A Redefinition of the Principles of the Acquis Communautaire

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A. Introduction

In search of a more coherent contract law,[1] the Acquis Principles (ACQP) sought to probe Community Law in order to better understand its intricacies and provided tools for a proper harmonisation of private law in the area of Contract law.[2] They sought to systematise and consolidate Community private law in order to provide indispensable support for the drafting of the Common Frame of Reference (CFR)[3] and were intended to facilitate the implementation of Community law in national law, to support future Community legislation and to facilitate its interpretation (Art. 1:101 ACQP). The principles can be considered pioneering in many respects, e.g. they provided that the consumer should be entitled to compensation for damage caused by the business in breach of its duty to provide information (Art. 2:208 (3) ACQP)[4] and thus pre-empted by many years the solution that would later be adopted by Art. 11a Directive 2005/29 in the context of unfair commercial practices (UCPD).[5] However, in the nearly 15 years that have passed since the last edition of the ACQP, society has evolved enormously, and there are today new challenges of all kinds (social, environmental, economic and technological) that oblige the legislator to adapt to new and different consumption models. Exchanges at distance have been reshaped as a result of the rapid development of the internet

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1 Communication from the European Commission of 11 July 2001 (COM [2001] 398 def) (OJ C 255, 13.9.2001).

2 Acquis Group, *Contract I* (2007) and *Contract II* (2009). This last work includes a revision of *Contract I*.

3 Schulze, "Die 'Acquis Grundregeln' und der Gemeinsame Referenzrahmen" (2007) 3 Zeitschrift für Europäisches Privatrecht, 731.

4 See Acquis Group, *Contract II*, Comments to Art. 2:208 ACQP, no 2, 146–48.

5 OJ L 149, of 11.6.2005. After the ACQP, then also Art. II.- 3.109 (3) DCFR; Art. 29.1 in connection with Art. 2 letter g CESL.

(even more so during and after the pandemic); e-commerce and distribution methods have evolved towards platform-based contracting; and greater transparency is needed in online transactions, for both consumers[6] and businesses.[7] At the same time, alongside the acquisition of tangible goods on a permanent basis over time, new forms of temporary (limited or unlimited) access to digital items are emerging, the delimitation of which from the traditional category of services is complex.[8] Goods also extend to those with embedded digital elements (see Directive (UE) 2019/771, on contracts for the sales of goods, SGD),[9] so that, as when these digital elements are supplied without being embedded in goods (see Directive (UE) 2019/770, on contracts for the supply of digital content and digital services, DCD),[10] the seller/trader is no longer liable only for defects that may exist at the time when the goods were delivered or at the time of supply (although this is not excluded, Art. 10.1 SGD, 11.2 DCD), but also for defects that occur or become apparent afterwards during a period of time (Art. 10.2 SGD; Art. 11.3 DCD).[11]

Moreover, mainly because of the existence of copyright on digital content, conformity is no longer only material but also legal. Furthermore, data protection legislation or any other rules -including technical standards developed by industry (Art. 7.1 letter a SGD; Art. 8.1 letter a DCD)- may influence the new concept of objective conformity, which thus becomes evolutionary.[12] It is also known that the price is not always paid in money, nor with other goods, but very often with personal data, which has made it necessary to review the adequacy of traditional rules, which cannot always be applied to situations that are no longer the typical ones for which they were intended. In particular, the obligations of the trader vis-à-vis the consumer who has created or provided content and then terminates the

6 Directive (EU) 2019/2161, of 27.11.2019 on better enforcement and modernisation of consumer protection rules in the Union (OJ L 328, of 18.12.2019).

7 Regulation (EU) 2019/1150, of 20.06.2019, on promoting fairness and transparency for professional users of online intermediation services (OJ L 186, of 11.07.2019).

8 Schulze and Zoll, *EU Contract Law* (2021), 227; Mischau, Lena, "The Concept of Digital Content and Digital Services in European Contract Law" (2022) 1 Journal of European Consumer and Market Law, 6 (11–13).

9 OJ L 136, of 22.5.2019.

10 OJ L 136, of 22.5.2019.

11 On updates, Schulze and Zoll, *EU Contract Law* (2021), 225–226.

12 Schulze and Zoll, *EU Contract Law* (2021), 224.

contract are inspired by Regulation (EU) 2016/679 on data protection,[13] and, in addition, *ad hoc* rules have had to be created in national laws on the consequences of the withdrawal of consent to the processing of such data, mainly in order to affirm the effectiveness of the contract and to recognise the trader's right to terminate or withdraw from the contract without the possibility of imposing penalties.[14] Other rules with an impact on contract law are found in Regulation (EU) 2018/302 on geo-blocking,[15] which limits contractual freedom by preventing discrimination between consumers on the basis of nationality or place of residence or the place from which they access digital content or services.

It would not be possible now to make an inventory of the materials currently shaping the new *acquis communautaire* and having an impact on contract law. Suffice it to point out that these changes have been brought about by rules adopted in the still recent past and, for the most part, in the framework of the Juncker Commission's Digital Market Strategy.[16] Some of these stem specifically from the "New Deal for Consumers" that led to the REFIT/Fitness Check.[17] Under the slogan "Shaping Europe's Digital Future", the von der Leyen Commission has pushed. i.a., for the *Digital Services Act* (DSA), which introduces new consumer protection rules for online markets. In addition, one of the key areas of the New European Consumer Agenda is the Green Transition, which will force legislation to adapt to the challenges posed by the planet's sustainability (e.g. by strengthening the right to repair or lengthening the seller's liability period).[18]

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13 OJ L 119, of 4.05.2016. See on this, Cámara Lapuente, "Termination of the Contract for the Supply of Digital Contents and Services, and Availability of Data: Rights of Retrieval, Portability and Erasure in EU Law and Practice", in Schulze, Staudenmayer and Lohsse (eds.), *Data as Counter-Performance – Contract Law 2.0?* (2020), 163–192.

14 Recital 40 DCD; Art. 119 ter 7 TR-LGDCU; Art. 621–78 CC Cat; § 327 q BGB. See on Spanish Law, Arroyo Amayuelas, "The Implementation of EU Directives 2019/770 and 771 in Spain" (2022) 2 Journal of European Consumer and Market Law, 35 (37).

15 OJ L 60, of 2.03.2018.

16 A Digital Single Market for Europe, COM (2015) 192 final, Brussels 6.05.2015.

17 SWD(2017) 209 final, Brussels, 23.05.2017. On this, see Twigg-Flessner, "Bad-Hand? The "New Deal" for EU Consumers" (2018) 4 Zeitschrift für das Privatrecht der Europäische Union, 167; Loos, "The Modernization of European Consumer Law: A Pig in a Poke?" (2019) 1 European Review of Private Law, 113; Grochowski, "European Consumer Law after the New Deal. A Tryptich" (2020) 1 *Yearbook of European Law*, 387. Available at: https://doi.org/10.1093/yel/yeaa016.

18 Augenhofer, "European Commission's Public Consultation on Sustainable Consumption of Goods – Promoting Repair nd Reuse. Response of the European Public Institute" (2022), 1 (available on the ELI webpage). https://

This is not the place to consider whether all these legislative changes are sufficient, whether more detailed or simpler rules are needed, or how an increasingly multidisciplinary contract law -in which technical elements play a preponderant role, and where codes of conduct often replace the law- should be approached in the future.[19] It suffices for now to underline the role that private law has played in all these changes and to remark that the reform of pre-existing rules and the enactment of new ones have perpetuated the punctilious approach to the problems and, consequently, the difficulties inherent to the fragmentary approach to legislation remain. It is still necessary, therefore, to create rules that will help the smooth development of legislation and from this point of view it is worth considering the revival of the ACQP. It is therefore necessary to highlight how certain changes have affected these rules, to identify some inconsistencies in the *acquis* that should be overcome and, possibly, to suggest some new rules. Although additional background is provided by other *soft law* texts (PECL, DCFR, CESL and the Feasibility Study (FS) on the CESL), the changes that have occurred since then are not reflected in these texts, even though some of them already covered digital content as a subject matter of contracts.[20] The exception is the ELI Rules on online platforms, which, drafted using the same method as the ACQP, provide a solid basis for filling some of the gaps in the DSA.

B. Are new Acquis Principles needed for the digital age?

Even though society is evolving more rapidly, the rules are more complex, and digitalisation is accelerating the need for their production, it might be said that the coherence of the *acquis communautaire* is as important today – and will be even more so in the future – as it was at the time when the major projects aiming at the creation of a European contract law were

www.europeanlawinstitute.eu/news-events/upcoming-events/events-sync/news/sustainable-consumption-of-goods-response-to-the-european-commissions-public-consultation/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=55c27f5ac238733e46af2e40dc5085fd.

19 See Durovic and Tridimas (eds.), *New Directions in European Private Law* (2021) and therein some rather skeptical contributions to the role of private law in guiding social transformation at present.

20 See Art. 2 letter j of the proposed Regulation on the CESL and, on conformity, Arts. 91 letter c and 99 ff CESL.

undertaken. The fragmentation to which the way of legislating by means of isolated legislative acts leads makes coherence difficult, and the impact of technology on the law requires clear rules that make understanding easier. When the time comes, a retrospective analysis of the *acquis* will have to be made, which, while allowing the system to be reconstructed, will also allow reflection on its further development.[21]

I. A Contract Law for Consumers and Businesses

The ACQP generalised the principles underlying the Community rules, provided that they did not treat consumers differently from other subjects. Such equal treatment applied to package travel contracts (Art. 2:E-01, 7:E-02 ACQP)[22] but also, to give just a few examples, to duties of information (Art. 2:201 ACQP),[23] or unfair terms (Art. 6:301 (2) ACQP).[24] Such a perspective should be maintained and generalised: on the one hand, because online platforms are the main gateway to markets for most small businesses in the digital economy and this also creates asymmetries of power and information between them; on the other hand, because it can be very difficult to distinguish between personal and business use of certain digital content -and this is probably why the new DCD (Recital 17) and SGD (Recital 22) no longer define when a consumer is to be considered a consumer when concluding dual purpose contracts; and, finally, because thanks to the development of the collaborative economy, a different model of consumer is being created, where s/he is no longer a mere recipient of goods and services, but also the one who produces or supplies them, and it is not always clear when s/he loses this status. Until recently it could be difficult to know when a consumer was, in reality, a trader;[25] Art. 6a letter

21 Janssen, "Editorial: Der digitale Acquis Communautaire und die Frage nach dem Danach" (2021) 1 European Review of Private Law, 1 (2).

22 See for explanations, Acquis Group, *Contract II*, Comments to Art. 7:E-02, no. 4, 384.

23 See for explanations, Acquis Group, *Contract I*, Comments to Art. 2:201, no 8, 78.

24 See for explanations, Acquis Group, *Contract I,* Comments to Art. 6:301, no. 6–8, 235–236. In Spain the STS 3.06.2016 (RJ 2016\2306) admits the control of unfair terms in B2B contracts ex Art. 1258 CC, which establishes that contracts are binding according to good faith.

25 STJUE C-105/17, of 4.10.2018, *Kamenova* (§§ 36–40, 45). See Twigg-Flessner, "Disrupted Technology – Disrupted Law? How the Digital Revolution Affects (Contract) Law", in De Franceschi (ed.) *European Contract Law and the Digital Single Market* (2016), 21 (34–36).

b Directive 2011/83[26] does not dispel all doubts, even though the provision obliges the platform to clarify whether the third party offering the goods, services or digital content is acting as a trader or not, because nothing ensures that the subject is telling the truth and, according to Art. 15 ECD, the platform was not obliged to verify it ("on the basis of the declaration of that third party to the provider of the online marketplace").[27] Art. 30 DSA now imposes traceability of sellers and obliges the platform to monitor and verify their identity (it has to make best efforts to do so), but, on the one hand, liability for the accuracy of the information provided remains on the trader and, on the other hand, the fundamental question of who is to be considered a trader in the online world is still not adressed.[28] This question and, more generally, the determination of who is considered to be a professional is becoming increasingly difficult to answer in view of the emergence of new online activities[29] and the possibility that their assessment may change over time.[30]

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26 As introduced by Art. 4.5 of Directive (EU) 2019/2161, of 27.11.2019, as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019).

27 Recital 28 Directive (EU) 2019/2161 of 27.11.2019, as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019). See Paisant, *Droit de la consommation* (2019), 377; Cauffman, "New EU Rules on business-to-consumer and platform-to-business relationships" (2019) 4 Maastricht Journal of European and Comparative Law, 469 (476). On the specific hypothesis in which such a falsehood could occur, Loos, "The Modernization of European Consumer Law (Continued): More Meat on the Bone After All" (2020) 2 European Review of Private Law 407 (417–418).

28 See CJEU C-105/17, of 4.10.2018, *Kamenova*. On the importance of this issue in connection with the reform of Art. 6a, Twigg-Flessner, "Band Hand?", p. 172, p. 173. See also Lodder/ Morais Carvalho, "Online Platforms: Towards an Information Tsunami with New Requirements on Moderation, Ranking, And Traceability" (2022) 4 European Business Law Review, 537 (549). This is without prejudice to the fact that traders are prohibited from pretending that they are not. According to Annex I, point 22 Directive 2005/29, it is a misleading commercial practice: "To fraudulently claim or create the false impression that a trader is not acting for the purposes of his commercial, industrial, craft or professional activity, or to misrepresent himself as a consumer". According to the Guidance on the interpretation and application of Directive 2005/29 (OJ C 526, of 29.12.2021), p. 89, this applies to any incorrect or inaccurate statement of not being a trader [...]. See also Commission CRD Guidance (OJ C 525, 29.12.2021), p. 40.

29 CJEU C-208/18, of 3.10.2019, *Petruchova* (person participating in transactions carried out on the FOREX market based on her own actively placed orders, but through a third party professionally engaged in this activity); CJEU C-774/19, of 10.12.2020, *Personal Exchange* (online poker player).

All this makes it difficult to know when consumer law should be applied to a contractual relationship. Therefore, rather than adapting it to the new digital context, its rules should perhaps be generalised to any contractual party, especially if one considers that contracts are increasingly standardised in the digital sphere.[31] The CESL took B2B contracts into account (Art. 7.2), and the rules governing them were sometimes mandatory.[32] Other rules of the *acquis communautaire* also apply to certain businesses with the same level of protection as given to consumers. The European Electronic Communications Code, for example, provides that certain provisions which *a priori* apply only to consumers, in particular those relating to contract information, maximum duration and packages, also benefit small and micro-enterprises and non-profit organisations, as defined in national law (unless they explicitly waive such protection).[33] Further evidence of the similar attention paid by the legislator to common problems are the rules laid down in Art. 6a 1 letter a Directive (EU) 2011/83, Art. 7.4a Directive 2005/29[34] and Art. 5.5 Regulation (UE) 2019/1150 on the necessary transparency in the underlying parameters of rankings and classifications of providers of goods and services. There are still other cases where the protection hitherto afforded only to natural persons or consumers has also been extended to entrepreneurs (e.g. on portability)[35] and sometimes in a

30 Even though the business activity was "not negligible", CJEU C-498/16, of 25.01.2018, *Schrems,* holds that the social media user does not lose the consumer status with which s/he initially contracted if s/he does not use the service on an "essentially professional" basis. For criticism, see Calvo Caravaca, Alfonso-Luis, "Consumer Contracts in the European Court of Justice Case Law. Latest Trends" (2020) 12 Cuadernos de Derecho Transnacional, 86 (95).

31 Schulte-Nölke, Hans, "The Brave New World of EU Consumer Law – Without Consumers, or Even Without Law" (2015) 4 Journal of European Consumer and Market Law, 135–139.

32 Arts. 2,2, 56.1, 70.3, 74.2 CESL provide examples of mandatory rules in business-to-business contracts. For the definition of mandatory rules, see Art. 2 letter v of the proposed Regulation.

33 See Recital 259 of the Electronic Communications Code (Directive (UE) 2018/1972, of 11.12.2018; OJ L 36, of 17.12.2018).

34 As introduced by Art. 3.4 letter b of Directive (EU) 2019/2161, as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019).

35 Cf. Art. 20 Regulation (EU) 2016/679 on the processing of personal data (OJEU L 119, 4.05.2016) and Art. 6 of Regulation (EU) 2018/1807 on a framework for the flow of non-personal data in the European Union (OJ L 303, 28.11.2018) and Art. 6.1 letter h DMA. In contrast, there is no right to portability in Regulation (EU) 2019/1150 on promoting fairness and transparency for professional users of online intermediation

much stricter way (e.g. the rules on terms about termination or suspension of services).[36]

On the other hand, the recent SGD and DCD only cover B2B relations regarding the seller/trader's right to redress and they do so in a residual manner, since they delegate the specific settlement to national law (Art. 18 SGD, Art. 20 DCD).[37] Both in this case and with regard to lack of conformity, an extension of the rules to B2B contracts would have been desirable.[38] The fact that Member States should remain free to extend the protection afforded to consumers to natural or legal persons that are not consumers within the meaning of the directives (such as non-governmental organisations, start-ups or SMEs) (Recitals 16 DCD, 21 SGD) already shows that there are no values in those instruments that are exclusively inherent to consumer protection. Moreover, on closer inspection, some provisions are no longer compatible with such protection, such as when the seller/trader is allowed to exclude objective conformity requirements (Art. 8.5 DCD, Art. 7.5 GDS) without any great difficulty and in a relatively uncomplicated way. It is indeed also true that certain provisions of the CISG (a B2B specific rule) are used to interpret certain B2C rules.[39]

II. The need for coherent rules and definitions

The following remarks will highlight certain (sometimes flawed) rules that would require some future adjustments.

services (OJ L 186, of 11.07.2019). Regulation (EU) 2017/1128 on cross-border portability of online content services (OJ L 168, of 30.06.2017) only considers consumers.

36 Cf. Art. 3.1 letter c and Art. 4 Regulation (EU) 2019/1150 and Art. 3.3 and Annex 1 letter g Directive 93/13.

37 For criticism, Schulze, "Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht" (2019) 4 Zeitschrift für Europäisches Privatrecht, 695 (702–703); Beale, "Digital Content Directive and Rules For Contracts on Continuous Supply" (2021) 2 Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 96 (105).

38 See Livre 3 Droit du Commerce Electronique du Code des Affaires (Section 4, Arts. 43–46) (p. 17 version February 2022). Regarding the *Code des affaires*, see literature in fn. 96.

39 Regarding the interpretation of Art. 7 letter b DCD in accordance with Art. 35.2 letter b CISG (but the same would be true for Art. 6 letter b SGD), see Beale, "Digital Content", pp. 97–98, fn 20.

1. The emergence of platforms: how to define them?

The different rules refer to platforms in several ways. They refer to online or digital platforms, but also to gatekeepers, online intermediation services, hosting providers, as well as directly to the nature of the specific service they offer (e.g. online marketplace, search engine, or host of user-generated content). The broad definition of "online platform" in Art. 3 letter i DSA (first part) emphasises the intermediary function of the service provider who hosts and disseminates information to the public at the request of the recipient and stresses the independent nature of this activity. Search engines are not to be included in this definition (Art. 3 letter j DSA), which is consistent with other rules that refer to them expressly and separately (and only the most recent definitions actually mention the possibility of oral queries).[40] Many rules use similar, but not identical, definitions for the same representative idea of the *online* marketplace, operated by or on behalf of the trader, which allows consumers to conclude distance contracts with other traders or consumers, but these rules refer interchangeably to "service",[41] "information society service provider",[42] "digital service",[43] or "intermediary service provider",[44] and not all of them reflect the necessary technological neutrality: while some still refer to websites or internet sites, others emphasise that it is a service using programmes (*software*) including a website, part of a website or an application, consistent with the concept of "online interface" as used in other norms/regulations.[45] A homogeneous definition is needed, one that also distinguishes platforms that play an

40 Art. 4.18 Directive (EU) 2016/1148, concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, of 19.7.2016). Art. 2.5 of Regulation (EU) 2019/1150.

41 Art. 2 letter n of Directive 2005/29, as amended by Art. 3.1 letter b of Directive (EU) 2019/2161 (OJ L 328, of 18.12.2019); Art. 2.17 Directive 2011/83, as amended by Art. 4.1 letter e of Directive (EU) 2019/2161.

42 Art. 4.1 point f Regulation (EU) 524/2013, on online dispute resolution for consumer disputes (OJ L 165, of 18.6.2013).

43 Art. 4.17 Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union (OJ L 194, of 19.7.2016).

44 Art. 3.11 Regulation (EU) 2019/1148 on the marketing and use of explosives precursors (OJ L 186, of 11.7.2019).

45 Recital 25 of Directive (EU) 2019/2161 (OJ L 328, of 18.12.2019). The definition of online interface can already be found in Art. 2 point 16 of Regulation (EU) 2018/302, on geo-blocking (OJ L 60 I, of 2.3.2018). In addition, Art. 3.15 Regulation (EU) 2017/2394, on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 345, of 27.12.2017).

intermediary role from those that take on the main role of providing goods and services and/or perform an intermediary role which entails control of the underlying business. Art. 6.3 DSA does not provide a convincing rule. On the other hand, Art. 3 letter i DSA (second part) is rather confusing (see Recital 13 DSA) when distinguishing online platforms from merely hosting providers.

2. The importance of having a contract

The 2015 and 2017 Proposals for Directives on certain aspects of online sales and digital content contained a definition of a contract,[46] which was not included in the rules that were finally adopted.[47] In the context of B2B contracts, Regulation (EU) 2019/1150 is also silent (Art. 1.4),[48] but it takes a pragmatic approach and declares itself applicable regardless of whether or not there is a contractual relationship between the platform and the professional users.[49]

This question seems to be relevant, however, to the problem of whether the provisions of the DCD apply to consumers who provide their personal data to the trader as consideration for the digital content or service (i.e. when that "any other purpose" other than the ones foreseen in Art. 3.1 II DCD arises). Nevertheless, the DCD is confusing on this point. While, according to Art. 3.1 II DCD, such data provision already triggers the application of the DCD,[50] Recital 24 DCD provides that the DCD applies

46 Art. 2 letter h of the Proposal of 9.12.2015 on certain aspects concerning contracts for the online and other distance sales of goods (COM (2015) 635 final): "contract means an agreement intended to give rise to obligations or other legal effects": idem, Art. 2 letter g of the Amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods of 31.10.2017 (COM(2017) 637 final); Art. 2.7 of the Proposal on certain aspects concerning contracts for the supply of digital content of 9.12.2015 (COM/2015/0634 final). See also, Recital 10 Regulation (UE) 2019/1150: "Such a contractual relationship should be deemed to exist where both parties concerned express their intention to be bound in an unequivocal manner on a durable medium, without an express written agreement necessarily being required."

47 Recital 12, 24 and Art. 3.10 SGD; Recital 18 and Art. 3.6 DCD.

48 Art. 1.4. Regulation (UE) 2019/1150: "This Regulation shall not affect national civil law, in particular contract law, such as the rules on […] formation [..] of a contract […]". See however Recital 10.

49 On search engines (Art. 2.5), see Recitals 4, 26.

50 See Beale, "Digital Content Directive and Rules For Contracts on Continuous Supply" (2021) 2 Journal of Intellectual Property, Information Technology and Electronic

only if a contract can be deemed to have been concluded according to the law of the Member States.[51] National laws do not provide this nuance and many of them would seem to presuppose the existence of a contract in such a case.[52] However, since in consumer law consent by way of silence or implied consent is not allowed where there is an obligation to pay (Arts. 8.2 II, 27 CRD), it should likewise not be possible to treat consent to the gathering and exploitation of personal data as tacitly given by the mere fact of using the digital service (e.g. surfing the web). In addition, Regulation (EU) 2016/679 also requires explicit consent for data processing (Art. 6.1 letter a). Consequently, a rule would be necessary to clearly express that browse agreements are prohibited in this sort of contracts, provided that the more pragmatic and simpler perspective already offered by Art. 3.1 II DCD does not prevail.

3. Accessibility and continuity as features of digital elements

Accessibility and continuity are objective conformity criteria (Art. 8.1 letter b DCD) that are not defined in the DCD. Although "accessibility" may refer to online availability,[53] it could also be defined on the basis of negative characteristics. Thus, a digital content or service would be said not to be accessible if the consumer cannot listen to or view it on particular devices, or in specific locations, because technological measures prevent them from doing so. However, understood in this way, accessibility is confused or

Commerce Law, 96 (105); Savin, "Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context", in Durovic and Tridimas (eds), *New Directions in European Private Law* (2019), 213 (222).

51 But see for an integrated reading of Art. 3 (1) II and Recital 24 DCD, Metzger, "Un modelo de mercado para los datos personales: Estado de la cuestión a partir de la nueva directiva sobre contenidos y servicios digitales", in Arroyo and Cámara (eds), *El Derecho privado en el nuevo paradigma digital* (2020), 125.

52 Thus, in Portugal, Art. 3.3 letter *b* Decreto-Lei n. 84/2021 of 18 October 2021; in Spain, Art. 59.4 TR-LGDCU; in France, Art. 224–25–2 Code de la Consommation. In other cases, the rule is declared applicable, without questioning whether a contract exists. Thus, in Malta, Art. 3.2 Digital Content and Digital Services Contracts Regulations, 2021 (L.N. 406 of 2021. Consumer Affairs Act, Cap. 378); Italy, Art. 135-octies 4 Codice del consumo.

53 Twigg-Flessner, "Conformity of Goods and Digital Content / Digital Services", in Arroyo and Cámara (eds.), *El Derecho privado en el nuevo paradigma digital* (2020), 75: "[...] where this is only accessed online and not installed directly on the consumer's device".

overlaps with "functionality" and "interoperability". On the other hand, the need for digital content to be accessible is also implicit in the requirement for "continuity". "Continuity" means absence of interruptions (Recital 51 DCD)[54] but can also be explained through "portability", which means that the service cannot be suspended when the consumer changes his/her place of residence. In addition, the continuity requirement could be reflected in the trader's duty to provide updates, because this is a periodic (hence, continuous) obligation that allows the enjoyment of the digital elements to be maintained (Recital 57 DCD). On reflection, this does bring continuity closer to the requirement of durability that applies to goods (Art. 2.13, Art. 7.1 letter d SGD).[55]

4. The need to clarify/generalise some novel rules

The SGD and DCD build on concepts and principles that previously existed in the *acquis*, but also embrace innovative rules. Apart from the clear and well-known differences in the two directives regarding the suppression or maintenance of the notice of lack of conformity as a requirement for the consumer to exercise remedies; or the different scope for Member States to waive or extend the seller's liability periods, or the period for reversal of the burden of proof,[56] other less obvious discrepancies that are equally striking will be highlighted here. At the same time, it is inevitable to question which regulation is preferable and/or whether any rule should be omitted altogether.

54 Twigg-Flessner, "Conformity of Goods and Digital Content / Digital Services", in Arroyo and Cámara (eds.), *El Derecho privado en el nuevo paradigma digital* (2020), 75: "at any point during the contract period".

55 For the identification between durability and continuity, Morais Carvalho, "Introducción a las nuevas Directivas sobre contratos de compraventa de bienes y contenidos o servicios digitales", in Arroyo and Cámara (eds.), *El Derecho privado en el nuevo paradigma digital* (2020), 39. On the comparison between updates and durability, Twigg-Flessner, Conformity of Goods and Digital Content / Digital Services", in Arroyo and Cámara (eds.), *El Derecho privado en el nuevo paradigma digital* (2020), 75.

56 See Zöchling-Jud, Brigitta, "Beweislast und Verjährung im neuen europäischen Gewährleistungsrecht", in Stabentheiner, Wendehorst and Zöchling-Jud, Brigitta (Hrsg.), *Das neue europäische Gewährleistungsrecht* (2019), 197.

a) Personal data as consideration

The DCD supports the provision of personal data by the consumer for purposes that go beyond those that would be necessary to meet legal requirements or to carry out the performance of contractual obligations. Such a transfer of personal data is not described as a price (Art. 2.7 DCD).[57] However, the European Electronic Communications Code had previously not been reluctant to assume a very broad concept of remuneration which does include the transfer of personal or other data to the service provider.[58] Consequently, nothing should prevent such an alignment. On the other hand, the SGD does not even mention the possibility that personal (or other) data may serve as consideration. Perhaps this can be explained by the simple reason that it is not in practice the most common form of transactions involving tangible goods in the offline world. However, the argument no longer holds if the object is smart goods with embedded digital elements, since, along with (or instead of) a price in money, the consumer usually provides personal data as well. The same could in fact be true of any other online sale, and there should therefore be no objection to generalising the rule contained in Art. 3.1 II DCD.[59]

b) On mixed contracts

How the contract should be qualified when it is a package with different elements does not receive a homogeneous answer in the European directives.[60] Art. 3.6 I DCD states that where a single contract between the same trader and the same consumer includes in a bundle elements supplying digital content or a digital service and elements providing other services or goods (such as the provision of digital television and the purchase of

57 European Data Protection Supervisor, Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, [pp. 1–26], pp. 3, 7.

58 Recitals, 15, 16 of Directive (UE) 2018/1972, of 11.12.2018 (OJ L 36, of 17.12.2018).

59 See De Franceschi, Alberto, *La vendita con elementi digitali* (2019), 60; Vanherpe, "White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content" (2020) 2 European Review of Private Law, 251 (258).

60 Arnau Raventós, "Bienes y elementos digitales: ¿dos mundos aparte? (2021) 24 Revista Educación y Derecho, 1 (6–7).

electronic equipment, Recital 33 DCD), the Directive shall only apply to the elements of the contract concerning the digital content or digital service. Therefore, each performance is governed by its own rules. However, the picture is different within a sale of tangible goods. Thus, according to Art. 2.5 CRD, a contract aiming at both the transfer of ownership of the goods and the provision of related services (e.g. installation or maintenance) by the same seller qualifies as a sales contract. This means that its provisions also apply to non-typical obligations under such a contract. For the consumer the advantage lies in the fact that this avoids having to resort to a different liability regime (objective/by fault). Yet, the SGD takes a different view from both the DCD and CRD. Indeed, although an installation of the goods could form part of the sales contract (Art. 8 letter a SGD), where a contract includes elements of both sales of goods and provision of services, it should be left to national law to determine whether the whole contract can be classified as a sales contract (Recital 17 SGD). This disregards CJEU C-247/16 of 7 September 2017, *Schottelius* (§§ 38, 44), which, based on Directive 99/44, specified that for the contract to be considered a sale, the provision of services must be ancillary;[61] in other words, the main purpose or the predominant element of the contract must be the transfer of ownership. This is also the approach taken by the European Commission when interpreting Art. 2.5 CRD.[62] It may be possible that the service contract is of a digital nature, and therefore it should also be possible to qualify a contract that includes a digital service supply as a sale of goods. However, such an interpretation would clash with Art. 3.6 I CDD, which, as mentioned above, requires that each provision be governed by its own rules. The problem is that it will not always be easy to distinguish this case from the sale of a good with embedded digital elements.

61 See Arnau Raventós, "Transmisión onerosa de un producto y su conformidad con el contrato: una relectura de la STJUE de 7 de septiembre de 2017 (Asunto 247/16, Schottelius)" (2018) 2 Revista Electrónica de Direito, 42.

62 See Commission CRD Guidance (OJEU C 525, 29.12.2021), 7–9.

c) Subjective/objective conformity requirements

aa) Unequal formulations

Accessibility and continuity are criteria that appear in Art. 8.1 letter b DCD, but not in Art. 7.1 letter d SGD. In contrast, durability is mentioned in Art. 7.1 letter d SGD, but not in Art. 8.1 letter b DCD, without a clear reason, since the meaning of durability in Recital 32 SGD ("the ability of the goods to maintain their required functions and performance through normal use") ought to apply not only to the goods but also to the digital elements.[63] It is also unclear why durability is not among the subjective conformity requirements. On the other hand, interoperability is exclusively a subjective conformity criterion for digital elements (Art. 6.1 letter a SGD and 7.1 letter a DCD), which is not reflected in the objective conformity requirements (Art. 7.1 letter d SGD and Art. 8.1 letter b DCD). The meaning of this omission is unclear and should therefore be clarified.[64]

There are other, perhaps minor, differences between the two directives. For example, packaging, which is provided for in Art. 7.1 letter c SGD, is not provided for in Art. 8.1 letter c DCD, although it is certainly possible to supply digital content on a durable medium, which could be send e.g. by post. Moreover, the reference to "other instructions" (apart from those referring to installation instructions) is a specification that only appears in Art. 7.1 letter c SGD (cf. Art. 8.1 letter c DCD). On the other hand, the assistance referred to in Art. 7 letter c DCD is not mentioned in Art. 6 SGD, although there is no doubt that, if agreed, it must also be provided.[65]

Concerning the trader's duty to provide the latest version of digital content, Art. 8.6 DCD does not have an equivalent in the SGD regarding

63 Arnau Raventós, "Bienes y elementos digitales: ¿dos mundos aparte?" (2021) 24 Revista Educación y Derecho, 1 (14); Twigg-Flessner, "Conformity of Goods and Digital Content / Digital Services", in Arroyo and Cámara (eds.), *El Derecho privado en el nuevo paradigma digital* (2020), 75.

64 Staudenmayer, Comments to Art. 8 DCD, in Schulze – Staudenmayer (eds.), *EU Digital Law. Article-by-Article Commentary* (2020), 142; and Schulze and Zoll, *European Contract Law* (2021), 224, consider that the objective expectations of the consumer do not reach this aspect: "intentionally only been included as a subjective criterion". However, they do not exclude it, Van Gool and Michel, "The New Consumer Sales Directive 2019/771 and Sustainable Consumption: a Critical Analysis" (2021) 4 Journal of European Consumer and Market Law, 136 (138).

65 Arnau Raventós, "Bienes y elementos digitales: ¿dos mundos aparte? (2021) 24 Revista Educación y Derecho 1 (15).

smart goods.[66] Furthermore, the combined reading of Art. 8.1 letter d DCD and Art. 8.6 DCD raises doubts.[67] The trader must indeed provide the latest version of the digital content, but the objective conformity criterion only requires the trial version or preview of the digital content or digital service to be taken into account. It must surely be understood that the trader must deliver the most recent version at the time of the conclusion of the contract, but as an agreement to the contrary is allowed, this would lead to the application of the objective criterion that only took the trial version into account. This leads, in short, to the usefulness of that rule being questioned.

bb) The waiving of some objective conformity requirements

Art. 7.5 SGD and 8.5 DCD expressly and separately require consumer acceptance that a particular characteristic of the goods, digital content or digital service deviated from the objective requirements for conformity when concluding the contract. The word "expressly" clearly reflects the transparency required of the trader,[68] because it is this transparency that enables the consumer's consent to be qualified and explicit. However, the concept is broader and must also be linked to a positive action and a consumer's active and unequivocal behaviour (Recitals 49 DCD, 36 SGD). In the online world an example of such behaviour would be ticking a box.[69] In telephone contracting, on the basis of Art. 8.6 CRD, the consumer would only be bound once s/he has signed the trader's declaration or sent his/her agreement in writing or sent his/her confirmation on a durable

66 Arnau Raventós, "Bienes y elementos digitales: ¿dos mundos aparte? (2021) 24 Revista Educación y Derecho 1 (15); Vanherpe, "White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content" (2020) 2 European Review of Private Law, 251 (261).

67 Cf. Arnau Raventós, "Bienes y elementos digitales: ¿dos mundos aparte? (2021) 24 Revista Educación y Derecho 1 (16).

68 Beale, "Digital Content Directive and Rules for Contracts on Continuous Supply" (2021) 2 Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 96 (98).

69 Regarding Art. 8.1 II, Art. 22 CRD and the other provisions of the CRD requiring the consumer's consent or express request, see Guidelines on the interpretation and application of Directive 2011/83 issued by the European Commission (OJEU C 525, 29.12.2021), p. 59, p. 62.

medium (paper, e-mail, sms or fax).[70] However, if the contract is concluded face-to-face, should an oral declaration be admissible? In other cases where, at the time of the contract being concluded, the legislator has required a separate consent of the consumer to certain contractual terms, s/he has also asked for her/his signature.[71] Therefore, in view of the different scenarios in which SGD and DCD may operate, it is debatable whether Recitals 36 SGD and 49 DCD mean the same.[72] It should also be pointed out that the consumer acceptance is excluded when the conformity criteria refer to the installation (Arts. 8 SGD and 9 DCD), without the reason for this limitation being clear.[73]

Finally, it is worth mentioning that, even if the agreement that digital content or services are not to be provided in accordance with the latest available version is also allowed, the requirements of Art. 7.5 SGD and 8.5 DCD no longer apply in such a case.

cc) The duration period for updates

The differences between the two directives are also apparent regarding updates of digital content or services. When they are supplied continuously over a period, the DCD sets out a duty to provide updates to extend throughout the duration of that period (Art. 8.3 letter a, Art. 8.4 DCD). However, when digital elements continuously supplied are inserted into goods, the SGD follows another scheme: the seller must provide updates for a minimum of two years, because that is also the seller's liability period

70 Considering technological developments, Directive (UE) 2019/2161 has removed the reference to the fax number from the list of means of communication in Article 6.1 letter c of Directive 2011/83/EU, as the fax is rarely used nowadays and is largely obsolete (Recital 46).

71 Thus, regarding the right of withdrawal and the prohibition of advance payments, Art. 5.4 II Directive 2008/122/EC of 14.01.2009, on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale, and exchange contracts (OJ L 33, of 3.2.2009).

72 For criticism, Artz, "Pactos sobre la falta de conformidad en las Directivas 2019/770 y 2019/771" (2019) 2–3 *LaNotaria*, 120 (121). Further considerations, Zöchling-Jud, "Das neue Europäische Gewährleistungsrecht für den Warenhandel" (2019) 3 Zeitschrift für das Privatrecht der Europäische Union, 115 (120).

73 This was not the case in the 2015 Proposal for a Directive on online sales (Art. 4.3). Staudenmayer, Comments to Art. 8 DCD, in Schulze and Staudenmayer (eds.), *EU Digital Law. Article-by-Article Commentary* (2020), 163, draws attention to the change, but does not explain what the basis for this difference in treatment should be.

for lack of conformity (Art. 7.3 letter b, Art. 10.2 SGD). If the supply lasts longer, then the general DCD rule applies again. It is difficult to distinguish between the ambit of both rules, especially when it is unclear which is the predominant element (e.g. a key ring that incorporates a chip that makes it possible to find the keys).[74] On the other hand, somewhat confusingly, periodical delivery or delivery in several stages of digital items (e.g. downloads of e-books under a subscription contract) are also considered a continuous supply (Recital 57 DCD), but then the duty to update is extended for as long as the consumer can reasonably expect (Recital 31 SGD, Art. 7.3 letter a SGD and 8.2 letter b DCD). This last rule is the one that, in fact, should have been generalised to all cases, because it is the one that best reflects the idea that updates are adapted to the purpose of the supply and to the expected durability of each good or device.[75]

dd) Unilateral modification of the contract

It is questionable whether the rule on unilateral modification of digital content and services and the consumer's right to terminate the contract should only be provided for in relation to the continuous supply of digital elements (Art. 19 DCD). For no apparent reason, the rule does not apply to sales of goods with digital elements,[76] nor to the supply of digital content by a single act of supply or a series of individual acts of supply.[77]

74 Vanherpe, "White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content" (2020) 2 European Review of Private Law, 251 (261): "The Split based on the period of continuous supply of digital content (less vs more than two years) appears to be somewhat artificial and easy to circumvent".

75 See European Parliament Resolution of 25.11.2020 "Towards a more sustainable single market for business and consumers" (2020/2021(INI) (P9_TA(2020)0318), no 7, letter a: "corrective updates – i.e. security and conformity updates – must continue throughout the estimated lifespan of the device, according to product category". See also, Bach,"Neue Richlinien zum Verbrauchgüterkauf und zu Verbraucherverträgen über Digitale Inhalte" (2019) 24 Neue Juristische Wochenschrift, 1705 (1707).

76 For criticism, Sein, "Goods with Digital Elements' and the Interplay with Directive 2019/771 on the Sale of Goods" (January 30, 2020), p. 8. Available at: https://ssrn.com/abstract=3600137); De Franceschi, *La vendita con elementi digitali* (2019), 41, 99–100.

77 For criticism, Bach, "Neue Richlinien zum Verbrauchgüterkauf und zu Verbraucherverträgen über Digital Inhalte" (2019) 24 Neue Juristische Wochenschrift,

III. Does the effet utile of the directives require the consumer's expectations to be specified?

The task of drafting principles based on the *acquis* requires one not to innovate, nor to provide more efficient solutions, nor to fill in the gaps that are evident in the *acquis* itself, unless the effectiveness of European law requires such steps to achieve common effects or effects that are as similar as possible in national laws. Therefore, it is necessary to discover what ideas are at the heart of the directives, and which are needed to fulfil their purpose. Both the DCD and the SGD seek to protect the consumer's expectation to receive goods, content, and digital services in conformity with the contract. Conformity must be assessed by considering, among other factors, the purpose for which digital content or services of the same type would normally be used and the qualities and characteristics that consumers can reasonably expect.[78] Sometimes, it is national or EU law that guarantees normative expectations (Art. 7.1 letter a SGD, Art. 8.1 letter a DCD). Thus, Art. 3.1 of Regulation (EU) 2017/1128 on cross-border portability of online content services obliges those who provide an online content service against payment of money to allow subscribers temporarily present in a Member State to access and use the online content service in the same manner as in their Member State of residence. Where they do not fulfil this obligation, the result is a lack of conformity with the contract.[79] Moreover, Art. 7(1) of that Regulation declares any contractual provisions excluding or limiting cross-border portability to be unenforceable. This example further demonstrates that it is necessary to complete the blacklist on unfair terms in all cases where the non-negotiated term deviates from the rights expressly set out in the law (Art. 6:304 ACQP).

In many cases, the absence of a normative expression of these expectations can lead to a considerable lack of legal certainty and a lower level of protection. Thus, for example, in the absence of rules establishing a novel catalogue of consumer rights to make copies of digital content, use it on different devices, share it among family or friends, or resell it, it is difficult to establish an objective delineation of consumer expectations that should

1705 (1707); Wendland, Comments to Art. 19 DCD, in Schulze – Staudenmayer (eds.), *EU Digital Law. Article-by-Article Commentary* (2020), 321.

78 Recital 29 SGD, Arts. 6–8 SGD; Recital 45 DCD, Arts. 7–9 DCD.

79 Grünberger, "Verträge über digitale Güter" (2018) 2–4 Archiv für die civilistische Praxis, 213 (264–265).

be used to ascertain the conformity of digital elements.[80] As a general rule, it has not been recognised that the flipside of copyright limitations are mandatory consumer rights. Notwithstanding the well-known exceptions introduced by the European Union, such as the one referring to back-up copies of computer programs and, as mentioned above, the limitation of the contractual freedom of copyright holders in the context of cross-border portability, the general rule remains that the consumer can be deprived of such rights with his/her express consent. It is not clear that the most likely deficit in consumer protection can be mitigated by the application of Directive 93/13/EC on unfair terms, which is not even mentioned in the DCD or the SGD. It would be worth exploring whether in this case national laws could provide examples of what consumer expectations deserve to be protected.[81]

IV. What role should national law play in the creation of the ACQP? On the liability of platforms

The role played by national laws in the drafting of the ACQP was never decisive.[82] Even so, they did have some influence. National laws were used to reinforce what seemed to be a clear principle in the acquis (e.g. the duty to act in good faith in pre-contractual relations (Art. 2:101 ACQP);[83] they also played an instrumental role when different provisions of the community law referred to them (e.g. concerning the non-requirement of any form for exercising the right of withdrawal (Art. 5:102 ACQP)[84]. National laws were sometimes instrumental in filling the gap resulting from a non-existent regulation (e.g. damages for breach of the business' duty to

80 See Oprysk – Sein, "Limitations in End-User Licensing Agreements: Is There a Lack of Conformity Under the New Digital Content Directive?" (2020) 51 International Review of Intellectual Property and Competition Law, 594; Spindler, "Digital Content Directive and Copyright-related Aspects" (2021) 2 Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 111 (119, 124 ff).

81 Grünberger, "Verträge über digitale Güter" (2018) 2–4 Archiv für die civilistische Praxis, 213 (250 ff, 265 ff).

82 For a deficit-focused critique of the recourse to national legal systems, see Jansen and Zimmermann, "Grundregeln des bestehenden Gemeinschaftsprivatrechts?" (2007) 23 Juristenzeitung, 113 (1118–1120); Micklitz, "Selbst-Reflektionen über die wissenschaftlichen Ansätze zur Vorbereitung einer europäischen Vertragsrechtskodifikation" (2007) 1 Zeitschrift für das Privatrecht der Europäische Union, 2 (11).

83 See Acquis Group, *Contract II*, Comments to Art. 2:201 ACQP, no 9, 103.

84 See Acquis Group, *Contract II*, Comments to Art. 5:102 ACQP, no 2, 240–241.

inform). In the current context, recourse to national laws could play a more decisive role, especially if one considers the very numerous issues that both the DCD and the SGD leave to the discretion of the national legislator.

One such issue is referred to in Recitals 18 DCD and 23 SGD, which allow the national legislator to establish liability of platforms vis-à-vis the consumer for breaches by the seller of goods or supplier of digital content. It seems clear that the expression "platform providers that do not fulfil the requirements for being considered a trader under this Directive" refers to platforms that act merely as intermediaries.[85] However, the directives do not make clear what criteria are used to determine when such intermediation exist (apart, of course, from what the terms and conditions of the service provide). Sometimes it has been understood that the control they exercise over the business deprives them of the status of intermediaries.[86] Other times, it has not, but the appearance that the platform is the actual seller/supplier also allows them to be held liable for the latter's breaches.[87] Art. 6.3 DSA imposes the loss of the safe harbour on platforms that do not correctly display who is the trader or exercise control over the underlying business, which would imply that they nevertheless retain their status as intermediaries (see also Art. 2.2 DSA). Yet, it does not establish what parameters are used to determine when such control exists, although Recital 23 can help to understand the undefined wording of rule. Whatever the case, it is still up to the Member States to determine the liability regime.

One might think that as long as the platforms are not obliged to verify the products offered by third parties or to identify whether their qualities are true, it is not reasonable for them to be liable, together with the seller,

85 On the status as a trader of the natural or legal person acting as an intermediary, in the name or on behalf of the trader conducting the business, CJEU C-536/20, of 24.02.2022, *Tiketa* (§§ 31–36).

86 CJEU C-434/15, of 20.12.2017, *Asociación Profesional Élite Taxi (*§§ 34–41, § 39: "decisive influence"); CJEU C-20/16, of 10.04.2018, *Uber France* (§§ 19–22, 21: "decisive influence"). See also, on the Proposal for a DSA, SWD (2020) 348 final. Part 2/ 2. Annex 9: Liability Regime, p. 161: "[...] some of these criteria would actually mean, following existing case-law that the intermediary is not an information society service provider. In those cases, normal liability rules as in the offline world for services and traders would apply".

87 In respect of appearance and in the light of the CJEU C-149/15, of 9.11.2015, *Wathelet*, see on the Proposal for a DSA, SWD (2020) 348 final. Part 2/ 2. Annex 9: Liability Regime, p. 160: "[....] a national court could assess that an online Marketplace is liable for a defective product sold". On the possibility of extending that judgment to platforms, *see* also Commission CRD Guidance (OJEU C 525, 29.12.2021), pp. 27–28.

for the lack of conformity of the goods or digital elements,[88] and neither if, in addition, it appears that they do not infringe any duty of information for which they alone are particularly liable.[89] At most, they may be liable for breach of the duties incumbent on them, which the DSA now increases, e.g. in relation to the traceability of sellers or the duty to report the illegality of a product or a service (Arts. 30, 32). In these (and other) cases, Art. 54 DSA acknowledges the consumer's right to claim damages in accordance with EU or national law.

It is reasonable to impose liability on platforms that have a predominant role when the trader offers goods or services that are not in conformity with the contract and it is wise to provide consumers with the same remedies they have against the trader in a B2C contract. It should be borne in mind that platforms do not merely facilitate transactions, but have the power to transform market relations and to influence the contract between platform users (e.g. by imposing their anti-discrimination policy). If the consumer meets the provider of goods and services on the platform, it is precisely because of the trust that he or she has in the platform. If one prefers to look at it another way, one could say that the platform is the facilitator of the medium that makes infringement possible. Moreover, the platform is in a better position than the consumer to hold the defaulting supplier liable, i.e. its liability vis-à-vis the consumer could be mitigated by the granting of a right of redress.[90]

A model for national regulation is now provided by the recently enacted Portuguese regulation, which proposes that platforms should be jointly and severally liable with the seller who incurs in a lack of conformity, if it appears that they do not inform about their contractual role, or if they exercise more than an intermediary role because they have control over the underlying transaction and, ultimately, predominant influence (e.g. setting

88 It is not possible to appeal to the duty of professional diligence, Art. 5 Directive 2005/29, according to Guidance on the interpretation and application of Directive 2005/29 (OJ C 526, of 29.12.2021), p. 88. See on that Duivenvoorde, Brams, "The Liability of Online Marketplaces under the Unfair Commercial Practices Directive, the E-commerce Directive and the Digital Services Act" (2022) 2 Journal of European Consumer and Market Law, 43.

89 See Art. 6.1a Directive (EU) 2011/83, as amended by Art. 4.5 of Directive (EU) 2019/2161. Regarding the visibility of the identity of the professional user providing goods or services, see Art. 3.5 Regulation 2019/1150.

90 Cauffman and Goanta, "A New Order: The Digital Services Act and Consumer Protection" (January 2021), p. 10, available at: https://www.researchgate.net/publication/348787835.

the terms of service and, among them, the price, or promoting advertising associated with the platform rather than the seller).[91] The regulation is inspired by the ELI Model Rules on Platforms' Liability, which also take into account the *acquis* on the effects of appearance in contracting.[92]

Attributing liability to the platform for the breach of a contract that it has not concluded is of course contrary to the principle of relativity of contracts, but other rules of the *acquis* also impose liability on non-contracting third parties (Recital 46 and Art. 13, 23 Package Travel Directive 2015/2302; see also, Art. 7:E-02 ACQP).[93] Nor should it be neglected that the DCD does not prevent the consumer from bringing a claim directly against the producer or developer of the digital content (Recitals 63 SGD, 13 DCD). In Spain, Art. 125.1 and 2 TR-LGDCU provides for direct contractual claim by the consumer against the producer, for lack of conformity, when it is impossible or too burdensome for the consumer to address the contracting party. It therefore allows the consumer to sue a person directly who is involved in an earlier step in the chain of transactions, even if that person is not a party to the contract. Against third parties, the consumer can only claim that the good or the contents are brought into conformity, but the Dieselgate scandal has highlighted the importance of good faith and the trust placed in these third parties. Thus, the recent Supreme Court Judgment of 11 March 2020 also allows for damages to be claimed against the producer, on the understanding that this is a basic consumer right and because of the difficulty in claiming damages from a seller that may be insolvent.[94] So if the car does not fulfil the characteristics with which it was offered, with respect to the final buyer there is not only a breach by the direct seller, but also by the manufacturer who placed it on the market and

91 See Art. 44 Decreto-Lei n. 84/2021 and Morais, "The Implementation of the EU Directives 2019/770 and 2019/771 in Portugal" (2022) 1 Journal of European Consumer and Market Law, 31 (34–35). For the previous situation, Campos Carvalho, "Online Platforms: Concept, Role in the Conclusion of Contracts and Current Legal Framework in Europe", in Arroyo and Cámara (eds.), *El Derecho privado en el nuevo paradigma digital* (2020), 249–250.

92 CJEU C-149/15, of 9.11.2015, *Wathelet* (§§ 33–34, 44); AG Szpunar Conclusions C-434/15, of 20.12.2017, *Elite Taxi Professional Association* (§ 53). On the ELI Model Rules, see Busch et al., "The ELI Model Rules on Online Platforms" (2020) 2 Journal of European Consumer and Market Law, 61. Accordingly, see the European Parliament resolution of 20.10.2020: "Digital Services Act: Improving the functioning of the Single Market", Section VI.

93 Acquis Group, *Contract II*, Comments to Art. 7:E-02, no 3, 383.

94 RJ 2020\752. See also STS 23.07.2021 (RJ 2021\3583).

advertised it. And the damage suffered by the buyer corresponds directly to the non-performance attributed to the manufacturer. Therefore, if such a direct action is possible against the manufacturer, why should it be ruled out that it can also be brought against the platform, when it is the platform that ultimately creates the risk of contracting through it? Those risks – where they exist (e.g. in a social network less probably than in (some) online marketplaces)- should be borne by the platform itself, jointly and severally with the seller, without prejudice to the actions that the platform itself could then bring against the latter.

C. Final remarks

Despite several failed attempts by European institutions to create a more coherent general contract law, the path should not be abandoned. Some scholars believe that it is time to tidy up, re-evaluate the existing soft law texts (PECL, DCFR, CESL, FS CESL) and provide them with the appropriate interrelation and context;[95] others think of the opportunity of a European Code, this time for business-to-business relations.[96] At the same time, there are those who consider it necessary to go further and explore other core areas of classic civil law.[97] Here the case has been made for the usefulness of revising the ACQP in the area of contract law, to maintain their function as a source for the drafting of rules, transposition and interpretation of European law, although there is no longer (or not yet) a Commission Communication to stimulate discussion on the best way to carry out the development of European Contract Law.[98] The reason is that European law is still developing and facing new challenges. Digitalisation

95 Zimmermann and Jansen, *Commentaries on European Contract Laws* (2018).

96 See Schulze, "A Code for European Traders and Companies" (2016) 6 Journal of European Consumer and Market Law, 233; Dupichot, "Vom Brexit zum Europäichen Wirtschaftsgesetzbuch" (2017) 2 Zeitschrift für Europäisches Privatrecht, 245; Lehmann, "Towards New Horizons: Commenting and Codifying European Business Law", in Schulte-Nölke and Janssen (eds), *Researches in European Private Law and Beyond – Contributions in Honour of Reiner Schulze's Seventieth Birthday* (2020), 27.

97 Von Bar, *Gemeineuropäisches Sachenrecht*, I (2015) and II (2019).

98 But see the REFIT Fitness Check on Consumer Law (12/2015): "The Fitness Check will therefore explore whether and to what extent a potential codification of EU consumer law into a single EU instrument could bring added clarity, remove overlaps, and fill any gaps" (https://ec.europa.eu/smart- regulation/roadmaps/docs/2016_just_023_evaluation_consumer_law_en.pdf).

has been mentioned in the preceding pages, but there is also the pending adaptation of private law to the ecological transition, which will require more environmentally friendly rules. The *acquis communautaire* is constantly evolving, and it is necessary to reflect on this development. The usefulness of drafting new principles of the *Acquis* has been argued here, although permanent changes prevent a definitive picture of future ACQP. However, an exercise to improve and consolidate the rules that already exist is not premature; and nor should technological development prevent us from suggesting rules or guiding principles for future legislation.