Digital Revolution - New Challenges for Law

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PART 1
NEW CHALLENGES AND PERSPECTIVES

A. Digital Revolution – New Challenges for Law: Introduction

I. The starting points

The contributions to this volume reflect the exchanges amongst legal scholars and practitioners from several European countries and various legal fields held at a conference in spring 2018.[1] The conference, and thus the following papers, arose from the discussions which took place over the past three years in a "Special Interest Group" (SIG) of the European Law Institute (ELI): the Digital Law SIG.[2] The discussions were initiated in 2015 at a conference concerning the "Digital Revolution – Challenges for Contract Law in Practice"[3], which served as a basis for the Digital Law SIG's first work programme. **1**

The thoughts and proposals made by the Digital Law SIG have since been underpinned by the strong belief that the effects of the "digital revolution" on technology, economy, and society have also become a central challenge for the law and thus for academic and practicing lawyers alike. The initial focus was directed towards the challenges for contract law. However, contract law is only one key example of the new questions and new developments resulting from the "digital revolution", which of course also extends to practically all areas of private law, as well as public law and criminal law. Take the trade in data, the legal classification of data, the protection of personal data, and the prevention of invasion of non-personal data sets as examples. These topics have acquired considerable practical and economic relevance not only for contract law and tort law but also for intellectual property, industrial property rights, criminal law, and constitutional law. A similar effect can also be seen with regard to the use of artificial intelligence in almost all areas of our daily lives: the use of smartphones or other "virtual assistants" to order goods and services (e.g. in household items and in vehicles). **2**

The many questions which arise for the law from this dramatic shift in our daily lives cannot be solved solely, or even for the most part, within the national legal framework. Isolated national solutions would hardly satisfy the cross-border (or practically borderless) nature of the communication, the activities, and the risks in the digital world. Global answers to global changes would therefore be the best path to follow. However, it is apparent that the different political perceptions and economic interests at present would, despite the efforts,[4] only have limited effect, if any, **3**

[1] ELI Digital Law SIG Conference on "Digital Revolution: Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies – Challenges for Law in Practice", Villa Braida, Mogliano Veneto, Italy, 19–20 April 2018.

[2] See https://www.europeanlawinstitute.eu/hubs-sigs/sigs/digital-law-sig/ accessed 6 July 2019.

[3] Conference at the University of Münster, Germany, on 1–2 October 2015. The results of the conference were published in Schulze/Staudenmayer (eds.), *Digital Revolution – Challenges for Contract Law in Practice*, Nomos 2016.

[4] Such as the recent speech given by the President of the French Republic, Emmanuel Macron at the Commemoration of the centenary of the Armistice at the Arc de Triomphe in Paris, France, on 11 November 2018, available at <https://www.elysee.fr/en/emmanuel-macron/2018/11/12/speech-by-mr-emmanuel-macron-president-of-the-republic-commemoration-of-the-centenary-of-the-armistice-arc-de-triomphe> accessed 6 July 2019.

particularly when one considers the "big players" in the production and use of digital content (such as China and the USA).

4 From a policy perspective, there is therefore much in favour of the approach to find solutions alongside national law at the "junction" between national and international rules – so also and particularly within world regions and in regional supranational communities such as the European Union. It was therefore with good reason that the European Commission referred not only to the central role of the digital economy for the European internal market but also to the need for the accompanying development of legal instruments for the "Digital Single Market".[5]

5 It is against this background that the following contributions direct the attention towards the tasks and problems arising from the "digital revolution" for EU law. However, it is not limited to one area such as contract law, but seeks to highlight the scope and diversity of the challenges for European law. Such approach extends to various individual disciplines as well as to the consequence of digitalisation in outlining new overlaps and relationships between different fields of law (e.g. the relationship between contract law and data protection, or private and criminal responsibility in the Internet of Things). Furthermore, it will be necessary in the long term to determine which new aspects and structures may arise for the main areas of law as a result of the "digital revolution" and to determine their relationship to each other – the contributions to this volume can serve merely as a starting point due to the highly dynamic nature of the "digital revolution".

6 Such issues are expressed in the following contributions in a broad spectrum of different approaches and opinions. This introduction cannot explore each in detail, but shall simply highlight several *Leitmotive*, which run through the discussion as a whole and characterise the new challenges posed for EU law by the "digital revolution".

II. Trade in data and data rights

1. "Free flow of data" and individual data rights

7 The "digital revolution" has rendered "data" not only a core aspect of almost every economic activity but also to a central part of modern law. However, legal science cannot tackle this issue just from one single perspective; it must approach it from various angles and with different approaches and questions. These are the only means to allow legal science to consider the diverse interests, purposes, and contexts in which data are used in society and how the effects of data collection and processing with or without the consent of the data subject emerge. Accordingly, the tasks for the European legislator include the promotion of the "free flow of data"[6] in the internal market as well as the protection of the individual's personal data[7].

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[5] Cf, in particular, European Commission, *A Digital Single Market Strategy for Europe* (Communication), COM (2015) 192 final of 6.5.2015; European Commission, *Building a European Data Economy* (Communication), COM (2017) 9 final of 10.1.2017 and the accompanying European Commission Staff Working document, SWD (2017) 2 final of 10.1.2017; European Commission, *A Connected Digital Single Market for All* (Communication), COM (2017) 228 final of 10.5.2017; European Commission, *Artificial Intelligence for Europe* (Communication), COM (2018) 237 final of 25.4.2018 and the accompanying European Commission Staff Working Document, *Liability for Emerging Digital Technologies*, SWD (2018) 137 final of 25.4.2018.

[6] Cf European Commission, *Building a European Data Economy (Communication)*, COM (2017) 9 final of 10.1.2017, 5 ff. and the accompanying European Commission Staff Working document, SWD (2017) 2 final of 10.1.2017, 5 ff. See Drexl, *Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy*, in this volume.

[7] Cf the European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119/1.

Alongside the protection of personal data, underpinned by privacy rights in national constitutions and by Art. 8 EU Charter of Fundamental Rights,[8] it is however necessary for legal science and, possibly, the European legislator to consider the questions related to non-personal data.[9] There is a double task in this respect. Firstly, securing the "free flow of data" from isolation and blockades as far as the access to data is a requirement for market functionality, economic innovation or to ensure important common resources. This certainly requires a development of competition law in light of the new challenges, but also perhaps further approaches such as the obligation to grant licences under particular conditions ("compulsory licences").[10] **8**

Secondly, there is the task to develop conceptual approaches in order to allow greater precision in the legal attribution (including non-personal data) to particular persons.[11] Such non-personal data may, for example, be of decisive importance for the production, administration, and operation of business entities and thus require protection from unauthorised access, for instance from competitors, hackers and all kinds of "data pirates". Here it is to be considered whether answers just from intellectual property law (including industrial property and, in particular, licencing law) may suffice. It may be appropriate for legal science and the legislator to outline a particular new right to data in order to ensure a person's entitlement to receive and process data sets.[12] **9**

In contrast, it appears doubtful whether mere recourse to the notion of property (as it is typically used in the core areas of civil law) is suited as characterising this right to data ("data ownership").[13] A right to data can indeed serve to protect the property against others, as for the owner of tangible objects (and the author of intellectual property). However, in contrast to tangible objects and intellectual property rights, which draw on the traditional concept of property and intellectual property, data can be multiplied ("copied") and transferred to others without a change in substance or a loss in value. Moreover, in contrast to the owner of a tangible object or, for example, a copyright, the party entitled to the data can transfer such data to many others without himself suffering a loss in substance or value of the data. In this respect, the conceptual basis for the entitlement to data must be clearly distinguished from the traditional notion of **10**

[8] Jarass, *Charta der Grundrechte der Europäischen Union – Kommentar,* 2nd ed., C.H. Beck 2016, Art. 8; Kranenborg, in: Peers/Hervey/Kenner/Ward (eds.), *The EU Charter of Fundamental Rights – A Commentary*, C.H. Beck/Hart/Nomos 2014, Article 8 – Protection of Personal Data; Schulze, *Datenschutz und Verträge über digitale Inhalte*, in: Kindl/Arroyo Vendrell/Gsell (eds.), *Verträge über digitale Inhalte und digitale Dienstleistungen,* Nomos 2018, 123–142.

[9] See Drexl, *Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy*, in this volume.

[10] On this subject cf Grützmacher, *Data Interfaces and Data Formats as Obstacles to the Exchange and Portability of Data: Is there a Need for (Statutory) Compulsory Licences?*, 189; Lohsse/Schulze/Staudenmayer, *Trading Data in the Digital Economy: Legal Concepts and Tools*, 11; and Weber, *Improvement of Data Economy through Compulsory Licences?*, 135, in: Lohsse/Schulze/Staudenmayer (eds.), *Trading Data in the Digital Economy: Legal Concepts and Tools*, Nomos/Hart 2017.

[11] On this subject cf Lohsse/Schulze/Staudenmayer *Trading Data in the Digital Economy: Legal Concepts and Tools?*, 13 (16 ff.); and Zimmer, *Property Rights Regarding Data?*, in: Lohsse/Schulze/Staudenmayer (eds.), *Trading Data in the Digital Economy: Legal Concepts and Tools*, Nomos/Hart 2017, 101.

[12] On this subject cf e.g. Zech, *Data as a Tradeable Commodity*, in: De Franceschi (ed.), European Contract Law and the Digital Single Market, Intersentia, 2016, 51–80; van Erp, *Ownership of Digital Assets*, *EuCML* 2016, 73–74.

[13] On this point see Drexl and others, *Data Ownership and Access to Data – Position Statement of the Max Planck Institute for Innovation and Competition of 16 August 2016 on the Current European Debate (2016) Max Planck Institute for Innovation and Competition Research Paper No 16-10*, <http://www.ip.mpg.de/en/link/positionpaper-data-2016-08-16.html> accessed 6 July 2019; Amstutz, *Dateneigentum*, *AcP* 2018, 439–551.

property even though data rights in the modern economy can undoubtedly reflect just as high a value as ownership of property.[14]

2. Consumer protection

11 The potential value of data as an asset does not require consideration solely for the trade in data between businesses (i.e. B–B) but also in the field of consumer protection (to name just one more challenge for the European legislator). It is particularly the consumer who is often not aware of the considerable economic value in making his personal data, location, buying behaviour etc. available to a service provider in return for apparently "free" services such as games, weather forecasts, traffic information, and social media platforms. The nature of the supply of data as counter-performance in a synallagmatic contract therefore belongs to the primary topics requiring attention in order to understand the effect of the "digital revolution" on the notion of contract.[15]

12 Accordingly, the European Union started to bring consumer protection in line with the digital age by acknowledging data as counter-performance for the purposes of the new Digital Content Directive[16]. Art. 3(1) of the Digital Content Directive states that the Directive shall apply to any contract where the consumer provides data as counter-performance. As such, the Directive aims to protect the consumer receiving supposedly "free" services for which he "only" has to make his data available to the supplier (often without knowing the high value of these data for the supplier's own advertising or for sale to a third party)[17].

13 The Digital Content Directive's broad scope of application touches on questions central to European contract law, such as the notion of non-conformity and the structure of remedies. It joins together continuity and innovation in European contract law because it derives these concepts from consumer sales law (in particular the Consumer Sales Directive 1999/44/EC[18]), but generalises and modernises them. Indeed, the new Directive applies these concepts not just to sale but also to services, ultimately turning them to aspects of general contract law.[19] It modernises these concepts by adapting them to the demands of the supply of digital content, i.a. with new aspects such as interoperability, integration into the digital environment, and "updating". Finally, the new Digital Content

[14] Cf Wendehorst, *Besitz und Eigentum im Internet der Dinge*, in: Micklitz/Reisch/Joost/Zander-Hayat (eds.), *Verbraucherrecht 2.0 – Verbraucher in der digitalen Welt*, Nomos 2017, 367 ff.

[15] Cf Schmidt-Kessel, *Consent for the Processing of Personal Data and its Relationship to Contract*, in this volume.

[16] Directive 2019/770/EU 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 (Digital Content Directive) [2019] OJ L 136/1.

[17] Cf De Franceschi, *Digitale Inhalte gegen personenbezogene Daten: Unentgeltlichkeit oder Gegenleistung?*, in: Schmidt-Kessel/Kramme (eds.), *Geschäftsmodelle in der digitalen Welt*, Jenaer Wissenschaftliche Verlagsgesellschaft 2017, 125 ff.

[18] European Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive) [1999] OJ L 171/12. The Consumer Sales Directive was repealed by Directive 2019/771/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods (Sale of Goods Directive) [2019] OJ L 136/28.

[19] See Schulze, *Supply of Digital Content – A New Challenge for European Contract Law*, in: De Franceschi (ed.), *European Contract Law and the Digital Single Market – The Implications of the Digital Revolution*, Intersentia 2016, 127–144; Schulze, *Nuevos retos para el derecho de contratos europeo y cuestiones específicas acerca de la regulación del suministro de contenidos digitales*, in: Arroyo Amayuelas/Serrano de Nicolás (eds.), *La Europeización del derecho privado: cuestiones actuales*, Marcias Pons 2016, 15–27; Grünberger, *Verträge über digitale Güter*, *AcP* 2018, 214–295; Artz/Gsell, *Vebrauchervertragsrecht und digitaler Binnenmarkt*, Mohr Siebeck 2018; Wendehorst/Zöchling-Jud, *Ein neues Vertragsrecht für den digitalen Binnenmarkt*, Manz 2016.

Directive aims at the further development of consumer contract law by protecting the consumer in his dual role as recipient of digital content and supplier of data.

As specifically concerns the aspect of "updates", in the digital economy a well known problem takes a new shape: indeed, planned obsolescence of products and digital content increasingly impacts our everyday life, undermining the performances of smart devices, from mobile phones to personal computers, connected cars, and smart homes. This shatters the very basis of consumer law, challenges its effectiveness, and raises some crucial issues, requiring innovative solutions. Addressing the legal implications of such phenomenon has thus become a necessity.[20] Current sanctions and the approach of the EU legislator on this point so far showed a lack of effectiveness, leaving open some fundamental questions. Is actual consumer law fit enough to tackle planned obsolescence? Can unfair trading law contribute to improving the effectiveness of consumer contract law in solving the issue of planned obsolescence? Other major issues concern the growing tension with the goal of achieving sustainable development and a circular economy;[21] ensuring longer durability of consumer goods is indeed crucial for achieving more sustainable consumption behaviour, waste reduction and environmental protection.[22] From this perspective, the new Sale of Goods Directive provides that, in order for goods to be in conformity with the contract, they should possess the durability which is normal for goods of the same type, and which the consumer can reasonably expect. This creates a synergy with the Digital Content Directive, which provides, among the objective requirements for conformity, that the trader shall ensure that the consumer is informed of and supplied with updates, including security updates, that are necessary to keep the digital content or digital service in conformity, for the period of time during which the digital content or digital service is to be supplied under the contract, or that the consumer may reasonably expect. **14**

III. The rise of the Platform economy: Disruption and Regulatory challenges

The digitalisation of products, services, and business processes has delivered an important contribution to the spread and growth of online platform business models, which have a disruptive effect on the traditional market models and play a key role in the digital economy. Gross revenue in the EU from collaborative platforms is continuously and rapidly expanding. **15**

Online platform business models have emerged in several sectors as e.g. transportation, accommodation, retail, food home-delivery service, and banking. The rise of the 'platform economy' is having a disruptive effect both on established business models and associated legal rules.[23] In recent years, this gave rise to case law and legislative activity both at EU level and in most EU Member States. Important problems and questions continue to arise not only concerning private law issues, but also regarding competition, public law, and tax regulation. **16**

[20] See most recently e.g. Hess, *Geplante Obsoleszenz*, Nomos 2018, 29 ff.; cf Brönnecke/Wechsler (eds.), *Obsoleszenz Interdisziplinär*, Nomos 2015. Cf Italian Competition Authority, 25 September 2018, PS11039, *Apple*; Italian Competition Authority, 25 September 2018, PS11039, *Samsung*.

[21] See <http://ec.europa.eu/environment/circular-economy/index_en.htm> accessed 6 July 2019.

[22] Cf on this point De Franceschi, *Planned Obsolescence Challenging the Effectiveness of Consumer Law and the Achievement of a Sustainable Economy*, *EuCML* 2018, 217–221.

[23] See Busch/Schulte-Nölke/Wiewiórowska-Domagalska/Zoll, *The Rise of the Platform Economy: A new Challenge for EU Consumer Law?*, *EuCML* 2016, 3 ff.; Colangelo/Zeno-Zencovich, *Online Platforms, Competition Rules and Consumer Protection in the Travel Industry*, *EuCML* 2016, 75 ff.; Engert, *Digitale Plattformen*, *AcP* 2018, 305 ff.