Schulze / Staudenmayer

EU Digital Law

Article-by-Article Commentary

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edited by

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Foreword

Digitalisation is one of the major challenges of the 21st century and has resulted in rapid and extensive changes to the legislative framework in response. Lawyers in Europe should be prepared for this transition and for working with the legislation once it enters into force. Recent EU legislation has swiftly adopted European law affording traditional core areas of private law with salient new features. For instance, over just a few years new legislation ranging from the Portability Regulation to the Platform Regulation has given rise to numerous individual provisions relevant to contract law. Moreover, full harmonisation has been extended to key aspects of consumer contract law. In particular, the 2019 Directive concerning contracts for the supply of digital content and digital services regulates aspects such as contractual obligations, liability, remedies, restitution and contract modification. The Directive adapts traditional private law by introducing new approaches, for example on data as counter-performance, update obligations, performance over a period of time, and integration into the digital environment. The parallel 2019 Directive on the sale of goods provides equally significant changes to sales law. The 'Modernisation Directive' has aligned further areas of consumer contract law to new developments, in particular through changes to the Consumer Rights Directive. European Digital Law will set the trend for the adaptation of national private laws to meet the challenges of digitalisation and provide a private law framework for the transition towards the digital economy.

This commentary on European Digital Law provides a guide to understanding and applying these new provisions. It gives an insight into the function and legal context underlying the provisions and provides an extensive explanation thereof. The comments examine the potential questions that will arise when applying these provisions and therefore should ease their application in practice, for instance when advising clients, drafting contracts and in litigation. Furthermore, publication at this particular time strives to inform and offer suggestions during the important stage of transposition of the new Directives into national law. At the same time, the commentary also will assist legal education in these new fields. Finally, it contributes to the development of legal doctrine responding to the changes at European and national level and providing a systematic foundation, thereby paving the way towards a consistent and comprehensive private law framework for digitalisation.

The international team of contributors comprises authors from several EU Member States, reflecting the European nature of the legislation covered by this commentary. However, as the new legislative developments, a commentary on European digital law presents a particular challenge for editors and contributors alike. We rely on feedback and support from the readers and therefore appreciate all suggestions on how to improve and develop the commentary.

The editors especially thank Dr. Jonathon Watson for his tireless efforts, enthusiasm, valuable knowledge and advice. Particular thanks are also due to Dr. Matthias Knopik at Nomos Publishers, whose contribution and support, especially during the 'Corona crisis', ensured timely publication.

Münster and Brussels — *Reiner Schulze*

May 2020 — *Dirk Staudenmayer*

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Introduction*

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A. The new challenges for EU law

Digitisation is one of the most important trends of the current century. It will change our economy and society as fundamentally as the industrial revolution did.[1] Our economy is in a process of transition towards a **'digital economy'**.[2] This term does not mean a separate economy or a specific sector of the overall economy. The changes caused by digitisation will ultimately lead to the entire economy becoming digital. **1**

* This introduction expresses only the personal opinions of the authors and does not bind in any way the European Commission.

[1] cf. the fundamental thesis of *Brynjolfsson/McAfee*, p. 6 et seq. While the invention of the steam engine by James Watt replaced human and animal muscle power, digitisation will multiply exponentially the possibilities of using the human brain.

[2] See *Lohsse/Schulze/Staudenmayer*, p. 13 et seq.

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2 At present, there is a global race to reap the benefits of emerging digital technologies or developments such as artificial intelligence, quantum computing or the growth of the Internet of Things. There is a clear and strong political willingness and momentum around the world to harvest the **growth advantages** of digitisation. While this is being achieved with tools such as industrial policy and support for research, the law will be another tool that should contribute to obtaining the economic benefits out of the process of digitisation. An EU legal framework, adapted to these challenges, may also be able influence global standards and serve as a model for the developing laws of other countries.

3 While digitisation will bring many beneficial developments for our economy and society, it may also have risks. In Europe, there is a willingness to **safeguard** the structure and main features of our **social market economy** and guarantee our **fundamental values**.[3] The law is a tool which may be utilised to achieve this objective. One prominent example of the fundamental values, to which the EU is committed and which is manifest in the EU Charter of Fundamental Rights (Art. 8 EU Charter) and the adoption of the GDPR, is the protection of personal data.

4 Digitisation therefore presents the European Union with the challenge to develop its **legal framework**. The challenges facing primary and secondary EU law extend to numerous policy fields such as competition law,[4] intellectual property law, consumer protection, and judicial cooperation.

5 The EU has the internal market as one of the advantages and privileged tools at its disposal. Accordingly, the European Commission declared the 'Digital Single Market' to be one of its priorities.[5] Its first step towards the adaptation of its legal and policy framework was its **'Digital Single Market Strategy'**[6] (hereinafter 'DSM Strategy') from May 2015. This strategy provided the political basis for a series of subsequent Commission initiatives with the aim of creating a framework to build a European Digital Single Market and to use it as a motor for the growth of the European economy. These initiatives included the further development of EU law, not only through new legislation but also through reforms of existing EU law. Since then, the EU's legal responses to the challenges of digitisation – or in short: EU digital law – have contributed to the significant development of the *acquis communautaire* in various areas.

6 **Contract law** has an important position in this developing legal framework, given its central role for a functioning market economy.[7] Whereby contracts are the tool which makes transactions work in the economy, contract law provides the general framework within which these transactions take place. It is an area of law which is already experiencing a rapid and profound change due to the influence of digitisation. The impact covers a variety of matters, such as the pre-contractual information and communication, the conclusion and performance of a contract, as well as new subject matter of contracts and forms of trade, together with associated new contract practices. Contract law could thus be facing a phase of modernisation.[8]

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[3] cf. Political guidelines of Commission President von der Leyen, 4 available online under https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf (last accessed 23 January 2020).

[4] cf. *Crémer/De Montjoye/Schweitzer*, 52 et seq. on the position of competition law and policy in the regulatory landscape and p. 70 et seq. how competition law could be adapted, available online under https://ec.europa.eu/competition/information/digitisation_2018/report_en.html (last accessed 23 January 2020).

[5] See *Juncker*, available online under https://ec.europa.eu/commission/sites/beta-political/files/juncker-political-guidelines-speech_en.pdf (last accessed 11 September 2019).

[6] COM(2015) 192 final.

[7] See *Schulze/Staudenmayer*, p. 19.

[8] See *Schulze/Zoll*, § 1, mn. 61 et seq.

It is therefore not surprising that some of the measures proposed by the European Commission soon after the publication of the 'DSM Strategy' concerned contract law. As one of the first legislative initiatives, the Commission presented in December 2015 proposals for directives concerning digital contracts. These were the 'Proposal for a Directive on certain aspects concerning the supply of digital content'[9], which formed the basis for the **Digital Content Directive**, and the 'Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods'[10], later on extended to all sales and being the basis for the **Sale of Goods Directive**, which regulates goods with digital elements. The final versions of the proposed Directives were adopted in May 2019. Both Directives concern core areas of contract law such as the contractual nature of the performance and the remedies available to the buyer. The Digital Content Directive also covers other matters, in particular the seller's obligation to perform and, to a certain extent, the concept of counter-performance. When regulating these matters for consumer contracts, they follow the traditional scope and dual objectives of consumer contract legislation: to contribute to the proper functioning of the (digital) single market and to ensure a high level of consumer protection (for digital contracts)[11]. However, this does not mean that EU measures adapting private law to the needs of the digital economy are at present, or will be in the future, restricted to B2C contracts. **7**

The Digital Content Directive and the Sale of Goods Directive are thus the first, important step towards – and at present at the centre of – the **new European contract law legislation** which responds to the changes brought about by digitisation. **8**

However, these two Directives do not represent the entirety of the EU's legislative response in this area. The EU's first response with relevance for contract law implementing the 'DSM Strategy' took the form of the **Portability Regulation** in June 2017. The **Geoblocking Regulation** followed in February 2018 and prohibited unjustified geo-blocking and related forms of discrimination.[12] In July 2019, shortly after the adoption of the Directives on Digital Content and Sale of Goods, another important measure touched upon another area of contract law: the **'Platform Regulation'**[13]. This Regulation intends to ensure the transparency of, and trust in, the online platform economy in B2B relations,[14] in particular through rules on contract terms (e.g. Art. 8 Platform Regulation). Looking at these legislative responses to the needs of the 'digital economy' as a whole, the possibility of a versatile and far-reaching development emerges which could take European contract law well beyond the *acquis communautaire* of the 'pre-digital era'. **9**

B. EU Digital Law Commentary

I. Legislation

1. Digital Content Directive

This commentary is centred on 'EU Digital Law' in the field of contract law due to its paramount importance for the development of the internal market. The focus is on the **10**

[9] COM(2015) 634 final.

[10] COM(2015) 635 final.

[11] See Art. 1 DCD; Art. 1 SGD.

[12] The Geoblocking Regulation was not included in this Commentary as key aspects of its content are referred to in the context of portability of digital content.

[13] This Regulation could not be included in this edition of the Commentary due to the short timeframe between its finalisation and publication in the Official Journal and the copy deadline.

[14] See Recital 3 Platform Regulation.

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Digital Content Directive as it is not only one of the pioneering accomplishments within 'EU Digital Law' but covers, and fully harmonises, core areas of **contract law**. It is extremely important for contractual practice because it applies to millions of contracts that EU citizens conclude on a daily basis – from downloading software to streaming music and films and even to buying a DVD. It is also of far-reaching importance for the development of the system and the doctrine of European contract law. It transfers concepts and principles from consumer sales law to new areas, combines them with innovative approaches to digital content and in this way outlines some features of a European general contract law.[15] When dealing with digital issues, it contains ground-breaking new developments, such as the inclusion of data as counter-performance into the scope[16] and a new obligation of the trader to arrange for updates of digital content or digital services[17].

11 *a) Approach.* The focus of legislation, and in this context the Proposal for the Digital Content Directive, on the 'Digital Single Market' was part of a new approach in the area of European contract law.[18] For European contract law, this was not just a response to the changes brought about by digitisation, it also has to be viewed from the perspective of a **chronological development**. European contract law lived in the 1990 s through a phase of rapid development through legal acts with far-reaching and profound effects on national contract law and contractual practice – such as the Unfair Terms Directive and the Consumer Sales Directive. However, these directives were all of a minimum harmonisation nature, i.e. Member States had to implement the directives in their national law, but could do so with a higher level of consumer protection standards.[19] In its first attempts to switch to full harmonisation, the Community legislator was treading carefully. The first directive, where the Commission Proposal followed a full harmonisation approach, was the Distance Marketing of Financial Services Directive. The Council agreed to the full harmonisation approach of this Directive as a matter of principle. However, it chose a minimum harmonisation approach for the rules on pre-contractual information,[20] as the national rules in this area were too dissimilar. The Consumer Credit Directive was the first to follow a full harmonisation approach in its entirety. While ultimately a consensus on full harmonisation was found, the price paid was that within its scope, the Directive still left a wide margin of implementation to Member States.[21]

12 An attempt by the Commission Proposal for the Consumer Rights Directive[22] to **consolidate** and transform four existing minimum harmonisation contract law directives in one full harmonisation Directive failed. The Consumer Rights Directive did not replace the Consumer Sales and Unfair Terms Directives. These key Directives of European contract law retained their minimum harmonisation approach. The Proposal for a Common European Sales Law[23] (CESL) was a reaction to this failure; it suggested an optional harmonisation approach as alternative.[24] However, despite approval by the European Parlia-

[15] See *Schulze* (2019), 695 et seq.
[16] See Digital Content Directive → Art. 3, mn. 46 et seq.
[17] See Digital Content Directive → Art. 8, mn. 110 et seq.
[18] COM(2014) 910 final, 6.
[19] As to the disadvantages of the minimum harmonisation approach see *Staudenmayer* (2012), p. IX et seq.
[20] cf. Art. 4(2) Distance Marketing of Financial Services Directive.
[21] The best example is Art. 16 Consumer Credit Directive on early repayment.
[22] COM(2008) 614 final.
[23] COM(2011) 635 final; for an overview see *Staudenmayer* (2012), p. VII et seq. For more details see *Schulze* (2012).
[24] As to the functioning of an optional harmonisation approach see *Staudenmayer* (2012), p. XVI et seq.

ment to the approach[25], this attempt ultimately failed in Council, due to the resistance from a number of Member States.

13 The Commission drew the lessons from the experiences with the Consumer Rights Directive and the CESL for its Proposal for the current Digital Content Directive.[26] The optional harmonisation approach was dropped, the form of a directive was chosen and the aim of the Proposal was for full harmonisation. Nevertheless, the Digital Content Directive draws greatly from the **CESL** in terms of content and drafting. The provisions on conformity serve as an example, but others may also be found in other provisions.[27] The CESL had already integrated rules on the supply of digital content into its system of general contract and sales law and thus played a pioneering role worldwide. The Digital Content Directive draws on this model by largely following the structures and concepts that have developed in European contract law, particularly in the field of (consumer) sales law.[28]

14 The Commission Proposal has been the subject of lively legal discussions over the following years,[29] nevertheless a number of **core elements** of the Commission Proposal's regulatory model remained unchanged in the legislative process. This concerns, for example, a wide scope achieved through a very broad notion of 'digital content' and 'digital services'. Another example is that the Directive does not replace the traditional contract types of national laws (such as purchase, service, and rental contracts), but rather uses an overarching approach which covers all types of supply of digital content and digital services and prescribes certain results to be achieved, for instance in the form of consumer remedies. A very important step is that the final version of the Directive essentially follows the Commission Proposal with regard to the inclusion of data, although with some modifications in the drafting, whether it can be explicitly viewed as counter-performance, and the limitation to personal data. The same applies to conceptual continuity in relation to the *acquis communautaire* in consumer contract law and to the CESL as regards the definitions of 'consumer' and 'trader' defining the scope, conformity, burden of proof, liability for non-conformity and the structure of remedies. There are certain **innovative approaches** in the Commission Proposal which took into account specific features of digital content. They include a generic remedy to bring digital content into conformity, thereby eliminating the distinction between repair and replacement, and specific requirements for the supply of digital content, such as 'interoperability', and consideration of the 'digital environment'.[30]

15 However, the Commission Proposal also underwent a number of **changes** in the course of the legislative process. Some of them involve drafting rather than substance (such as the express reference 'digital services' alongside 'digital content'), while others relate to issues of far-reaching importance.

16 In particular, it was only in the course of the legislative process that the question whether **goods with digital elements** are regulated in the Digital Content Directive or in the Sale of Goods Directive was finally clarified. In a different manner from the approach taken in the Commission Proposal,[31] the European Parliament initially insisted on the inclusion of goods with digital elements only in the Digital Content Directive.

[25] See the European Parliament legislative resolution of 26 February 2014 (OJ C 285, 29.8.2017, p. 235).

[26] As to the Commission approach see *Staudenmayer* (2016), 804 et seq.

[27] See ibid. and *Staudenmayer* (2020) for the cases where the Directives use substantive models or drafting from the CESL.

[28] *Schulze* (2016), p. 134 et seq.

[29] See, for example, the statement from the *European Law Institute*; *Spindler*, 183 et seq.; *Schulze* (2016); the contributions in *Schulze/Staudenmayer/Lohsse, Terryn/Claeys,* and *Wendehorst/Jud*.

[30] *Schulze* (2019), 711–712.

[31] See *Staudenmayer* (2016), 810 et seq.

The Council took the opposite position, i.e. to regulate goods with digital elements only in the Sale of Goods Directive. But it quickly became clear to the Council that, based on that decision, it would be necessary to adapt the Consumer Sales Directive. Its provisions, dating back to 1999, were obviously not conceived with goods with digital elements in mind. In addition, the European Parliament established an iunctim during the trilogue negotiations on the Digital Content Directive. Before the decision of the Council to regulate goods with digital elements in sales law, the European Parliament took as its – not unjustified – starting point, that the Digital Content Directive would be adopted in any event while an adoption of the Sale of Goods Directive in Council was uncertain. While in the trilogue negotiations, the European Parliament conceded changing its initial approach towards regulating goods with digital elements only in the Sale of Goods Directive, it insisted on adoption of both Directives simultaneously. This presumed that the European Parliament had to agree with the way goods with digital elements would be regulated in the Sale of Goods Directive in order to ensure adoption of the Digital Content Directive. In addition to this factor, there was the element of time pressure since both Directives needed to be voted in plenary before the dissolution of the European Parliament, ahead of the elections in May 2019. This meant in practice that an agreement on both Directives needed to be achieved in February 2019. On the basis of work by the Commission during the course of 2018, which was fed into the legislative process in Council, this led to an elaboration of a regime for goods with digital elements in the Sale of Goods Directive to which the European Parliament ultimately agreed.

17 On this basis, it has been possible to establish the **delimitation** of the scope of both Directives. Accordingly, digital elements fall within the scope of the Sale of Goods Directive if they are incorporated in, or interconnected with, a physical object and are necessary for the performance of its functions and if the digital elements are provided with the goods under the sales contract. If these conditions are not fulfilled, the respective digital elements are regulated by the Digital Content Directive. Physical media fall within the scope of the Digital Content Directive if they are used exclusively as carrier of digital content, such as USB sticks or CDs. (Art. 3(3) and (4) DCD; Art. 3(3) and (4) SGD).

18 A particularly important amendment to the Digital Content Directive during the legislative process, concerned the change in the **conformity** approach[32], reflecting also widespread criticism[33]. While the Commission Proposal in principle gave priority to the subjective element, the objective requirements are now the more important set of conformity criteria.[34] On the other hand, the complete lack of regulation of claims for **damages** is one of the 'losses' during the legislative procedure. While Art. 14 of the Commission's Proposal regulated damages only in a very rudimentary manner, the final version of the Directive leaves this matter entirely to Member States' law.[35]

19 *b) Structure.* In contrast to other directives (e.g. Consumer Rights Directive, E-Commerce Directive), the Digital Content Directive is not divided into chapters or sections. Nonetheless, the **content and order** of the individual articles reveal features of a structure which allows to re-group its provisions into certain clusters.

20 In common with other directives, in particularly the Consumer Rights Directive, the **initial provisions** contain a general description of subject matter and purpose (Art. 1 DCD), the definitions (Art. 2 DCD), a detailed definition of the scope (Art. 3 DCD) and the level of harmonisation (Art. 4 DCD). The definition of the scope in Art. 3(1) DCD is

[32] Digital Content Directive → Art. 6, mn. 22 et seq.

[33] For example, *European Law Institute,* 4, 18–21; *Schulze* (2016), p. 135; the comments by Colombi Ciacchi/van Schagen in: *Schulze/Staudenmayer/Lohsse,* p. 124–125.

[34] Digital Content Directive → Art. 8, mn. 2.

[35] For criticism see *Schulze* (2019), 720–721.

even longer than the scope provision in the Consumer Rights Directive. Read together with the respective recitals, it reflects a strong effort of Member States in Council to describe – even more clearly than the scope itself – what the Digital Content Directive does not regulate.[36] The Digital Content Directive intentionally avoids a legal classification of the specific type of contract (such as a sales or services contract) to which it applies, but extends its scope to all contracts with consumers for the supply of digital content or services. A major novelty, with considerable implications for the future development of European contract law for the digital economy, is the fact that the Digital Content Directive is not only applicable if the consumer pays money to the trader but also if he provides personal data to the trader in return for the supply of digital content or a digital service.[37]

21 In the following **cluster** of provisions, the Directive establishes the **basis** for the subsequent consumer **remedies**. It first provides the **obligation** on the trader **to supply** the digital content or digital service (Art. 5 DCD). This performance obligation is not contained either in the Consumer Sales Directive or in the Sale of Goods Directive. The Directive then turns to **conformity** of the supplied digital content or service (Arts 6–10 DCD). In this context, it defines the subjective requirements for conformity with the contract (Art. 7 DCD), objective requirements for conformity (which must be fulfilled in addition to the subjective requirements; Art. 8 DCD), the consequences of an incorrect integration (Art. 9 DCD) and the rights of the consumer in the event of use restrictions resulting from a violation of third-party rights (Art. 10 DCD). These provisions, which are based on the CESL, constitute a further development of the concept of conformity used in the Consumer Sales Directive.[38] In a number of instances, they are tailored to the supply of digital content and services. Moreover, they also introduce **concepts**, which are **new to European contract law** and may also have a significant impact on new areas of private law in response to the challenges from new technologies. The most important is an obligation on the seller to ensure that the consumer is supplied with **updates**.[39] Finally, they introduce a new distinction between the continuous supply over a period of time in contrast to a single act or a series of individual acts of supply. This distinction is designed to adapt the rules to the fact that the former category is more similar to the provision of services, while the latter is more like a sale.[40] It is used to determine the period during which updates have to be supplied (Art. 8(2) DCD), for the guarantee period (Art. 11(2) and (3) DCD), the period for the burden of proof (Art. 12(2) and (3) DCD) and some means of exercising the remedies (Arts 14(5); 16(1) DCD).

22 The following provisions on the **liability** of the trader (Art. 11 DCD), on the **burden of proof** (Art. 12 DCD) and on **remedies** (Arts 13 and 14 DCD) reflect the structure of the provisions on the primary obligations of the trader in Art. 5 and Arts 6 et seq. DCD: they lay down first the consequences of non-performance pursuant to Art. 5 DCD and then the consequences of non-conformity pursuant to Arts 6 et seq. in as far as they do not apply to both non-performance and non-conformity. A remarkable difference to the Consumer Sales Directive is that the period for reversing the burden of proof with regard to non-conformity has been extended to one year (Art. 12(2) DCD). In principle, the Digital Content Directive provides for the same set and hierarchy of remedies in the case of non-conformity as the Consumer Sales Directive. However, it modifies this basic scheme in several respects by taking into account specific features of the supply of digital

[36] See Digital Content Directive → Art. 3, mn. 91 et seq.
[37] See Digital Content Directive → Art. 3, mn. 46 et seq.
[38] See Digital Content Directive → Art. 6, mn. 4 et seq.
[39] See Digital Content Directive → Art. 8, mn. 110 et seq.
[40] See Digital Content Directive → Art. 8, mn. 132 et seq.

content and digital services (e.g. by expressing subsequent performance with the phrase 'to bring the digital content or digital service into conformity' without providing a choice between 'repair' or 'replacement' – which is not meaningful for digital content or digital services). These provisions on remedies are supplemented by more detailed provisions on the exercise of the right of termination (Art. 15 DCD) and the obligations both parties have in such a case (e.g. to refrain from using digital content or to retrieve digital content; Arts 16–18 DCD).

23 The right of the trader to **modify the digital content** or digital service in accordance with Art. 19 DCD is closely related to the trader's obligations to update in Arts 7 and 8 DCD and changed its purpose between the Commission Proposal and the Directive as finally adopted.[41] This is also a matter with which the Directive is entering new legal territory. For the **right of redress** (Art. 20 DCD), it adopted the model of the Consumer Sales Directive.[42]

24 The last part of the Directive consists of largely familiar **final provisions** on the enforcement by the Member States (including the participation of public or private bodies), its mandatory nature, amendments to other legal acts, the transposition by Member States (adoption by 1 July 2021; application of the measures to comply with the Directive from 1 January 2022), the future review by the Commission, the entry into force and the Member States as addressees (Arts 21–27 DCD). These final provisions also include (although not necessarily where they might be expected to be found, namely under the heading 'Transposition' in Art. 24(2) DCD) the intertemporal rules on the contracts subject to the Directive.

2. Consumer Rights Directive

25 In addition to the new provisions of the Digital Content Directive and the Sale of Goods Directive, a number of existing directives in the field of consumer protection remain of particular importance for the supply of digital products and the needs of the digital economy. This applies in particular to some provisions of the Consumer Rights Directive. This Directive was originally intended to bring together four earlier directives into a single set of rules, thereby giving **greater coherence to core areas of consumer law**. However, mainly due to the concerns of Member States in the Council, it eventually only replaced two earlier directives (Doorstep Selling Directive and Distance Selling Directive) when it was adopted in 2011.

26 In contrast to these earlier Directives, the Consumer Rights Directives prescribes full harmonisation. Its provisions focus on **information duties** and **rights of withdrawal**. Most of these provisions concern distance contracts (such as contracts concluded via the Internet that are particularly important for the supply of digital products) and off-premises contracts. With regard to information obligations, however, it also contains provisions applicable to other consumer contracts ('on-premises contracts').

27 With regard to the adaptation of EU law to the changes brought about by digitisation, the Consumer Rights Directive – similar to the draft CESL[43] – also plays a **pioneering role** as some of its provisions explicitly deal with aspects of contracts for the supply of digital content. In particular, the list of information obligations contains the express obligation to inform the consumer about 'the functionality, including applicable technical protection measures, of digital content' (Arts 5(1)(g), 6(1)(r) CRD). It also imposes an obligation to provide information on the interoperability of digital content with hard-

[41] *Staudenmayer* (2019), 2501.
[42] On the limitations of Art. 4 CSD, see *Staudenmayer* (2000), p. 42 et seq.
[43] Above → mn. 12 et seq.

ware and software (Arts 5(1)(h), 6(1)(s) CRD). In this respect, the Consumer Rights Directive had already introduced initial concepts surrounding 'digital content' into European consumer contract law.[44]

3. E-Commerce Directive

28 The E-Commerce Directive dates from 2000, clearly before the impact of digitisation on the economy and society was felt. However, the Directive was already based on an understanding of the crucial **importance of electronic commerce** for the internal market. To this end, it was intended to help remove legal obstacles to the development of electronic commerce and ensure the free movement of information society services (Art. 1 E-Commerce Directive).

29 With this focus on new forms of commercial communication and information society services, the E-Commerce Directive dealt with important legal issues. Two decades after its adoption, its **revision,** in order to adapt it to the changes that have occurred in the meantime, is now under discussion.[45] Nevertheless, its provisions remain part of the framework conditions for the supply of digital products and thus also for contracting in this field. This applies not only to the provisions of this Directive on general information obligations and on commercial communication (Arts 5 et seq.) but also to the information obligations and the principles relating to placing the order pursuant to Arts 10 and 11 and to the liability of Internet intermediaries pursuant to Arts 12 et seq. E-Commerce Directive.[46]

4. Portability Regulation

30 The Portability Regulation, like the Digital Content Directive, goes back to the European Commission's 2015 DSM Strategy.[47] However, the legislative procedure for the Regulation could be completed almost two years before the Digital Content Directive was adopted and its provisions already entered into force in **April 2018**. The Regulation is relatively concise with only **nine articles**.

31 The Portability Regulation 'introduces a common approach in the Union to the cross-border portability of online content services' by ensuring that subscribers to portable online content services which are lawfully provided in their Member State of residence, can access and use those services when temporarily present in a Member State other than their Member State of residence' (Art. 1 Portability Regulation). For example, the subscriber of a streaming service should also be able to use the service if he is temporarily in another Member State, without incurring any additional burdens.

32 It has considerable **practical significance** for the businesses concerned and the citizens of the EU who can draw concrete practical advantages from its application. Moreover, it highlights the interfaces between EU contract law in the 'digital age' and other areas of law as well as the need for coherent solutions in the context of the DSM Strategy (e.g. with regard to data protection, copyright, telecommunications law and general media law).[48]

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[44] See Consumer Rights Directive → Art. 6, mn. 9. Definitions originally used in the Consumer Rights Directive have since been changed by the Modernisation Directive, see Digital Content Directive → Art. 7, mn. 34, and Consumer Rights Directive → Art. 6, mn. 9.

[45] See, for example, E-Commerce Directive → Introduction to Arts 12–15, mn. 6–8.

[46] For more detail see the comments on the E-Commerce Directive, Arts 10–11 and Arts 12–15.

[47] For more detail see Portability Regulation → Introduction, mn. 58, 81 et seq.

[48] For further details see Portability Regulation → Introduction, mn. 18 et seq.

II. Aim

33 This commentary aims to provide information on the new law with which the EU is responding to the challenges of the digitisation and the needs of the digital economy in the field of contract law. With a team with authors from several EU Member States, the aim is to assist in ensuring that the common European responses to technological challenges and the needs of the digital economy, especially in a cross-border context, are effective in the legal practice of the Member States. This commentary should **facilitate the direct application** of the Portability Regulation as well as the transposition of the Digital Content Directive – and the updated Consumer Rights Directive – into Member States law and the application of their implementing legislation. In order to achieve this purpose, it is essential that the objectives, the precise content and potential problems with applying the new and already familiar European provisions are known, thoroughly explained and discussed. It is the hope of the editors that this commentary can contribute to an exchange of ideas and experiences among lawyers from many Member States. Only in this way, can a **common understanding of European law** be developed to facilitate the uniform application of EU regulations and effective harmonisation on the basis of EU directives.