

Editorial

by Karin Sein and Martin Ebers

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- 1 This special issue continues the academic debate on the topical issues of the new Directives on Digital Content and Services and Consumer Sales and, more broadly, on new technologies related to consumer contracts. The contributions of this volume are based on the presentations held at the virtual conference “Digital Consumer Contract Law and New Technologies” on the 26th-27th of November 2020. The conference – originally meant to take place in Tallinn but postponed and moved online due to COVID-19 restrictions – was part of the research project PRG124 “Protection of consumer rights in the Digital Single Market – contractual aspects”, funded by the Estonian Research Council. The aim of the conference was to look into the core questions of the new consumer contract law directives, their interrelationship with other legal areas such as copyright or telecommunications law, their implications for consumers and industry as well as their ongoing transposition in Member States. Additionally, it provided a vivid discussion of certain new technologies and business models (AI, blockchain, internet of bodies, Legal Tech) and whether the new rules for consumer contracts are fit to deal with them.
- 2 Our special issue starts with *Hugh Beale’s* comprehensive overview of the Digital Content Directive and, more specifically, assessment of its rules on long-term contracts. He also reminds us of the utmost importance of public enforcement as consumers will usually have little incentive to exercise their rights under the directive due to their low value. *Gerald Spindler* then explores the interrelationship of the Digital Content Directive with copyright law and scrutinizes the triangle between copyright holders, traders and consumers by concentrating especially on the copyright restrictions in EULAs and whether they can be considered as a lack of conformity of digital content under the objective conformity test of the directive. He concludes, however, that the directive does not solve the problems in the triangle as consumers are not able to enforce their rights against the
- rightsholders and refers to the French model of *action directe* as a possible solution.
- 3 The issue then turns to the new digitalized Sale of Goods Directive, starting with the analysis of the seller’s updating obligation in case of smart consumer goods by *Piia Kalamees*. She emphasizes that this obligation can be burdensome for traders as they usually are not in a position to provide the updates themselves; yet they are liable vis-à-vis consumers if the updates are missing or are leading to a lack of conformity of the good. To balance the seller’s position, she suggests designing the national rules on the seller’s right of redress in a mandatory manner, e.g. by limiting the possibility to exclude the right of redress in standard terms. *Alberto De Franceschi* also deals with the sale of consumer goods with digital elements and explores the consumer’s remedies for lack of conformity, pointing out that consumers should not be allowed to by-pass the directive’s system of remedies by using other remedies provided by national law. Moreover, he raises a fundamental question of whether the actual consumer law is fit to tackle planned (digital) obsolescence and ensure longer durability of consumer goods. *Peter Rott*, in turn, asks about the impact of the new consumer contract law directives on the smart car industry. He develops the argument that although the allocation of liability for interconnected digital services with the seller of the car would seem to strengthen the consumer’s position, different rules for hardware and digital content and services can easily complicate the enforcement of remedies. *Karin Sein* investigates the complicated interplay of the Digital Content Directive, the new European Telecommunications Code and Audio-Visual Media Directive, especially in case of bundle contracts, and points out certain inconsistencies.
- 4 At the time of the conference Member States were in the process of drafting their transposition rules of the new directives. As the Digital Content Directive leaves contract typology to the competence of Member States, it felt important to discuss how

jurisdictions with a civil code tradition deal with the implementation of its overarching contract law rules into national law. The country reports by *Brigitta Zöchling-Jud* (Austria), *Marco Loos* (Netherlands), *Monika Namysłowska*, *Agnieszka Jabłowska* and *Filip Wiaderek* (Poland), *Laurynas Didžiulis* (Lithuania) and *Irene Kull* (Estonia) demonstrate that legislative choices vary considerably even within the civil law countries, including transposing the digital content provisions in the general part of contract law (Germany, Lithuania, Estonia), in the special part following the rules of sales contract (Netherlands) or even developing a separate act outside the civil code that integrates consumer contract law norms both on digital content as well as consumer sales (Austria, Poland).

- 5 The last section of this special issue deals with new technologies and the question of whether EU consumer law directives and especially the new Directives on Digital Contract Law are equipped to deal with the upcoming challenges posed by them. *Cristina Amato* focuses on the Internet of Bodies (IoB), which can be understood as an extension of the Internet of Things (IoT), since it connects the human body to a network through devices that are ingested, implanted, or connected to the body in some way. As Amato points out, the European Union has not yet set up a coherent regulatory framework in this field and proposes to set up a new framework which integrates the New Legislative Framework and the European Standardisation System with sales law. After that, *André Janssen* examines whether the new Directives on Digital Contract law are really “smart contract ready” based on blockchain technology. In this context, he focuses especially on two problems that can arise with smart contracts, i.e. (i) whether a smart contract with a virtual currency payment obligation is governed by the new Consumer Sales Directive, and (ii) whether a smart contract component is a “digital element” of a sold good under the New Consumer Sales Directive. The last contribution, written by *Martin Ebers*, discusses whether existing EU consumer law is equipped to deal with situations in which AI systems are either used for internal purposes by companies or offered to consumers as the main subject matter of the contract. The analysis reveals a number of gaps in current EU consumer law, in particular regarding dark patterns and online behavioral advertising, growing information asymmetries, risks of algorithmic decision making, liability for defective AI systems, and missing standards for assessing whether AI systems comply with the objective conformity criteria. In this light, Ebers discusses upcoming legislation in the field of AI and Consumer Law.
- 6 The new Directives on Digital Contracts are part of a wider strategy of the European Union in the field of consumer law and the digital economy in general.

In the past two years, the EU also amended – as part of the “New Deal for Consumers” – the Consumer Rights Directive (CRD) 2011/83 and the Unfair Commercial Practices Directive (UCPD) 2005/29 – and adopted the new Directive on Representative Actions 2020/1828, in order to facilitate the enforcement of consumer rights in the digital age. Additionally, the European Commission presented in December 2020 two new proposals: first, the proposal for a Digital Services Act, which aims to introduce mechanisms for removing illegal content, possibilities for users to challenge platforms’ content moderation decisions, and transparency measures for online platforms. And second, the proposal for a Digital Markets Act, which aims to ensure that large online platforms (so called “gatekeepers”) behave in a fair way vis-à-vis business users who depend on them. In November, the European Commission also published a new consumer law agenda for the next 5 years. According to this agenda, the Commission is planning to publish guidance documents on the application of the UCPD and the CRD to problematic practices observed in e-commerce that prevent consumers from obtaining important information and abuse their behavioural biases. This refers, more specifically, to the use of ‘dark patterns’ (user-interface designs aimed at manipulating consumers), profiling, hidden advertising, fraud, misleading information and manipulated consumer reviews.

- 7 More legislative actions are yet to come: In the field of new technologies, the European Commission intends to present – as a follow up to its White Paper on AI – legislation aimed at tackling the ‘technological, ethical, legal and socio-economic aspects of AI.’ In parallel, there is also an ongoing discussion on how the current liability framework can be adapted to new technologies, discussed inter alia in the European Commission’s Report on the safety and liability implications of AI, and the European Parliament’s resolution with recommendations to the Commission on a civil liability regime for AI. Last but not least, as part of its European Data Strategy, the Commission presented also a proposal for a Data Governance Act and announced to come up with a proposal at the end of 2021 for a so-called Data Act aiming to “foster business-to-government data sharing for the public interest”. How these legislative proposals will fit into existing consumer law, remains – for the time being – unclear.
- 8 In view of these dynamic developments, this special issue attempts to contribute to a better understanding of the new Directives on digital contract law. We hope that we have succeeded in doing so and wish all readers a stimulating and exciting read.

Karin Sein and Martin Ebers