The Sharing Economy in the EU and the Law of Contracts

*Rolf H. Weber**

Abstract

The concept of the "share economy" has not been developed in a meaningful way in the European Union ("EU") to date. The importance of the data economy has been acknowledged and many discussion papers are circulating regarding this subject. Despite this progress, the competence of the EU is partly limited in certain fields and the harmonization of 28 national laws causes difficulties. However, two initiatives in the area of contract law are attempting to address these problems: the Digital Content Directive; and the Online and Other Distance Sales of Goods Directive. The Digital Content Directive accepts (i) the digital content as subject matter of the contract and (ii) data as a tradeable asset, i.e., as a form of remuneration for a good or service. Therefore, cross-border interoperability and portability of digital content should be better secured in the future. The Online and Other Distance Sales of Goods Directive introduces additional consumer protection rules. The final version of the two Directives is expected to be released in the second half of 2017. In the medium run, more emphasis must be paid to the elements of the collaborative economy. Most likely, sale, service, and digital content can and will be combined in one transaction but with different parties (being "prosumers"). Nevertheless, at least in respect of "traditional" contract law, the disruptive effects of the digital revolution and their implications are now being considered by the EU legislator.

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* Dr. Rolf H. Weber is Professor emeritus for international business law at the Law Faculty of Zurich University, Switzerland, Director of the Center for Information Technology, Society, and Law at this University and practicing attorney-at-law in Zurich. Valuable comments during the preparation of this article have been made by Dr. iur. Eva Maissen and MLaw Dominic Staiger, Faculty of Law, University of Zurich. Recent documents could be included into the text until Spring 2017.

Introduction

On May 6, 2015, the European Commission ("Commission") adopted the Digital Single Market Strategy ("Strategy") of the European Union ("EU").[1] The Strategy addresses a large number of different regulatory actions in various business-related fields. Amongst other objectives, the Strategy intends (i) to strengthen the free flow of data, (ii) to abolish the remaining anticompetitive telecommunications rules and to facilitate consumers' access to digital products, digital services, and infrastructures, and (iii) to introduce a new regulatory regime for the strengthening of the digital economy.[2]

Because contract law has traditionally been founded on national legislative instruments, the Commission announced in the Strategy its intent to provide a set of harmonizing rules for contract law in the digital economy.[3] This promise was fulfilled on December 6, 2015, when the Commission published proposals for two new directives:

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1 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe*, COM (2015) 192 final (May 6, 2015) [hereinafter *Communication from the Commission*].

2 *See id.* at 3–4. For an overview of the objectives of the Digital Single Market Strategy, see Rolf H. Weber, *Competitiveness and Innovation in the Digital Single Market*, 2 Eur. Cybersecurity J. 72, 72–78 (2016).

3 *See Communication from the Commission*, *supra* note 1, at 4–5.

- Directive of the European Parliament and the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content;[4] and
- Directive of the European Parliament and the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods.[5]

The two submitted legislative proposals contain a targeted set of provisions attempting to overcome the existing differences between the offline and the online regulatory environment and to avoid unjustified impediments for online transactions.[6] The Commission proposes to implement so-called "fully harmonised rules."[7] This approach deviates from the traditional concept of minimal harmonization among the EU Member States, which allows each country to introduce more detailed regulations protecting individuals to a higher extent. The full harmonization approach has the objective of creating a coherent legal framework throughout the whole EU Digital Single Market.[8]

The scope of the two proposed Directives are different as expressed in the Directives' titles: Supply of Digital Content; and Online and Other Distance Sales of Goods. However, the whole "construction" of the legislative projects is very similar. The similar construction and, sometimes, identical wording is used if the specific subject matter does not need to have implemented particular rules.[9] In addition, the explanatory memoranda of the two proposed Directives contain comparable reasons for their justification: the collection of expertise for impact assessments.[10] Therefore, the Commission judges the two proposals as a package with common objectives.

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4 *Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content*, COM (2015) 634 final (Dec. 9, 2015) [hereinafter *Digital Content Directive*].

5 *Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods*, COM (2015) 635 final (Dec. 9, 2015) [hereinafter *Online and Other Distance Sales of Goods Directive*].

6 *Digital Content Directive*, *supra* note 4, at 1–4.

7 *Id.* at 2; *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 2.

8 *See* Rolf H. Weber & Dominic Oertly, *E-Commerce und Sharing Economy in der Europäischen Union: Ein Vertragsrechtlicher Überblick*, 22 JUSLETTER IT nn.10–11 (2016); Martin Schmidt-Kessel et al., *Die Richtlinienvorschläge der Kommission zu Digitalen Inhalten und Online-Handel – Teil 1*, 1 ZEITSCHRIFT FÜR DAS PRIVATRECHT DER EUROPÄISCHEN UNION 2, 3–4 (2016); Tanya Stariradeff, *Vollharmonisierung und Anhebung des Verbraucherschutzniveaus im Online-Kaufrecht*, MULTIMEDIA UND RECHT 715 (2016).

9 *Digital Content Directive*, *supra* note 4; *Online and Other Distance Sales of Goods Directive*, *supra* note 5.

10 *Digital Content Directive*, *supra* note 4, at 2–4; *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 2–5.

Assessing the economic environment, the Commission identified a relatively low amount of e-commerce transactions within the EU at present, and a yearly increase in the volume of online transactions of only slightly above ten percent. In order to boost this sector of the economy, harmonized rules are seen as a means to facilitate the execution of online transactions, to lower the respective costs, and to increase legal certainty in the execution of the business.[11]

In the context of the modern and rapidly growing share economy, the two proposed Directives do not adequately cover the whole legal environment. First, both legislative documents focus on the (contractual) business rules with consumers, i.e., substantively on consumer protection, which is only a part of the digital economy. Second, an overarching legislative concept encompassing a large variety of commercial relations in the share economy does not yet exist.[12]

The Commission was aware of these limitations and subsequently, in Spring 2016, it launched another wave of communications and proposals:

- Draft for a Geo-Blocking Regulation[13] intended to prevent suppliers from fragmenting national markets by blocking mechanisms and complementing the recently adopted Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market;[14]
- Draft for a Regulation dealing with cross-border parcel delivery services;[15]
- Communication addressing online platforms;[16]

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11 For an analysis of the current e-commerce situation in Europe, see Weber & Oertly, *supra* note 8, at nn.7–8. *See generally* DIRK STAUDENMAYER, DIE RICHTLINIENVORSCHLÄGE DER KOMMISSION ZU VERTRÄGEN ÜBER DIGITALEN INHALT UND ONLINE-WARENHANDEL 1 (2016), https://www.bundestag.de/blob/422100/af6f72a64b501ba8124894b99e080975/staudenmayer-data.pdf.

12 *Compare Digital Content Directive*, *supra* note 4, *with Online and Other Distance Sales of Goods*, *supra* note 5.

13 *Proposal for a Regulation of the European Parliament and of the Council on Addressing Geo-Blocking and Other Forms of Discrimination Based on Customers' Nationality, Place of Residence or Place of Establishment Within the Internal Market and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC*, COM (2016) 289 final (May 25, 2016).

14 *Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on Cross-Border Portability of Online Content Services in the Internal Market*, 2017 O.J. (L 168) 1.

15 *Annex to the Proposal for a Regulation of the European Parliament and of the Council on Cross-Border Parcel Delivery Services*, at 2, COM (2016) 285 final (May 25, 2016).

16 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and*

- Communication on stimulating cross-border e-commerce for Europe's citizens and businesses;[17] and
- Communication on the collaborative economy,[18] identifying as key issues the market access requirements (professional provision of services, peer-to-peer provision of services, collaborative platforms), the liability regimes, the protection of users, the self-employed and workers in the collaborative economy, and taxation.

This flurry of legislative activities is driven by political considerations; the Commission envisages to strengthen the EU digital economy. While these efforts are laudable, similar approaches have not been successful in the past. The proposal for a Common European Sales Law ("CESL"),[19] presented in 2011, was confronted with major objections raised by Member States and had to be abandoned later. The newest wave of contractual rules appear to have better chances even if some parts, for example remedies, are contested in principle. But the initiatives also lead to fragmented legislation which is not desirable for business. Because many pieces of legislation and projects are works in progress, the following contribution gives a broad, high-level overview of the legal developments and highlights the most important novelties in the field of contract law as it relates to these Directives and the share economy.

I. Supply of Digital Content

Between the two proposed legislative instruments, the draft for the Digital Content Directive is the more important and innovative document. Therefore, the bulk of the following discussion focuses on this Directive.

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the Digital Single Market Opportunities and Challenges for Europe, COM (2016) 288 final (May 25, 2016).

17 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Comprehensive Approach to Stimulating Cross-Border e-Commerce for Europe's Citizens and Businesses*, COM (2016) 320 final (May 25, 2016).

18 European Commmission Press Release IP/16/2001, A European Agenda for the Collaborative Economy (June 2, 2016), http://europa.eu/rapid/press-release_IP-16-2001_en.htm. For more information on this proposal, see Christoph Busch, *Crowdsourcing Consumer Confidence: How to Regulate Online Rating and Review Systems in the Collaborative Economy*, *in* European Contract Law and the Digital Single Market 223, 223–29 (Alberto De Franceschi ed., 2016).

19 *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, at 2, COM (2011) 635 final (Oct. 11, 2011).

A. Scope of Application

1. Product of Elements

The scope of application of the proposed Digital Content Directive is quite broad. The term "digital content" encompasses:

> (a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software, (b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and (c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service.[20]

This definition shows that the Digital Content Directive envisages encompassing all data-related content that potentially plays a role in connection with digital transactions, particularly databases, social networks, electronic auction and trading platforms, blogging environments, and even streaming services and data related to 3D printers.[21] Part of the reason for this extensive definition is an attempt by the Commission (as expressed in Consideration 11 of the Directive) to cover not only present technologies, but also future developments in order to avoid the possibility that digital content that has not yet been developed would make an amendment of the Directive necessary in a not-too-distant future.[22] Excluded from the definition of digital content is "services performed with a predominant element of human intervention by the supplier where the digital format is used mainly as a carrier."[23] Nevertheless, the typical business platforms of the sharing economy, for example Airbnb and Uber, fall into the scope of application of this Directive.[24]

As for Consideration 11, the proposed Digital Content Directive excludes so-called "embedded" digital content from its scope if the content is integrated into a good as a fixed part and only plays a re-

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20 *Digital Content Directive*, *supra* note 4, at 24. For the interpretation of the term "digital content," see Christian Twigg-Flesner, *Disruptive Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law*, *in* EUROPEAN CONTRACT LAW AND THE DIGITAL SINGLE MARKET, *supra* note 18, at 21, 31. *See also* Herbert Zech, *Data as a Tradeable Commodity*, *in* EUROPEAN CONTRACT LAW AND THE DIGITAL SINGLE MARKET, *supra* note 18, at 51, 55.

21 *See* Weber & Oertly, *supra* note 8, at n.28.

22 *Digital Content Directive*, *supra* note 4, at 15–16.

23 *Id.* at 25.

24 Gerald Spindler, *Verträge über Digitale Inhalte – Anwendungsbereich und Ansätze, Vorschlag der EU-Kommission zu Einer Richtlinie über Verträge zur Bereitstellung Digitaler Inhalte*, 3 MULTIMEDIA UND RECHT, 147, 148 (2016).

mote function of the good.[25] This exception might be confronted with difficult practical delineations in the future, particularly in view of the Internet of Things.[26] The decision of the Commission not to include digital contracts executed by machines into the scope of the Directive's application is also likely to cause problems in its future interpretation.

Some specific contracts are explicitly excluded from the scope of the Directive's application,[27] in particular, electronic communications services (for example, communication services that provide access) covered by the E-commerce Directive 2000/31, healthcare services, gambling services, and financial services (such as payments through PayPal or with Bitcoins) that are subject to a number of legal instruments governing the financial markets.[28]

Even if some legal uncertainties exist and the exclusion of specific services could lead to a partial lack of legal clarity, the broad scope of application of the Directive is desirable. In particular, technological changes and advances will not cause the Directive to become redundant and out of date.

2. Payment Elements

Two new issues related to payment elements that were introduced in this proposed Directive merit special attention. First, an important novelty can be found in Article 3, paragraph 1 of the Directive: "This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data."[29] Consequently, the Commission acknowledges that information about persons or market participants (i.e., the respective data) has a value comparable with traditional money.[30] This acknowledgment is probably the most important new element of the digital contract legislation: data is now accepted as a tradeable commodity.[31]

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25 *Digital Content Directive*, *supra* note 4, at 16.

26 Weber & Oertly, *supra* note 8, at n.29.

27 *Digital Content Directive*, *supra* note 4, at 25; Weber & Oertly, *supra* note 8, at n.31.

28 *Digital Content Directive*, *supra* note 4, at 25; *see* Council Directive 2015/2366, tit. 1, art. 1, 2015 O.J. (L 337) 53–54.

29 *Digital Content Directive*, *supra* note 4, at 24–25.

30 *Id.*; Jan M. Smits, *New European Proposals for Distance Sales and Digital Contents Contracts: Fit for Purpose?*, 2 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 319, 320–321 (2016).

31 For further details, see Alberto De Franceschi, *European Contract Law and the Digital*

But the regulation of the payment elements also creates a drawback in respect to the scope of application: the proposed Directive is only applicable if the products or services are paid for with some kind of consideration.[32] As a consequence, many business models which are not based on an active offering by the provider may fall outside the scope of application of this Directive.[33] Examples of this include cost-free webmail services, the download of music and films, streaming services if the contents are not being compensated (for example, pornographic content), and social media services if the customer does not have to pay a contribution.[34]

B. Conformity of the Digital Content with the Contract

According to Article 6 of the proposed Directive, the digital content shall

> be of the quantity, quality, duration and version and shall possess functionality, interoperability and other performance features such as accessibility, continuity and security, as required by the contract[,] . . . be fit for any particular purpose for which the consumer requires it and which the consumer made known to the supplier at the time of the [contract] conclusion[,] . . . be supplied along with any [appropriate] instructions and customer assistance[,] . . . and be updated as stipulated by the contract.[35]

In other words, the digital content must be in conformity with the contractual arrangements, but it is not fully clear whether subjective perceptions or objective standards should be used.[36]

Single Market: Current Issues and New Perspectives, *in* EUROPEAN CONTRACT LAW AND THE DIGITAL SINGLE MARKET, *supra* note 18, at 1, 5; and Zech, *supra* note 18, at 51.

32 *Digital Content Directive*, *supra* note 4, at 24–25.

33 Niko Härting, *Digital Goods und Datenschutz – Datensparen oder Monetarisieren?*, 32 COMPUTER UND RECHT 735, 736 (2016); Friedrich Graf von Westphalen & Christiane Wendehorst, *Hergabe Personenbezogener Daten für Digitale Inhalte – Gegenleistung, Bereitzustellendes Material oder Zwangsbeitrag zum Datenbinnenmarkt?*, 37 BETRIEBS-BERATER 2179, 2180–81 (2016).

34 For further details, see Härting, *supra* note 33, at 736–38.

35 *Digital Content Directive*, *supra* note 4, at 26.

36 *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 26; *see* RAFAL MAÑKO, EUROPEAN PARLIAMENTARY RESEARCH SERV., PE 582.048, CONTRACTS FOR SUPPLY OF DIGITAL CONTENT: A LEGAL ANALYSIS OF THE COMMISSION'S PROPOSAL FOR A NEW DIRECTIVE 11, 16 (2016); Jacques de Werra & Evelyne Studer, *Contracts on Digital Content in Europe: Balancing Between Author-Protective Copyright Policies and Consumer Policies*, 2017 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND FINANZMARKTRECHT (forthcoming 2017).

The well-known traditional notion of conformity, however, is exposed to inherent challenges in the case of digital content because the usual criteria for goods cannot easily be applied to online characteristics.[37] A special aspect concerns the approval of the supplier to the use of digital content by the customer; due to its characteristics, the use is permanent or repeated on several devices in parallel since a single use does not have a negative impact on the quality of the digital content. Legal doctrine expresses the opinion that the requirements for this type of approval should not be set at a high level.[38] Particular problems could also occur due to the distinction between the failure to supply and the lack of conformity, which is unclear in the case of delivery of digital content, i.e., of information.[39] This aspect might be mitigated by the fact that the Directive has abolished the traditional duty of a nonconformity notification by the consumer to the supplier, as contained in many legislative acts, in the case of contractual noncompliance.[40]

In order to avoid a potential infringement of copyright law, the contractual provisions should not require the supplier to violate rights of lawful owners, previous licensees of the digital content, or relevant parts of that content. Consequently, innovative start-up enterprises would not be limited to offer new beta versions of digital content in the market, i.e., new competitors would not be overly restricted in the market.[41]

The Directive explicitly requires the supplier to fulfill the conformity obligation during the whole duration of the contractual arrangement.[42] Furthermore, at the time of the contract's conclusion, the supplier is obliged to make available the most recent version of the digital content to the consumer.[43] However, a continuous obligation to update the digital content is not contained in the Directive. Respective duties would have to be introduced on a contractual basis. But if digital content is to be integrated into existing hardware, con-

37 *See* STAUDENMAYER, *supra* note 11, at 3; Reiner Schulze, *Supply of Digital Content: A New Challenge for European Contract Law*, *in* EUROPEAN CONTRACT LAW AND THE DIGITAL SINGLE MARKET, *supra* note 18, at 127, 134–35.

38 Spindler, *supra* note 24, at 151–152; Weber & Oertly, *supra* note 8, at n.34.

39 Martine Behar-Touchais et al., *Remedies in the Proposal Digital Content Directive: An Overview*, *in* CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT: REGULATORY CHALLENGES AND GAPS 129, 136–38 (Reiner Schulze, Dirk Staudenmayer & Sebastian Lohsse eds., 2017).

40 Smits, *supra* note 30, at 322.

41 *See* STAUDENMAYER, *supra* note 11, at 3; Spindler, *supra* note 24, at 151; *see also infra* Section I.D.1.

42 *Digital Content Directive*, *supra* note 4, at 27.

43 *Id.*

formity includes the obligation of the supplier to see to it that the integration does not lead to failures.[44]

In order to strengthen the legal position of the consumer, the burden of proof with respect to the contractual conformity lies on the shoulders of the supplier, as it is assumed that the lack of conformity existed at the time of delivery of the digital content.[45] Because the digital content usually does not lose its value through the actual use, this rule extends almost indefinitely, even if no specific warranty period is stated in the proposed Directive.[46] An escape from this obligation only exists if the supplier makes it plausible that the digital environment of the consumer is not compatible with the delivered digital content and that the consumer has been informed about this fact prior to the conclusion of the contract.[47] However, the obligation of the consumer to cooperate with the supplier in respect to the functionality of the digital environment is relatively unclear at the present. Additional problems occur if security issues come up during the lifetime of the contract. In such a situation, the responsibility might remain with the consumer.[48]

C. Legal Remedies

The Directive contains several provisions addressing issues of legal remedies: namely remedies for the failure to supply, remedies for the lack of conformity with the contract, termination rights, and rights to damages (Articles 11–14).[49] The most important provision concerns the lack of conformity with the contract: in such a case the consumer is entitled to have the delivered digital content brought into conformity with the concluded contract free of charge, with the exception of the situation that such a remedy would be disproportional. The supplier is obliged to realize the conformity with the contract within a

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44 Weber & Oertly, *supra* note 8, at n.35; *see also* Gerald Spindler, *Verträge über Digitale Inhalte – Haftung, Gewährleistung und Portabilität, Vorschlag der EU-Kommission zu Einer Richtlinie über Verträge zur Bereitstellung Digitaler Inhalte*, MULTIMEDIA UND RECHT 219 (2016).

45 *Digital Content Directive*, *supra* note 4, at 27–28.

46 Weber & Oertly, *supra* note 8, at n.36.

47 *Digital Content Directive*, *supra* note 4, at 27.

48 Spindler, *supra* note 24, at 152.

49 *Digital Content Directive*, *supra* note 4, at 28–30. For an overview see Geraint Howells, *Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distance Sales of Goods*, *in* EUROPEAN CONTRACT LAW AND THE DIGITAL SINGLE MARKET, *supra* note 18, at 145, 145–61; Behar-Touchais, *supra* note 39; Smits, *supra* note 30, at 321–22; and De Werra & Studer, *supra* note 36.

reasonable time frame.[50] If conformity is not reached, the consumer is entitled to either a proportioned reduction of the price or a termination of the contract where the supplier must reimburse the already-paid purchase price.[51]

An extracontractual termination, however, requires that the nonconformity of the actual performance concerns the "functionality, interoperability and other main performance features of the digital content such as its accessibility, continuity, and security."[52] This provision is not particularly convincing because a serious problem can also occur when there is an accumulation of several minor performance features. In such a situation it should be possible to assess several minor faults as a major nonconformity situation under the contract.[53]

In the case of termination of the contract, the Directive introduces some innovative rules in favor of the consumer, namely a specific right of data portability.[54] Obviously, already-made payments are to be reimbursed.[55] However, if the consumer has not paid money but provided data, the supplier is required to abstain from using this data.[56] Furthermore, the supplier must return the data made available by the consumer within a reasonable period of time and in a common data format without charging the customer.[57] This provision is to be welcomed; the problem with its wording, however, consists of the fact that it is driven by the notion of restitution in a contractual sense, not by the notion of data portability as now understood by Article 20 of the EU General Data Protection Regulation ("GDPR").[58] If this wording were to be replaced by a reference to the GDPR, however, it must cover not only personal data (as does the GDPR), but also nonpersonal data.

In the case of nonconformity with the contract, the consumer is entitled to damages.[59] At the moment, however, the relationship be-

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50 *Digital Content Directive*, *supra* note 4, at 28–29.

51 *Id.*

52 *Id.* at 29.

53 Spindler, *supra* note 44, at 221; Weber & Oertly, *supra* note 8, at n.38.

54 *Digital Content Directive*, *supra* note 4, at 29–30.

55 *Id.* at 29.

56 *Id.*

57 *Id.*

58 Rolf H. Weber, *Data Protection in the Termination of Contract*, *in* CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT: REGULATORY CHALLENGES AND GAPS, *supra* note 39, at 189, 201–02; *see* Karl-Nikolaus Peifer, *The Proposal of the EU Commission for a Regulation on Ensuring the Cross-Border Portability of Online Content Services in the Internal Market*, *in* EUROPEAN CONTRACT LAW AND THE DIGITAL SINGLE MARKET, *supra* note 18, at 163, 170–71.

59 *Digital Content Directive*, *supra* note 4, at 30.

tween the fully harmonized EU rules and existing national contract law is not fully clear. In reaction to the Digital Content Directive, some authors have argued that the concept of full harmonization is not in line with the need to leave room for domestic provisions on damages claims; therefore, it appears still to be open to what extent the wording of the remedies provisions will be weakened in the final version of the Directive.[60]

D. Relations to Other Areas of Law

Contracts do not have a stand-alone function in the digital legal environment, but rather are often intertwined with other areas of law, particularly copyright and data protection law.

1. Copyright

In principle, the Digital Content Directive tries to avoid any interference with copyright law. However, it cannot be overlooked that the improvement of the protection of authors and performers in their upstream contractual arrangements can significantly impact the downstream agreements between suppliers of digital content and their customers. Article 17 of the Digital Content Directive reflects the reality of a chain of contracts in the digital content contractual ecosystem: the contract usually covers the relation between supplier and customer (consumer), but not necessarily the relationship between the supplier and the different members of the chain of transactions.[61] Therefore, the interactions between author-protective and consumer-protective tools merit special attention in order to develop a coherent framework.

In September 2016, the Commission presented a Proposal for a Directive on Copyright in the Digital Single Market as well as three additional legal instruments addressing specific copyright issues in the information society.[62] The interrelation of copyright with contract law

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60 *See* Weber & Oertly, *supra* note 8, at n.41.

61 *Digital Content Directive*, *supra* note 4, at 32; *see* De Werra & Studer, *supra* note 36.

62 *See Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, COM (2016) 593 final (Sept. 14, 2016); *Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes*, COM (2016) 594 final (Sept. 14, 2016); *Proposal for a Regulation of the European Parliament and of the Council on the Cross-Border Exchange Between the Union and Third Countries of Accessible Format Copies of Certain Works and Other Subject-Matter Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled*, COM (2016) 595 final (Sept. 14, 2016); *Proposal for a Directive of the European Parliament and of the Council on*

is not yet a major theme of the new "package" of legal instruments; the coming months will show whether a coherent legal framework will be established.

2. Data Protection

The intersection between contract law and data protection law, particularly in the context of the delivery of digital content, has not yet been discussed in detail, notwithstanding the parallel regulatory activities in the EU and the tensions between the two legal fields.[63] A main problem with the development of an appropriate interest balancing test is that the Digital Content Directive allocates a certain value to data in contrast to the GDPR, which sees data as the object of protection.[64] The principle of data minimization, which is an important element of data protection law, also does not coincide with the increased possibility under the Digital Content Directive to pay for goods or services by delivering personal data.

In principle, data processing is permissible if the data owner agrees to the processing; the consent constitutes an authorization for the data processing.[65] If a customer pays for a good or service with the delivery of data, an implicit consent can be assumed at first blush. However, such assessment is not always suitable because the customer might not have realized that the payment by data delivery would also include a right of the supplier to subsequently process the data.[66] For that reason, it is imperative that the supplier of digital content is transparent with the customers by alerting them to the fact that data delivered as payment will be processed in a certain way.

E. Assessment

The proposed Digital Content Directive convincingly provides for a broad scope of application.[67] Insofar, future technological innovations should also be captured by the new legislative project. But a

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Certain Permitted Uses of Works and Other Subject-Matter Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled and Amending Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, COM (2016) 596 final (Sept. 14, 2016).

63 For further details, see generally Weber, *supra* note 58.

64 *See* Härting, *supra* note 33, at 738.

65 *See, e.g.*, Alessandro Mantelero, *The Future of Consumer Data Protection in the E.U.: Rethinking the "Notice and Consent" Paradigm in the New Era of Predictive Analytics*, 30 Computer L. & Security Rev. 643, 649 (2014).

66 *See* Härting, *supra* note 33, at 739.

67 *See supra* Section I.A.

few rules excluding the application of this Directive are not justified. In particular, as mentioned above, it would make sense to include the coverage of contracts executed by machines (i.e., robotics) within the scope of application. Equally, "embedded" digital content should be covered by the Directive.

According to the intention of the Commission, the new contract law Directives are designed to strengthen the consumer's position. In theory, such a decision can be considered equitable. However, the Commission appears to have underestimated that, in the field of digital content and data, the "traditional" consumer can easily become a trader and thereafter is no longer a consumer.[68] This change is mainly taking place in the share economy, for example the use of online sharing platforms such as Airbnb and Uber.[69] If individuals share their resources with others, they become traders and, consequently, fall outside the scope of the Digital Content Directive. Often the term "prosumer" is used in this situation. Whether this result is a desirable scenario is at least doubtful.

On the other hand, a major positive element of the proposed Directive consists of the fact that the delivery of data can be a substitute for the payment of money.[70] Consequently, the EU legislator now attributes a value to data. In the digital economy, it is important that data is a tradeable good as "res intra commercium."[71] However, this concept only applies with respect to data that has been actively delivered by the consumer to the supplier, not in the case of a passive collection of data by the supplier or with the use of cookies. This limited acknowledgment of the value of data is hardly justifiable. To remedy this, the scope of Article 3 of the Directive should be expanded.

The provisions on the conformity of the digital content with the contract and the provisions on legal remedies are rather traditional and complicated for the application in practice. A streamlining of these rules and a more innovative approach with respect to legal remedies would make the two new legal instruments more valuable.

A further weakness is that the proposed Directive does not develop any typology of contractual arrangements, i.e., the presented provisions do not qualify the legal relations according to the commonly known categories (such as sale, license, service, etc.).[72] This fact

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68 *See* Twigg-Flesner, *supra* note 20, at 34–35.

69 *Id.*

70 *Digital Content Directive*, *supra* note 4, at 24–25.

71 *See* De Franceschi, *supra* note 31, at 5.

72 *See* Eva Maissen, *Service, Kauf oder Nutzungsberechtigung – Vertragstypen bei digitalen*

should be reconsidered in light of the possibly enlarging national competences for the regulations on legal remedies; otherwise, the envisaged harmonization will fail.

II. Online and Other Distance Sales of Goods

At least conceptually, the proposed Online and Other Distance Sales of Goods Directive is less important than the Digital Content Directive. Therefore, the following discussion is shorter than the previous Part.

A. Scope of Application

The scope of application of the Directive related to Online and Other Distance Sales of Goods closely follows two existing Directives: the Sales of Consumer Goods and Associated Guarantees Directive 1999/44; and the Consumer Rights Directive 2011/83.[73] According to Article 2 of this Directive, the term "distance sales contract" means "any sales contract concluded under an organised distance scheme without the simultaneous physical presence of the seller and the consumer, with the exclusive use of one or more means of distance communication, including via internet, up to and including the time at which the contract is concluded."[74] The information exchange must be done by way of a "durable medium."[75]

As a result, a CD or DVD, which qualifies as digital content under the Digital Content Directive, does not fall within the scope of the Online and Other Distance Sales of Goods Directive.[76] The problem with this discrepancy is that merchants must comply with different

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Inhalten, *in* Geschäftsmodelle in der Digitalen Welt 95–112 (Schmidt-Kessler & Kramme eds., 2017).

73 *Compare Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 23 (describing scope as concerning "distance sales contracts concluded between the seller and the consumer"), *with* Directive 1999/44 of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L 171) 12, 14 (describing scope as concerning "sale of consumer goods and associated guarantees"), *and* Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64, 72 (describing scope as concerning "contracts concluded between consumers and traders").

74 *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 24.

75 *Id.* ("'[D]urable medium' means any instrument which enables the consumer or the seller to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored[.]").

76 Weber & Oertly, *supra* note 8, at n.12.

legal provisions depending on the offered product. As mentioned, the sale of a CD or a DVD is subject to the Digital Content Directive if the respective product is offered as a download. The terminal equipment, however, falls within the scope of the Online and Other Distance Sales of Goods Directive.[77] This less-than-coherent legal regime, which contradicts the prevailing "omnichannel" marketing strategy of businesses,[78] might force smaller suppliers to establish different distribution channels. As a result, legal fragmentation, at least partly transmitted to the EU Member States, cannot be avoided.[79]

B. Conformity with the Contract

Article 4 of the Online and Other Distance Sales of Goods Directive is similar to the provision of the Digital Content Directive and corresponds to the previous consumer protection regulations. The quantity, quality, and description of the good must conform to either the contractual information or the published advertisements and be fit for the particular purpose of the good as stated in pre-contractual descriptions.[80] The performance has to meet the expectations of the consumer under objective and subjective scrutiny. Looking at the reactions of legal doctrine after publication of the proposed Directive, the objective criteria might have the prevailing weight in the future.[81]

Article 8 of the Online and Other Distance Sales of Goods Directive contains a rule about the relevant time for establishing the conformity with the contract: the seller is liable for any nonconformity existing at the time when "the consumer or a third party indicated by the consumer . . . has acquired the physical possession of the goods; or . . . [when] the goods are handed over to the carrier chosen by the consumer, where that carrier was not proposed by the seller."[82] An exception from this rule applies if the supplier is responsible for the installation of the good at a place designated by the consumer. In such

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77 *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 24.

78 *See* Patrick Antinozzi, *Omnichannel Marketing Strategies: The What, Why and How*, BUS. 2 COMMUNITY (Apr. 27, 2016), http://www.business2community.com/marketing/omnichannel-marketing-strategies-01522833#TUj0dV9WMuYEJsm3.97 [https://perma.cc/LX9G-VUPE].

79 *See* Weber & Oertly, *supra* note 8, at nn.15–16.

80 *Compare Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 25, *with Digital Content Directive*, *supra* note 4.

81 *See* Weber & Oertly, *supra* note 8, at n.17; *see also* Carsten Föhlisch, Stellungnahme zum Vorschlag für die EU-Richtlinie über Bestimmte Vertragsrechtliche Aspekte des Online-Warenhandels und Anderer Formen des Fernabsatzes von Waren (Apr. 25, 2016), https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/AbteilungenReferate/IB6_VA_Digitales_Vertragsrecht_Stellungnahme_Trusted_Shops_AG.pdf?__blob=publicationFile&v=1.

82 *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 26.

a situation, the conformity test must be done after installation when the consumer has acquired physical possession of the goods.[83]

C. Legal Remedies

As is the case for the Digital Content Directive, there are quite detailed provisions for the applicable legal remedies in this Directive.[84] At first glance, the consumer is entitled to have the goods brought into conformity with the contract by the supplier, free of charge, either by repair or replacement.[85] Such a repair or replacement "shall be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and their purpose."[86] If the repair or replacement is not satisfactory, the consumer is entitled to a proportionate reduction of the price.[87] Furthermore, the consumer has the right to "withhold the payment of any outstanding part of the price, until the seller has brought the goods into conformity with the contract."[88] These legal remedies are only restricted if the consumer has contributed to the lack of conformity.[89]

The basic provision of Article 9 is supplemented by concrete rules related to the replacement of goods (Article 10), the consumer's choice between repair and replacement (Article 11), price reduction (Article 12), and the consumer's right to terminate the contract (Article 13).[90] The most remarkable aspect concerns the right of the consumer to terminate the contract even in case of a minor failure of conformity.[91] This rule deviates from the previous consumer protection regulations and from the Digital Content Directive.[92] A clear reasoning for this deviation increasing the business risks of suppliers does not appear to be available.

Similar to the Digital Content Directive, however, the Online and Other Distance Sales of Goods Directive does not contain any clear provisions with respect to the relationship between the new EU rules

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83 *Id.*

84 *See supra* Section I.C. and note 50.

85 *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 27.

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* at 27–28.

91 *See id.* at 28.

92 *See supra* Section I.C.

and the national provisions on damages in the case of nonperformance of contract.[93]

Specific regulations (not identical to the Digital Content Directive for material reasons) are foreseen in relation to the time delay during which the nonconformity with the contract must be claimed, as well as in relation to the burden of proof. The warranty period is prolonged to two years, strengthening the position of the consumer in comparison with the existing legal situation.[94] The burden of proof will be heavier on the supplier as the lack of conformity claimed by the customer during the two-year warranty period is supposed to have already existed at the time of delivery of the product.[95]

D. Assessment

The proposed Directive related to Online and Other Distance Sales of Goods further develops existing consumer protection regulations in the digital field. The respective provisions are not subject to major criticisms, but the submitted proposals are also not particularly innovative.

While the similarity of the wording of the provisions in the Online and Other Distance Sales of Goods Directive to the wording of the Digital Content Directive makes sense, the delineation of the scope of application is not convincing in all respects. Merchants should not be subject to two different legal standards depending on whether deliveries are made online or through a physical device. Because new rules are envisaged to be introduced, the "omnichannel" distribution system should not be restrained by a lack of harmonized requirements applicable to online sales and physical deliveries.

The approach of full harmonization has not yet solved the problem of the application of domestic-law remedies. Further efforts should be undertaken in order to make clear in which circumstances the new EU law applies and in which circumstances the traditional national law should apply.

III. Share Economy

A. Lack of Comprehensive Regulatory Framework

As previously outlined, based on the Digital Single Market Strategy of May 2015, the Commission presented two Directives for the

93 *See supra* Section I.C.

94 *Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 29.

95 *Id.* at 26–27.

implementation of digital contract rules in December 2015.[96] The above considerations have shown that the two Directives have a specific scope of application; however, even if broadly interpreted, their scope does not fully encompass all aspects of the share economy having become an important business model in the online world.[97] Therefore, it should not be underestimated that the platform economy is having a disruptive effect on the establishment of businesses and the implementation of legal rules.

"Share economy" can be defined as "[a]n economic system in which assets or services are shared between private individuals, either free or for a fee, typically by means of the Internet."[98] Often, the sharing takes place on online platforms that should fall within the scope of application of the new Digital Content Directive.[99] However, even if this assessment prevails, several additional legal challenges remain that need to be solved.

The reason for the limited scope of the two new Directives might lie in the fact that, probably due to political considerations, the Commission decided to continue with the existing consumers' regulatory framework with some further digital elements. The new phenomenon of digital content is covered by the Digital Content Directive. Nevertheless, other appearances of daily life do not fall within the scope of any of the two Directives (e.g., robotics). A more overarching scope could help cover a wider range of new online business models.

Particularly, questions arise as to the treatment of new services such as Airbnb and Uber. These services are no longer trapped by the traditional notion of "consumer" because the individuals are using and offering these services at the same time. In other words, a person that was previously a consumer can easily become a trader and therefore be beyond the scope of the two new Directives.[100] In view of this change of role from consumer to trader, the concerned person—often called "prosumer"—also changes the legal regime, in particular because she is losing the benefit of the protection rules for consumer. To overcome this lack of a comprehensive regulatory framework, the Commission has published a European Agenda for a collaborative

96 *See supra* Introduction.

97 For a theoretical overview, see Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 281–96 (2004).

98 *Sharing economy*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/sharing_economy [https://perma.cc/D6ZR-WHZA] (last visited Oct. 8, 2017).

99 *See supra* Section I.A; *see also* De Franceschi, *supra* note 31, at 15–16.

100 *See supra* Section I.E.

economy on June 2, 2016, inviting EU Member States to coordinate their national laws with the EU legislative initiatives.[101]

B. Market Access

An important element of the share economy is the market access of new businesses such as start-ups. Obviously, this aspect is not only governed by contract law but by various other segments of the legal framework, such as telecommunications law and ownership rules. Therefore, traditional contract law must be extended to new horizons.

In principle, within the EU the fundamental freedoms of unrestricted movements of goods (Article 28 of the Treaty on the Functioning of the European Union ("TFEU"))[102] and of services (Article 56),[103] as well as the freedom to establish a business (Article 49),[104] are guaranteed. In the services sector, a concretization is given through Directive 2006/123 on the services in the internal market.[105] The justification for national trade barriers is restrictively designed in Article 36 of the TFEU: convincing reasons such as health and environment protection, avoidance of unfair competition practices, and tax considerations can be invoked, but the European Court of Justice is regularly interpreting these exceptions in a narrow manner.[106] In addition, the general proportionality principle must be observed by the national legislator.[107]

Nevertheless, as practice has shown, some EU countries as well as state-internal governmental bodies or even municipalities are trying to protect national businesses by introducing license regimes or requiring the fulfillment of specific conditions for the establishment of new digital enterprises. The most well-known example is Airbnb. Many local authorities introduced the requirement that people interested in renting out their homes must either obtain a license or manifold domestic provisions (of labor law, tax law, etc.) must be fulfilled.[108]

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101 *See supra* Introduction; *see also* European Commmission Press Release IP/16/2001, *supra* note 18.

102 Consolidated Version of the Treaty on the Functioning of the European Union, art. 28, 2016 O.J. (C 202) 47, 59–60 [hereinafter TFEU].

103 *Id.* art. 56.

104 *Id.* art. 49.

105 Directive 2006/123/EC, 2006 O.J. (L 376) 36 (EC).

106 *See* TFEU, *supra* note 102, art. 36.

107 *See* Consolidated Version of the Treaty on European Union, art. 5, 2016 O.J. (C 202) 13, 18.

108 *E.g.*, Feargus O'Sullivan, *Europe's Crackdown on Airbnb*, CityLab (June 20, 2016), http://www.citylab.com/housing/2016/06/european-cities-crackdown-airbnb/487169.

In the context of market access regulation, the question arises whether a difference should be introduced between commercial services and other services rendered only occasionally and without specific remuneration. From a normative perspective, the possible license regimes could be made dependent of the commercial terms;[109] if certain service providers do not want to establish an actual business, the market entry requirements should be lower. At any rate, market access regulations must always be designed in a nondiscriminatory manner.[110]

The owners of platforms could also be subject to market access regulations if they are not simply making the use of the platform available but also offer additional services, for example financial, gambling, or health services.[111] In such a situation, not only license regimes may be in place, but additional regulations appear to be justifiable, for example, in respect to ownership (final economic beneficiary), reasonable terms and conditions of the contractual relationships, or the setting of the price (for example in the insurance business).[112] Because such sector-based regulations are not contested in principle, in reality the main discussions concern the differentiation between transportation and rental services; the regulatory regime has an impact on the subsequent contractual relationships depending upon the concerned sector.

From a legal perspective, two main questions arise. First, should Uber be classified as a transportation service, allowing Member States to introduce a regulatory regime, or as a general service of the information society? Second, to what extent can EU regulation determine labor law issues?

Since August 7, 2015, the European Court of Justice has debated the classification of the Uber business in the context of its assessment of the validity of a Spanish regulation containing specific restrictions based on the classification of the business as a transportation service.[113] In its opinion of May 11, 2017, the Advocate General has ar-

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109 Weber & Oertly, *supra* note 8, at n.48.

110 *See* Charlotte Sieber-Gasser, *Wirtschaften im Rechtlichen Graubereich – Herausforderungen im Umgang mit Uber, Airbnb und Co.*, ZEITSCHRIFT FÜR EUROPARECHT, Jan. 2017, at 1, 9–10.

111 *Digital Content Directive*, *supra* note 4, at 25.

112 Weber & Oertly, *supra* note 8, at nn.49–50; Sieber-Gasser, *supra* note 110, at 11.

113 *See* Case C-434/15, Asociación Profesional Élite Taxi v. Uber Systems Spain, S.L., 2015 O.J. (C 363) 21, 22.

gued that Uber is rendering transportation services;[114] the European Court often follows the Advocate General.

C. *Labor Relationships and Taxes*

The sharing economy has generated many new forms of employment and occupation. The most prominent and intensely debated example concerns the drivers offering services within the Uber transportation business.

Labor law is mainly a domain of national regulations, and the competence of the Commission is limited to the realization of the fundamental freedom related to the unrestricted movements of employees.[115] Therefore, the EU actions on the collaborative economy can only consist of recommendations, not binding legal instruments.

In labor law, the compensation element is important, but also the particularities of the "work" and the dependence on the business headquarters (for example, policies introduced by Uber) play a role.[116] If an individual is receiving a salary and is subordinated to an organizational structure, circumstantial evidence exists that a labor relationship should be assumed, and therefore labor law should be applied.[117]

Consequences from the legal qualification of a service's relationship concern the compliance with minimum labor standards and, in particular, the application of social security regimes (such as pension funds, age insurance, etc.). For obvious reasons, suppliers such as Uber deny the existence of an employer-employee relationship if an individual is offering transportation services. This approach makes the services cheaper for the organization and thereby increases the efficiency of the business. A main reason why states in the European Union and the United States (for example, New York) introduce specific regulations is because these states believe working individuals need some social protection. So far, a general understanding as to what extent such rules are justified has not been developed.[118]

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114 Press Release, Court of Justice of the European Union, Advocate General's Opinion in Case C-434/15 (May 11, 2017), https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170050en.pdf.

115 TFEU, *supra* note 102, art. 45.

116 The European Commission also suggests using these criteria in its guidance report, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda for the Collaborative Economy*, at 11–12, COM (2016) 356 final (June 2, 2016).

117 *Id.*

118 *See* Aurélien Witzig, *L'ubérisation du Monde du Travail – Résponses Juridiques à une Évolution Économique*, 135 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 457 (2016); Sieber-Gasser, *supra* note 110, at 12–13.

Additional issues relate to the payment of taxes. The problem in the taxation field is similar to the problem of labor relationships.[119] The businesses usually prefer to argue that the individuals actually rendering a service are subject to taxation; in contrast, the individual service providers consider the duty to fill out tax forms and to make the due payments overly burdensome.[120] The government itself has to make sure that taxes are actually paid and that the administration of the tax declarations and tax collections is facilitated (for example, by allowing the use of electronic means). Therefore, not only are direct taxes on the income at stake, but in most countries so are value added taxes. So far, a harmonized framework related to the taxation of such services has not been achieved.

D. Liability and Consumer Protection

Liability issues are not contained in the two proposed Directives dealing with digital contract law. Foreseen remedies relate to the noncompliance with the contractual terms, i.e., the rules concern the contractual responsibility.[121] Consequently, liability issues will still be governed by national laws in the future. In particular, the question of whether strict liability should be introduced for actions of artificial agents (e.g., robotics) might not be decided on the EU level.

The only exception concerns internet service providers. Articles 12 through 15 of the E-commerce Directive 2000/31 limits their liability according to the executed functions.[122] Access providers acting as a "mere conduit" are solely liable for the proper transmission of the data;[123] hosting providers are excluded from the liability of the content available on their websites as long as they have not been advised to take down illegal content.[124] Based on these regulations, the question of whether platform owners and similar service providers should be entitled to benefit from this "liability privilege" becomes important. According to the assessment of the Commission, online platforms

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119 For further details, see Weber & Oertly, *supra* note 8, at n.54.

120 *See* Christian Solmecke & Bonny Lengersdorf, *Rechtliche Probleme bei Sharing Economy*, 8 MULTIMEDIA UND RECHT 493, 497 (2015).

121 *Compare Digital Content Directive*, *supra* note 4, at 27–29, *with Online and Other Distance Sales of Goods Directive*, *supra* note 5, at 27–29.

122 Council Directive 2000/31, arts. 12–15, 2000 O.J. (L 178) 1 (EC).

123 *Id.* art. 12.

124 *Id.* art. 14.

should enjoy the respective preferential treatment because otherwise the growth of the digital economy could be seriously jeopardized.[125]

Because the Commission has not yet prepared specific rules on the online intermediary platforms, a group of German and Polish professors have developed a discussion draft of a corresponding Directive.[126] With the objective of balancing innovation and market regulation, the discussion draft intends to introduce information, transparency, communication principles, reputational feedback systems, and protection duties vis-à-vis users, as well as duties of the platform operator towards the customer and the supplier.[127] A special chapter is devoted to the liability of the platform operator.[128] For the time being, it is unclear whether the Commission will take up this academic proposal.

In the case of wrong or misleading information (for example ratings) on websites and online platforms, the regulations governing unfair competition practices apply. In this regard, the online world is not much different from the offline world. Nevertheless, new critical issues might occur—for example, if rooms offered through Airbnb are used for showing pornographic movies.[129]

As mentioned above, the traditional term "consumer protection" can lose its delineation in the share economy because a consumer has an easy possibility to become a trader; even if, for example, the business of a house owner offering a room through Airbnb to tourists might not be overtly commercial, such an individual can hardly still be considered a consumer.[130] Consequently, the question arises: Under what circumstances are so-called "peer-to-peer services" considered commercial and the supplier of the respective services no longer a consumer? Possible factors of consideration can be (i) the yearly turnover, (ii) the profit orientation, and (iii) the frequency of the services offerings.[131]

Finally, the forthcoming regulations covering share economy activities must also reflect the requirements of the data protection

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125 For further details, see Weber & Oertly, *supra* note 8, at nn.56–57; and Sieber-Gasser, *supra* note 110, at 11.

126 Research Grp. on the Law of Dig. Servs., *Discussion Draft of a Directive on Online Intermediary Platforms*, 5 J. EUR. CONSUMER & MKT. L. 164 (2016).

127 *See generally id.*

128 *Id.* at 167–68.

129 Weber & Oertly, *supra* note 8, at n.58; Solmecke & Lengersdorf, *supra* note 120, at 495.

130 *See supra* Section I.E.

131 Weber & Oertly, *supra* note 8, at n.59.

framework. The new GDPR entering into force in May 2018 should play an important role in digital contractual relations.[132]

E. Assessment

Share economy is a term now widely discussed in the EU. This discussion, and the share economy itself, will continue to grow and become more important moving forward. The Commission is interested in introducing an appropriate framework for online transactions and has submitted two legal instruments related to digital contract law.[133] However, an overarching competence to establish a coherent legal environment on share economy is not within the constitutional authority of the Commission.[134] As a consequence, the main instruments of the Commission remain the Recommendations and the Action Plans that have been presented in the past months. The share economy will remain a subject to be dealt with by the EU and national bodies together. As experience shows, in such a situation the risk is substantial that the agreed compromises will lead to a low level of coherence.

Generally, it can be assumed that the market access regulations will become more flexible, as this is in the interest of online businesses. However, labor law and tax law restrictions are likely to become an increasingly cumbersome matter as many national governments might try to protect existing structures, amongst others (such as the political environment), depending on the power of domestic unions and professional associations.

How the liability regime in a more developed share economy outside of contractual relations will be designed is hard to predict at the moment, but the general trend suggests some form of strict liability.

Outlook

The EU legislator has become active in the field of digital contract law. Two initiatives are out for discussion: the Digital Content Directive; and the Online and Other Distance Sales of Goods Directive. The first envisaged Directive would bring some remarkable novelties, namely digital content as subject matter of the contract and the acknowledgment of data as a tradeable asset.[135] The second envisaged

132 For further details, see Weber, *supra* note 58.

133 *See supra* Sections I.A, II.A.

134 *See supra* Sections I.A, II.A.

135 *See Digital Content Directive*, *supra* note 4.

Directive extends previous regulatory provisions on consumer protection to the online world,[136] i.e., it appears to be too closely related to existing legal instruments to justify a new regime. Overall, however, the Commission has chosen a reasonable approach for tackling the contract law environment of digital transactions. In particular, cross-border interoperability and portability of digital content will be better secured in the future.

Some weaknesses exist in the delineation of the application scope of the two Directives. Further refinement or extension of the scope is necessary in order to enable businesses to realize an "omnichannel" marketing strategy.[137] Furthermore, the definition of data as a tradeable asset could be enlarged by including passively collected data;[138] insofar it can be said that even a good concept has the potential to become better. The corresponding tasks should be tackled in connection with a clearer positioning of contract law vis-à-vis data protection law (mainly the new GDPR) and intellectual property law (copyright law). Finally, the assessment of the blurring line between supplier and consumer merits more thorough discussion.

The concept of full harmonization does not seem to have found its final convincing form, particularly in the field of legal remedies. The Commission has announced it will review the respective chapters of the two legislative instruments.[139] Through this process, a concise model for the delineation from the applicable national rules should be developed.

In the medium run, more emphasis must be paid to the elements of the collaborative economy. This is particularly important in view of the increasing combination of sale, service, and digital content in one transaction but with different parties.[140] The problem with the Commission lies in its limited ability to introduce binding rules. Therefore, more coordination with and among national legislators will be important. The same assessment is true for the development of ownership rules of virtual assets. The realization of such a policy attempt, however, also depends on the overall acceptance of legislative activities introduced by the EU.

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136 *See Online and Other Distance Sales of Goods Directive*, *supra* note 5.

137 *See supra* Section II.A; *see also Online and Other Distance Sales of Goods*, *supra* note 5, at 2, 23.

138 *See supra* Section I.E; *see also Digital Content Directive*, *supra* note 4, at 24.

139 *See* Axel Voss & Evelyne Gebhardt, *Contracts for Supply of Digital Content*, EUROPA (Sept. 20, 2017), http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-contracts-for-supply-of-digital-content [https://perma.cc/VDG2-XPGH].

140 *See* European Commmission Press Release IP/16/2001, *supra* note 18.

In a nutshell, as indicated by Professor Christian Twigg-Flesner,

> [w]hatever might be said about the detail[s of the EU legislative activities, particularly the rules on digital content,] the fact that a proposal on contract[s] for the supply of digital content has been [presented by the EU] has an obvious signalling function: the disruptive effect[s] of the digital revolution ha[ve] reached the law of contract[s] and the time to consider the implications flowing from this [fact] has come.[141]

141 Twigg-Flesner, *supra* note 20, at 46.