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Consumer rights and the digital market

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Published in:

Electronic communications, audiovisual services and the Internet

Publication date:

2020

Document Version

Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for pulished version (HARVARD):

Jacquemin, H & Ledger, M 2020, Consumer rights and the digital market. in *Electronic communications, audiovisual services and the Internet*. Sweet and Maxwell, 2020, pp. 367-393.

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CONSUMER RIGHTS AND THE DIGITAL MARKET

Hervé Jacquemin and Michèle Ledger

A. THE EU CONSUMER ACQUIS AND ITS RATIONALE

Weakness of the consumer Consumers are not always confident when buying from suppliers (i.e. traders or sellers acting in a professional capacity) and are generally considered the weaker party in the contract. Often, consumers are not sufficiently aware of their rights and/or of the factual data surrounding the agreements. Also, they do not have the same bargaining power as the professional party to the contract. As stated recently by the Court of Justice:

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“...in relation to a trader, the consumer is in a weaker position, in that he must be deemed to be less informed, economically weaker and legally less experienced than the other party to the contract.”¹

Consumers are also often not aware of their basic consumer rights in relation for instance to legal warranties, the right of withdrawal, the termination of the contract or the portability of their data. It is also very common that the terms and conditions are unilaterally drafted by the trader and can only be accepted or refused by the consumer. The average consumer is therefore the weaker contracting party (compared to a professional) because he or she is unable to negotiate the contract or impose his or her own terms. Traders can take advantage of the consumer's weak position and impose unfair contract terms (unbalanced liability exemptions for instance) or undertake more generally unfair commercial practices (misleading acts or omissions and/or aggressive commercial practices).

Digital markets amplify the weakness of consumers Online, consumers are even more vulnerable because of two additional features: (i) first the *means used to conclude the agreement*: contracts are concluded at a distance and by electronic means, typically through a website, an online marketplace or a mobile app; and (ii) second the *object* of the contract as such, which can be the purchase of digital content (or services) like a film that is webstreamed or downloaded to a device, a

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¹ *Komisia za zashtita na potrebitelite* (C-105/17) EU:C:2018:808, para.34. The Court of Justice also stated that: “the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms”: *Mostaza Claro* (C-168/05) EU:C:2006:675, para.25. Also, *Oceano Grupo* (C-240/98 to C-244-98) EU:C:2000:346, para.25; *Pannon GSM Zrt* (C-243/08) EU:C:2009:350, para.22; *Asturcom Telecomunicaciones SL* (C-40/08) EU:C:2009:615, paras 29 to 31; *VB Pénzügyi Lízing Zrt.* (C-137/08) EU:C:2010:659, paras 46 to 48; *Pereničová et Perenič* (Case C-453/10) EU:C:2012:144; *Horatiu Ovidiu Costea* (C-110/14) EU:C:2015:538, para.18; *Nemzeti Fogyasztóvédelmi Hatóság* (C-388/13) EU:C:2015:225, para.53.

subscription to social media, cloud or trust services, artificial intelligence applications or services relying on blockchain. In all these situations, the consumers often do not have the required level of knowledge of the products and their characteristics (that cannot be viewed and touched like in a brick and mortar shop, because of the distance and/or because of their technical complexity such as AI apps or cryptocurrencies). Moreover, consumers may not be aware of the identity of the professional seller/supplier (as, for instance, the identification data provided on the website could be fake), or they may not have a full understanding of the fees to be paid. Consumers—especially minors—could for instance be surprised that when as it is often the case in the gaming sector, they download an app on their smartphone free of charge, they are then asked to carry out an “integrated purchase” i.e. to make a payment to benefit from all the functionalities of the app.

7-003 Legal framework protecting consumers at the EU level To ensure a high level of protection for consumers, many Directives—and more recently, Regulations—have been adopted at the EU level. Some of them are horizontal and apply to the whole economy while others are sector specific and apply for instance to the provision of electronic communications networks or services² or the provision of information society services.³ Horizontal instruments prescribe either *substantial* protection rules or *procedural* protection rules.

7-004 Substantial horizontal consumer protection rules Considering the general weakness of consumers, several horizontal Directives help them enter into contracts with suppliers in a more informed manner while also minimising any potential for fraud or abuse on behalf of traders at all the stages of the contractual relationship, i.e. before the contract is concluded, at the time of conclusion, during the performance of the contract and when it is terminated. The main substantial protection Directives that are in force are the following:

- the Unfair Contract Terms Directive (“UCTD”);⁴
- the Unfair Commercial Practices Directive (“UCPD”);⁵ and
- the Consumer Rights Directive (“CRD”).⁶

7-005 Those rules have been strengthened to give more rights to consumers in the digital markets, especially when buying from an online marketplace, when search-

² See arts 98 to 116 of Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, [2018] OJ L321/36, analysed in Chapter II of this book.

³ See Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), [2000] OJ L178/1 and Regulation 2019/1150 of the European Parliament and of the Council of 20 July 2019 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L186/57, analysed in Chapter III of this book.

⁴ Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts, [1993] OJ L95/29 (“UCTD”).

⁵ Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 (“UCPD”). See also Commission Staff Guidance on the Implementation/Application of Directive 2005/29/CE on Unfair Commercial Practices, SWD (2016) 163 (May 2016).

⁶ Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, [2011] OJ L304/64 (“CRD”). See also: DG Justice Guidance document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (June 2014), available at https://ec.europa.eu/info/sites/info/files/crd_guidance_en_0.pdf [Accessed 17 September 2019].

ing online and to make sure that consumer rights apply in relation to “free” digital services i.e. those which are exchanged against personal data and not against monetary payment. This has been achieved by the following legislative measures:

- the proposed directive on better enforcement and modernisation of EU consumer protection rules, which amends the previous Directives;⁷
- the Directive on Digital Content Contracts (“DCD”), which specifically covers digital content contracts;⁸ and
- the Directive on Contracts for the Sales of Goods (“SGD”).⁹

Procedural horizontal consumer protection rules Substantial protection can only be achieved if effective redress mechanisms are in place in case of disputes between consumers and professionals. Procedural rules complement the substantive rules. Because of the features of most disputes (among others, low value cases) preference is given, in a first stage, to a simple, fast and affordable out-of-court settlement procedure, compared to a traditional judicial procedure. The procedural instruments adopted at the EU level are the following:

- the Regulation establishing a Small Claims Procedure;¹⁰
- the Directive on Mediation in Civil and Commercial matters;¹¹
- the Directive on Injunctions;¹²
- the Directive on Consumer Alternative Dispute Resolution (ADR);¹³
- the Regulation on Online Dispute Resolution for Consumer Disputes;¹⁴ and

Proposal for a directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules.

⁷ Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 (“DCD”). This Directive should be transposed by the Member States by 1 July 2021 and its measures should be applicable by 1 January 2022.

⁸ Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC [2019] OJ L136/28 (“SGD”). This Directive should be transposed by the Member States by 1 July 2021 and its measures should be applicable by 1 January 2022. This Directive replaces Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

⁹ Regulation 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199.

¹⁰ Directive 2008/52 of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136.

¹¹ Directive 2009/22 of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests [2009] OJ L110. In April 2018, the Commission proposed a revision of this Directive, which is still currently being negotiated by the European Parliament and the Council: Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, COM(2018) 184. This proposal was made in the context of the new deal for consumers, at the same time as the proposal for the Directive on modernisation and better enforcement of EU consumer protection rules.

¹² Directive 2013/11 of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] OJ L165.

¹³ Regulation 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes [2013] OJ L165.

- the Regulation on Cooperation between National Authorities in Enforcement.¹⁵

7-007

The Unfair Contract Terms Directive, the Unfair Commercial Practices Directive and the Consumer Rights Directive also address to a certain extent enforcement measures¹⁶ and the penalties in case of violation of the enacted provisions which must be effective, proportionate and dissuasive.¹⁷ The Directive on better enforcement and modernisation of EU consumer protection rules improves the enforcement of existing Directives by requiring Member States to set fines for the infringements of the rights granted in the Directives on the basis of a non-exhaustive and indicative list of criteria such as the nature, gravity and scale of the infringement. The other main improvement relating to enforcement relates to the fact that for widespread infringements (affecting consumers in at least two EU countries other than the EU country where the infringement originated) traders could become subject to a maximum fine of at least 4% of the trader's annual turnover in the concerned countries.¹⁸ This chapter focuses on the most important horizontal EU instruments prescribing substantial protection rules to the benefit of consumers: the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive and the Consumer Rights Directive.¹⁹

B. OBJECTIVES AND SCOPE OF THE EU CONSUMER PROTECTION RULES

1. Objectives of the EU consumer protection rules

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Main objectives The EU consumer protection Directives have two main objectives: (i) to contribute to the proper functioning of the internal market and (ii) to achieve a high level of consumer protection by harmonising national consumer protection rules.²⁰ When purchased or provided online, goods and services move freely without frontiers and it is key to harmonise national rules to reduce legal uncertainty for pan-European suppliers resulting from different legal provisions

¹⁵ Regulation 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws [2017] OJ L345.

¹⁶ UCTD art.7, UCPD art.11 and CRD art.23.

¹⁷ UCPD art.13 and CRD art.24.

¹⁸ Where the information on the turnover is not available, the Member States must set maximum fines of at least €2 million. Member States could set higher maximum fines.

¹⁹ See J. Luzak and S. van der Hof, "Directive 2011/83/UE—Consumer Rights Directive (Electronic Commerce Aspects)", *Concise European Data Protection, E-Commerce and IT Law*, 3rd edn (Alphen aan den Rijn, Kluwer Law International, 2018), from p.325; C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law* (Cheltenham, Edward Elgar Publishing, 2016); N. Reich, H.-W. Micklitz, P. Rott and K. Tonner, *European Consumer Law* (Cambridge, Intersentia, 2014). Each year, the European Commission publishes a Consumer Markets Scoreboard available at: https://ec.europa.eu/info/publications/consumer-markets-scoreboard_en [Accessed 17 September 2019].

²⁰ UCPD art.1 and CRD art.1. The purpose of ensuring a high level of protection to the benefit of consumers is not expressly mentioned in art.1 of the UCTD but it is apparent in the recitals: "more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms". Quoting the programmes for a consumer protection and information policy (Preliminary programme of the European Economic Community for a consumer protection and information policy, 1975 OJ C92), it is also confirmed that "acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contract and the unfair exclusion of essential rights in contracts".

among the Member States while also ensuring a common level of protection for all EU consumers.

7-009

Minimal harmonisation Directives The Unfair Contract Terms Directive is a minimal harmonisation Directive.²¹ This means that the Member States, when implementing its provisions into national law, are not allowed to reduce the consumer protection level set by the Directive but they may introduce a higher level of protection. Some Member States have indeed added some terms to the EU list of unfair terms.²² Therefore, differences remain between national legal frameworks and professional sellers need to adapt their legal policies and contract processes depending on the Member States where their consumers have their main residence.

7-010

Maximum harmonisation Directives The EU law makers understood that to achieve a proper functioning of the internal market, especially in the digital environment where goods and services can be provided without borders, minimal harmonisation directives are not always sufficient to remove the obstacles to the free provision of services and the free movement of goods. The more recent Unfair Commercial Practices Directive and the Consumer Rights Directive provide for maximal (or full) harmonisation.²³ The Directive on Digital Content Contracts and the Directive on Contracts for the Sales of Goods also provide for maximum harmonisation except for some provisions (in particular, Member States are still allowed to introduce a legal guarantee period that is longer than two years). In case of maximum harmonisation, Member States cannot adopt national rules having a higher or lower consumer protection level. The main disadvantage of full harmonisation Directives is the possible reduction of the level of protection: since the Member States cannot derogate from the Directive, including when the objective is to provide a higher level of protection to the benefit of the consumers, some Member States had to repeal more stringent and protective national provisions in their national legal frameworks. Another adverse effect of maximal harmonisation is the possible violation of the Directive—especially the Unfair Commercial Practices Directive—by national legal provisions, regulating other well-known commercial practices (such as combined offers,²⁴ sales at specific periods,²⁵ below cost selling,²⁶ clearance sales,²⁷ price reduction only permitted when there is a reference price,²⁸ etc.). There are many rulings of the Court of Justice dealing with the relationship between these national legal provisions and the Unfair Commercial Practices Directive and these rulings show that when a practice falls within the scope of the Unfair Commercial Practices Directive, the practice cannot be

²¹ UCTD art.8.

²² In Belgium for instance the list contains the prohibition of clauses that foresee price increases compared to the advertised price when the consumer refuses to receive invoices by email: Belgian Code of Economic Law, art.VI. 83, 33^o.

²³ UCPD art.4 and CRD art.4. This is a difference with previous Directives governing distance (Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144) and off-premises contracts (Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372 of 31 December 1985). They are however some minor exceptions to the full harmonisation: see e.g. CRD art.5(4).

²⁴ *VTB-VAB NV and Galatea* (Joined Cases C-261/07 and C-299/07) EU:C:2009:244.

²⁵ *Wamo* (C-288/10) EU:C:2011:443; *Immo* (C-126/11) EU:C:2011:851.

²⁶ *Euronics Belgium* (C-343/12) EU:C:2013:154.

²⁷ *Köck* (C-206/11) EU:C:2013:14.

²⁸ *Commission v Belgium* (C-421/12) EU:C:2014:2064.

prohibited per se since it is not included in the list of the 31 practices prohibited in all circumstances.²⁹

2. Scope of the EU consumer protection rules

- 7-011** **Criteria determining the scope of the Directives** Each Directive covers particular areas i.e. what is harmonised in relation to a given type of transaction or situation (*material scope*) in the relationship between “sellers or suppliers” and consumers (*personal scope*). The Unfair Contract Terms Directive covers “unfair terms” in contracts concluded between “sellers or suppliers” and “consumers”. The Unfair Commercial Practices Directive applies to “unfair business-to-consumer commercial practices”,³⁰ before, during and after a commercial transaction in relation to a product.³¹ The Consumer Rights Directive applies to “any contract between a trader and a consumer”.³² The Directive on Digital Content Contracts is the first piece of EU legislation that targets specifically certain contractual issues (namely conformity, remedies in case of lack of conformity and modification and termination of the contract) relating to digital content and services offered to consumers by traders. The Directive on Contracts for the Sales of Goods covers the same contractual areas but with respect to the sale of physical goods to consumers.
- 7-012** **Material scope of the Unfair Contract Terms Directive** The Unfair Contract Terms Directive outlaws terms that have not been individually negotiated and which, contrary to the requirement of good faith, cause a significant imbalance in the rights and obligations of the parties arising out of the contract and to the detriment of the consumer.³³
- 7-013** **Material scope of the Unfair Commercial Practices Directive** Both concepts of “business-to-consumer commercial practices” and “product” are defined to determine the scope of the Unfair Commercial Practices Directive. “Business-to-consumer commercial practices” (also referred to below as commercial practices) means any conduct by a trader, directly connected with the promotion, sale or supply of a product to consumers;³⁴ a “product” means any good or service including immovable property, rights and obligations.³⁵ These definitions are therefore very broad³⁶ and also include digital content. The Directive is particularly well suited to address disputes between traders and consumers that arise online, such as misleading advertising on a website, unclear/missing information on the price or main characteristics of a product sold on an online marketplace, misleading information given by a *chatbot* or aggressive practices generated by an AI application. The strength of the Directive is also that it applies regardless of when the practice was

carried out: before the conclusion of the agreement (including when no agreement was finally concluded), at the moment of the conclusion of the agreement, during its performance or after its termination. Various areas are however excluded from its scope,³⁷ which also is without prejudice to Community or national rules relating to the health and safety aspects of products³⁸ and to rules determining the jurisdiction of the courts.³⁹

The material scope of the Consumer Rights Directive The scope of the Consumer Rights Directive is framed by reference to the definition of “goods”,⁴⁰ “sales contract”,⁴¹ “service contract”,⁴² “distance contract”,⁴³ “off-premises contract”⁴⁴ or “digital content”.⁴⁵ In the digital context, the concepts of “distance contract” and “digital content” are particularly relevant. A distance contract is defined as:

7-014

“...any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.”

Contracts concluded through eCommerce websites, mobile apps or platforms therefore clearly fall within this definition. Digital content means “data which are produced and supplied in digital form”. The definition is wide and includes:

“...computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.”⁴⁶

However, the Consumer Rights Directive is not applicable to some types of contracts including social services, healthcare or financial services.⁴⁷

The material scope of the Digital Content Directive The Directive on Digital Content Contracts applies to digital services and to digital content. Digital services allow the consumer to create, process, store or access data in digital form or that allow the sharing of or any other interaction with data in digital form that is uploaded or created by the consumer or other users of that service.⁴⁸ The Directive therefore applies to services such as cloud services, music and video streaming, television services, social networks and messaging apps; so long as these services are offered to consumers. The Directive also covers digital content defined as data which are produced and supplied in digital form. It includes digital content supplied through tangible mediums (like CDs and DVDs), provided the tangible medium serves exclusively as the medium to carry the digital content.

7-015

²⁹ See Annex I of the UCPD.

³⁰ As laid down in UCPD art.5.

³¹ UCPD art.3(1).

³² CRD art.3(1).

³³ UCTD art.3(1).

³⁴ UCPD art.2(d) defines unfair practices as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing”.

³⁵ UCPD art.2(c).

³⁶ On the wide scope *ratione materiae* of the UCPD, see e.g. *Nemzeti Fogyasztóvédelmi Hatóság* (C-388/13) EU:C:2015:225, para.34; *Mediaprint Zeitungs- und Zeitschriftenverlag* (C-540/08) EU:C:2010:660, para.21; and *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (C-59/12) EU:C:2013:634, para.40.

³⁷ See art.3 and recitals 6 to 10 of the UCPD.

³⁸ UCPD art.3(3).

³⁹ UCPD art.3(7).

⁴⁰ CRD art.2(3).

⁴¹ CRD art.2(5).

⁴² CRD art.2(6).

⁴³ CRD art.2(7).

⁴⁴ CRD art.2(8).

⁴⁵ CRD art.2(11).

⁴⁶ CRD recital 19.

⁴⁷ CRD art.3(3).

⁴⁸ DCD art.2(2).

7-016 *The material scope of the Directive on Contracts for the Sales of Goods* The Directive on Contracts for the Sales of Goods applies both to online sales of goods and to offline sales of goods.⁴⁹ It also covers goods with digital elements, i.e. goods incorporating or inter-connected with digital content/services without which the good would not be able to function, such as a smart TV that is advertised as including a specific video application. In this case, the video application element is covered by the Directive on Contracts for the Sale of Goods.

7-017 **Personal scope of the Directives** Regarding the personal scope, reference is made in all the Directives to the concepts of “sellers/suppliers” or “traders” on one hand and to the concept of “consumers” on the other hand. In the Unfair Commercial Practices Directive, the trader is:

“...any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.”⁵⁰

Public entities should also be considered as traders, in the context of these Directives. The Court of Justice decided that the:

“Unfair Commercial Practices Directive must be interpreted to the effect that a public law body charged with a task of public interest, such as the management of a statutory health insurance fund, falls within the persons covered by the Directive.”⁵¹

The scope of the Directive must be construed by taking into account the purpose of the measures (and the possible misleading practices preventing consumers from an informed choice) and, in this context, the consumer deserves to be protected, no matter “the body at issue or the specific task it pursues are public or private”.⁵² The consumer is “any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”.⁵³ The Court of Justice decided that such a concept must be applied in abstracto, regardless of whether the consumers actually have technical or legal knowledge with regard to the agreement. The Court decided that:

“...a natural person who practices as a lawyer and concludes a credit agreement with a bank, in which the purpose of the credit is not specified, may be regarded as a ‘consumer’ within the meaning of that provision, where that agreement is not linked to that lawyer’s profession.”⁵⁴

In the case of dual purpose contracts (e.g. an attorney buying a computer on a website, to be used partly for professional purposes, and partly for private purposes), the natural person could be considered as a consumer, when “the trade purpose is so limited as not to be predominant in the overall context of the contract”.⁵⁵ These definitions of trader and consumer are the two sides of the same coin, since the main criterion to be taken into account is the (professional or non-professional) purpose for which the person is acting. Both concepts are also used in the Directive on

Contracts for the Sales of Goods⁵⁶ and in the Directive on Digital Content Contracts.⁵⁷ Except for slight differences,⁵⁸ the definitions are similar to those of the Unfair Commercial Practices Directive. When implementing the Directives in their national legal systems, Member States usually also refer to the same definitions.

Application in collaborative economy Some discussions may occur in the context of the sharing economy,⁵⁹ when deciding whether the person selling goods or providing services on the platform, is acting as a consumer or a trader. In the latter case and should the other party be a consumer, the legal framework protecting consumers is applicable. Following the European Commission:

“...the mere fact that a person engages in an activity in the collaborative economy will not mean that that person automatically qualifies as a trader, under the UCPD, the qualification of whether a person is a trader or not is the outcome of a case-by-case assessment, which has to take all factual aspects into account, such as whether an essential part of that person’s income stems from a given collaborative economy activity.”⁶⁰

The Court of Justice confirmed this case-by-case approach and provided numerous circumstances to be taken into account in this context, such as:

“...whether the sale on the online platform was carried out in an organised manner, whether that sale was intended to generate profit, whether the seller had technical information and expertise relating to the products which she offered for sale which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status which enabled her to engage in commercial activities and to what extent the online sale was connected to the seller’s commercial or professional activity, whether the seller was subject to VAT, whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with her usual commercial or business activity, whether the goods for sale were all of the same type or of the

⁵⁶ SGD art.2(2) and (3).

⁵⁷ DCD art.2(5) and (6).

⁵⁸ For instance, art.2(2) of the CRD expressly mentions in the definition of “trader” that the legal person may be privately or publicly owned. Article 2(c) UCTD, expressly mentions traders, business or professions of a public nature. In consideration to these definitions, some contracts are therefore excluded per se from the scope of the Directive. It is confirmed by a recital of the Directive, with reference to “contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements”. In addition, art.1(2) states that “the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive”.

⁵⁹ The “sharing economy” or “collaborative economy” is growing rapidly and in various sectors (short-term accommodation, like Airbnb; passenger transportation, like Uber; sale of goods, like eBay; collaborative finance, in some crowdfunding platforms, like Seedrs; etc.). Although it is too narrow to describe the phenomenon, reference could be made to the definition proposed by the EU Commission: “business models where activities are facilitated by collaborative platforms that create an open marketplace for the temporary usage of goods or services often provided by private individuals” (Communication from the Commission, A European Agenda for the collaborative economy, COM(2016) 356, p.3).

⁶⁰ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/CE on Unfair Commercial Practices, SWD(2016) 163, point 5.2.5.

⁴⁹ SGD art.2.

⁵⁰ UCPD art.2(b).

⁵¹ *BKK Mobil Oil Körperschaft des öffentlichen Rechts* (C-59/12) EU:C:2013:634, para.41.

⁵² *BKK Mobil Oil Körperschaft des öffentlichen Rechts* (C-59/12) EU:C:2013:634, para.37.

⁵³ UCPD art.2(a).

⁵⁴ *Horăți Ovidiu Costea* (C-110/14) EU:C:2015:538, para.30.

⁵⁵ CRD recital 17.

same value, and, in particular, whether the offer was concentrated on a small number of goods".⁶¹

A misleading qualification (as consumer instead of trader) could give rise to penalties, under the applicable tax regulation, or under the Unfair Commercial Practice Directive.⁶²

7-019 Directives apply to the digital economy Because the Unfair Contract Terms Directive and the Unfair Commercial Practices Directive are technology neutral, they apply to online transactions. Compared to the other Directives, the Consumer Rights Directive also addresses issues raised in the digital context (contracts concluded online or contracts with a digital object, such as those relating to digital content). As explained above, the more recent Directive on Digital Content Contracts specifically targets digital services such as cloud, social media and entertainment services, while the Directive on Contracts for Sales of Goods has recognised that some goods integrate digital components and that these components should be absorbed in the underlying protection under the sale of goods legal framework. Many transactions are entered into by consumers through platforms (social media websites, marketplaces, app stores, collective buying websites, etc.)⁶³ and in all these situations, the measures enacted at the EU level need to be fulfilled by the traders.

7-020 Some Directives also apply when the consumer does not pay a monetary price but provides personal data to the trader The Consumer Rights Directive already applies to the contract for the provision of digital content not supplied on a tangible medium, regardless of whether the consumer pays a price in money or against personal data. For service contracts (including digital services), the situation is different as the Consumer Rights Directive currently only applies if the consumer pays a monetary price. Indeed the definition of a service contract in the Consumer Rights Directive clearly contains a reference to the fact that the consumer needs to pay or to undertake to pay a price for the service.⁶⁴ If the contract service is free but the consumer provides their personal data, the protection afforded by the Directive therefore does not apply. The recently adopted Directive on better enforcement and modernisation of EU consumer protection rules aligns the rules by amending the Consumer Rights Directive to specify that the Directive applies in full to the supply of digital services that are provided against the exchange of personal data.⁶⁵ The Directive on Digital Content Contracts also provides the same solution. It specifies that although personal data cannot be considered as a commodity, the Directive should ensure that consumers are entitled to contractual remedies even when the business model is to offer services without payment but in exchange for personal data.⁶⁶ The Directive is therefore meant to apply for instance when a consumer opens a social media account and provides contact details which can be

⁶¹ *Komisia za zashitta na potrebitelite* (C-105/17) EU:C:2018:808, para.38.

⁶² See point 22 of Annex I and art.5(5) of the UCPD.

⁶³ See Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/CE on Unfair Commercial Practices, SWD (2016) 163, point 5.2.1.

⁶⁴ CRD art.2(6).

⁶⁵ Directive on better enforcement and modernisation of EU consumer protection rules art.2(2)(b) which adds para.1(a) to art.3 of the CRD.

⁶⁶ DCD recital 24. The Directive also clarifies that the personal data could be provided to the trader either at the time when the contract is concluded or at a later time.

used by the provider (not only to supply the service or to comply with legal obligations). Typically, this covers the case when for instance the consumer's data (photos, posts, etc.) are processed by the trader for marketing purposes. However, it is also specified that the Directive should not apply where digital content and services are not supplied in exchange for a price or to situations where the trader collects personal data only to supply the content or service or to meet legal requirements. It should not apply either where the trader only collects metadata such as information on the consumer's device or browsing history. These and other situations are excluded from the scope of the Directive but Member States are allowed to extend the application of the Directive to these situations.⁶⁷

C. PROTECTION MEASURES IMPOSED BY THE DIRECTIVES

Diversity of the measures aiming at protecting consumers Because of the weakness of consumers (in their relationships with traders), the Directives have introduced diverse protection measures. The Unfair Contract Terms Directive prohibits unfair contract terms, while the Unfair Commercial Practices Directive prohibits unfair commercial practices. Other important protection measures are foreseen in the Consumer Rights Directive: information duties and formal requirements to be complied with by online suppliers, a right of withdrawal, a prohibition of additional payments and rules on delivery and the passing of risk. The Directive on Digital Content Contracts and the Directive on Contracts for Sales of Goods close some legal gaps, namely the conformity of the digital content/service or the physical good with the contract, the remedies in case of lack of conformity and modification and termination of the contract. Taken together, these Directives provide a comprehensive level of protection for online digital consumers, although the rules are spread across five Directives.

1. Prohibition of unfair contract terms

Unfair contract terms according to the grey list— The Unfair Contract Terms Directive establishes a so-called *grey* list of 17 terms for which the unfairness is presumed but this presumption can be rebutted. Some Member States have turned this grey list into a black list in the sense that the presumption of unfairness cannot be rebutted.

- Some terms relate to the *performance of the contract* and penalties in case of non-performance (mainly by the professional).⁶⁸ The list includes terms which have the object or effect of "inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance",⁶⁹ for instance, the T&C of the trader could foresee that in case of non-compliance by the trader with the delivery duties (the good is not in line with the order), the sole remedy of the consumer is to ask for another delivery; whereas under general contract law, other remedies are normally available in the event of non-performance (termination of the agreement, for instance).

⁶⁷ Directive on better enforcement and modernisation of EU consumer protection rules recitals 34 and 35.

⁶⁸ See also points (c) (d) and (e) (o) and (q) of the Annex of the UCTD.

⁶⁹ Point (b) of the Annex of the UCTD.

- Other terms relate to the *liability* regime. This is the case when terms have the object or effect of “excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury”.⁷⁰
- Other terms relate to the *termination* of the agreement or to its *tacit renewal*. They can have as their object or the effect of “automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early”:⁷¹ for instance, on a film streaming platform the T&Cs could state that agreement is concluded for one year, and is tacitly extended for another period of one year, except if the consumer terminates it in writing nine months before the anniversary date.
- Another group could bring together terms having the object or the effect to undermine the *consent* given by the consumer, regarding the applicable terms, the price or the characteristics of the product: “irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract”:⁷² this may be the case of a pre-ticked box stating that the consumer has read and accepted the terms and conditions (sometimes without any hyperlink to the T&C or without any possibility to untick the box); “enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract”:⁷³ this may be the case when, following a specific clause, the trader is allowed to modify the T&C at their own discretion (and, for instance, to exclude their liability or to turn obligations of result into obligations of means); “enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided”:⁷⁴ this may be the case when, by virtue of the applicable T&C, the trader is allowed to deliver red shoes, instead of the blue shoes ordered by the consumer; or to offer for download a movie in Spanish, instead of the English version ordered by the consumer; “limiting the seller’s or supplier’s obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality”:⁷⁵ this may be the case of an online retailer that excludes their liability if the carrier does not deliver the goods to the consumer.

23 **Unfair contract terms according to the general clause** Next to the grey list, the Directive establishes an open norm providing that:

“...a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”⁷⁶

Various circumstances must be taken into account when assessing the unfairness of contractual terms, and in particular the nature of the goods or services and

⁷⁰ Point (a) of the Annex of the UCTD.

⁷¹ Point (h) of the Annex of the UCTD. See also points (f) and (g).

⁷² Point (i) of the Annex of the UCTD. See also points (l) (m) and (p).

⁷³ Point (j) of the Annex of the UCTD.

⁷⁴ Point (k) of the Annex of the UCTD.

⁷⁵ Point (n) of the Annex of the UCTD.

⁷⁶ CRD art.3(1).

the other terms of the contract. According to the Court of Justice:

“...the question whether that significant imbalance exists cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charged to the consumer under that clause.”⁷⁷

The scope is limited to contractual terms which have not been individually negotiated.⁷⁸ Since this is a minimum harmonisation Directive, some Member States have decided to extend the scope of the Directive to contractual terms which have been individually negotiated.

Interpretation of the terms Article 5 of the Unfair Contract Terms Directive foresees that where contract terms are offered to the consumer in writing, these terms must always be drafted in plain, intelligible language. The terms do not necessarily need to be in writing but when they are, they need to be drafted in plain intelligible language. In case of doubt about the meaning of a term, the Directive foresees that the term should be interpreted to the benefit of consumers. 7-024

Legal consequences in case of unfair terms Unfair terms should not be binding on the consumer and the contract should continue to bind the parties if it can continue to exist without the unfair terms.⁷⁹ As decided by the Court of Justice: 7-025

“...that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.”⁸⁰

Private international law is also addressed, since the choice of law of a non-Member country as the applicable law of the contract cannot not deprive the consumer from the protection granted by the Directive.⁸¹

2. Prohibition of unfair commercial practices

Prohibition of unfair commercial practices To assess whether the practice is unfair—and, therefore, prohibited⁸²—a three-step analysis must be carried out. The practice is prohibited when (i) it is contained in the list of the 31 commercial practices which must in all circumstances be regarded as unfair⁸³ (commercial practices unfair per se); (ii) it must be considered as unfair following the Semi-General Clause, by reason of its misleading or aggressive nature;⁸⁴ and/or (iii) it must be considered as unfair following the General Clause.⁸⁵ In the context of the General Clause and the Semi-General Clause, the assessment of the unfair nature of practice is made with reference to the criterion of the average consumer who “is 7-026

⁷⁷ *Constructora Principado SA* (C-226/12) EU:C:2014:10, para.22. See also *Mohamed Aziz* (C-415/11) EU:C:2013:164, para.68; *Banco Primus SA* (C-421/14) EU:C:2017:60, para.59.

⁷⁸ On this concept, see *OTP Bank Nyrt.* (C-51/17) EU:C:2018:750, para.46.

⁷⁹ UCTD art.6.

⁸⁰ *Horati Ovidiu Costea* (C-110/14) EU:C:2015:538, para.19.

⁸¹ UCTD art.6(2).

⁸² UCPD art.5(1).

⁸³ UCPD art.5(5) and Annex I.

⁸⁴ UCPD art.5(4) and arts 6 to 9.

⁸⁵ UCPD art.5(2).

reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors”.⁸⁶ The Court of Justice decided that the average consumer test is not a statistical test and that, to determine the typical reaction of that consumer in a given case, the national courts and authorities have to exercise their own faculty of judgment.⁸⁷ In other words, it is not a statistical concept and competent authorities do not need to rely on expert reports or consumer research polls to determine the expectations of average consumers.⁸⁸

7-027 *Unfair practices in digital markets* Many examples of unfair online practices, especially regarding online platforms, are provided in the Guidance on the Unfair Commercial Practices Directive that the European Commission updated in 2016.⁸⁹ For instance, the Guidance states that e-commerce platforms (insofar as they can be considered as a trader) should take appropriate measures enabling its users to clearly understand who their contracting party is and that users only benefit from the protection under EU consumer laws in relation to suppliers who are traders. This point is now also included in the Consumer Rights Directive and the Unfair Commercial Practices Directive since the adoption of the Directive on better enforcement and modernisation of EU consumer protection rules.⁹⁰ If an e-commerce platform fails to provide this information, the consumer could be misled, by action or omission and the consumer could be led to believe that the contract is concluded with the online platform rather than with a third party (who may not be bound to respect consumer protection legislation).

7-028 *Unfair commercial practices according to the black list* Annex 1 of the Unfair Commercial Practices Directive provides for a blacklist of 31 commercial practices which must in all circumstances be considered as unfair. Some of them are unfair because of their misleading nature (1-23°), others because of their aggressive nature (24-31°). The Directive on better enforcement and modernisation of EU consumer protection rules has amended the UCPD by adding some new practices to this list.

7-029 *Misleading practices* Practices can be misleading with regard to the product itself (“Stating or otherwise creating the impression that a product can legally be sold when it cannot”), the rights granted to the consumer or the trader (“Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer”) or its price (“Describing a product as ‘gratis’, ‘free’, ‘without charge’ or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item”). Regarding the claim that a product is free, some discussion could occur concerning online games that can be downloaded free of charge but for which in-app purchases are proposed once the game is downloaded. Some misleading practices aim at attracting/leading consumers to a shop or a website to sell consumers something else:

⁸⁶ UCPD recital 18.

⁸⁷ *Canal Digital Danmark A/S* (C-611/14) EU:C:2016:800, para.39.

⁸⁸ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163, Pt 2.5.

⁸⁹ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163, Pt 5.2.

⁹⁰ New art.7(f) of the UCPD and new art.6 a 1.(c) of the CRD.

“Making an invitation to purchase products at a specified price without disclosing the existence of any reasonable grounds the trader may have for believing that he will not be able to offer for supply or to procure another trader to supply, those products or equivalent products at that price for a period that is, and in quantities that are, reasonable having regard to the product, the scale of advertising of the product and the price offered (bait advertising).”

Four new misleading practices, which are particularly widespread online are added to this list by the Directive on better enforcement and modernisation of EU consumer protection rules⁹¹: not disclosing paid advertisement/payment for achieving higher ranking within search results; reselling events tickets if the trader acquired them by automated means to circumvent limits on the sale of the ticket (such as limits on the number of tickets that a single buyer can purchase); stating that reviews of a product are submitted by consumers who have purchased the product, without taking reasonable and proportionate steps to check that they originate from such consumers; and submitting/commissioning another person to submit false consumer reviews or endorsements, or misrepresenting consumer reviews or social endorsements to promote products.

Aggressive practices Various instances of aggressive practices are also listed. These mainly consist in using harassment and/or coercion, either physically or morally. This is the case when the practice is “creating the impression that the consumer cannot leave the premises until a contract is formed” or:

7-030

“...requiring a consumer who wishes to claim on an insurance policy to produce documents which could not reasonably be considered relevant as to whether the claim was valid, or failing systematically to respond to pertinent correspondence, in order to dissuade a consumer from exercising his contractual rights.”

Standard and burden of proof The burden for the consumer to prove that a practice is unfair is normally low and the court or authority in charge of the case has little margin of discretion: either the factual circumstances are met and the practice is unfair; or the factual circumstances are not met and the practice can continue. However, the application of some practices mentioned in the list could be debated in a specific case. For instance, it could be difficult to demonstrate that a false impression was created in the consumer’s mind.⁹²

7-031

Unfair commercial practices according to the Semi-General Clause A practice must also be considered as unfair when it is misleading, or when it is aggressive.⁹³ In both cases, the same requirement should be met: the consumer must demonstrate that the practice “causes or is likely to cause him to take a transactional decision that he would not have taken otherwise”. The concept of transactional decision means:

7-032

“...any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to

⁹¹ New points 11a, 23a, 23b, 23c of Annex 1 of the UCPD.

⁹² Annex 1, points 9, 21, 22, 23, 24 and 31 of the UCPD.

⁹³ Respective arts 6 and 7 of the UCPD and arts 8 and 9 of the UCPD.

exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.”⁹⁴

The concept is interpreted broadly by case law. In addition to this requirement, another condition must also be satisfied, depending on whether it is a misleading or an aggressive practice.

7-033 *Misleading practices* The practice can be misleading by action or by omission. A misleading action occurs when the practice contains false information or if it deceives (or could deceive or is likely to deceive) the average consumer in relation to one or more elements such that the main characteristics of the product, price, consumer’s rights, nature, attribute and rights of the trader.⁹⁵ In some circumstances, the practice of dynamic pricing which is widespread in online ticket sales could be considered as unfair, when the relevant information is not granted to the consumer.⁹⁶ A misleading omission could also be claimed by the consumer for instance

“...if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, [the practice] omits material information that the average consumer needs, according to the context, to take an informed transactional decision.”⁹⁷

It is also the case when a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner material information or fails to identify the commercial intent of the commercial practice if not already apparent from the context.⁹⁸

7-034 *Aggressive practices* A commercial practice is considered aggressive:

“...if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer’s freedom of choice or conduct with regard to the product.”⁹⁹

The Directive provides a list of circumstances to be considered to determine whether harassment, coercion, or undue influence are used and related to timing, location, threat to take an action that cannot legally be taken, etc.¹⁰⁰ In the online context, various practices could be considered as aggressive, including for instance: pre-ticked boxes on an ecommerce website or harassment generated by an artificial intelligence application to promote some services. Personalised pricing or marketing practices could be considered as unfair under the Semi-General Clause (due to their misleading or aggressive nature), and these practices could also be in breach of the General Data Protection Regulation.¹⁰¹

035 *Unfair commercial practices according to the General Clause* When a practice

⁹⁴ UCPD art.2(k).

⁹⁵ UCPD art.6(1).

⁹⁶ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163, p.134.

⁹⁷ UCPD art.7(1).

⁹⁸ UCPD art.7(2).

⁹⁹ UCPD art.8.

¹⁰⁰ UCPD art.9.

¹⁰¹ Commission Staff Working Document Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, SWD(2016) 163, p.135.

cannot be regarded as unfair according the black list or the Semi-General Clause, it could still (or also) be prohibited if both requirements of the General Clause of the Unfair Commercial Practices Directive are met¹⁰²: (i) first, the commercial practice is contrary to the requirements of professional diligence, defined as

“...the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity”¹⁰³

—this needs to be assessed on a case-by-case basis; and (ii) second, the practice:

“...materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.”

The Directive defines what is meant by a practice that “materially distorts the economic behaviour of consumers”¹⁰⁴: it is a commercial practice that appreciably impairs the consumer’s ability to make an informed decision, thereby leading the consumer to take a transactional decision he or she would not have taken otherwise. The Directive¹⁰⁵ also considers the situation of particularly vulnerable consumers due to mental or physical infirmity, age or credulity that the trader could reasonably foresee. It specifies that the practice should be assessed from the perspective of the average member of that group. This is particularly important for commercial practices directed towards vulnerable groups of consumers such as minors or elderly people. Children and teenagers are often the targets of marketing campaigns, especially through digital media/devices. Also, the practice of providing apps free of charge, before promoting in-app purchases (such purchases are made to get additional features or to advance through the game) is widespread: in these situations, children and teenagers are actively prompted to make purchases and it is very difficult for them to resist these additional purchases.

Cases involving online digital contracts Even though the Unfair Contract Terms Directive is one of the first consumer protection laws, it is particularly effective in relation to online digital contracts. In France for instance, the Tribunal de Grande Instance of Paris has recently decided that most of the T&C of Twitter,¹⁰⁶ Google¹⁰⁷

7-036

¹⁰² In *CHS Tour Services GmbH* (C-435/11) EU:C:2013:574, para.45, the Court of Justice clarified that “having regard both to the wording and to the structure of Articles 5 and 6(1) of that Directive, and to its general scheme, a commercial practice must be regarded as ‘misleading’ within the meaning of the second of those provisions if the criteria set out there are satisfied, and it is not necessary to determine whether the condition of that practice’s being contrary to the requirements of professional diligence, laid down in Article 5(2)(a) of that Directive, is also met”.

¹⁰³ UCPD art.2(h).

¹⁰⁴ UCPD art.2(e).

¹⁰⁵ UCPD art.5(3).

¹⁰⁶ TGI Paris, 9 April 2019, available at <https://www.quechoisir.org/action-ufc-que-choisir-donnees-personnelles-l-ufc-que-choisir-obtient-la-condamnation-de-facebook-n65523> [Accessed 17 September 2019].

¹⁰⁷ TGI Paris, 12 February 2019, available at <https://www.quechoisir.org/action-ufc-que-choisir-donnees-personnelles-l-ufc-que-choisir-obtient-la-condamnation-de-google-n63567> [Accessed 17 September 2019].

and Facebook¹⁰⁸ were unfair and were therefore prohibited. In these high-profile cases, the French consumer protection association UFC-Que Choisir brought a legal action against these platforms on the grounds that the general conditions of use of the services contained unfair and abusive clauses. In the Facebook case, 430 clauses were deemed unfair. Prompted by the European Commission, Facebook is changing its general conditions of use, which will be drafted in clear and understandable language.¹⁰⁹ For instance, under the previous T&Cs, Facebook claimed that it had the right to unilaterally change its terms of service, with no limitations. Facebook has agreed that it can only change its terms of service in cases where the changes are reasonable and by taking due account of the users' interests. Further, Facebook will give users advance warning about the decision to change the terms of service. Also of interest in the case, the action was brought under a so-called "Coordinated action" under the Consumer Protection Cooperation Network established under the Consumer Protection Cooperation Regulation (see para.7-05).¹¹⁰

3. Information duties and formal requirements

7-037 Information duties Because of the important information asymmetry between consumers and the professional traders which is often amplified for digital services, EU consumer law imposes information obligations on traders. As explained by the Court of Justice:

"...the information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that the consumer decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier."¹¹¹

Information duties and formal requirements are imposed by the Consumer Rights Directive. These *positive* obligations must be applied in conjunction with the *prohibition* of misleading commercial practices.

7-038 Information duties before the conclusion of the contract Information requirements for contracts other than distance contracts are imposed by art.5 of the Consumer Rights Directive. They need to be carried out by the trader before the consumer is bound by a contract or any corresponding offer (when?) and in a clear and comprehensible manner (how?). Formal requirements are therefore quite low. Information duties as such (which information?) concern the main characteristics of the goods or services, the identity of the trader, the price, the duration of the

¹⁰⁸ TGI Paris, 7 August 2018, available at <https://www.legalis.net/jurisprudences/tgi-de-paris-jugement-du-7-aout-2018> [Accessed 17 September 2019].

¹⁰⁹ European Commission Press Release, *Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities*, IP/19/2048 (9 April 2019), available at http://europa.eu/rapid/press-release_IP-19-2048_en.htm [Accessed 17 September 2019].

¹¹⁰ See European Commission webpage on Coordinated actions in the field on consumer protection: available at https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/coordinated-actions_en [Accessed 17 September 2019].

¹¹¹ *Sony Europe Limited* (C-310/15) EU:C:2016:633, para.40. The Court added, in another case, that it shall therefore meet "the legitimate objective in the public interest of consumer protection, in accordance with Article 169 TFEU [...] without, however, affecting the essence of the entrepreneur's freedom of expression and information, or its freedom to conduct a business, as enshrined in Articles 11 and 16 of the Charter": *Walbusch Walter Busch GmbH & Co. KG* (C-430/17) EU:C:2019:47, para.42.

agreement or some legal rights granted to the consumer (legal guarantee of conformity for goods). The Directive foresees that some specific information needs to be provided when selling digital content, i.e., data which are produced and supplied in digital form. This covers for instance computer programs and music that is supplied either through downloading or streaming or from a tangible medium or through any other means. This information relates to the functionality of the digital content, including technical protection measures and relevant interoperability of digital content with hardware and software. To comply with the requirement of functionality, the trader should at least provide the following information on the content when relevant: language of the content, method of providing (download or streaming, for instance), duration, file type and size, and any limitation on the use of the product.¹¹²

Specific information for distance contracts Distance selling methods could increase the vulnerability of consumers as, for instance, the goods bought online cannot be manipulated or tested like in a brick and mortar shop. Therefore, art.6 of the Consumer Rights Directive imposes additional information in case of distance and off-premises contracts. This mainly concerns the price (especially, where applicable, additional delivery charges or the costs of using the means of distance communication), the right of withdrawal and the possibility of having access to an out-of-court complaint and redress mechanism.¹¹³ Article 8(1) of the Consumer Rights Directive also imposes additional formal requirements stating that the trader shall make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. Specific requirements also need to be fulfilled when the contract is concluded electronically and when the consumer needs to make a payment. Additional information needs to be given¹¹⁴ (compared to information that needs to be given in the context of other distance contracts like mail order): for instance, information also needs to be given on the delivery restrictions and the accepted payment methods,¹¹⁵ which are particularly important questions when making cross-border online purchases. Furthermore, the trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function must be labelled in an easily legible manner. If the trader does not comply, the consumer is not to be bound by the contract or order.¹¹⁶ Traders therefore need to design the channel that enables the conclusion of the agreement (pre-contractual information—basket—order form—summary of the order—validation—confirmation) very carefully, to ensure that they comply with each and every formal duty. Like in the Unfair Commercial Practices Directive,¹¹⁷ the Directive takes into account the limited time or space to display the information, resulting from the use

7-039

¹¹² DG Justice Guidance concerning the Consumer Rights Directive 2011/83 (June 2014). The Guidelines also provide a model for the display of consumer information about digital content (on a website or a mobile app).

¹¹³ Traders may use the model instructions on withdrawal, provided in Annexe I(A) of the Consumer Rights Directive: art.6(4) of the CRD. This provision also states that "the trader shall have fulfilled the information requirements laid down in points (h) (i) and (j) of paragraph 1 if he has supplied these instructions to the consumer, correctly filled in".

¹¹⁴ CRD art.8(2).

¹¹⁵ CRD art.8(3).

¹¹⁶ CRD art.8(2).

¹¹⁷ UCPD art.7(3).

of some methods of communication used for the conclusion of the contract, which could be particularly relevant in the digital context (short advertising messages on social media platforms, mobile apps...¹¹⁸ In these cases, only a limited set of the most important pre-contractual information needs to be provided prior to the conclusion of the agreement, and the remaining information can be provided after the contract is concluded.¹¹⁹

7-040 Information duties after the conclusion of the contract Information duties and formal requirements also need to be met within a reasonable time after the conclusion of a distance contract.¹²⁰ The consumer must be provided with the confirmation that the contract has been concluded on a durable medium. This confirmation must include the information that needed to be provided before the conclusion of the agreement or the offer, unless it was already provided on a durable medium before the conclusion of the distance contract. For digital content not supplied on a tangible medium (a movie that is streamed, for instance), the consumer must receive confirmation that the performance of the agreement has begun with their prior express consent and that they acknowledge that they cannot activate their right of withdrawal.¹²¹ Both requirements of “durable medium” and “provision” are normally met when the confirmation is sent to the consumer by email, including the relevant information prescribed by art.8 in the body of the message or in attachment. A durable medium means any instrument which allows the consumer or the trader to store information addressed personally to him so that it is accessible for future reference for a length of time that is adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.¹²² The process used by the trader needs to comply with three main functions: legibility of information, durability of information and integrity of information. The Court of Justice decided that:

“...in the context of new technologies, a substitute for paper form may be regarded as capable of meeting the requirements of the protection of the consumer so long as it fulfils the same functions as paper form”¹²³

and that the website of a trader where its terms and conditions were available could not be considered as a durable medium because it did not:

¹¹⁸ *Walbusch Walter Busch GmbH & Co. KG* (C-430/17) EU:C:2019:47, para.39: “the assessment of whether, in a specific case, the means of communication allows limited space or time to display the information, as provided for in Article 8(4) of Directive 2011/83, must be carried out having regard to all of the technical features of the trader’s marketing communication. In that regard, it is necessary to ascertain whether, having regard to the space and time occupied by the communication and the minimum size of the typeface which is appropriate for the average consumer targeted by that communication, all the information set out in Article 6(1) of that Directive may objectively be displayed within that communication. On the other hand, the choices made by the trader concerned regarding the development and use of the space and time at its disposal as a result of the means of communication which it decided to use are not relevant for the purposes of that communication”. See also *Canal Digital Danmark A/S* (C-611/14) EU:C:2016:800.

¹¹⁹ CRD art.8(4).

¹²⁰ CRD art.8(7), the information should be provided “at the latest, at the time of the delivery of the goods or before the performance of the service begins”.

¹²¹ CRD art.8(7).

¹²² CRD art.2(10). Also recital 23 of the CRD giving as examples paper, USB sticks, CD-ROMs, DVDs, memory cards or the hard disks of computers as well as emails.

¹²³ *Content Services* (C-49/12) EU:C:2012:419, para.41. Also *Bavag* (C-375/15) EU:C:2017:38.

“...allow the consumer to store information which is personally addressed to him in such a way that he can access it and reproduce it unchanged during an adequate period without the seller being able to amend the content unilaterally.”¹²⁴

The function of integrity was therefore missing.

Online platform specific information requirements The recently adopted Directive on better enforcement and modernisation of EU consumer protection rules introduces new information requirements, especially to provide more transparency for consumers in relation to online marketplaces. This Directive amends both the Consumer Rights Directive and the Unfair Commercial Practices Directive whereby online marketplaces¹²⁵ have to inform consumers about the main parameters determining the ranking of the offers, and whether they enter into a contract with a trader or a non-trader (such as another consumer).¹²⁶ Further, if the third party offering the goods is a non-trader, as may be the case in the collaborative economy, the online marketplace should provide a short statement (not only through a reference to the standard T&C or other contractual documents) that the consumer rights will not apply. On ranking, and before the consumer is bound, the provider of an online marketplace should provide the consumer with general information (that needs to be made available in a specific section of the online platform which is directly and easily accessible from the page where the offers are presented) on the main parameters determining ranking of offers presented to the consumer as a result of a search query and the relative importance of those parameters.¹²⁷ The new Directive does not prevent Member States from imposing additional information requirements for online marketplaces, so long as these provisions are proportionate, non-discriminatory and justified on the grounds of consumer protection.¹²⁸ Also of interest for digital consumers, the UCPD is modified to specify that where a trader provides access to consumer review of products, the trader should provide information on whether and how the trader ensured that the published reviews originate from consumers who have actually purchased the product.¹²⁹ Other information requirements are added, which are not specific to online marketplaces such as the existence of the legal guarantee of conformity for goods, digital content and digital services, the existence and the conditions of after-sales services and commercial guarantees where applicable. Information requirements relating to functionality and interoperability have also been slightly amended.¹³⁰ Finally, information should also be provided to the consumer if the price is personalised on the basis of automated decision making.¹³¹

¹²⁴ *Content Services* (C-49/12) EU:C:2012:419, para.47.

¹²⁵ An online marketplace is defined as a service which allows consumers to conclude distance contracts with other traders or consumers using software, including a website, part of a website or an application that is operated by or on behalf of the trader (art.2(1)(d) of the Directive on better enforcement and modernisation of EU consumer protection rules): new art.2(n) of the UCPD and new art.2(17) of the CRD.

¹²⁶ New art.6a of the CRD and new art.7(f) of the UCPD.

¹²⁷ New art.6a of the CRD. A parallel transparency obligation for ranking is imposed in platform-to-business relationship by the art.5 of Regulation 2019/1150 of the European Parliament and of the Council of 20 July 2019 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L186/57, analysed in Chapter III of the book.

¹²⁸ New art.3(5) and (6) of the CRD.

¹²⁹ New art.7(6) of the UCPD.

¹³⁰ New art.5 of the CRD.

¹³¹ New art.6(1ea) of the CRD.

4. Right of withdrawal

7-042 Main principles The Consumer Rights Directive provides that the consumers have 14 days to withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs other than those provided for in the Directive.¹³² Consumers are given the possibility to withdraw from agreements because they are unable to test or assess the purchased good as if they entered a brick and mortar shop, nor are they able to ascertain the nature of the service.¹³³ To determine the starting point of the 14-calendar-day period, the Consumer Rights Directive distinguishes between four kinds of contracts¹³⁴: (i) service contracts: the day of the conclusion of the contract; (ii) sales contracts: the day on which the consumer (or a third party other than the carrier as indicated by the consumer) acquires physical possession of the goods; and (iii) contracts for the supply of digital content which is not supplied on a tangible medium: the day of the conclusion of the contract.¹³⁵ A list of exceptions to the right of withdrawal is provided, including, among others:

“...service contracts after the service has been fully performed if the performance has begun with the consumer’s prior express consent and with the acknowledgement that he will lose his right of withdrawal once the contract has been fully performed by the trader”¹³⁶

or:

“...the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer’s prior express consent and his acknowledgement that he thereby loses his right of withdrawal.”¹³⁷

7-043 Exercise of the right of withdrawal If consumers decide to exercise their right of withdrawal, they should inform the trader before the expiration of the 14-day period.¹³⁸ The information can be given in different ways: by using the model withdrawal form, through any other unequivocal statement, whether offline or online, or through the trader’s website (in that case the trader must send an acknowledgement of receipt). In case of withdrawal, both the trader and the consumer need to carry out certain obligations. The trader must reimburse all the payments received from the consumer (including the costs of the standard delivery) within 14 days following the day on which they were informed of the withdrawal decision.¹³⁹ In principle, the same means of payment (e.g., payment by credit card) must be used.¹⁴⁰ The consumer needs to send the goods back at their own cost within 14 days). The consumer cannot dispose of the goods as they wish before exercising the right of withdrawal since they are:

¹³² CRD art.13(2) and art.14.

¹³³ See *Walbusch Walter Busch GmbH & Co. KG* (C-430/17) EU:C:2019:47, para.45; *Messner* (C-489/07) EU:C:2009:502, para.20.

¹³⁴ DG Justice Guidance document concerning Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (June 2014), p.5.

¹³⁵ CRD art.9(2).

¹³⁶ CRD art.16(a).

¹³⁷ CRD art.16(m).

¹³⁸ CRD art.11.

¹³⁹ CRD art.13(1).

¹⁴⁰ CRD art.13(2).

“...liable for any diminished value of the goods resulting from the handling of the goods other than what is necessary to establish the nature, characteristics and functioning of the goods.”¹⁴¹

The consumer should therefore do nothing more with the goods than they would do when buying similar goods from a brick and mortar shop.

Sanctions in case of violation of the rules on the right of withdrawal The Consumer Rights Directive provides specific sanctions if the traders fail to comply with some of their duties in the context of the right of withdrawal. If the traders fail to provide information on the right of withdrawal before the conclusion of the agreement or the offer, the period of withdrawal is extended to the benefit of the consumer: it expires 12 months after the end of the initial withdrawal period.¹⁴² If the traders do not inform the consumer of the fact that they will need to bear the cost of returning the goods, the traders need to bear those costs.¹⁴³

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5. Other consumer rights and prohibition of specific practices

Delivery and passing of risk (scope limited to sales contracts) According to the Consumer Rights Directive¹⁴⁴ unless parties agree otherwise, the trader must deliver the goods by transferring the physical possession or control of the goods to the consumer without undue delay, but not later than 30 days from the conclusion of the contract. If the trader fails to fulfil their obligation to deliver the goods at the time agreed with the consumer, the consumer is entitled to terminate the agreement. This right of termination can only be exercised if the consumer has made an ultimate call to the trader to deliver the goods within an additional period of time appropriate to the circumstances (except in well-defined cases, in particular when the agreed delivery period was essential). In these circumstances, the contract may be terminated with immediate effect. In sales contracts, the passing of risk is usually regulated by national contract law. Under French or Belgian contract law for instance, unless the parties have agreed otherwise, the passing of risk takes place when the property is transferred from the seller to the buyer (i.e. when the sales contract is concluded which is normally when the buyer and the seller exchange consent). The risk for loss or damage before the delivery (but after the exchange of consent) is therefore normally borne by the consumer. To address this problem, the Consumer Rights Directive¹⁴⁵ postpones the passing of risk to the moment when the consumer or “a third party indicated by the consumer and other than the car-

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¹⁴¹ CRD art.14(2).

¹⁴² CRD art.10(1); art.10(2) also states that “if the trader has provided the consumer with the information provided for in paragraph 1 of this Article within 12 months from the day referred to in Article 9(2), the withdrawal period shall expire 14 days after the day upon which the consumer receives that information”.

¹⁴³ CRD art.14(1). See also CRD art.6(6).

¹⁴⁴ CRD art.18(1).

¹⁴⁵ CRD art.20.

rier has acquired the physical possession of the goods".¹⁴⁶ These rules on delivery and passing of risk only apply to sales contracts.¹⁴⁷

7-046 Lack of conformity and updates The Directive on Digital Content Contracts¹⁴⁸ and the Directive on the Sale of Goods¹⁴⁹ introduce very similar rules on conformity whereby traders need to comply with both subjective requirements (i.e. those that are foreseen in the contract and which relate for instance to the functionality and interoperability requirements) and objective requirements (stipulated in the directives such as that the digital content needs to be provided with all the accessories and instructions). In case of digital content/services and smart goods (such as smart TVs), the trader needs to supply the consumer with the updates needed to keep the purchased service or item in conformity during periods that vary according to whether the purchased item is a smart good or digital content/service. The burden of proof that the digital content/service or good is in conformity lies with the trader for one year for both types of purchases.¹⁵⁰ For digital content/services and smart goods, the trader is presumed to ensure conformity throughout the duration of the contract. However, if the trader shows that the consumer's digital environment is not compatible with the technical requirements of the digital content/service (and informed them about such requirements), the burden of proof is reversed and the consumer needs to prove the lack of conformity. Remedies in case of lack of conformity are also harmonised. For digital content/services, the consumer can ask for the digital content/services to be brought into conformity. If this is not possible or too burdensome, the consumer is entitled to a price reduction or to terminate the contract.¹⁵¹ For goods, the consumer can choose between repair or replacement. If that is not possible or too burdensome, the consumer can ask for a price reduction or contract termination.¹⁵² Provisions are introduced for digital content/services that are supplied over a period of time to allow the trader to modify the digital content/services for instance through software upgrades under certain conditions.¹⁵³

7-047 Prohibition of additional payments The Consumer Right Directive prohibits three kinds of additional payments¹⁵⁴: (i) first, it prohibits fees for the use of means of payment that exceed the cost borne by the trader for the use of such means. This provision must be read in conjunction with the Payment Services Directive which provides a higher level of protection to the benefit of the consumers;¹⁵⁵ (ii) second, the Directive prohibits fees for the use of the telephone help line which are ad-

¹⁴⁶ An exception, consistent with the ratio legis of the provision, is however provided by art.20: "the risk shall pass to the consumer upon delivery to the carrier if the carrier was commissioned by the consumer to carry the goods and that choice was not offered by the trader, without prejudice to the rights of the consumer against the carrier."

¹⁴⁷ CRD art.17. As set forth in art.17(1) of the CRD, "those Articles shall not apply to contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or the supply of digital content which is not supplied on a tangible medium".

¹⁴⁸ DCD art.5.

¹⁴⁹ SGD arts 5 and 6.

¹⁵⁰ However, Member States can set a period of two years for goods: art.11 of the SGD.

¹⁵¹ DCD art.13.

¹⁵² SGD art.13.

¹⁵³ DCD art.19.

¹⁵⁴ CRD arts 19, 21 and 22.

¹⁵⁵ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market art.62(4), amending Directives 2002/65/EC, 2009/110/EC

ditional to the basic telephone rate (premium rates)- according to the Court of Justice, the concept of basic rate refers to an ordinary rate for a telephone call;¹⁵⁶ and (iii) third, the Directive provides that before a consumer is bound by a contract or offer, the trader needs to seek the express consent of the consumer to any extra payment (on top of the remuneration agreed for the trader's main contractual obligation). If the trader has not obtained the consumer's express consent but has inferred consent by using default options which the consumer is required to reject to avoid the additional payment, the consumer is allowed to be reimbursed of this payment. When purchasing travel services on a website for instance, it was common practice for consumers to be prompted by pre-ticked boxes specifying for instance "I would like to purchase travel insurance". The consumer therefore needed to untick the box but often failed to notice the box and ended up paying for unwanted additional services. To protect consumers from this kind of practice, an opt-in principle is now provided.

Right to retrieve digital content The newly adopted Directive on Digital Content¹⁵⁷ and the Directive on better enforcement and modernisation of EU consumer rules introduce a new consumer right: to retrieve any content (other than personal data, which is covered by the General Data Protection Regulation)¹⁵⁸ which was provided or created by the consumer when using the digital content or service supplied by the trader. The CRD Directive is modified¹⁵⁹ to specify that in case the consumer exercises their right of withdrawal, the trader should not use any content (except personal data) which was provided or created by the consumer when using the digital content or service supplied by the trader except in the following circumstances: the content has no utility outside the context of the digital content or service, the content only relates to the consumer's activity when using the digital content or service, the content has been aggregated with other data by the trader and it cannot be disaggregated without disproportionate efforts and the content has been generated jointly by the consumer and others (and the other consumers are able to continue to make use of the content). If the consumer requests it, the trader should make available to the consumer any content provided or created by the consumer when using the digital content or service, except in certain circumstances (broadly in line with when the trader is allowed to use the consumer's content). The Directive specifies that the consumer should be entitled to retrieve digital content free of charge, without hindrance from the seller, within a reasonable time and in a commonly used and machine readable format. The Directive on Digital Content Contracts contains substantially the same provisions except that the rules apply in case of termination of the contract.¹⁶⁰

and 2013/36/EU, and Regulation (EU) No.1093/2010, and repealing Directive 2007/64/EC. [2015] OJ L337.

¹⁵⁶ *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV* (C-568/15) EU:C:2017:154, para.27. At para.31, the Court added that "provided that that limit is respected, the fact that a trader may or not make a profit through a non-geographic helpline is irrelevant".

¹⁵⁷ Directive on Digital Content art.16(4).

¹⁵⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council 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 art.20, and repealing Directive 95/46/EC [2016] OJ L119/1, analysed in Chapter V of this book.

¹⁵⁹ New art.13(7) of the CRD.

¹⁶⁰ DCD art.16.

7-049 Initiatives to promote the digital single market creating consumer related rights—prohibition of geo-blocking The Geo-Blocking Regulation¹⁶¹ prohibits online¹⁶² traders from discriminating between customers (including consumers) within the EU based on their country of residence or nationality (e.g. by applying higher prices). This puts an end to some widespread practices particularly present in certain online sectors such as accommodation and online retailing and which contributed to a general climate of consumer mistrust in conducting online cross-border transactions. It prevents discrimination (e.g. refusal to sell or price discrimination) based on country of residence or nationality in three situations: when the trader sells goods without delivery to the country of the customer, when the trader provides electronically supplied services (except if they are protected by copyright); when the trader provides services that are supplied in a country that is different to that of the customer (typically a German resident makes an online booking for accommodation for a holiday in Spain). Additionally, it also prevents traders from blocking access to websites and from using automatic re-routing without the prior consent of the customer. Discrimination based on the country in which the payment card is issued is also banned.

7-050 Cross-border content portability The Content Portability Regulation¹⁶³ applies to providers of portable online content services offered against payment and which are protected by copyright (such as a subscription video-on-demand service or an online paying music streaming service). They must offer to their subscribers (including consumers) who are temporarily outside their country of residence the cross-border portability of the services they have subscribed to in their country of residence, at no additional charges. Services provided for free could opt into the portability system under certain conditions. Although these regulations are not strictly within the EU consumer protection acquis, they set out important rights for consumers in the cross-border digital single market context.

¹⁶¹ Regulation 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on consumers' nationality, place of residence or place of establishment within the internal market and amending Regulation 2006/2004 and 2017/2394 and Directive 2009/22 [2018] OJ L601/1.

¹⁶² The regulation does not apply to certain services: financial services, electronic communications and audiovisual services, transport services and gambling services. Also copyright protected content such as music streaming and e-books are not within the scope of the regulation.

¹⁶³ Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168/1, analysed in Chapter VIII of this book.