that the implementation of these Directives will prove to be a decisive step towards the harmonization of "Digital Law" in the EU.

Guidelines for Country Reports

Each Author of Country Reports was invited to consider the aspects listed in the following guidelines, with a focus on the questions and aspects considered more noteworthy for the respective Country.

I. Introduction. General Framework
   - I.1. In which code / legal act did your Member State transpose the DCD and the SGD?
   - I.2. Did the transposition of the Directives have an impact on the structure of the existing general law of obligation and contracts, consumer law, intellectual property law and data protection law? If so, what kind of impact?

II. Definitions and scope of application
   - II.1. How did the notions contained in the DCD (see in particular Art. 2) and SGD (see in particular Art. 2) impact on the already existing rules and on the related doctrinal debate? In this regard, please consider in particular the

following notions of: digital content, digital service, goods with digital elements, integration, updates, price, digital environment, compatibility, functionality, interoperability, durable medium.

II.2. What is the impact on the general theory of contract / contract types of the figures of contracts for the supply of digital content / digital services and for the supply of goods with digital elements?

II.3. Which kind of impact did produce in your national legislation / doctrinal debate the introduction of a provision on data as a counter-performance? In this regard, did your Member State apply existing or did introduce new rules on contract formation / existence / validity?

II.4. Are the implementing provisions of the two Directives suitable to be applied to the B2B contracts?

III. Conformity of goods

III.1. How did your Member State implement the subjective and the objective requirements for conformity?

- Please consider in particular: i) the durability requirement; ii) the duty to inform and supply the consumer with updates which are necessary to keep the digital content or digital service in conformity; iii) the liability exemption for the case in which the consumer fails to install updates.

III.2. Did your Member State specify the provision regarding the exclusion of existence of a lack of conformity in the case provided by Art. 8, para. 5 DCD and Art. 7, para. 5 SGD (with particular regard to the concept of "particular characteristic")?

III.3. Did your Member State introduce measures to improve Sustainability and the Circular Economy?

- How did your Member State implement the "durability" requirement in Art. 7, para. 1, lett. d, SGD?
  - How did your Member State implement the requirements in product-specific Union legislation (see e.g. recital 32 SGD), especially the requirements relating to durability and repairability mentioned above?
  - What is the relationship, if any, between the two sets of provisions in national law?
  - Does your Member State have national rules on availability of spare parts and corresponding information obligations, and if so, what do they foresee?
  - Did your Member State coordinate the implementing provisions of the SGD with those of Directive 2009/125/EC establishing a framework for the setting of ecodesign requirements for energy-related products?
  - What penalties did your Member State implement according to Art. 20 directive 2009/125/EC? Are there for this any private law sanctions?
- Did your Member State adopt measures for enhancing environmental sustainability / circular economy in way of implementation of DCD and SGD (see e.g. recital 32 SGD)?

III.4. Please assess the consequences of the incorrect installation of the digital content or digital service.

III.5. How did your Member State handle the consumer's duty to provide personal data as a counter-performance in terms of its enforceability?
III.6. Did your Member State regulate the Modification of Digital Content or Digital Service in way of implementation of the SGD?
III.7. How did your Member State transpose Art. 10 DCD and Art. 9 SGD on third party rights in its national law? Did your Member State apply the DCD/SGD remedies for a lack of conformity to the situations covered by those provisions? If not, did your Member State apply rules on nullity or rescission and what would be their details?
III.8. Did your Member State regulate the relationship with Intellectual Property Law? Does the consumer have the right to "resell" digital contents?

IV. Liability of the Trader
IV.1. How did your Member State regulate the single act / long term supply of digital content / digital services?
IV.2. How did your Member State regulate the interruption of long-term supply of digital content / digital services?
IV.3. How does your national law regulate the consequences of a failure to deliver / supply with respect to obstacles like impossibility or force majeure? Does your national law provide for rules about change of circumstances?
IV.4. Did your Member State regulate early termination of Number-Independent Interpersonal Communication Service (NI-ICS)?
IV.5. How did your Member State coordinate Art. 107, para. 2 European Electronic Communications Code and Art. 3, para. 6, subpara. 3, dir. 2019/770/EU on bundles?
IV.6. What are in your Member State the consequences of the trader's non-compliance with the GDPR regarding contracts for the supply of digital content/digital services?

V. Remedies for the failure to supply and remedies for the lack of conformity
V.1. Did your Member State introduce / maintain a right to withhold payment for contracts under the DCD and what would be the conditions and modalities? What conditions and modalities apply for the exercise of the right to withhold payment for contracts under the SGD under national law?
V.2. Did your Member State adopt specific rules in order to define the place of delivery and the place of repair and replacement?
V.3. Does your Member State foresee rules about the costs of transport for the case of repair / replacement (e.g. being advanced or reimboursed)?
V.4. Is the provision of the right of withdrawal (regarding the consent for the processing of personal data) and the right of termination (see Art. 15 DCD) through declaration a deviation from the general structure of the right of withdrawal in your Member State or does it follow an already existing tendency in your Country?
V.5. Did your Member State introduce specific rules regarding the contractual consequences of withdrawal of consent for processing personal data, or do general contract law rules apply?
V.6. How did your Member State deal with restitution where the trader supplies digital content and/or digital services?
V.7. How did your Member State deal with restitution where the trader supplies digital content and / or digital services and the consumer provides personal data as a counterperformance?

V.8. Does your Member State prioritize repair over replacement in order to enhance environmental sustainability (see e.g. recital 48 SGD)? Is there doctrinal debate on this?

V.9. Which kind of sanctions does your Member State adopt for fighting premature / planned obsolescence of goods? What is in this regard the relationship with the internal rules on unfair commercial practices?

V.10. Does the law of your Member State provide an automatic transfer of the rights against the initial seller from the initial consumer to a subsequent buyer? If so, how is this transfer regulated?

V.11. If not, does the law of your Member State allow the initial consumer and a subsequent buyer to contractually agree that the rights against the initial seller are transferred to the subsequent buyer? If so, does your national law allow the initial seller to exclude the transferability of the rights under the legal guarantee or a commercial guarantee in his general terms and conditions?

Please explain whether your Member State provided express regulation for the cases in which:

i) the consumer bought goods and then moved to another Country;

ii) the seller delivered the goods in accordance with the Geo-Blocking Regulation and is now obliged to carry out repair or replacement in a country he does not offer delivery to.

VI. Commercial Guarantees

How did your national legislator regulate commercial guarantees? In particular: did your Member State use the option provided for in Art. 17 para. 4 SGD, laying down rules on other aspects concerning commercial guarantees which are not regulated in the SGD, including rules on the language or languages in which the commercial guarantee statement is to be made available to the consumer?

VII. Time Limits

VII.1. How did your Member State implement the provisions on time limits?

VII.2. In particular, how did your legislator made use of the concerning options provided by the Directives (Art. 10 SGD and Art. 11 DCD)?

VII.3. Did your Member State intend to maintain or introduce provisions on interruption or suspension of the liability period or limitation period? If so, what do these provisions foresee?

VII.4. Did your Member State maintain or introduce the "Obligation to notify" as allowed by Art. 12 SGD?

VIII. Right of Redress

How did your Member State implement the provision on the right of redress? How was it coordinated with the other remedies?

IX. Relationship with other remedies

What is the relationship between the implementing provisions of the DCD and SGD and the remedies otherwise provided by your national law of obligations and contracts (e.g. compensation, etc.)?