

Schulze / Staudenmayer

EU Digital Law

Article-by-Article Commentary

Second Edition



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edited by

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Preface

Four years after the publication of the first edition of ‘EU Digital Law’, a new edition has become necessary. The present second edition incorporates the development of doctrine and case law as well as the implementation of directives into national law during this period. More importantly, the commentary expanded to integrate a number of important new legal acts which have pushed forward the adaptation of EU law to the digital transition. Thus, this new edition includes the private law-relevant parts of all legal acts regulating the platform economy, i.e. the Digital Markets Act, the Digital Services Act, and the Platform Regulation. It also contains the Sale of Goods Directive. Together with the Digital Content Directive, these two Directives regulate digital products, i.e. goods with digital elements as well as digital content and digital services. The commentary includes also the latest changes to the Sale of Goods Directive, stemming from the Right-To-Repair Directive, adopted on 30 May 2024, but not yet published in the Official Journal. While the recently enacted Data Act is briefly explained in the introductory section of this new edition, the commentary of its provisions is reserved for the next edition in order to include the model contract terms for data sharing contracts and the standard contract clauses for cloud computing contracts to be recommended by the Commission by September 2025. The introduction explains why these model clauses constitute *de facto* the soft transposition law of the Data Act. It is thus appropriate to analyse the Data Act provisions together with them.

Including this EU legislation in this second edition is in line with the aims of the EU Digital Law Commentary: Digitalisation is one of the major trends of the 21st century and has resulted in rapid and important adaptations of the legislative framework in response. Lawyers in Europe should be prepared for the digital transition and for working with this legislation. Recent EU legislation has swiftly adopted European law affording traditional core areas of private law with salient new features and numerous individual provisions relevant to contract law. Moreover, full harmonisation has been extended to key aspects of consumer contract law, amongst others through the Digital Content Directive and the Sale of Goods Directive of 2019.

This commentary on European Digital Law continues to provide 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, the commentary strives to inform and offer suggestions during the important stage of the emerging application of the new regulations and the transposition of the new Directives into national law. In addition, it also will assist legal education and training 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 digital EU private law.

The international team of contributors comprises authors from several EU Member States, reflecting the European nature of the legislation covered by this commentary. However, given the speed of 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.

Preface

The editors especially thank Dr. Jonathon Watson for his commendable participation with his valuable knowledge and advice, as well as the student assistants Kim von Göldel and Yannick Tasei. Particular thanks are again due to Dr. Matthias Knopik at Nomos Publishers, whose contribution and support ensured timely publication despite all difficulties.

Münster and Brussels
September 2024

*Reiner Schulze
Dirk Staudenmayer*

CONTENTS

Preface	V
Contributors	XI
Abbreviations	XIII
Short titles of European legislation	XVII

Introduction	1
--------------------	---

DIGITAL CONTENT DIRECTIVE (2019/770)

Article 1	Subject matter and purpose	21
Article 2	Definitions	32
Article 3	Scope	45
Article 4	Level of harmonisation	83
Article 5	Supply of the digital content or digital service	88
Article 6	Conformity of the digital content or digital service	99
Article 7	Subjective requirements for conformity	111
Article 8	Objective requirements for conformity	125
Article 9	Incorrect integration of the digital content or digital service	164
Article 10	Third-party rights	180
Article 11	Liability of the trader	196
Article 12	Burden of proof	209
Article 13	Remedy for the failure to supply	218
Article 14	Remedies for lack of conformity	239
Article 15	Exercise of the right of termination	269
Article 16	Obligations of the trader in the event of termination	276
Article 17	Obligations of the consumer in the event of termination	294
Article 18	Time limits and means of reimbursement by the trader	304
Article 19	Modification of the digital content or digital service	313
Article 20	Right of redress	320
Article 21	Enforcement	328
Article 22	Mandatory nature	331
Article 23	Amendments to Regulation (EU) 2017/2394 and Directive 2009/22/EC	334
Article 24	Transposition	335
Article 25	Review	340
Article 26	Entry into force	345
Article 27	Addressees	345

SALE OF GOODS DIRECTIVE (2019/771)

Article 1	Subject matter and purpose	346
Article 2	Definitions	346
Article 3	Scope	347
Article 4	Level of harmonisation	359
Article 5	Conformity of goods	361
Article 6	Subjective requirements for conformity	371
Article 7	Objective requirements for conformity	386
Article 8	Incorrect installation of the goods	427
Article 9	Third-party rights	435
Article 10	Liability of the seller	443
Article 11	Burden of proof	460
Article 12	Obligation to notify	469
Article 13	Remedies for lack of conformity	476
Article 14	Repair or replacement of the goods	510
Article 15	Price reduction	524

Contents

Article 16	Termination of the sales contract	531
Article 17	Commercial guarantees	545
Article 18	Right of redress	557
Article 19	Enforcement	562
Article 20	Consumer information	563
Article 21	Mandatory nature	563
Article 22	Amendments to Regulation (EU) 2017/2394 and Directive 2009/22/EC	565
Article 23	Repeal of Directive 1999/44/EC	566
Article 24	Transposition	566
Article 25	Review	566

CONSUMER RIGHTS DIRECTIVE (2011/83)

Article 5	Information requirements for contracts other than distance or off-premises contracts	577
Article 6	Information requirements for distance or off-premises contracts	591
Article 6a	Additional specific information requirements for contracts concluded on online marketplaces	607
Article 8	Formal requirements for distance contracts	614
Article 14	Obligations of the consumer in the event of withdrawal	626
Article 16	Exceptions from the right of withdrawal	630
Article 18	Delivery	634

E-COMMERCE DIRECTIVE (2000/31)

Article 5	General information to be provided	647
Article 6	Information to be provided	663
Article 7	Unsolicited commercial communication	671
Introduction to Arts 10–11	678
Article 10	Information to be provided	680
Article 11	Placing of the order	687

DIGITAL SERVICES ACT

Introduction to the Digital Services Act	692	
Article 1	Subject matter	698
Introduction to Arts 4–8	708
Article 4	‘Mere conduit’	714
Article 5	‘Caching’	723
Article 6	Hosting	731
Article 7	Voluntary own-initiative investigations and legal compliance	757
Article 8	No general monitoring or active fact-finding obligations	760
Article 14	Terms and conditions	766
Article 17	Statement of reasons	780
Article 27	Recommender system transparency	788
Article 28	Online protection of minors	797
Article 30	Traceability of traders	805
Article 38	Recommender systems	816

PLATFORM REGULATION (2019/1150)

Article 1	Subject matter and purpose	819
Article 2	Definitions	832
Article 3	Terms and conditions	845
Article 4	Restriction, suspension and termination	858
Article 5	Ranking	866

Contents

Article 6	Ancillary goods and services	875
Article 7	Differentiated treatment	879
Article 8	Specific contractual terms	887
Article 9	Access to Data	892
Article 10	Restrictions to offer different conditions through other means	898

PORTABILITY REGULATION (2017/1128)

Introduction	904	
Article 1	Subject matter and scope	926
Article 2	Definitions	929
Article 3	Obligation to enable cross-border portability of online content services	942
Article 4	Localisation of the provision of, access to and use of online content services	955
Article 5	Verification of the Member State of residence	959
Article 6	Cross-border portability of online content services provided without payment of money	974
Article 7	Contractual provisions	979
Article 8	Protection of personal data	983
Article 9	Application to existing contracts and rights acquired	986
Article 10	Review	989
Article 11	Final provisions	990

DIGITAL MARKETS ACT

Introduction to the Digital Markets Act	991	
Article 1	Subject matter and scope	994
Article 2	Definitions	1001
Article 3	Designation of gatekeepers	1029
Article 5	Obligations for gatekeepers	1041
Article 6	Obligations for gatekeepers susceptible of being further specified under Article 8	1058
Article 7	Obligation for gatekeepers on interoperability of number-independent interpersonal communications services	1085
Article 8	Compliance with obligations for gatekeepers	1091
Article 9	Suspension	1098
Article 10	Exemption for grounds of public health and public security	1102
Article 12	Updating obligations for gatekeepers	1107
Index	1115	

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Introduction*

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

Introduction

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A. Adaptation of EU law to the needs of the digital economy	1
B. EU Digital Law Commentary	12
I. Legislation	12
1. The Digital Content and Sale of Goods Directives	12
2. Consumer Rights Directive	27
3. E-Commerce Directive	30
4. Digital Markets Act	32
5. Digital Services Act	34
6. Platform Regulation	38
7. Portability Regulation	40
8. The Data Act	43
II. Aim of this commentary	62

A. Adaptation of EU law to the needs of the digital economy

- Digitalisation** 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 digitalisation will ultimately lead to the entire economy becoming digital.
- At present, there is a global race to reap the benefits of emerging digital technologies or developments such as artificial intelligence, quantum computing, the emerging data economy 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 digitalisation. 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 digitalisation. However, in order to achieve such purpose, the **EU legal framework needs to be adapted** to these challenges. Such adapted legal framework may also be able influence global standards and serve as a model for the developing laws of other countries.
- While digitalisation 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.
- Digitalisation therefore presents the European Union with the challenge to adapt its **legal framework**. The challenges facing primary and secondary EU law extend to

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, digitalisation will multiply exponentially the possibilities of using the human brain.

² See *Lohsse/Schulze/Staudenmayer* (2017), p. 13 et seq.

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).

Introduction

numerous policy fields such as competition law,⁴ intellectual property law, consumer protection, and judicial cooperation.

The **adaptation** of EU private law to the needs of the digital economy is taking place **in three waves**.⁵ The **first wave** began at the end of the nineties and amended EU private law for the purpose of **promoting electronic commerce** and adapting consumer protection tools. The **E-Commerce Directive** of June 2000 is an important deliverable in this first wave. The **Consumer Rights Directive** of 2011, which dealt mainly with distance selling methods (and replaced the Distance Selling Directive of 1997), concluded this first wave. At present, we are in the **second wave**. It is partially a reaction to a **new generation of digital products** enabled through new technologies. These new products – digital content and digital services as well as smart products – are now regulated by the Digital Content Directive and the Sale of Goods Directive. Another aspect of this phase is a response to **emerging dependencies**, for instance that between data-haves and data-have-nots in the data economy. A **third wave**, intended to regulate among other things the means by which private law should deal with **autonomously acting AI**, has already begun. The Commission proposals for an AI Liability Directive and for the review of the Product Liability Directive are the first elements of this third wave.⁶ The EU's legal responses to the challenges of digitalisation – or in short: EU digital law – have contributed to a significant development of the *acquis communautaire*.

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 experiencing a rapid and profound change due to the influence of digitalisation. 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 is thus facing a phase of modernisation.⁸

Two key contract law measures concerning digital contracts were adopted in May 2019. These were the **Digital Content Directive**, regulating contract law aspects of digital content and digital services, and the **Sale of Goods Directive**, which introduces rules on smart products⁹ (called goods with digital elements by the Directive). 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.¹⁰ However, this does not mean that EU measures adapting

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 30 August 2024).

⁵ cf. *Staudenmayer*, *Europäisches Digitales Zivilrecht*, Kapitel 1 and 8.

⁶ On the challenges of AI for tort law cf. *Lohsse/Schulze/Staudenmayer*, 'Liability for AI – Opening a new chapter of adapting European private law to the digital transition' in *Lohsse/Schulze/Staudenmayer (eds)* (2023), *Liability for AI*.

⁷ See *Schulze/Staudenmayer*, p. 19.

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

⁹ Cf. the contributions in *Lohsse/Schulze/Staudenmayer* (2022).

¹⁰ See Art. 1 DCD; Art. 1 SGD.

Introduction

private law to the needs of the digital economy are at present, or will be in the future, restricted to B2C contracts.

- 8 While the Digital Content Directive and the Sale of Goods Directive are important steps adapting European contract law to the changes brought about by digitalisation, they do not represent the entirety of the EU's legislative response in this area.
- 9 The first legal acts in the second wave of adapting EU private law to the needs of the digital economy tackled the emerging risk that **digital technologies allow to departmentalise markets**.¹¹ The **Portability Regulation** of June 2017 aimed at ensuring that subscribers to portable online content services can access and use those services when temporarily present in another Member State. The **Geo-blocking Regulation** of February 2018 dealt with the commercial practice that traders block or limit access to their online interfaces, such as websites and apps, by customers from other Member States. It prohibited unjustified geo-blocking.
- 10 A different cluster of measures in the second wave of EU digital law regulated different aspects of the emerging **platform economy and the dependencies resulting from it**. The **'Platform Regulation'** does not tackle yet this emerging dependency between platform providers and their business users which is created mainly because of the network effect.¹² Instead, it aims at achieving more transparency in the platform economy in B2B relations, among others through rules on contract terms. Thereby, the Platform Regulation does not interfere into the commercial practices of the platform providers which are an expression of the imbalance of bargaining power between them and their users. It restricts itself to ensure that the platform's business users know what they are accepting in the contract concluded with the platform. The **Digital Market Act** goes considerably further in regulating the dependency between platform providers and their business users, but restricts its scope to so-called 'gatekeepers'. It regulates in particular commercial practices of these gatekeepers and the way how they deal with the data gained through providing their platform services. Thereby it regulates to a rather large extent the content of the contracts concluded between gatekeepers and their business customers.
- 11 As part of the second wave of adaptation of EU private law to the needs of the digital economy, the **Data Act** is concerned with managing with another emerging dependency in the data economy. It endeavours to answer the question of who has access to data and under what conditions can data be used commercially.¹³ This question is central because of the growing significance of data as factor of production. As data increasingly becomes the blood in the veins of the data economy¹⁴, future innovative business models will need access to data. The rise and roll-out of the Internet of Things allows smart products¹⁵ to collect data.¹⁶ The fast and ever-increasing mass of data leads to a datafication of business processes and data-based business models. Two features of data

¹¹ The Geoblocking Regulation, a part of this cluster, is not included in this Commentary. Cf. instead *Staudenmayer*, *Europäisches Digitales Zivilrecht*, Kapitel 6.

¹² On the dependency between platform providers and business users and the underlying reasoning of the Platform Regulation, cf. *Staudenmayer*, 'Towards a European Private Law of the Digital Economy? – Trends', p. 78 et seq.

¹³ Cf. Recital 4 1st sentence According to *Harari*, p. 97, it could be the most important political question of our time how to regulate the use of data.

¹⁴ *Lohsse/Schulze/Staudenmayer (eds)*, *Trading Data in the Digital Economy: Legal Concepts and Tools*, p. 15.

¹⁵ As regards the importance of smart products in the IoT, see *Lohsse/Schulze/Staudenmayer*, "Smart Products" – A Focal Point for Legal Developments in the Digital Economy' p. 13 et seq. in *Lohsse/Schulze/Staudenmayer (2022)*.

¹⁶ Cf. Recital 1 2nd sentence Data Act. The Data Act regulates the so-called connected products (Art. 2 (5)). Cf. also Recital 14.

are particularly relevant in this context. Data is a non-rivalrous resource, which means that the use of data by one market player does not limit the availability, the usability, nor the value of the same data for use by other market players. While this potentially would allow for easy sharing of data, data is at the same time also an excludable resource. In other words, it is by no means automatically available for use by anyone as its use can be easily restricted. Dependency is created, when a business needs data of another business for the development of its own innovative business model or for running such business model, but does not have any other source to obtain this data.

B. EU Digital Law Commentary

I. Legislation

1. The Digital Content and Sale of Goods Directives

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 Digital Content Directive and the Sale of Goods Directive as they are not only pioneering accomplishments within 'EU Digital Law' but cover, and fully harmonise, core areas of **contract law**. They are extremely important for contractual practice because they apply to millions of contracts in the digital economy that EU citizens conclude on a daily basis. The Digital Content Directive covers thus for instance downloading software, streaming music, buying a film on a DVD or being part of social media. The Sale of Goods Directive concerns the purchase of smart product which incorporates software necessary for its functioning or is interconnected with a digital service. They are also of far-reaching importance for the development of the system and the doctrine of European contract law. They transfer concepts and principles from consumer sales law to new areas, combine them with innovative approaches and in this way outlines some features of a European general contract law.¹⁷ When dealing with digital issues, they contain ground-breaking new developments, such as the inclusion of data as counter-performance into the scope¹⁸ and a new obligation of the trader to arrange for updates of digital content or digital services or digital elements in smart products¹⁹.

a) *Approach*. The Digital Content Directive and the Sale of Goods Directive adopt a **full harmonisation approach**. European contract law lived in the 1990s 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.²⁰ 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

¹⁷ See *Schulze* (2019), 695 et seq.

¹⁸ See Digital Content Directive → DCD Art. 3 mn. 46 et seq.

¹⁹ See Digital Content Directive → DCD Art. 8 mn. 110 et seq. and Sale of Goods Directive → SGD Art. 7 mn. 83 et seq.

²⁰ As to the disadvantages of the minimum harmonisation approach see *Staudenmayer* (2012), p. IX et seq.

Introduction

of principle. However, it chose a minimum harmonisation approach for the rules on pre-contractual information,²¹ 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.²²

- 14 An attempt by the Commission Proposal for the Consumer Rights Directive 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 Law²³ (CESL) was a reaction to this failure; it suggested an optional harmonisation approach as alternative.²⁴ However, despite approval by the European Parliament of the approach²⁵, this attempt ultimately failed in Council, due to the resistance from a number of Member States.
- 15 The Commission drew the lessons from the experiences with the Consumer Rights Directive and the CESL for its Proposals for the current Digital Content and Sale of Goods Directives.²⁶ The optional harmonisation approach was dropped, the form of a directive was chosen and the aim of the Proposals was full harmonisation. Nevertheless, both Directives draw 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 and the Sale of Goods Directives draw 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
- 16 The Commission Proposals were the subject of lively legal discussions over the following years,²⁹ nevertheless a number of **core elements** of the Commission Proposals' regulatory model remained unchanged in the legislative process. As regards the Digital Content Directive, 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 Digital Content Directive essentially follows the Commission Proposal with regard to the inclusion of data, although with some modifications in the drafting, whether data is explicitly recognised as counter-performance, and in the limitation to personal data. For both Directives, the same applies to conceptual continuity in relation to the *acquis communautaire* in consumer contract law and to the CESL as

²¹ cf. Art. 4(2) Distance Marketing of Financial Services Directive.

²² The best example is Art. 16 Consumer Credit Directive on early repayment.

²³ 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.

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, Terryyn/Claeys, and Wendehorst/Jud.*

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 for the Digital Content Directive 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

However, the Commission Proposals 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 to ‘digital services’ alongside ‘digital content’ in the Digital Content Directive), while others relate to issues of far-reaching importance. 17

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. 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 *unctim* 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. 18

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). 19

A particularly important amendment to the Digital Content Directive during the legislative process, concerned the change in the **conformity** approach³², reflecting also 20

³⁰ Schulze (2019), 711–712.

³¹ See Staudenmayer (2016), 810 et seq.

³² Digital Content Directive → DCD Art. 6 mn. 22 et seq.

Introduction

widespread criticism³³. 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 on the Digital Content Directive regulated damages only in a very rudimentary manner, the final version of both Directives leave this matter to some equally rudimentary statements in the recitals³⁵ and to Member States' law.³⁶

- 21 *b) Structure.* In contrast to other directives (e.g. Consumer Rights Directive, E-Commerce Directive), the Digital Content and the Sale of Goods Directives are 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.
- 22 In common with other directives, for instance the Consumer Rights Directive, the **initial provisions** contain a general description of subject matter and purpose (Art. 1 DCD; Art. 1 SGD), the definitions (Art. 2 DCD; Art. 2 SGD), a detailed definition of the scope (Art. 3 DCD and Art. 3 SGD) and the level of harmonisation (Art. 4 DCD; Art. 4 SGD). The definition of the scope in Art. 3(1) DCD is 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.³⁷ 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 adaptation of European contract law to the needs of 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.³⁸
- 23 In the following **cluster** of provisions, the Directives establish the **basis** for the subsequent consumer **remedies**. The Digital Content Directive 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 Digital Content Directive then turns to **conformity** of the supplied digital content or service (Arts 6–10 DCD), while the Sale of Goods Directive immediately after the initial provisions deals with the conformity of goods (Arts. 5–9 SGD). In this context, they define the subjective requirements for conformity with the contract (Art. 7 DCD; Art. 6 SGD), the objective requirements for conformity (which must be fulfilled in addition to the subjective requirements; Art. 8 DCD; Art. 7 SGD), the consequences of an incorrect integration or incorrect installation (Art. 9 DCD; Art. 8 SGD) and the rights of the consumer in the event of use restrictions resulting from a violation of third-party rights (Art. 10 DCD; Art. 9 SGD). These provisions, which are partly based on the CESL, constitute a further development of the concept of conformity used in the Consumer Sales Directive.³⁹ In a number of instances, they are tailored to the

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 → DCD Art. 8 mn. 2.

³⁵ See Recital 73 of the Digital Content Directive and Recital 61 of the Sale of Goods Directive.

³⁶ See Art. 3(10) of the Digital Content Directive and Art. 3(6) of the Sale of Goods Directive. For criticism see *Schulze* (2019), 720–721.

³⁷ See Digital Content Directive → DCD Art. 3 mn. 91 et seq.

³⁸ See Digital Content Directive → DCD Art. 3 mn. 46 et seq.

³⁹ See Digital Content Directive → DCD Art. 6 mn. 4 et seq.; Sale of Goods Directive → SGD Art. 5 mn. 12 et seq.

supply of digital content and services or the sale of goods with digital elements. 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 stemming from new technologies. The most important is an obligation on the seller to ensure that the consumer is supplied with **updates**.⁴⁰ 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.⁴¹ It is used to determine the period during which updates have to be supplied (Art. 8(2) DCD; Art. 7(3) SGD), for the guarantee period (Art. 11(2) and (3) DCD; Art. 10(2)–(6) SGD), the period for the burden of proof (Art. 12(2) and (3) DCD; Art. 11(3) SGD) and some means of exercising the remedies (Arts 14(5); 16(1) DCD).

The following provisions on the **liability** of the trader (Art. 11 DCD; Art. 10 SGD), on the **burden of proof** (Art. 12 DCD; Art. 11 SGD) and on **remedies** (Arts 13 and 14 DCD; Art. 12 to 16 SGD) reflect the structure of the provisions on the primary obligations of the trader in the above provisions of the Directives. In the Digital Content Directive, 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. In the Sale of Goods Directive, they refer to the consequences of non-conformity pursuant to Art. 5 et seq. A remarkable difference of the Digital Content Directive compared 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, both Directives provide for the same set and hierarchy of remedies in the case of non-conformity as the Consumer Sales Directive. However, this basic scheme is modified in several respects, in particular by taking into account specific features of the supply of digital content and digital services (e.g. in Art. 14(3) DCD 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; Art. 16(1) SGD) 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; to return the goods to the seller at his expense and to reimburse the price under specified conditions; Art. 16(3) SGD).

The Digital Contract Directive provides for the right of the trader to **modify the digital content** or digital service in Art. 19. This right 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.⁴² This is also a matter with which the Directive is entering new legal territory. For the **right of redress** (Art. 20 DCD; Art. 18 SGD), both Directives adopted the model of the Consumer Sales Directive.⁴³

The last parts of the Directives consist 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

⁴⁰ See Digital Content Directive → DCD Art. 8 mn. 110 et seq.; Sale of Goods Directive → SGD Art. 7 mn. 83 et seq.

⁴¹ See Digital Content Directive → DCD Art. 8 mn. 132 et seq.; Sale of Goods Directive → SGD Art. 7 mn. 98.

⁴² Staudenmayer (2019), 2501.

⁴³ On the limitations of Art. 4 CSD, see Staudenmayer (2000), p. 42 et seq.

Introduction

States (adoption by 1 July 2021; application of the measures to comply with the Directives from 1 January 2022), the future review by the Commission, the entry into force and the Member States as addressees (Arts 21–27 DCD; Arts. 19-27 SGD). 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 and Art. 24 (2) SGD) the intertemporal rules on the contracts subject to the Directive.

2. Consumer Rights Directive

- 27 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 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.
- 28 In contrast to these earlier Directives, the Consumer Rights Directive 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 content and services as well as smart products) and off-premises contracts. With regard to information obligations, however, it also contains provisions applicable to other consumer contracts (‘on-premises contracts’).
- 29 With regard to the adaptation of EU law to the needs of the digital economy, the Consumer Rights Directive – similar to the CESL⁴⁴ – also plays a **pioneering role** as some of its provisions explicitly deal with aspects of contracts for the supply of digital content. This already applied to the initial 2011 version of the Directive which had already introduced initial concepts surrounding ‘digital content’ into European consumer contract law. It was extended and deepened in 2019 by the additions and amendments to the Consumer Rights Directive introduced by Article 4 of the Modernisation Directive. In particular, the list of information obligations in the initial version of the Consumer Rights Directive already contained the express obligation to inform the consumer about ‘the functionality, including applicable technical protection measures, of digital content’. The 2019 version additionally refers to goods with digital elements and digital services (Arts 5(1)(g), 6(1)(r) CRD). Accordingly, it extends the initial obligation to provide information on interoperability with hardware and software for digital content to goods with digital elements and digital services (Arts 5(1)(h), 6(1)(s) CRD). The Modernisation Directive has also extended and clarified the scope, definitions and information requirements of the Consumer Rights Directive for a number of other items that require regulation in the digital economy.⁴⁵ In particular, a newly inserted Art. 6a CRD has introduced special information obligations for contracts concluded on online marketplaces.

⁴⁴ Above → mn. 15 et seq.

⁴⁵ For further details see the comments on the Consumer Rights Directive → CRD Art. 6 mn. 11 et seq.

Index

Bold numbers refer to articles, normal ones to margin numbers.

- Abuse of dominant position *Platform Reg.* 4 5
- Acceptance *DCD* 13 56
- Access economy *DCD* 3 45
- Access to data *Platform Reg.* 7 2, 10
- Access to legal remedies *DMA* 5 44 et seqq.
- Acquis Communautaire
Platform Reg. 2 2 et seqq.
- Activation of the procedure *DMA* 10 3 et seqq.
- Adaptation of private law *DCD* 3 49
– waves *DCD* 3 6
- Additional information requirements
E-Commerce Dir. 5 6
- Additional means of communication
E-Commerce Dir. 5 33
- Adequate understanding *Platform Reg.* 5 14
- Admission to the profession
– Member State *E-Commerce Dir.* 5 45
- Advertising *DCD* 3 95 et seqq.
- Advertising prices *DMA* 5 76 et seqq.
- Affiliated companies *Platform Reg.* 9 5
- Affiliate programmes *Platform Reg.* 3 11
- Affirmative action *Platform Reg.* 3 8
- Age assessment *DSA* 28 37 et seqq.
- Aim of the DSA *DSA* 1 4 et seqq.
- Algorithm *Platform Reg.* 5 6
- Algorithmic transparency
Platform Reg. 5 2 et seqq.
- Aliud *DCD* 11 11, 14 12, 15
- Ancillary contractual obligations
Platform Reg. 10 7
- Ancillary goods and services *Platform Reg.* 2 8,
6 4, 10 1
- Ancillary service *DSA* 6 14, 58, 79
- Antitrust law *Platform Reg.* 1 7, 6 2, 7 3, 9 2,
10 2
- Applicability *DCD* 3 1
- Application and enforcement
DSA 14 54 et seqq.
- Approach
– distribution method-neutral *DCD* 3 41, 75
– technology-neutral *DCD* 3 41
- Artificial intelligence (AI) *DCD* 2 43;
E-Commerce Dir. 11 17
– autonomous *DCD* 3 6
– liability *DCD* 3 6
- Assessment of terms and conditions
Platform Reg. 3 17
- Assistance to providers *DSA* 28 39 et seqq.
- Asymmetry of information *Platform Reg.* 7 1
- Automated technologies *DSA* 8 2
- Automatic contracting
E-Commerce Dir. **Intro** 10–11 4, 10 26, 11 17
- Availability *Platform Reg.* 5 10, 10 5
- Average business user *Platform Reg.* 5 10
- Average user *E-Commerce Dir.* 5 56
- B2B
– integration *DCD* 9 72
- B2B contract *DCD* 3 7
- B2C contract *DCD* 3 10, 7 9; *SGD* 6 5
- Balance between rights *E-Commerce Dir.* 5 10
- Best-price clause *Platform Reg.* 10 1 et seqq.
- Big data
– features *DCD* 3 46 et seqq.
- Black box *Platform Reg.* 5 3 et seqq.
- Black list *Platform Reg.* 8 1
- Blocking
– injunction *DSA* 4 24 et seqq., 29
– order *DSA* 4 28 et seqq., 6 34
– procedures *DSA* 6 35
– techniques *DSA* 4 25, 7 7, 8 2
- Blue pencil doctrine *Platform Reg.* 3 14
- Bundle contract *DCD* 3 86, 121 et seqq.,
131 et seqq., 14 11
– termination *DCD* 3 128, 133
- Burden of proof *DCD* 1 23, 4 11;
DMA 8 8 et seqq.
– consumer *DCD* 12 4
– continuous supply *DCD* 12 3, 19 et seqq.
– continuous supply of digital goods or services
SGD 11 20 et seqq.
– delivery *CRD* 18 49
– digital environment *DCD* 9 13
– discharge *DCD* 12 21
– failure to supply *DCD* 12 10
– general principles *DCD* 9 64
– installation *SGD* 8 30
– integration *DCD* 9 63 et seqq.
– lack of conformity *SGD* 11 1 et seqq.,
24 et seqq.
– liability *SGD* 11 26
– mandatory nature *SGD* 11 27 et seqq.
– period for reversal *SGD* 11 13 et seqq.
– pre-contractual information *CRD* 5 23, 6 23
– presumption *DCD* 12 1 et seqq., 15,
18 et seqq.; *SGD* 11 15 et seqq., 22 et seqq.
– relation to Common European Sales Law
(CESL) *SGD* 11 7
– relation to Consumer Sales Directive (CSD)
SGD 11 5
– relation to DCD *SGD* 11 8 et seqq.
– relation to Draft Common Frame of Reference
(DCFR) *SGD* 11 6
– relation to SGD *SGD* 11 11
– scope *SGD* 11 12

Index

- single act of supply of digital goods or services
SGD 11 19
- targeted full harmonisation
SGD 11 29 et seqq.
- termination DCD 14 70
- third party rights DCD 10 17, 65 et seq.;
SGD 9 23 et seq.
- trader DCD 12 11
- Business premises
 - definition CRD 5 11
- Business user DMA 2 1 et seqq., 68 et seqq.;
Platform Reg. 2 7, 6 3
- Causation DCD 9 39 et seq., 10 40, 20 21
 - integration DCD 9 39 et seq., 56
- Changes of terms and conditions
DSA 14 38 et seqq.
- Characteristics Platform Reg. 5 14
- Charter of Fundamental Rights of the European
Union Platform Reg. 1 11
- Click wrap DCD 10 43
- Cloud computing DSA 4 14, 6 18
- Cloud computing service DMA 2 53 et seqq.
- Codes DSA 28 31
- Codes of conduct DSA 1 36 et seqq.
- Combination of personal data
DMA 5 18 et seqq.
- Commercial communication
E-Commerce Dir. 6 1 et seq., 12
 - definition E-Commerce Dir. 6 3, 14 et seqq.
 - exceptions E-Commerce Dir. 6 20
 - form of information E-Commerce Dir. 6 16
 - identifiability E-Commerce Dir. 6 11, 21
 - information society service
E-Commerce Dir. 6 37
 - rules E-Commerce Dir. 6 5
 - scope E-Commerce Dir. 6 19
 - technology neutral E-Commerce Dir. 6 18
 - transparency E-Commerce Dir. 6 2
- Commercial guarantee SGD 17 1 et seqq.
 - advertising SGD 17 23
 - binding nature SGD 17 22, 37 et seqq.
 - burden of proof SGD 17 3, 39 et seqq.
 - conditions for invoking SGD 17 23 et seqq.,
33
 - content SGD 17 32
 - definition SGD 17 12 et seqq.
 - durability SGD 17 26 et seqq.
 - mandatory nature SGD 17 41
 - provided by producer SGD 17 18 et seqq.
 - provided by seller SGD 17 18
 - relation to Capital Requirements Directive
(CRD) SGD 17 7
 - relation to Common European Sales Law
(CESL) SGD 17 6
 - relation to Consumer Sales Directive (CSD)
SGD 17 4
 - relation to DCD SGD 17 8
 - relation to Draft Common Frame of Reference
(DCFR) SGD 17 5
 - relation to SGD SGD 17 10
 - scope SGD 17 11 et seqq.
 - targeted full harmonisation
SGD 17 42 et seqq.
 - transferability SGD 17 36
- Commission Guidelines Platform Reg. 5 2, 16
- Common European Sales Law (CESL)
Intro 15; DCD 3 42, 6 4, 7 4, 6 et seq., 11, 24,
42, 48, 8 11, 15, 70, 94 et seq., 100; SGD 6 7,
18, 43, 7 5, 9, 31, 34, 78
 - burden of proof DCD 12 8
 - conformity DCD 6 9 et seq., 19, 8 1 et seqq.,
7, 9 et seq.; SGD 6 13, 7 3 et seqq.
 - liability DCD 11 5
 - termination SGD 16 6 et seqq.
 - territoriality principle DCD 10 9
 - third party rights DCD 10 9
- Compatibility
 - conformity DCD 8 47; SGD 7 64
 - definition DCD 2 48 et seq., 7 34, 36 et seq.,
8 18, 49, 51; SGD 6 30, 32 et seq., 7 12, 60, 62
 - pre-contractual information CRD 5 42, 6 52
- Competent authorities
 - controlling and supervising authorities
E-Commerce Dir. 5 26
- Competition Law Platform Reg. 10 2
- Complaints DSA 30 39 et seqq.
- Compliance DSA Intro 28
- Compulsory enforcement DMA 8 13 et seqq.
- Conclusion of contract E-Commerce Dir. 5 25
- Conditions for promotional offers
 - easy accessibility E-Commerce Dir. 6 32
- Conditions of access DMA 6 148 et seqq.,
163 et seqq.
- Conflicting decisions DMA 1 24
- Conflict of laws DCD 10 23
- Conformity
 - accessibility DCD 8 1 et seqq., 46 et seq.,
52 et seqq.; SGD 7 56, 67
 - accessories DCD 7 48 et seq., 8 1 et seqq.,
70 et seqq.; SGD 6 43 et seq., 7 34 et seqq.
 - agreed purpose DCD 7 1 et seqq.,
42 et seqq.; SGD 6 37 et seqq.
 - agreed subjective requirements DCD 7 23;
SGD 6 17
 - ailure to install update DCD 8 148;
SGD 7 115
 - AI systems SGD 7 100
 - aliud DCD 7 1 et seqq., 26 et seqq.; SGD 6 21
 - approach Intro 20
 - average consumer DCD 8 17; SGD 7 11
 - back-up copy DCD 8 30
 - codes of conduct DCD 8 24, 31; SGD 7 17
 - common denominator DCD 6 6
 - compatibility DCD 7 24, 33, 8 1 et seqq.,
46 et seqq.; See Compatibility; SGD 6 18, 29,
7 56 et seqq.

- consumer specifications *DCD* 7 47; *SGD* 6 41 et seq.
- continuity *DCD* 8 46 et seq., 52, 55; *SGD* 7 56, 67
- corresponding subjective and objective requirements *DCD* 7 22; *SGD* 6 16
- cumulative objective requirement *DCD* 8 13
- cumulative requirements *SGD* 6 16
- cumulative subjective requirement *DCD* 7 19; *SGD* 6 12, 7 7
- customer assistance *DCD* 7 48, 52, 8 81; *SGD* 6 47
- description *DCD* 7 1 et seq., 4, 24 et seq.; *SGD* 6 18 et seq.
- durability *SGD* 7 56 et seq.
- emission performance *SGD* 7 22
- fit for purpose *DCD* 7 5, 8 1 et seq., 15 et seq.; *SGD* 7 9 et seq.
- functionality *DCD* 7 24, 33, 8 1 et seq., 46 et seq.; See Functionality; *SGD* 6 18, 29, 7 56 et seq.
- GDPR infringement *DCD* 8 27; *SGD* 7 20
- goods with digital elements *SGD* 8 3 et seq.
- higher quantity *DCD* 7 29, 31, 8 38, 40; *SGD* 6 24, 26, 7 47, 49
- horizontal term *DCD* 6 20
- impact of copyright restrictions *DCD* 6 42; *SGD* 6 27
- incorrect installation *SGD* 8 13 et seq., 29
- installation *DCD* 7 51; *SGD* 6 46, 8 1 et seq.
- installation instructions *DCD* 8 75; *SGD* 7 39
- installation of goods *SGD* 6 25
- instructions *DCD* 7 48, 50, 8 1 et seq., 70, 74 et seq.; *SGD* 6 43, 45, 7 34, 38 et seq., 40 et seq.
- integration instructions *DCD* 8 75
- integration of digital content or service *DCD* 6 40
- interoperability *DCD* 7 24, 33, 8 1 et seq., 47 et seq.; See Interoperability; *SGD* 6 18, 29, 7 63 et seq.
- interruptions *DCD* 8 102; *SGD* 7 82
- less quantity *DCD* 7 29 et seq., 8 1 et seq., 38 et seq.; *SGD* 6 24 et seq., 7 47 et seq.
- mandatory nature *SGD* 8 31 et seq.
- model *SGD* 7 27 et seq.
- modification *DCD* 19 8; *SGD* 6 51
- normal *DCD* 8 36; *SGD* 7 45
- normal features *SGD* 7 55, 7 2
- normal for the same type *DCD* 8 42; *SGD* 7 51 et seq.
- normal performances features *DCD* 8 45
- normal use *DCD* 8 1 et seq., 17, 21 et seq.; *SGD* 7 11, 15
- not exhaustive subjective requirements *DCD* 7 20, 40; *SGD* 6 14
- objective approach *DCD* 6 8
- objective requirements *DCD* 6 18 et seq., 7 2, 8 1, 11; *SGD* 6 2, 13, 7 1, 5
- other features *SGD* 7 44 et seq., 50, 55
- over a period of time *DCD* 7 40 et seq., 8 99 et seq., 131; *SGD* 7 81 et seq., 101
- packaging *DCD* 8 82; *SGD* 7 37
- performance features *DCD* 8 35 et seq., 41, 45
- personal data provided *DCD* 8 44
- platform provider *SGD* 6 5
- pre-contractual information *DCD* 7 1 et seq., 10 et seq.; *SGD* 6 6
- presumption *DCD* 6 7, 7 1 et seq., 3 et seq.; *SGD* 6 3
- preview *DCD* 8 87
- price paid *DCD* 8 44
- principle *DCD* 6 6
- private copies *DCD* 8 29
- product safety *SGD* 6 24
- public statements *DCD* 8 1 et seq., 60, 63 et seq.; *SGD* 7 71, 74 et seq.
- purpose *DCD* 8 17; *SGD* 7 11
- quality *DCD* 7 24 et seq., 32, 8 1 et seq., 35 et seq., 41 et seq.; *SGD* 6 18 et seq., 28, 7 44 et seq., 50 et seq.
- quantity *DCD* 7 24 et seq., 28 et seq., 8 1 et seq., 35 et seq.; *SGD* 6 18 et seq., 23 et seq., 7 44 et seq.
- reasonable consumer expectation *DCD* 8 1 et seq., 35 et seq., 57, 59 et seq., 70, 73, 76, 78 et seq., 93 et seq.; *SGD* 7 34, 36, 39, 41 et seq., 44 et seq., 68 et seq., 78 et seq.
- reasons for subjective approach *DCD* 6 1 et seq., 25 et seq.; *SGD* 6 19
- rebuttable presumptions *DCD* 6 7
- regulatory standards *DCD* 8 24 et seq., 31; *SGD* 7 17 et seq.
- requirement of valid contract *DCD* 7 8; *SGD* 6 4
- sample *SGD* 7 27 et seq.
- security *DCD* 8 46 et seq., 52, 56; *SGD* 7 56 et seq., 66
- service level agreements *DCD* 7 13; *SGD* 6 7
- subjective approach *DCD* 6 5 et seq., 22; *SGD* 6 15
- subjective requirements *DCD* 6 18 et seq., 7 1 et seq., 18; *SGD* 6 1 et seq., 11, 13 et seq.
- subjective requirements in negotiated terms *DCD* 7 14; *SGD* 6 8
- subjective requirements in standard terms *DCD* 7 14; *SGD* 6 8
- subjective requirements with lower standard *DCD* 6 30
- technical standards *DCD* 8 1 et seq., 24, 31 et seq.; *SGD* 7 17, 23 et seq.
- third party rights *DCD* 6 41; *SGD* 6 26 et seq.
- threshold *DCD* 14 55
- trial version *DCD* 8 83 et seq.
- trial version made available *DCD* 8 89 et seq.
- unified concept *DCD* 9 11
- update *DCD* 7 53, 8 1 et seq., 110; See Update; *SGD* 6 48, 7 83
- version *DCD* 8 1 et seq., 58, 98, 104 et seq.; *SGD* 7 53, 69

Index

- waiver *DCD* 8 1 et seq., 153 et seq.;
SGD 7 121 et seq.
- Conformity requirements
 - mixed *DCD* 6 11
 - objective *DCD* 6 9 et seq.
 - subjective *DCD* 6 9 et seq.
- Consent *DMA* 2 131 et seq.
- Consistency *DCD* 6 36, 25 23;
Platform Reg. 2 2; *SGD* 6 21, 25 20
 - between Digital Content Directive and Sale of Goods Directive *DCD* 6 38, 25 1 et seq., 19 et seq.; *SGD* 6 23, 25 17 et seq.
 - with the Consumer Sales Directive *DCD* 6 37; *SGD* 6 22
- Consumer *DCD* 3 1 et seq., 7 et seq.;
Platform Reg. 1 16, 18, 2 7; *SGD* 3 3
 - average *DCD* 8 17, 22, 54; *DSA* 6 61; *E-Commerce Dir.* 6 10, 24; *SGD* 7 11, 16
 - benchmark *E-Commerce Dir.* 6 10
 - cooperation *DCD* 12 12, 29 et seq.
 - definition *DCD* 2 23 et seq., 3 9, 23, 25, 4 12, 5 11
 - definition extension *DCD* 3 24
 - dual use *DCD* 2 25
 - expectations *DCD* 8 155, 11 27; *SGD* 7 122
 - legitimate expectations *DCD* 10 6, 41 et seq.
- Consumer contract law *DCD* 3 2
- Consumer law *Platform Reg.* 2 6 et seq.
- Consumer protection *DSA* 6 82, 8 8;
Platform Reg. 3 3
 - high level *DCD* 1 1, 9 et seq.
 - injunction *DSA* 4 27
- Consumer Rights Directive *DCD* 3 1, 5, 9, 19, 24, 42, 65 et seq., 141; *Platform Reg.* 5 3 et seq.
 - extension of scope *DCD* 3 26
 - termination *SGD* 16 3 et seq.
 - third party rights *DCD* 10 11
- Consumer Sales Directive *DCD* 3 4, 9, 12 et seq., 26, 34, 6 4 et seq., 37, 7 47, 8 11, 15, 20, 36, 60, 63 et seq., 83, 88, 94; *SGD* 6 7, 22, 41, 7 5, 9, 14, 27, 29, 31, 45, 71, 74, 78, 81
 - conformity *DCD* 6 5 et seq., 19, 7 3 et seq., 8 3 et seq., 8; *SGD* 6 13
 - liability *DCD* 11 4
 - redress *DCD* 20 6 et seq.
 - repair or replacement *SGD* 14 3 et seq.
 - termination *SGD* 16 2, 25
 - third party rights *DCD* 10 8
- Contact data of the supervisory authority
E-Commerce Dir. 5 41
- Content *DMA* 9 9 et seq.
 - user-generated *DSA* 6 55
- Content moderation *DSA* Intro 26
- Content selection *DSA* 7 8
- Context *DMA* 3 3 et seq., 5 6 et seq., 7 3 et seq., 9 3, 10 2, 12 1 et seq., 7 et seq.; *DSA* 14 3 et seq., 17 3 et seq., 28 13 et seq., 30 2 et seq., 38 4
- Contract
 - bundled *DCD* 3 86, 91, 100, 127
 - data *DCD* 3 56
 - definition *DCD* 3 27
 - interpretation *DCD* 3 89, 7 15; *SGD* 6 9
 - language *E-Commerce Dir.* 10 8 et seq.
 - legal nature *DCD* 1 29
 - legal qualification *DCD* 3 10 et seq., 28
 - long-term *DCD* 11 8, 33
 - object *DCD* 3 39, 56
 - personal data *DCD* 3 56 et seq., 65 et seq.
 - transparency obligation *DCD* 3 88
- Contract Law *Platform Reg.* 1 13
- Contracts for the International Sale of Goods (CISG)
 - conformity *DCD* 6 6, 8
 - liability *DCD* 11 6
 - remedies *DCD* 13 9
 - termination *SGD* 16 11 et seq.
 - third party rights *DCD* 10 8
- Contract terms *DSA* Intro 4–8 12;
Platform Reg. 2 8
 - content control *DCD* 6 33, 7 17
 - unfair *DCD* 3 129
- Contractual consent *Platform Reg.* 3 8, 17
- Contractual relationship *Platform Reg.* 2 11
- Control *DMA* 2 112; *Platform Reg.* 2 5, 7 5
- Convention on the International Sale of Goods
 - conformity *DCD* 8 8
- Coordination *DMA* 1 23; *DSA* 1 6 et seq.
- Copyright *DCD* 3 1, 151; *DSA* 6 24, 31, 70, 8 1, 6, 11; *Portability Reg.* Intro 73
 - audiovisual media
Portability Reg. Intro 34 et seq.
 - Berne Convention *Portability Reg.* Intro 26
 - digital content *DCD* 10 1 et seq.
 - DSM Copyright Directive
Portability Reg. Intro 15, 85
 - injunction *DSA* 4 12, 26
 - liability *DSA* 5 3
 - reform *Portability Reg.* Intro 12 et seq.
 - territoriality *Portability Reg.* Intro 30 et seq., 3 1, 6, 4 3, 7 16
 - work *Portability Reg.* Intro 27 et seq.
- Copyright directive *DSA* 6 19
- Copyright law *DCD* 10 3
 - EULA *DCD* 10 2
 - primacy of contract *DCD* 10 4, 45, 57
 - territoriality principle *DCD* 10 47
- Core platform service *DMA* 2 4 et seq.
- Counterperformance
 - advertising *DCD* 3 95
 - data *DCD* 3 46, 48 et seq., 53 et seq., 65
 - money *DCD* 3 48, 72
 - personal data *DCD* 3 48 et seq., 54 et seq., 71 et seq., 114, 143
 - price *DCD* 3 29

- Country-of-origin principle
 - permissibility of sending unsolicited commercial communication *E-Commerce Dir.* 7 7
- Craft *DCD* 3 10
- Criteria for assessing the clearness and unambiguity of information
 - subjectively relative *E-Commerce Dir.* 6 34
- Crowdfunding platforms *Platform Reg.* 1 19, 8 6 et seq.
- CSDM Directive *DSA* 17 7
- Cure
 - costs *DCD* 14 25 et seq.
 - frustrated expenditure *DCD* 14 77
 - impossibility *DCD* 14 30 et seq., 45
 - inconvenience *DCD* 14 29
 - method *DCD* 14 20
 - place *DCD* 14 78
 - proportionality *DCD* 14 36 et seq., 45
 - time *DCD* 14 21 et seq.
- Damages *DCD* 1 21, 28, 39, 3 156 et seq., 5 35 et seq., 9 38, 10 64, 13 59 et seq., 14 5, 79 et seq., 20 19; *Platform Reg.* 6 6
 - compensation for damage *SGD* 3 35 et seq.
 - integration *DCD* 9 38
- Data *DCD* 3 46; *DMA* 2 88 et seq.
 - asset *DCD* 3 48, 72
 - consent *DCD* 3 148
 - consent freely given *DCD* 3 70
 - contractual performance *DCD* 3 6
 - de facto currency *DCD* 3 52
 - exceptions to use *DCD* 16 41 et seq.
 - non-personal *DCD* 16 2
 - other *DCD* 2 33, 3 50, 16 37, 50
 - personal *DCD* 2 31 et seq., 3 6, 48, 50, 145 et seq., 8 44, 16 2, 14, 24 et seq.
 - processing *DCD* 3 60 et seq., 145 et seq., 16 30 et seq.
 - production factor *DCD* 3 48
 - refraining from use *DCD* 16 39 et seq.
 - restitution *DCD* 16 5, 14, 24 et seq.
 - retrieval *DCD* 16 58 et seq., 17 11
 - time of provision *DCD* 3 51
 - withdrawal of consent *DCD* 3 70, 15 18, 16 32 et seq.
- Data Access *Platform Reg.* 8 2, 9 1 et seq.
 - contractual *Platform Reg.* 9 4
 - of online intermediation service providers *Platform Reg.* 9 5
 - technical *Platform Reg.* 9 4
- Data Act *Platform Reg.* 3 4
- Data-based business model *Platform Reg.* 9 1
- Data economy *DCD* 3 49
- Data minimisation *DMA* 7 25 et seq.
- Data portability *DMA* 6 103 et seq.
- Data protection *Platform Reg.* 9 2, 6
- Data Protection Law *Platform Reg.* 4 13
- Deception of consumers *Platform Reg.* 5 15
- Deep learning *Platform Reg.* 5 8
- Defamatory content *DSA* 8 16
- Defects
 - hidden *DCD* 1 30, 14 76; *SGD* 3 40, 4 4
 - vices cachés *SGD* 4 4
- Definition of price
 - selling price *E-Commerce Dir.* 5 50
- Definitions *DSA* 14 9
- Delegated acts *DMA* 3 41 et seq.
- Deletion of data *Platform Reg.* 4 8
- Deletion of user account *Platform Reg.* 4 8
- Delisting *Platform Reg.* 5 13
- Delivery *DCD* 3 78
 - burden of proof *CRD* 18 49
 - carriage by third party *CRD* 18 20 et seq.
 - goods with digital elements *CRD* 18 22
 - lack of conformity *CRD* 18 28 et seq.
 - mandatory nature *CRD* 18 50
 - moment of delivery *CRD* 18 1 et seq., 24 et seq.
 - other means of delivery *CRD* 18 23
 - relation to Art. 5 and 6 CRD *CRD* 18 14
 - relation to Art. 17 CRD *CRD* 18 12
 - relation to Art. 20 CRD *CRD* 18 13
 - relation to Common European Sales Law (CESL) *CRD* 18 10
 - relation to Dangerous Goods Declaration (DGD) *CRD* 18 7
 - relation to Draft Common Frame of Reference (DCFR) *CRD* 18 9
 - relation to DSD *CRD* 18 8
 - relation to SGD *CRD* 18 5 et seq.
 - remedies for failure *DCD* 3 78
 - scope *CRD* 18 15 et seq.
 - transfer of physical possession *CRD* 18 17 et seq.
- Delivery costs *E-Commerce Dir.* 5 49
 - requirement for presenting price information *E-Commerce Dir.* 5 51
- De minimis *Platform Reg.* 7 6
- Dependencies *DCD* 3 6
- Description *Platform Reg.* 6 5
- Designation as a gatekeeper *DMA* 3 32 et seq.
- Designation decision *DMA* 3 49 et seq.
- Details of the service provider
 - direct and effective communication *E-Commerce Dir.* 5 32
 - rapid contact *E-Commerce Dir.* 5 32
- Development of technology *E-Commerce Dir.* 5 62
- Differential treatment *Platform Reg.* 7 5 et seq.
 - consideration *Platform Reg.* 7 7
 - declaration requirement *Platform Reg.* 7 9
 - forms *Platform Reg.* 7 6
- Digital content
 - access method *DCD* 3 45
 - beta version *DCD* 6 26, 8 62
 - carrier for digital content *SGD* 3 23

Index

- conformity *DCD* 16 16, 18
- consumer specifications *DCD* 3 35 et seqq.
- copies *DCD* 8 29 et seq.
- copyright *DCD* 10 1 et seqq.
- definition *CRD* 5 46; *DCD* 2 6 et seq., 3 40, 42 et seq., 45
- deterioration *DCD* 11 38
- embedded *DCD* 3 81
- free *CRD* 5 14, 46 et seq.
- incorporated *SGD* 3 20
- interconnected *SGD* 3 20
- license *DCD* 10 19
- place of use *DCD* 10 49
- pre-contractual information *CRD* 6 9
- prevention of further use *DCD* 16 75 et seq.
- refraining from use *DCD* 16 55 et seq., 17 9 et seq.
- signal transmission *DCD* 3 116
- tangible medium *DCD* 3 73
- transferability *DCD* 10 7
- trial version *DCD* 8 83
- Digital content contract
 - confirmation *CRD* 8 27 et seq.
 - contract type *CRD* 5 13
- Digital Content Directive *Platform Reg.* 1 6
- Digital content or service
 - nature *DCD* 8 60 et seqq.
 - same type *DCD* 8 18 et seqq., 42; *SGD* 7 51
- Digital economy *DCD* 3 6, 49; *Platform Reg.* 1 1
- Digital element
 - provided by seller *DCD* 3 93
 - provided by third party *DCD* 3 93
- Digital environment *DCD* 9 18 et seqq., 70
 - burden of proof *DCD* 9 13
 - consumer cooperation *DCD* 9 66
 - cooperation *DCD* 12 12, 29 et seq.
 - definition *DCD* 2 35 et seq., 9 18 et seq.
 - incompatibility *DCD* 12 22, 24, 27
 - joint liability *DCD* 9 23
 - third party *DCD* 9 22
- Digital Markets Act (DMA) *Platform Reg.* 1 6, 2 3 et seq., 13, 9 2, 10 2
- Digital products
 - digital content *DCD* 3 6
 - digital service *DCD* 3 6
- Digital representation of value *DCD* 2 8, 27 et seq., 3 111, 16 14
- Digital rights management *DCD* 2 45 et seq., 7 35, 8 50, 53; *SGD* 7 61
- Digital sector *DMA* 2 23
- Digital service *Platform Reg.* 2 14
 - access method *DCD* 3 45
 - definition *CRD* 5 1 et seqq., 14 et seq.; *DCD* 2 9 et seq., 3 40, 44 et seq.
 - interruption *DCD* 14 14
 - prevention of further use *DCD* 16 75 et seq.
 - refraining from use *DCD* 16 55 et seq., 17 9 et seq.
 - right of withdrawal *CRD* 14 5 et seq., 16 13 et seq.
 - trial version *DCD* 8 83
- Digital Services Act *DCD* 3 137;
Platform Reg. 1 6, 2 3 et seq., 13, 5 3 et seq., 10 2
- additional obligations of online platforms *E-Commerce Dir.* 5 7
- commercial communications *E-Commerce Dir.* 6 6
- hosting privilege *DCD* 3 137
- obligations of online platforms *E-Commerce Dir.* 6 23, 38
- online platforms *E-Commerce Dir.* 6 6
- Digital Single Market Directive *Platform Reg.* 1 6
- Digital Single Market strategy **Intro** 5, 42; *DCD* 1 1 et seqq., 7 et seq.; *Platform Reg.* 1 3, 2 1 et seqq., 3 et seq.; *Portability Reg.* **Intro** 1, 9 et seq.
- copyright *Portability Reg.* **Intro** 12 et seq.
- telecommunications *Portability Reg.* **Intro** 41
- Diligence duties *DSA* 6 78
- Diligence obligations *DSA* 1 24 et seqq.
- Diligent manner *DSA* 14 58 et seq.
- Dimming *Platform Reg.* 4 7
- Direct access to information
 - ICT system *E-Commerce Dir.* 5 58
- Direct and effective communication *E-Commerce Dir.* 5 35
- Direct applicability *Platform Reg.* 3 3
- Direct communication
 - electronic enquiry template *E-Commerce Dir.* 5 36
- Disclosure *Platform Reg.* 5 2, 6 5, 10 5
- Disclosure duty *DSA* 30 42 et seqq.
- Disintermediation *Platform Reg.* 1 1
- Dissemination *DSA* 6 11 et seq., 15 et seqq., 54
 - terrorist content *DSA* 6 5
- Distance contract *DSA* **Intro** 4-8 11, 8 9
 - definition *CRD* 5 11, 6 16 et seq.
- Distribution Channels *Platform Reg.* 3 11, 6 1
- Distribution restriction *Platform Reg.* 10 1 et seqq.
 - conditions of distribution *Platform Reg.* 10 4
 - contractual *Platform Reg.* 10 3
 - de facto *Platform Reg.* 10 3
 - economic, commercial or legal considerations *Platform Reg.* 10 6
 - justification *Platform Reg.* 10 5
 - means of distribution *Platform Reg.* 10 4
- Distribution strategy *Platform Reg.* 3 11
- DIY-clause *DCD* 9 4
- Dominant position *Platform Reg.* 7 3

- Draft Common Frame of Reference (DCFR)
 - DCD 11 7, 12 9
 - termination SGD 16 5
- Dual purpose contracts DCD 3 23, 25 et seq.
- Dual-use contracts SGD 3 5 et seq.
- Durability SGD 7 57
 - commercial guarantee SGD 17 26 et seqq.
 - guarantee SGD 7 58
 - repairability SGD 7 59
- Durable medium Platform Reg. 3 6, 4 11
 - definition DCD 2 56 et seq.
- Duties of care DSA Intro 4–8 13, 6 77, 7 4
- Duty to notify DMA 3 28 et seqq.
- Duty to store DSA 30 41
- Duty to update DSA 30 33 et seq.
- Easy access to information
 - form E-Commerce Dir. 5 54
 - location E-Commerce Dir. 5 54
- E-Commerce Directive DCD 3 137
- Effectiveness of statement
 - receipt by trader DCD 15 14
- Electronic Communications Code DCD 3 105
- Electronic mail
 - definition E-Commerce Dir. 7 16
- Electronic mail address E-Commerce Dir. 5 33
- Electronic means CRD 8 10;
 - E-Commerce Dir. 5 18 et seq.
 - lack of material substrate E-Commerce Dir. 5 19
 - limitations E-Commerce Dir. 6 13
- Electronic means of communication E-Commerce Dir. 5 34
- ELI Model Rules on Online Platforms DSA 6 65
- End user DMA 2 66 et seq.
- End user content DMA 7 22 et seqq.
- End user license agreement (EULA) DCD 10 2, 43, 45 et seq., 53
- Enforcement DSA 1 43 et seqq., 38 11;
 - Platform Reg. 4 5, 6 6, 7 14, 9 7, 10 7
 - collective DCD 21 8; SGD 19 1 et seqq.
 - consumer organisations DCD 21 9
 - cross-border DCD 21 5 et seq.
 - public Platform Reg. 1 5; SGD 19 1 et seqq.
- ePrivacy Directive E-Commerce Dir. 7 11;
 - Platform Reg. 9 6
- ePrivacy regulation E-Commerce Dir. 6 39, 7 24
- Established service provider
 - place of establishment E-Commerce Dir. 5 31
- Establishment Platform Reg. 1 18
- European Electronic Communications Code DCD 3 102, 104, 130 et seqq.
- Exception DMA 3 34 et seqq., 7 21
- Exception to the statement's duty DSA 17 22 et seqq.
- Exclusions DSA 28 25 et seq.
- Exemption
 - electronic communication services DCD 3 100 et seqq.
 - financial services DCD 3 110
 - free and open-source software DCD 3 112 et seqq.
 - gambling DCD 3 108 et seq.
 - healthcare DCD 3 106 et seqq.
 - number-independent-interpersonal communication services DCD 3 103 et seq.
 - professional services DCD 3 98
 - public performance DCD 3 115
 - public sector information DCD 3 118 et seqq.
 - public services DCD 3 99
 - sectoral DCD 3 97, 6 15
- Exemption decision DMA 10 6 et seqq.
- Explanation DSA 14 20, 17 1 et seqq., 12 et seq.; Platform Reg. 5 12
- Extension of the information obligation
 - amount of information E-Commerce Dir. 5 64
- Failure to deliver
 - additional time for performance CRD 18 30 et seqq.
 - consequences CRD 18 3 et seq., 48
 - mandatory nature CRD 18 50 et seq.
 - no additional period for performance CRD 18 35 et seqq.
 - termination CRD 18 43 et seqq.
- Failure to deliver on time
 - express refusal CRD 18 40 et seqq.
- Failure to perform Platform Reg. 4 3
- Failure to provide personal data DCD 3 148
- Fair dealing Platform Reg. 8 1
- Fairness Platform Reg. 1 4, 9
- Fairness control Platform Reg. 3 4
- Fairness review Platform Reg. 3 1
- Fees
 - administration DCD 18 32
 - definition DCD 18 28
 - reimbursement DCD 18 26
 - third party DCD 18 27
- Financial Products Platform Reg. 6 4
- Force majeure DCD 1 32, 13 46
- Form Platform Reg. 4 11
- Formal requirements DMA 9 6 et seq.
- Freiburger Kommunalbauten Platform Reg. 3 9
- Full harmonisation CRD 18 1 et seqq., 52 et seq.; DCD 10 1 et seqq., 70 et seq.; SGD 6 58, 7 142
 - no derogation from Article DCD 15 20
- Function DCD 3 1; DMA 1 1 et seqq., 2 1, 3 1 et seqq., 5 1 et seqq., 7 1 et seqq., 8 1 et seqq., 9 1 et seqq., 10 1, 12 1; DSA 1 1 et seqq.,

Index

- 14 1 et seq., 17 1 et seq., 27 1 et seq.,
28 1 et seq., 30 1, 38 1 et seqq.
- Functionality *Platform Reg.* 7 13
 - conformity *DCD* 8 47
 - definition *DCD* 2 39 et seq., 7 34 et seq.,
8 1 et seq., 49 et seq.; *SGD* 6 30 et seq.,
7 60 et seq.
 - information *CRD* 5 41, 6 52; *DCD* 9 9
- Functional link *Platform Reg.* 6 4
- Fundamental rights *DSA Intro* 4–8 12, 4 25,
7 10, 8 1, 6, 12, 17
- Gap-filling *Platform Reg.* 1 21, 3 17, 4 16, 8 8
- Gatekeeper *DMA* 2 2 et seq.
- Gatekeeper designation *DMA* 3 12 et seq.
- General contract law *SGD* 3 35
- General Data Protection Regulation
 - DCD* 3 1 et seqq., 54, 61, 70, 72, 143 et seqq.;
 - Platform Reg.* 9 6
 - consent *DCD* 3 63
 - contract *DCD* 3 63, 147
 - infringement *DCD* 3 148
- General framework *DSA Intro* 3 et seq.
- General terms and conditions *DCD* 10 69
- Geo-blocking *DCD* 10 44;
Portability Reg. Intro 7, 20 et seq., 3 26
- Geoblocking Regulation *Platform Reg.* 3 4
- Geographic address *E-Commerce Dir.* 5 30
- Gold plating *SGD* 3 36
- Good faith *DSA* 7 2, 5, 9; *Platform Reg.* 8 1
- Goods *SGD* 3 13
 - goods sold by way of execution *SGD* 3 24
 - goods to be manufactured or produced
SGD 3 15
 - goods with digital elements
SGD 3 18 et seqq.
 - nature *SGD* 7 72
 - same type *SGD* 7 12 et seq., 71
 - second-hand goods *SGD* 3 25 et seqq.
- Good samaritan rule *DSA* 7 1 et seqq.
- Goods with digital elements *Intro* 1 et seqq.,
18 et seq.; *DCD* 3 4 et seq., 79 et seqq.
- continuous supply *SGD* 10 31 et seqq.
- definition *DCD* 2 12 et seq., 3 82
- Grounds for suspension *DMA* 9 4 et seq.
- Guarantee document
 - on durable medium *SGD* 17 31
 - transparency *SGD* 17 34 et seq.
- Guidelines *DSA* 28 32
- Hardware *DCD* 2 35, 9 19
- Harmonisation
 - degree of harmonisation *DCD* 4 1;
SGD 4 1 et seqq.
 - full *Intro* 13; *DCD* 1 19, 21, 3 1, 4 1 et seq.,
6 2, 12, 14, 12 32; *SGD* 4 1 et seqq., 6 2,
8 et seq.
 - minimum *Intro* 13; *DCD* 4 2, 5
 - optional *Intro* 14
- Horizontal e-commerce requirements
E-Commerce Dir. 5 66
- Hosting
 - definition *DSA* 6 7 et seq.
 - services *DCD* 2 37
- Identifiability of advertising
 - particular rule *E-Commerce Dir.* 6 22
- Identifiability of commercial communication
 - holistic assessment *E-Commerce Dir.* 6 25
- Identification service *DMA* 2 64 et seq.
- Identity *Platform Reg.* 3 16
- IKEA-clause *DCD* 9 4
- Illegal content *DSA Intro* 4–8 8, 4 1, 16, 21, 32,
5 1, 29, 6 27, 7 3
- Illegality *DCD* 3 158
- Imbalance
 - structural *DCD* 3 2, 18
- Immovable property *SGD* 3 13
- Implementation *DCD* 1 35, 4 1 et seqq.,
7 et seq.; *DSA Intro* 13 et seqq.
- extended implementation *SGD* 3 36
- gold plating *DCD* 1 34
- Impossibility *DCD* 13 46, 49 et seq.
– consequences *DCD* 13 52
- delayed supply *DCD* 13 51 et seq.
- third party rights *DCD* 10 59
- In-app purchases *DMA* 2 62 et seq.
- Inclusion of data
 - exceptions *DCD* 3 60, 64
- Incorporation *DCD* 9 25, 27
- Independent audits *DSA Intro* 32
- Indexing mechanism *E-Commerce Dir.* 5 56
- Indication of the unsolicited nature of
commercial communication
 - form and content *E-Commerce Dir.* 7 19
- Individual request *E-Commerce Dir.* 5 22
- Information
 - Capital Requirement Directive (CRD)
DCD 9 9
 - clear and comprehensive *SGD* 3 30 et seqq.
 - functionality *DCD* 9 9
 - interoperability *DCD* 9 9
 - of business users *Platform Reg.* 3 2
 - technical requirements *DCD* 12 25 et seq.
- Information duties *DSA* 27 24 et seqq.,
30 11 et seqq.
- Information obligations *Platform Reg.* 7 2
 - functions *E-Commerce Dir.* 5 63
- Information on restrictions *DSA* 14 21 et seqq.
- Information overload *E-Commerce Dir.* 5 59
- Information requirements *DCD* 3 18 et seqq.
– other information requirements
E-Commerce Dir. 6 4

- Information society service *DMA* 2 1 et seqq., 17 et seqq.; *DSA Intro* 4–8 1, 6 71; *Platform Reg.* 2 9, 14
 - commercial communications *E-Commerce Dir.* 6 8
 - definition *E-Commerce Dir.* 5 13
- Informed decision *Platform Reg.* 6 1
- Informing recipients *DSA Intro* 22
- Infringement *Platform Reg.* 5 16
- Infringements of terms and conditions *Platform Reg.* 4 14
- Input errors *CRD* 8 34; *E-Commerce Dir.* 10 7, 11 1, 10 et seqq.
- Installation *DCD* 2 20, 9 29; *SGD* 8 1 et seqq.
 - burden of proof *SGD* 8 30
 - Common European Sales Law (CESL) *DCD* 9 5
 - Consumer Sales Directive (CSD) *DCD* 9 4
 - full harmonisation *SGD* 8 33 et seqq.
 - goods with digital elements *SGD* 8 3 et seqq.
 - instructions *DCD* 9 4
 - lack of conformity *SGD* 8 13 et seqq.
 - mandatory nature *SGD* 8 31 et seqq.
 - relation to Capital Requirements Directive (CRD) *SGD* 8 8 et seqq.
 - relation to Consumer Sales Directive (CSD) *SGD* 8 5
 - relation to DCD *SGD* 8 7
 - relation to Draft Common Frame of Reference (DCFR) *SGD* 8 6
 - relation to SGD *SGD* 8 11
 - relation with Common European Sales Law (CESL) *SGD* 8 6
 - remedies for lack of conformity *SGD* 8 29
 - scope *SGD* 8 12
 - SGD *DCD* 9 6 et seqq.
- Installation of the good *SGD* 3 16
- Instructions
 - completeness *DCD* 9 53
 - comprehensibility *DCD* 9 52
 - conformity *DCD* 8 75, 9 4, 11; *SGD* 7 39
 - erroneous *DCD* 9 55
 - installation *DCD* 8 75, 9 1 et seqq., 4 et seqq.; *SGD* 7 39
 - integration *DCD* 9 47 et seqq., 11 41
 - language *DCD* 9 54
 - missing *DCD* 9 55
 - standard of correctness *DCD* 9 52
 - third party *DCD* 9 51
- Intangible assets *SGD* 3 13
- Integration
 - B2B *DCD* 9 72
 - burden of proof *DCD* 9 63 et seqq.
 - by consumer *DCD* 9 47 et seqq.
 - by trader *DCD* 9 42 et seqq.
 - causation *DCD* 9 39 et seqq., 56
 - consumer cooperation *DCD* 9 66
 - damages *DCD* 9 38
 - definition *DCD* 2 18 et seqq., 9 14, 24 et seqq.
 - digital environment *DCD* 9 62
 - failure to supply *DCD* 9 62
 - full harmonisation *DCD* 9 69 et seqq.
 - general terms and conditions *DCD* 9 68
 - incorporation *DCD* 9 25, 27
 - incorrect *DCD* 9 32 et seqq., 11 40 et seqq.
 - instructions *DCD* 9 47 et seqq.
 - joint liability *DCD* 9 23, 70
 - liability *DCD* 11 17
 - linking *DCD* 9 26 et seqq.
 - measures *DCD* 9 24
 - multiple *DCD* 9 31
 - non-conformity *DCD* 9 35 et seqq.
 - objective/subjective standard *DCD* 9 33
 - obligation *DCD* 9 50
 - primary obligation *DCD* 9 60, 70
 - purpose *DCD* 9 30
 - recital *DCD* 9 15
 - relevant point in time *DCD* 9 57
 - remedies *DCD* 9 60 et seqq.
 - results *DCD* 9 24, 35
 - scope *DCD* 9 28
 - scope of application *DCD* 9 16 et seqq.
 - spheres of influence *DCD* 9 3
 - terminology *DCD* 9 8
 - update *DCD* 9 49, 58
- Integration instructions *DCD* 9 47 et seqq.
- Integrity, security and privacy *DMA* 7 27 et seqq.
- Intellectual property rights *Platform Reg.* 3 12
 - redress *DCD* 20 28
- Interaction of European and national law *Platform Reg.* 3 17, 4 16
- Interference in national contract law *DCD* 3 62, 6 17
- Intermediary *DSA* 4 11, 6 1, 23; *SGD* 3 8
 - conduit *DSA* 4 5
 - liability *DSA Intro* 4–8 6, 8 1
- Intermediary services *Platform Reg.* 2 14
 - active role *DSA* 6 73 et seqq.
- Intermediation services *E-Commerce Dir.* 5 20; *Platform Reg.* 2 10
- Internal complaint-handling *Platform Reg.* 4 15
- Internal market
 - functioning of the internal market *DCD* 1 4 et seqq.
- Internet service provider *DCD* 9 21
- Interoperability *CRD* 5 42; *DMA* 2 113 et seqq., 6 28 et seqq., 78 et seqq., 7 8 et seqq.
 - conformity *DCD* 8 1 et seqq., 47 et seqq.; *SGD* 7 63 et seqq.
 - definition *DCD* 2 50 et seqq., 7 34, 36, 38, 8 18, 9 14; *SGD* 6 30, 32, 34, 7 12
 - information *CRD* 6 52; *DCD* 9 9
- Interoperability duties *DMA* 7 10 et seqq.
- Interoperability request *DMA* 7 19 et seqq.
- Interpretation *DCD* 1 3, 20, 36, 4 7; *Platform Reg.* 1 10, 2 1 et seqq.
 - autonomous european *Platform Reg.* 2 19
 - contract *DCD* 3 89, 7 15; *SGD* 6 9

Index

- Invitation to purchase *CRD* 5 21
- IP-address *DCD* 3 56, 59
- Judicial review *Platform Reg.* 10 6
- Knowledge *DSA* 6 25 et seqq.
- Lack of conformity
- burden of proof *SGD* 11 1 et seqq.
 - third-party rights *SGD* 9 1 et seqq., 11 et seqq.
- Law Enforcement Directive *Platform Reg.* 9 6
- Law of obligations *Platform Reg.* 4 3 et seq.
- Legal action *Platform Reg.* 4 15
- Legal obligations *Platform Reg.* 8 5
- Legal persons
- identification *E-Commerce Dir.* 5 29
- Legislative objective *DSA* **Intro** 6 et seqq.
- Legitimate expectations *DCD* 10 6, 41 et seqq., 68, 72
- Legitimate reasons *Platform Reg.* 3 10, 4 1, 12
- Level of harmonisation *E-Commerce Dir.* 5 27
- Level of protection
- B2C and B2B relations *E-Commerce Dir.* 7 27
- Level of security *DMA* 7 14 et seqq.
- Liability
- carrier chosen by the consumer *SGD* 10 25 et seqq.
 - civil *Platform Reg.* 1 5
 - delivery *SGD* 10 9
 - digital elements *SGD* 10 15 et seqq.
 - fault *DCD* 10 55, 13 21; *SGD* 10 12
 - function *SGD* 10 1 et seqq.
 - goods with digital elements *SGD* 10 30 et seqq.
 - installation *SGD* 10 18 et seqq.
 - joint *DCD* 9 23
 - liability period *SGD* 10 27 et seqq., 52 et seqq.
 - limitation period *SGD* 10 42 et seqq., 46 et seqq., 52 et seqq.
 - live animals *SGD* 10 51
 - non-conformity *DCD* 11 15 et seqq.
 - non-performance *DCD* 11 9 et seqq.
 - objective lack of conformity *SGD* 10 12
 - payment *DCD* 17 31 et seqq.
 - period *DCD* 11 20 et seqq.
 - physical possession *SGD* 10 14
 - principle *SGD* 10 11
 - second-hand goods *SGD* 10 46 et seqq.
 - time *DCD* 11 16
 - time of delivery *SGD* 10 6, 13 et seqq.
 - update *DCD* 11 18
- Liability exemption *DSA* 1 19 et seqq.
- Liability period
- longer time limits *SGD* 10 41 et seqq.
 - Right-to-Repair Directive *SGD* 10 1 et seqq.
- License *DCD* 3 92; *Portability Reg.* **Intro** 51, 74, 3 1
- EULA *DCD* 10 2, 45 et seqq.
 - intermediary *Portability Reg.* **Intro** 51 et seqq.
 - means of verification *Portability Reg.* 5 30
 - segmented *Portability Reg.* 4 3
 - territorial *Portability Reg.* **Intro** 52 et seqq.
- Limitation period *DCD* 11 28, 37, 14 16
- suspension or interruption *SGD* 10 54 et seqq.
 - third party rights *DCD* 10 54
- Limited significance *E-Commerce Dir.* 7 23
- Link *E-Commerce Dir.* 5 55
- Linking *DCD* 9 26 et seqq.
- List of examples of services *E-Commerce Dir.* 5 17
- List of information
- indication of the price of the information society service *E-Commerce Dir.* 5 2
- Living animals *SGD* 3 25, 32 et seqq.
- Loyalty programmes *Platform Reg.* 5 11
- Machine-generated data *Platform Reg.* 9 3
- Main parameters *Platform Reg.* 5 15
- Mandatory nature *SGD* 21 1 et seqq.
- Manipulation of search results *Platform Reg.* 5 15
- Market investigation *DMA* 12 10 et seqq.
- Market power *Platform Reg.* 1 14
- McFadden *Platform Reg.* 2 9
- Mediation *Platform Reg.* 2 8
- Merger Control Regulation *Platform Reg.* 2 5
- Metadata *DCD* 3 56 et seqq.
- Method of payment *E-Commerce Dir.* 5 50
- Methods of providing information
- easy, direct access to information *E-Commerce Dir.* 5 53
 - permanent access to information *E-Commerce Dir.* 5 53
- Minimum content *DSA* 17 25 et seqq.
- Minimum information requirements *E-Commerce Dir.* 5 6
- Minimum standard *E-Commerce Dir.* 7 8
- Mirror caching *DSA* 5 10
- Misuse *DSA* 14 70 et seqq.
- Mixed contracts *SGD* 3 17
- Mobile e-commerce *E-Commerce Dir.* 5 62
- Model
- conformity See Sample or Model *SGD* 7 27
- Model rules for online platforms *Platform Reg.* 1 6
- Modernisation Directive *DCD* 3 65, 67
- Modification *DCD* 24 13 et seqq.
- conformity *DCD* 19 8
 - cost of *DCD* 19 13
 - exception to termination *DCD* 19 21

- information *DCD* 19 14 et seq.
- reason *DCD* 19 11 et seq.
- termination *DCD* 19 17 et seq.
- Modifications of digital content or services
DCD 7 53, 56, 8 110; *SGD* 7 83
- Modifications of goods *SGD* 6 48
- Modifications of goods with digital elements
SGD 6 51
- Moment of assessment of the clearness and unambiguity of information
 - receipt of information by the recipient
E-Commerce Dir. 6 35
- Monetary payments *DSA* 17 18 et seq.
- Monitoring *E-Commerce Dir.* 5 67;
Portability Reg. **Intro** 91, 93, 98
- Most-favored-customer clause
Platform Reg. 10 1 et seq.
- Multiple use *DCD* 9 31
- National court *DMA* 2 140
- Natural persons
 - pseudonym *E-Commerce Dir.* 5 29
- Network and Information Systems Directive
Platform Reg. 2 4
- Network connection *DCD* 2 35, 9 21
- New information *DSA* 30 35 et seqq.
- Next steps *DSA* **Intro** 20
- NIICS *DMA* 2 42 et seqq.
- NIS Directive *Platform Reg.* 2 13
- Non-conformity
 - cooperation *DCD* 9 13
 - notification *DCD* 1 24
 - third party rights *DCD* 10 16
 - time *DCD* 9 57 et seq.
- Non-fulfilment of the thresholds
DMA 3 45 et seqq.
- Non-governmental organisations *SGD* 3 4, 36
- Non-performance *DCD* 5 5
 - remedy *DCD* 5 2, 17 et seq., 11 14
- Non-personal data *DMA* 2 104 et seqq.
 - discontinued use *DCD* 15 12
- Non-profit activities *DSA* 6 71
- Notice and action procedures *DSA* 6 4, 39 et seq., 51
- Notice period *Platform Reg.* 3 7, 4 4, 9 et seq.
- Notification
 - non-conformity *DCD* 1 24
- Notification Requirement *Platform Reg.* 3 6
- Notifications from third parties
Platform Reg. 5 13
- Nullity *Platform Reg.* 3 13 et seqq.
 - erga omnes *Platform Reg.* 3 13
 - ex tunc *Platform Reg.* 3 13
 - geltungserhaltende Reduktion
Platform Reg. 3 15
 - partial *Platform Reg.* 3 14
- replacement of void terms *Platform Reg.* 3 15
- Objectivity *DSA* 14 60
- Obligation of conformity *DCD* 6 9, 28
- Obligations' update *DMA* 12 14 et seqq.
- Obligations for gatekeepers *DMA* 5 13 et seqq.
- Obligations on termination
 - other areas of consumer law *DCD* 17 3
- Obligations to be specified *DMA* 6 9
- Obligation to allow communication
DMA 5 34 et seqq.
- Obligation to deliver *SGD* 6 3 et seq.
- Obligation to grant access *DMA* 5 39 et seqq.
- Obligation to notify
 - burden of proof *SGD* 12 18
 - Common European Sales Law (CESL)
SGD 12 5 et seq.
 - consumers *SGD* 12 20 et seq.
 - Consumer Sales Directive *SGD* 12 4
 - content *SGD* 12 10 et seq.
 - Contracts for the international Sale of Goods (CISG) *SGD* 12 7
 - determination of lack of conformity
SGD 12 12 et seqq.
 - Draft Common Frame of Reference (DCFR)
SGD 12 4
 - form *SGD* 12 17
 - function *SGD* 12 1 et seqq.
 - legal consequences *SGD* 12 19
 - time requirements *SGD* 12 15 et seq.
- Obligation to supply *DCD* 6 3, 9
- Offer
 - confirmation *CRD* 8 24
- Off-premises contract
 - definition *CRD* 5 11, 6 19
- Online advertising exchanges
Platform Reg. 1 20
- Online advertising tools *Platform Reg.* 1 20
- Online content service
 - access *Portability Reg.* 3 24 et seq., 4 12, 15
 - additional charges *Portability Reg.* 3 36
 - database *Portability Reg.* 2 49
 - definition *Portability Reg.* 2 40 et seq.
 - free *Portability Reg.* **Intro** 49, 88, 96, 109, 2 48, 7 9, 9 12
 - illegal *Portability Reg.* 2 41
 - information *Portability Reg.* 3 46 et seq., 6 14
 - obligation *Portability Reg.* 3 50 et seqq.
 - paid *Portability Reg.* **Intro** 49, 88, 2 48, 3 16 et seq., 5 2, 9 10 et seq.
 - personal data *Portability Reg.* 3 17
 - providing *Portability Reg.* 4 11
 - quality *Portability Reg.* 3 37 et seq.
 - use *Portability Reg.* 3 27 et seq., 4 14 et seq.
- Online content-sharing services *DSA* 6 3, 9, 19, 33, 38, 8 6
- Online contracts *DSA* 6 65
- Online interface *Platform Reg.* 2 17