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Editorial

Towards a “Fitness Check” of EU Digital Contract and Sales Law

Harmonizing Digital Law has become a crucial task for European and national legislation in view of the challenges posed by the “digital revolution”. The implementation of the 2019 “Twin Directives” on the supply of digital content and digital services (DCD)¹ and on the sale of goods (SGD)² represents one of the most important steps on this path so far. In addition to the harmonization of Member States law, the emergence of a uniform law of the EU is becoming more and more important with regard to the challenges of digitization, as recently shown in particular by the Internet Platform Regulation.

In view of these changes at European and national level, 40 legal scholars from all Member States of the European Union have come together to examine the impact of European legislation in the EU Member States, and, more in general, on the development of private law in Europe, by analyzing the overarching features of harmonization, the contours and effects of legal unification with regard to the regulation of digital content, digital services, sales law and internet platform regulation, and the further perspectives of EU legislation in face of digital and sustainability challenges.³

This brief contribution anticipates some of the main outcomes of the abovementioned analysis, which will serve as a useful instrument for a forthcoming “Fitness Check” of EU Digital Contract and Sales Law. By 12 June 2024 the EU Commission shall review the application of the “Twin Directives”, and submit a report to the European Parliament, to the Council and to the European Economic and Social Committee.

The impact of the innovative approaches and the other provisions of the “Twin Directives” on the law of the Member States depends to a large extent on the general framework of implementation in

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

2 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

3 The results of the impact assessment of DCD and SGD in all 27 EU Member States, as well as of Platform-to-Business Regulation, Digital Services Act and Digital Markets Act are published in A De Franceschi and R Schulze (eds), *Harmonizing Digital Contract Law. The Impact of EU Directives 2019/770 and 2019/771 and the Regulation of Online Platforms* (Beck – Hart – Nomos 2023), with contributions by: Laura Aade, Zuzana Adamová, Esther Arroyo Amayuelas, Kaspars Balodis, Wojciech Bańczyk, Jean-Sébastien Borghetti, Mireille M. Caruana, Alberto De Franceschi, Laurynas Didžiulis, Philipp Fabbio, Adam Fuglinszky, Juanita Goicovici, Friedrich Graf von Westphalen, Hans Christoph Grigoleit, Geraint Howells, Jiří Hrádek, Bert Keirsbilck, Marco B. M. Loos, Christiana Markou, Plamena Markova, Emilia Mišćenić, Jorge Morais Carvalho, Damjan Možina, Jori Munukka, Elise Poillot, Katarzyna Południak-Gierz, Jernej Renko, Hugo-Maria Schally, Hans Schulte-Nölke, Reiner Schulze, Karin Sein, Rita Simon, Marie Jull Sørensen, Evelyne Terryn, Zafeirios Tsolakidis, Sef van Erp, Klaus Viitanen, Fidelma White, Brigitta Zöchling-Jud, Fryderyk Zoll. Each Author of Country Reports was asked to respond to 62 questions regarding the following main aspects: General Framework; Definitions and Scope of Application; Conformity of goods; Liability of the Trader; Remedies; Commercial Guarantees; Time Limits; Right of Redress; Relationship with other Remedies. Cf. H-W Micklitz, ‘The Full Harmonization Dream’ (2022) 4 EuCML 117 ff.

the respective Country. Above all, it can be of crucial importance in which code or other legal act through which the Member State has transposed these Directives and whether their transposition has an impact on the structure of the existing general law of obligations and contracts and consumer law or other areas of law such as intellectual property law and data protection law.

As far as the general framework of implementation in the 27 Member States is concerned, however, a rather complex picture emerges. The approaches of the national legislators differ both in terms of “where” and “how” they have implemented the Directives. With regard to the “where” in the context of the national legislative acts, a large number of Member States have opted for the implementation of one or both of the Directives by new acts outside of existing codes (e.g. among many others Romania; Croatia and Malta regarding the DCD). Some of them have transposed both directives together into one act (e.g. Bulgaria; Hungary, combining an overarching general part with two separate chapters for sales of goods and for supply of digital content and digital services). However, a number of other Member States have preferred integration into an existing code for either or both of the Directives. Among these, most have chosen integration with the Consumer code (e.g. Bulgaria, Finland, France, Italy and Latvia; Malta only SGD), but some have incorporated the provision implementing both or one of the Directives into their Law of obligations Act (e.g. Estonia; Croatia only the SGD), into their Law on the Sale of goods (e.g. Denmark) or into their Civil code (e.g. The Netherlands, Germany, and, to a large extent, Czech Republic).

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

Against this background, a highly differentiated finding emerges with regard to framework conditions for the impact of the “Twin Directives” on the law of obligations in the respective jurisdiction. It suggests that favorable starting conditions for a relatively strong impact may exist as far as the implementing provisions are integrated into the overall framework of a Code of obligations or of a Civil Code. Less favorable conditions for a significant influence on the national law of obligations beyond the scope of the Directives are likely to be assumed if the Directives are implemented in a separate legal act by almost verbatim reproduction, and the previously existing structure of the Code of obligations or of the Civil Code therefore remains unaffected. In addition to the transposition of the DCD in Estonia and some other countries, the German transposition offers a remarkable example of an obviously relatively far-reaching impact on the law of obligation in the case of integration into the Civil Code. In particular, with this integration, the German legislature has adapted the systematics of the BGB to the changes of the digital age by inserting a new title on “Contracts on Digital Products” into the General Law of Obligations to implement the provisions of the DCD (§§ 327 et seq. BGB). Furthermore, it has not only changed the consumer sales law in the BGB in accordance with the SGD. Rather, it opted for extended implementation and revised some provisions of the General Sales Law according to the patterns provided in the Directive (in particular by adopting a large part of the criteria for conformity with the contract and the equation of these criteria with the subjective ones in General Sales Law to extend them to all sales contracts; § 434 para. 3 BGB).

As for the impact of the “Twin Directives” on the structures of consumer law, this goes hand in hand with the impact on the law of obligations where the consumer law is incorporated into the Civil Code. If in contrast the two directives or one of them has been incorporated into a Consumer Code (as in Finland, Italy, France and Latvia, among others), this incorporation should regularly lead to a corresponding extension of the national system of consumer law. However, the further impact on the conceptual structure of the national consumer law seems to differ in each Member State in these

cases. It is likely to depend not least on the method of incorporation, particularly on the extent to which the incorporation into the consumer code is limited to a mere compilation or includes further interlocking.

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

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

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

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

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

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

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

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

Measures to improve environmental sustainability and the circular economy were discussed in most Member States in the course of the implementation process of the Twin Directives, and interesting solutions were taken with regard to the after-sales services and availability of spare parts (Spain), liability periods (e.g. Bulgaria, Estonia, France and Spain), and right to repair (e.g. France and Hungary). In this latter regard, the EU initiative on promoting the repair of goods will of course play a major role.⁴

Finally, it should be borne in mind that an analysis limited to the Member States’ legislation transposing the Directives can by no means give a complete picture of the impact of the Directives on the development of national law. Rather, in addition to the influence that can already be clearly identified, other components must also be taken into account. For example, the nature and extent of the influence in the respective Member State depends not least on the role the new provisions will play in contractual practice and in the judicial application of the law (the “law in action”). Furthermore, it remains questionable to what extent the objectives of the legislation (such as strengthening the internal market and reducing transaction costs in cross-border trade) can be achieved sufficiently in view of the regulatory deficits of harmonization, for example with regard to B2B contracts on the supply of digital content and digital services, or neighbouring matters such as the impossibility of the supply of digital content and digital services and the change of circumstances.

Two other components of the impact on the national laws are also difficult to assess. However, they can indicate a greater influence than it appears at first glance if one only looks at the current implementing legislation. On the one hand, the Directives and the national transposition provisions contain numerous models that can also guide future legislation in the Member States in areas that have not been regulated so far. This concerns not only fundamental terms and definitions in the area of the distribution of goods with digital elements and the supply of digital content and services – or in general: trade with data. Rather, these provisions also contain a number of regulatory models that can be used beyond their scope of application, for example, for updating obligations and other requirements of contractual conformity or for the obligations of the parties after termination of the

4 See https://commission.europa.eu/document/afb20917-5a6c-4d87-9d89-666b2b775aa1_en. Cf. Feedback of the European Law Institute on European Commission’s Proposal for a Directive on Common Rules Promoting the Repair of Goods, available at <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Feedback_Right_to_Repair.pdf>, accessed on 1 August 2023.

contract. This potential of the Directives and the transposition provisions for further legal development will come into play to the extent that the legislation of the Member States in the future will take into account the need to adapt further matters, in particular business to business legal relations, to the changes brought about by digitalization, and in doing so will strive for coherence with the provisions that have now emerged. On the other hand, it should not be overlooked that the Directives and their transposition provisions can also have effects beyond their scope of application independently of legislative measures. In particular, their conceptual and regulatory models can serve as a source of inspiration for the private shaping of law (for example, through contractual agreements, general terms and conditions or codes of conduct) and for the judicial resolution of conflicts in areas where no or no sufficiently detailed legislation on trade in data and related matters exists. Even if such “creeping effects” of implementation are difficult to detect, their importance for contractual practice should not be underestimated.

Such rather subtle components should be considered in addition to the effect that the “Twin directives” have already had immediately and clearly recognizable through the adoption of implementing legislation in the Member States to get a full picture of their impact. Therefore, if one takes them into account, despite the aforementioned regulatory shortcomings, there are good reasons to assume that the implementation of these Directives will prove to be a decisive step towards the harmonization of “Digital Law” in the EU. These are also likely to serve as a model at a supranational level, e.g. for the current and future work of UNCITRAL on “Data Contracts”.⁵

Within the outlined scenario and taking into account the shortcomings of the implementation in the Member States, the EU legislator shall also better address the synergy between the digital and the green transformation, by exploring measures to ensure that digital contract and sales law can accelerate and maximize the impact of policies to deal with climate change and protect the environment.

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⁵ See https://uncitral.un.org/en/working_groups/4/electronic_commerce.

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