Conference Report: Contracts for the Supply of Digital Content and Digital Services, A legal debate on the proposed directive, ERA Brussels, 22 November 2017

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On 22 November 2017 the Academy of European Law (ERA) hosted a conference on the recent developments on the Proposal for a Digital Content Directive in Brussels.

After welcoming remarks by Dr. Angelika Fuchs, Prof. Bénédicte Fauvarque-Cosson, University Paris II – Panthéon-Assas, chaired the first panel on the scope of the Directive. To begin with, Prof. Fauvarque-Cosson reminded the participants of the past developments in European contract law, mentioning the UPICC, the Principles of European Contract Law, and the CESL. The challenges these projects had to face clearly showed that for most member states contract law represented the heart of their legal traditions, and member states were therefore reluctant towards radical changes.

Evelyne Gebhardt, MEP, Co-rapporteur for the IMCO and JURI Committees, explained the position of the IMCO/JURI joined committee after the vote on 21 November 2017. In order to ensure updates for consumers and interoperability, a sensible inclusion of embedded digital content (EDC) was proposed. The scope of the Directive was extended to also include OTTs (Over-the-top content) in order to ensure remedies and conformity rights in this field. The overall objective were a high level of consumer protection and to anticipate rules for digital content on a European scale in order to prevent deviating national legislation.

Jeremy Rollson, Microsoft, praised the work of the Commission and the European Parliament. With regard to platforms, he proposed a modernization of the scope. Since the release of the proposal in 2015 by the commission, the technology had already gone through major changes. As various forms of OTTs existed, it proved hard to find a one size fits all model, however it were necessary to agree on certain principles. Rollson outlined the difficulties businesses were facing, because many different legal instruments had to be considered. He suggested a targeted scope in order to ensure the applicability of the rules.

The question, which rules should apply to embedded digital content, was addressed by Prof. Karin Sein, University of Tartu, Estonian EU Presidency Team. After having explained the advantages and disadvantages of the different approaches, she reported on the council's opinion to exclude embedded digital content from the scope of the Digital Content Directive. This solution offered the upside that from a consumer's perspective it was easily understandable, that the rules for goods also applied to smart goods. The overall goal was to achieve a future-proof solution, which was at the same time easily understandable for the average consumer.

In the following discussion Evelyne Gebhardt disagreed with Prof. Sein on the topic of embedded digital content and presented the European Parliament's opinion to extent the scope of the directive to EDC. The European Parliament preferred the split approach. This approach offered the main advantage that it were not up to the consumer to define where the product's defect lay, but the supplier had to determine whether the defect touched the digital content or the good itself. Prof. Sein replied that, overall, it was less relevant, where the rules were installed, since this was only a question of technique. Nevertheless, the installation of specific rules remained the main objective. Prof. Staudenmayer, Head of Unit – Contract Law, DG Justice, European Commission, agreed and added the main requirements of the rule were that it needed to be forward-looking and at the same time practical for consumers. Prof. Fauvarque-Cosson highlighted the different scope of the Digital Content Directive in contrast to the CESL, as the scope was limited to B2C-contracts and moreover the territorial scope covered domestic as well as cross-border contracts.

Prof. Karin Sein introduced the audience to the second panel's focus on conformity criteria, remedies and time limits. Agustín Reyna, BEUC, compared the specifications of the conformity criteria in the Commission's proposal to the Council's proposal and the IMCO/JURI report. During the upcoming Trilogues he would expect an agreement on a balance between objective and subjective criteria. He pointed to the possible conflicts between contractual disclaimers (subjective) and consumer expectations (objective). He praised the amendment in Art. 6a (5), which introduced specific rules for updates for digital content or digital services. In his opinion the relation between third party rights and copyright issues needed further clarification.

Staudenmayer added to the discussion on the inclusion of updates that consumers needed to be informed about possible updates as well as a right to terminate. The topic, whether the consumer should be able to keep the old version, was discussed controversially. With regard to the remedies package, Staudenmayer justified the facilitation of the right of termination by stating that most suppliers also preferred a termination of the contract, caused by the fact that they did not want to invest in a bad product and rather develop a new one. On the other hand consumers also profited, as the easier termination gave an incentive to suppliers to develop good products. Regarding the reversal of burden of proof, he reported on the commission’s reason to not imply a time limit, since digital content was not subject to wear and tear. However, as the council and the European Parliament supported a time limit for the burden of proof, a discussion on how long this period will be and when it should start is expected. To conclude, Staudenmayer emphasized the transition our economy is undergoing as it is turning towards a digital economy and reminded the participants of the importance of promoting this change in order to stay competitive on a global scale.

Panel II ended with a Round Table on the topic “Balancing the interest of suppliers and consumers? Watering down full harmonization?”. Fauvarque-Cosson explained the historic development from a preference for minimum to a preference for maximum harmonization and indicated that recently some member states saw the subsidiarity principle endangered. Therefore she suggested more targeted rules as a substitute for full harmonization. Concerning updates, Anna Papenberg, stated that updates could often be very burdensome and consumers needed access to previous versions. Prof. Schulte-Nölke referred to the suggestion of the ELI regarding embedded digital content, which proposed that in this case hard- and software should be subject to remedies and the consumer should be allowed to cherry-pick a system. The Round Table ended with the conclusion that defining a targeted scope could lead to similar results as full harmonization.

After a short lunch break, Stephen Deadman, Facebook Global Deputy Chief Privacy Officer reported on “Data and its role in the digital economy”. He stated that in the future, as part of a new wave of innovation, people would be made aware of the value of their data with the aim of empowering people in their life by using their data. In his opinion data driven innovation and privacy should become mutually enforcing. He underlined that data were not to be classified as a currency, as it were neither finite nor exclusive. In fact, data were superabundant and, by using data, people did not give up data.

Romain Robert, Legal Officer, Policy & Consultation Unit, EDPS, presented the "Interaction of the GDPR, the e-Privacy legislation and the Digital Content Directive". He stressed the EDPS's opinion that data were significantly different from money as a counter performance. He referred to the EDPS opinion from April 2017 on the proposed Directive and explained the position, why the term "data as a counter performance" should be avoided. Differences between the Digital Content Directive and the GDPR arose with regard to the definition of personal data. In the EDPS opinion almost all data provided by the consumer would be considered as personal data.

Insight on the topic "Data as a price under contract law?" was provided by Prof. Hans Schulte-Nölke, University of Osnabrück and the Radboud University Nijmegen. In his opinion the Digital Content Directive was not properly coordinated with the GDPR. He pointed to a conflict between contract law and the GDPR, as under data protection law personal data were protected as a fundamental right, whereas in contract law personal data could be considered as a counter-performance for a service. Hence under contract law the contract was the reason for the right to exchange, thus for what had been exchanged under the contract. Therefore the supplier had a right to keep the counter performance after proper performance of the contract. Meanwhile the GDPR granted a right to withdraw consent at any time (Art. 7 (3) GDPR). How can a balance be achieved in a way that, on the one hand, contract law is interpreted in the light of the GDPR and, on the other hand, considering the principle that GDPR supersedes contract law, but contract law purposes are still met. He came to the conclusion the GDPR should not hinder contract law. Further, he raised the question, whether a counter performance could be assumed, in the case that a supplier gathered more information than the amount that were necessary for the performance of the service.

"Provision of data and data processing under the proposed regime" was the subject of the Round Table at the end of the conference day. Jeremy Rollson drew the attention to his opinion that data were neither comparable to oil nor to a currency, but without doubt very valuable. Robert Reyna agreed and further elaborated that the idea of “data as a counter performance” put suppliers in a very strong position, as they could determine, which data to label as a counter performance and which to label a necessity for the contract. A solution to balance this power of determination could be a presumption in consumer law. Anna Papenberg specified that a consumer could not give away personal data, but, more specifically, the exploitation rights of data. The fact that consumers did not give up data, but that their data was being used, were not the same as a counter performance, added Stephen Deadman. It was agreed on the necessity to limit the power of the supplier in order to define, which data counted as counter performance and which was necessary for the execution of the contract. The event ended with warm words of thanks to the organizers and speakers for a highly interesting conference day.