Introduction
I. Introduction

Digitalisation is a fundamental trend of the current century that will change our economy and society as fundamentally as the invention of the steam engine by James Watts. That is why the creation of a Digital Single Market is the second of ten priorities of the Juncker-Commission. In its Digital Single Market Strategy, the Commission announced 16 initiatives to respond to this challenge and promote digitalisation. They are meant to create a comprehensive framework to build a European Digital Single Market and use it as a growth motor for the European economy. As one of the first legislative deliverables of this strategy, the Commission presented on 9 December 2015 the proposal for a directive on certain aspects concerning contracts on the supply of digital content (hereinafter ‘Digital

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1 See the fundamental thesis of E Brynjolfsson/A McAfee, The Second Machine Age (WW Norton 2014) 6 et seq. While steam power replaced human and animal muscle power, digitalisation will multiply exponentially the possibilities of using the human brain.


Content Directive’; DCD). This Directive could be the first step towards the private law of the digital economy.

II. Approach

Regarding digital content, there are hardly any EU contract law rules that would be specifically applicable to the supply of digital content\(^5\). While a few Member States have already enacted specific provisions on digital content\(^6\) or have started the legislative process\(^7\), most Member States do not have specific rules designed for digital content. In most cases, national legal orders apply existing general contract law rules, which were designed for other contracts.

A targeted regulatory framework for contractual rights and obligations when supplying digital content is therefore needed. Such a framework for digital content contracts can be seen as the first step towards adapting and complementing existing EU and national rules in order to respond to the challenges and needs of the Digital Economy. Important issues, such as on the rules how to trade data or how to define liability in the Internet of Things or for robotics, will also need to be discussed\(^8\) and thus will form the basis of subsequent Münster Colloquia on European Law and the Digital Economy\(^9\).

In order to respond to the needs of the Digital Economy, it is probably not necessary to create an entirely new framework. Existing civil law rules in general and contract law rules in particular are likely to be able to deal

\(^{(2016)}\) NJW 2719 et seq. For an overview see R Schulze/F Zoll, Europäisches Vertragsrecht (2nd edn, Nomos 2017).


\(^6\) For example in the United Kingdom in s 33 et seq Consumer Rights Act 2015.

\(^7\) For example in Ireland in s 41 et seq Consumer Rights Bill.

\(^8\) See the Digital Single Market Strategy (n 3) 17.

\(^9\) The third Münster Colloquium on European Law and the Digital Economy on 4–5 May 2017 will discuss the topic ‘Trading Data in the Digital Economy: Legal Concepts and Tools’.
with many challenges of digitalisation. Clarifications, adaptations or complementary legislation may however be necessary.

The Commission proposal for a Directive on contracts on the supply of digital content follows therefore a targeted and problem-oriented approach. Unlike the proposal for a Regulation on a Common European Sales Law (CESL)\(^\text{10}\), the present proposal does not strive to achieve comprehensive regulation. Rather, the Commission has analysed which of the different mandatory national consumer contract law rules that fall under Art 6(2) Rome I-Regulation\(^\text{11}\) create obstacles to the internal market. In substance, these are the national rules that go beyond the minimum harmonisation level of the Consumer Sales Directive\(^\text{12,13}\). The proposal is therefore mainly restricted to consumer remedies and the modalities of exercising them. For digital content, such an approach is particularly appropriate. Technological and commercial developments in this area are so fast that its careful regulation is required in order to promote innovation and not stifle it.\(^\text{14}\)


\(^{13}\) See European Commission, ‘Commission Staff Working Document – Impact assessment accompanying the document Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods’ SWD(2015) 274 final, 8 et seq, 48 et seq.

\(^{14}\) See, in relation to Blockchain technology, the contribution by N Guggenberger, ‘The Potential of Blockchain Technology for the Conclusion of Contracts’, in this volume.
As a matter of principle, the Commission proposal avoids overlaps and conflicts with other EU areas of law and other EU legislation. However, there are clearly neighbouring areas of law which are directly related to the matters dealt with by the proposal; the relationship between the proposal and these areas deserves attention. The proposal thus not only raises questions of its relationship with other, neighbouring areas of law. Furthermore, it also raises questions with a view to possible gaps resulting intentionally or unintentionally from the targeted approach. These questions provided the basis for the second Münster Colloquium on European Law and the Digital Economy which gave rise to this book. Examining these issues can provide hints for the discussion surrounding possible improvements to the proposal as well as for the ideas on appropriate legislative measures in the future. In addition, it can contribute to the further development of concepts and doctrine in European contract law, responding to the challenges presented by the digital economy. The introduction to this volume will therefore first provide an overview of the scope and structure of the proposed Digital Content Directive before outlining the matters covered in more detail in the contributions to this volume.

III. Scope and Content of the Proposed Digital Directive

1. Scope

The scope of the proposal is set out in Art 3 DCD in combination with the definitions of Art 2 DCD. Regarding the substantive scope, specifically in relation to the definition of digital content under Art 2(1) and the corresponding rules on the scope (particularly in Art 3(1), (3) and (4)), the Commission is pursuing an approach that is technology-neutral and therefore future-proof. This takes account of the rapid technological and commercial development in the digital market and aims to create a competitive environment. Traders should not have competitive advantages or disadvantages depending on, for instance, the distribution channel for and the specific design of their product. This is of particular importance for digital content, where the limits between different distribution channels and

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15 Held on 27–28 October 2016 at the University of Münster, Germany.
product categories are becoming increasingly blurred. Traders should also be prevented from circumventing the scope of the proposal by simply re-structuring their product.

a) Digital content

The definition of digital content is therefore broad. Art 2(1)(a) DCD uses the definition of digital content under Art 2 no. 11 of the Consumer Rights Directive (CRD) and Art 2(j) CESL. This definition is completed by examples taken from CESL. The definition in the proposed Directive does however go deliberately further and includes digital services (Art 2(1)(b)) and social media (Art 2(1)(c)). The scope captures thereby all types of digital content, starting with digital content on tangible media, eg a film on a DVD, software on a CD-ROM and music on a CD, as well as software or e-books downloaded and saved on a private computer. These types of digital content were already contained in CESL (Art 5(b)). Furthermore, digital content, such as software, which the consumer does not download, but to which he is only granted access, is also covered. Here, the proposal responds to the trend towards the Access economy. Software is less and less down-loaded, but instead merely accessed in the cloud. The same applies to movies watched and music listened to online as well as e-books kept and photos stored and edited in the cloud.

b) Data: the ‘currency of tomorrow’

The most significant achievement of the entire proposal can be found in Art 3(1) DCD, in the inclusion of digital content paid for with personal or other data. The proposal is implementing the fact that data – if not al-

16 See also the comments in the contributions by H Beale, ‘Conclusion and Performance of Contracts: Overview’ and S Navas Navarro ‘User-Generated Online Digital Content as a Test for the EU Legislation on Contracts for the Supply of Digital Content’, in this volume.
17 See recital 11 DCD.
19 See recital 13 DCD.
ready the currency of today – surely will be the ‘currency of tomorrow’. In its impact assessment, the Commission recognised that the supply of digital content against data constitutes a large part of the relevant market. It therefore included such contracts into the scope. In any case, as evidenced by so-called ‘freemium models’ where access to the digital content is first granted against the provision of data, but after a while access or an upgrade have to be paid for, it would be difficult to have a clear borderline. Consumers are also becoming ever more aware that their data has monetary value and is in fact monetised by traders. Again, the inclusion of contracts against data shows the premise of the proposal of being neutral on the choice of the distribution channel.

Such a broad scope naturally needs limits; pursuant to its targeted and problem-oriented approach the proposal does not want to regulate the entire internet. The most important limit can be found in Art 3(1) DCD which clarifies that only the data which the consumer ‘actively provides’ as a counter-performance is included in the scope.\(^{20}\) This includes personal data such as the name, address, email-address, age, gender etc when registering for a ‘free’ service on a website. The IP-address or meta-data retained when one surfs the internet and the time spent while having to watch a commercial before accessing a website are not covered\(^ {21}\). Due to the fast technological and commercial developments in this market, the proposal mandates the Commission to review the Directive in general and in particular this limitation of scope five years after its entry into force.\(^ {22}\)

Art 3(4) DCD contains another limitation. It is based on the principle that contracts against data should not be included, ie there should not be liability if the supplier needs the data to provide his service (eg the location of the user when using a navigation app) or if he is legally required to collect the data. If – on top of this – the supplier uses the data for commercial purposes, the Directive will again apply.


\(^{21}\) See recital 14 DCD.

\(^{22}\) See Art 22 DCD.
2. Content

As noted above, the proposed Digital Content Directive does not seek to regulate all aspects pertaining to contracts for the supply of digital content. Provisions concerning, for example, the control of contract terms, pre-contractual information duties, and the right of withdrawal, all of which can be applicable to the supply of digital content, are to be found in other pieces of EU legislation. According to recital 8 of the proposal, the Digital Content Directive aims to fully harmonise ‘a set of key rules that are so far not regulated at Union level’ including rules on conformity (Arts 6–10), remedies for lack of conformity and rules on the exercise of these remedies (Arts 11–14). At first glance, these key rules concern aspects of law which are, at present, regulated at European level, though not specifically in the context of digital content. The bulk of the proposal’s content therefore centres on the supplier’s duties and the consumer’s contractual rights and remedies in relation to the supplied digital content. This is reflected in the structure of the Digital Content Directive.

Two further focal points in the proposal concern long term contracts, specifically the modification of digital content (Art 15) and the right to terminate a long-term contract (Art 16). In this respect, the European legislator is not venturing into completely new territory on the abstract level, but approaches an issue particular to digital content.

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23 Most specifically in the Consumer Sales Directive, see below IV.2, V.
24 See recital 4 DCD.
IV. Conclusion and Performance of Contracts

1. Conclusion

a) Possible need for regulation

The rules on the performance of the contract are a main feature of the proposed Digital Content Directive. However, this proposal does not seek to regulate the formation of contract, including the pre-contractual phase and the mechanism for conclusion. Yet, the focus on conformity, the remedies for non-conformity, and on the modification and termination of the contract (as outlined in Art 1 DCD) does not prevent a number of the proposed provisions from referring to the conclusion of contract. Examples include Art 6(1)(b) with regard to the supplier’s knowledge ‘at the time of the conclusion of the contract’ and Art 6(4) with respect to the ‘conformity with the most recent version of the digital content which was available at the time of the conclusion of the contract’. Particular reference to the pre-contractual phase is made in Art 6(1)(a) with the stipulation that pre-contractual information can play a key role for the non-conformity of the digital content by forming an ‘integral part of the contract’. Perhaps most fundamentally, the important rule on the inclusion of digital content paid for with personal or other data concerns the underlying concept of contract in European contract law. In this respect it can have indirect effect on how the conclusion of contract is understood (in particular if counter-performance is considered a necessary requirement for the conclusion of a contract).26

Although the Digital Content Directive does not include the conclusion of contract in its content, it certainly does not allow the conclusion to be drawn that the challenges of digitalisation render it unnecessary to regulate this issue. The proposed can rather be viewed as a first step as regards a particular, individual aspect of such challenges. It leaves open the questions whether and by what means the challenges in neighbouring fields are to be approached in the future. Where the conclusion of contract is con-

cerned, such challenges could arise in various forms and may require legislative responses at European level. This may include, for example, the conclusion via autonomous systems within the ‘Internet of Things’\(^\text{27}\), the potential of the Blockchain technology for the conclusion of contract\(^\text{28}\) or preparing and concluding contracts via Internet-platforms\(^\text{29}\).

b) ‘Machine-to-Machine’ conclusion of contract

The issue of conclusion of contract ‘Machine-to-Machine’ has for some years been the subject of intense discussions in legal doctrine. The problems surrounding this type of contracting give reason to call attention to a rather general observation that all too often tends to be disregarded. Whereas the technical possibilities of the digital economy as such are unprecedented, the legal challenges raised by these possibilities are not necessarily new at all. In this particular instance, the questions pertain to the law of agency. At least in certain circumstances of machines concluding contracts it might possibly be more appropriate to think of the machine acting as an agent rather than just as a tool for communicating its owner’s decisions.\(^\text{30}\) In particular, a construction via the law of agency would allow for contracts being concluded by a machine on behalf of its owner even where the owner has lost his legal capacity. A machine, for example, would be able to conclude a valid contract when ordering medicine for a patient suffering from a disease which has taken this capacity from him. Such approach, however, would normally be perceived as rather difficult by modern lawyers, mainly because of an objection relating to an agent’s legal nature: According to what seems to be self-evident in modern law, in

\(^{27}\) See the contribution by M Loos, ‘Machine-to-Machine Contracting in the Age of the Internet of Things’, in this volume.

\(^{28}\) See the contribution by N Guggenberger, ‘The Potential of Blockchain Technology for the Conclusion of Contracts’, in this volume.


\(^{30}\) See the contribution by M Loos, ‘Machine-to-Machine Contracting in the Age of the Internet of Things’, in this volume.
particular in German law, agents need to have legal personality, but cannot merely be objects, not least, because it appears to be necessary to have some sort of redress to the agent where he has acted without his principal’s authority but given the impression to act with this authority. Any possibility of such redress, however, would also imply machines being capable of owning assets. That idea, in turn, appears to be rather theoretical, even if one were prepared to accept machines having some sort of legal personality. Thus, one should probably resort to a concept of agency that abstains from the requirement of an agent having such personality. From the point of view of modern law that seems to be rather far-fetched and innovative. Yet an restraints that one might possibly feel with what looks as being a matter of course in modern law appear to be much less important and restrictive with legal history in mind: In Roman law, for example, as an equal matter of course, it was possible to hold an owner of a slave liable where his slave had entered into a contract. Such liability was accepted provided only that, inter alia, the owner had either appointed his slave to run a business (in which case the owner by means of the so-called *actio institoria* could be held liable for all contracts entered into in the context of this business) or had appointed him as a ship’s master (in which case the owner was liable under the so-called *actio exercitoria*). Direct agency, on the contrary, with free persons acting on behalf of somebody else, was not, in principle, known to the Roman lawyers. Rather, the modern law of agency was developed at a later stage only so as to enable free persons to act on behalf of others as well. This modern law of agency, now, arguably has not directly been derived from the Roman model of slaves acting on behalf of their owners. In particular, Roman lawyers did not think of the slave acting ‘on behalf’ of its owner. Rather, they only allowed for the owner’s liability in addition to the slave’s liability arising from the contract which, in turn, was a natural obligation only. Nonetheless, to a certain extent the modern law of agency appears to be nothing but a modernised version of the Roman law liability for transactions entered into by slaves. Refraining from the requirement of legal personality of an agent would thus mean to merely complement the modern law of agency by its forerunners from ancient Roman law – and in any event, a machine having been plugged in by its owner does not, as far as the owner’s legal responsibility is concerned, seem to be much different from the situation where a Roman slave-owner had employed a slave with running his business. At least occasionally, as this example shows, legal history may thus well relativise the challenges presented by the digital economy.
2. Performance

The proposed Digital Content Directive regulates the performance of the contract in regard to the supplier’s obligation to supply the digital content (Art 5) and with respect to the conformity of the supplied digital content. The central provision on conformity (Art 6) is supplemented by provisions on the integration of the digital content into the consumer’s digital environment (Art 7), third party rights (Art 8), and the burden of proof (Art 9). According to Art 10, the supplier is liable to the consumer for any failure to supply the digital content and any lack of conformity existing at the time the digital content is supplied. Furthermore, this underlying provision on liability considers – as in other parts of the proposal – the specific aspects of the supply of digital content over a period of time (Art 10(c)).

Where the notion of conformity is concerned, there are two basic approaches that come into play: a subjective approach which concentrates on existing contractual relationships and a more objective approach which is based on statutory conformity criteria; a third option could be a mixed approach which takes into account both criteria as it is the case for the Consumer Sales Directive, the proposed CESL and, moreover, in the proposal for a directive on contracts for the online sale of goods. In Art 6(1) DCD the proposal gives precedence to the subjective approach, but also implements alternative objective criteria in Art 6(2) DCD. According to Art 6(1), the benchmark for conformity is, in principle, what the contract stipulates. For this purpose, Art 6(1) specifies in (a) to (d) the main criteria and thereby covers all categories which are generally used to describe the contractual performance. In each case, explicit reference is made to the contract or to the pre-contractual information which, according to Art 6(5) CRD, forms an integral part of the contract. This means that all criteria stipulated are only relevant as far as they are contained in the contract.

31 Schulze (n 26) 138–139.
33 Some of those criteria come from Art 99 CESL or, as far as Art 1(b) DCD is concerned, from Art 2(2)(b) CSD and were aligned to the needs of digital content.
The proposed provisions on the supply and conformity of digital content (Arts 5 et seq DCD) are the subject of lively discussions at both academic and political level. These concern in particular the preference that is given to the subjective approach in Art 6. Whereas the Commission’s proposal uses this approach mainly to avoid conflicts with copyright law, specific concerns have been raised as to the consumer’s position with regard to the use of the digital content. It has, for example, been suggested to improve this provision by strengthening the inclusion of the consumer’s ‘reasonable expectations’ within Art 6 DCD. Further questions surrounding this part of the proposal concern, for instance, the acceptable minimum standards, agreements on lower standards, ‘privacy by design’ and ‘privacy by default’. Although this volume can only approach a part of these aspects, they will certainly be emphasis on these matters in the further stages of the legislative process.


35 For detail on Art 6 see A Colombi Ciacchi/E van Schagen, ‘Conformity under the draft Digital Content Directive: regulatory challenges and gaps’, in this volume.

36 See below, VI.

37 BEUC, Proposal for a Directive on Contracts for the Supply of Digital Content – Preliminary Position Paper (April 2016) [2.3]; ELI (n 34) 2; IMCO (n 34) [4.3.2.6]; LIBE (n 34) 4, 19; Schulze/Zoll (n 4) § 5 [12].

38 ELI (n 34) 18–19; Schulze (n 26) 135.

39 ELI (n 34) 19.

40 ibid 23.

41 Alongside the contribution by A Colombi Ciacchi/E van Schagen, see also the contributions by H Beale and G Spindler in this volume.

42 See especially ELI (n 34) and the suggestions for amendments to legislation contained therein at 35 et seq.
V. Remedies

In addition to the notion of conformity, the link between existing concepts familiar to European contract law with new approaches for digital content can also be seen in relation to the remedies for non-conformity.\(^\text{43}\) There is thus an element of continuity that can be seen in adopting the basic structure and catalogue of remedies outlined for sales contracts by the Consumer Sales Directive (and also in the proposed CESL) for digital content: ‘bringing into conformity’, price reduction, termination of contract, and damages (Arts12 et seq DCD).\(^\text{44}\) Further continuity in the approach can also be seen in the primary role of subsequent performance as outlined in the Consumer Sales Directive.\(^\text{45}\) In accordance with this approach, the consumer’s entitlement to ‘have the digital content brought into conformity with the contract free of charge’ is the first level in the hierarchy of remedies (Art 12(1)). The proposed Directive does however give due consideration to the different subject matters of a contract for goods and a contract for digital content. In comparison to the Consumer Sales Directive, the Digital Content Directive therefore does not make express reference to the modes of performance in sales contracts (repair and replacement, Art 3(2) Consumer Sales Directive) and does not contain a specific right for the consumer to choose the manner by which the digital content is to be brought in conformity with the contract. Due consideration to the particular characteristics of the supply of digital content can especially be seen in the context of termination in Art 13 DCD. The provision contains rules concerning the effects of termination not only on the digital content supplied to the consumer (eg deletion of digital content) but also on any data supplied by the consumer to the supplier (eg data retrieval).

The lively discussion on the issue of conformity extends further to the proposed structure of the remedies for non-conformity.\(^\text{46}\) Comments and

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\(^{44}\) Schulze (n 26) 139.


\(^{46}\) For example, ELI (n 34) 28 et seq; G Howells, ‘Reflections on Remedies for Lack of Conformity in Light of the Proposals of the EU Commission on Supply of Digital Content and Online and Other Distance Sales of Goods’ in de

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criticisms refer both the rule in Art 11 DCD on immediate termination for the failure to supply\textsuperscript{47} as well as to the remedies for the lack of conformity with the contract in Art 12 and the details of termination under Art 13.\textsuperscript{48} Particular attention has been given to the provisions on the right to damages under Art 14 due to the possible gaps and regulatory challenges, and linked in part with proposals for extending the directive or for future rules. In this respect, one can question the extent to which it is appropriate to regulate damages at national or European level.\textsuperscript{49} It will be necessary to give further consideration to the types of loss that require regulation at European level and how, for such types of loss, national and European rules are to be linked. The issue of consequential losses is a particularly fitting example.\textsuperscript{50} The difficulties referred to in relation to Art 14 may ultimately lead back to a more general question: how can the ‘fragmented rules’ in European legislation in the field of private law be linked with the structured system of private law at national level in order to achieve their objectives and to ensure legal certainty and clarity through coherent contract law.

VI. Data Protection Law

The challenges in achieving legislative coherency are not limited to private law but extend to cover the relationship between the proposed Digital Content Directive and data protection. Both the proposal and EU data protection law relate to different areas of legislation. Since 1995, the EU data

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{47} For criticism of the immediate right to terminate see ELI (n 34) 27–28.
\item\textsuperscript{48} For example, BEUC (n 37) [2.7]; ELI (n 34) 28–29; IMCO (n 34) [4.2.5.10]; Koch (n 46) 141 et seq; B Lurger, ‘Anwendungsbereich und kaufvertragliche Ausrichtung der DIRL- und FWRL-Entwürfe’ in Wendehorst/Zöchling-Jud (n 34) 39.
\item\textsuperscript{49} See the contribution by P Machnikowski, ‘Regulation of Damages on National or European Level’, in this volume.
\item\textsuperscript{50} See the contribution by SAE Martens, ‘Contracts for the Supply of Digital Content – Consequential Loss’, in this volume.
\end{enumerate}
\end{footnotesize}
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protection legislation, in particular the 1995 Data Protection Directive\textsuperscript{51} sets a fully harmonised and uniform European regime for the protection of natural persons in relation to the processing of their personal data. The General Data Protection Regulation (GDPR) will replace this 1995 Directive and be applicable as from 25 May 2018.\textsuperscript{52} In order to see the complementarity with contract law, it is important to keep in mind the angle from which this legislation comes. The right to the protection of personal data is laid down in Art 8 EU Charter of Fundamental Rights, and the legal basis for the adoption of rules on the protection of individuals with regard to the processing of personal data can be found in Art 16 TFEU. The rights and freedoms laid down in the EU data protection law apply in all cases where personal data is processed. The proposal on contracts for the supply of digital content comes from the contract law angle and is concerned with a balance in the reciprocity between contractual performance and counter-performance. When this balance is disturbed, ie digital content which is not in conformity with the contract is supplied, it therefore provides consumers with specific contract law rights vis-à-vis such digital content and thereby re-establishes the contractual balance.

As a consequence, Art 3(8) DCD explicitly states that the Directive is without prejudice to the protection of individuals with regard to the processing of personal data. This means that it does not in any way affect the rules laid down in EU data protection law. Recital 22 of the proposal confirms this by referring to the existing Directives 95/46/EC and 2002/58/EC\textsuperscript{53}. The recital states that the implementation and application of this proposed Digital Content Directive should be made in full compliance with the legal framework in the field of personal data.


\textsuperscript{53} Given that the proposal was submitted by the Commission before the adoption of the GDPR, these references will have to be adapted to the GDPR.
The two pieces of legislation may therefore in practice apply in parallel to the same factual situation, i.e. when the consumer provides personal data to the supplier in exchange for digital content. In the context of a contract for the supply of digital content, when personal data is processed (regardless of whether money is also paid or not), the individual data subject will have all the rights laid down in current and future EU data protection legislation. At the same time, if the digital content is not in conformity with the contract, consumers will be able to exercise the remedies laid down in the digital content proposal.

The processing of personal data by the supplier in the context of a contract for the supply of digital content must be lawful under data protection law. This means that the controller has to show that one of the legal grounds for processing laid down in Art 7 of the 1995 Data Protection Directive, respectively Art 6(1) GDPR authorises the processing of the personal data in question. The digital content proposal does not add to or interfere with these legal bases for the lawful processing of personal data.

Nevertheless, in light of the new rules in the General Data Protection Regulation it will be necessary to give further consideration to a series of points concerning the relationship between data protection and contract law. For example, aside from the proposed Digital Content Directive, a link between the areas of data protection and contract law can be seen in respect of the right to withdraw in Art 7(3) GDPR. The consequences of this withdrawal right for the continuation of the contract and for the rules on withdrawal from the contract will have to be determined at national or European level in relation to general contract law and particularly for the supply of digital content. It is therefore a consequence that does not specifically affect the material scope of application of the Digital Content Directive but rather the broader nature of the relationship between data protection and contract law. Where the supply of digital content is concerned, it will be necessary to not only further examine the role of personal data as

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54 See the contribution by RH Weber, ‘Data Protection – An Overview’, in this volume.
remuneration in the conclusion of contract but also the data protection matters after termination of a contract for the supply of digital content.

VII. Intellectual Property Law

A further key issue for a functioning digital market concerns the questions arising from the relationship between contract law and intellectual property law. The legal and factual possibilities for the customer to use the digital content rest on the rights that the supplier of the digital content can, in consideration of rights of third parties (e.g., the developer of the digital content), afford to the customer. To a certain extent, the relationship between contract and copyright can be deemed as ‘communicating tubes’. With this relationship in mind, ‘End User License Agreements’ (EULA) play a central role. Moreover, there are many further questions of considerable importance for the supply of digital content in the contract–intellectual property relationship, as is shown by, for example, user-generated online digital content. Further contributions to this volume will consider these issues in more detail, nonetheless it is appropriate to call attention here to the two starting points in the proposed Digital Content Directive which refer to the relationship of its subject matter to intellectual property law. Recital 21 contains the clarification that the proposed directive does not deal with copyright and other intellectual property law. Not only does the proposal want to leave copyright law intact, but in addition it endeavours to take into accounts its aims and make its application unproblematic. This

57 See the contribution by G Spindler, ‘Contract Law and Copyright – Regulatory Challenges and Gaps’, in this volume, at II.
59 See the contribution by S Navas Navarro, ‘User-Generated Online Digital Content as a Test for the EU Legislation on Contracts for the Supply of Digital Content’, in this volume.
becomes manifest in the aforementioned preference given to subjective over objective criteria in the test for conformity of the digital content.\textsuperscript{60} The main reason for the proposal having chosen this approach is to avoid conflicts with possibilities granted by copyright law. In practice, the consumer hardly ever deals with the copyright holder directly, but almost always with one or the last link of an entire chain of sub-licensees. The last sub-licensee who supplies the digital content to the consumer is bound by restrictions, passed on to him contractually within this chain starting from the copyright holder. If objective conformity criteria were included, this could result in cases in which the last sub-licensee is, on one hand, obliged to provide a certain level of performance to the consumer, although, on the other hand, he is not permitted because of the restrictions imposed on him from previous levels of the distribution chain. Such a dilemma, which would create a conflict between the aims of contract law and copyright law, should be avoided.

Additionally, the relationship with intellectual property law is to be seen in the objective conformity criterion in Art 8 DCD. This provision stipulates that the digital content shall be free of any right of a third party, including rights based on intellectual property, which could affect its use in accordance with the contract. This provision deals with cases in which the supplier promised the consumer more than he can keep under the intellectual property restrictions he is subject to. According to Art 8, this amounts to non-conformity. Art 8 DCD has its source in Art 102 CESL, which in turn is based on Arts 41 and 42 of the UN Convention of the International Sale of Goods. By comparison, the rule contained in Art 102 CESL, also applicable to commercial contracts, has been shortened and tailored to consumer contracts. However, Art 8 DCD does by no means affect the intellectual property rights in question. This is clarified by recital 21 DCD which stipulates that Art 8 is without prejudice to intellectual property rights themselves.

The starting points adopted by the proposed Directive require in-depth discussion. The contributions to this volume take on this task, though further discussion will be necessary as the legislative process progresses. A number of concerns have been raised in relation to the question whether the Directive’s starting points give sufficient consideration to the custom-

\textsuperscript{60} See above, IV.2.
er’s interests or whether they fall far behind the supplier’s interests and above all those of third parties who, also in relation to the supplier, have secured a strong position in relation to the rights over digital content. These concerns possibly refer to a need for regulation that extends beyond the scope of the proposed directive.

It may be necessary to discuss the relationship between contract law and intellectual property law with an in-depth focus on the conceptual basis of European private law. This is one of the issues which will be particularly topical for the broad discussion on how to trade data in the Digital Economy and may, in this context, help design the features of possible further legislative measures.

The ongoing academic and political discussion in this area highlights that there are indeed a number of legal and economic concepts and options available for trading data. These pose further questions as to their potential for making available the appropriate framework facilitating access and use of data, to the extent responding to the needs of the Digital Economy, and as to their legal and economic design. For this reason, the topic chosen for the third Münster Colloquium on European Law and the Digital Economy (4–5 May 2017) is ‘Trading Data in the Digital Economy: Legal Concepts and Tools’.

The recent Communication from the European Commission on ‘Building a European Data Economy’ and the public consultation launched by it will intensify the discussion on these core questions of the Digital Single Market and the European private law for the Digital Economy. Commissioner Oettinger has already raised the idea of a ‘European Digital Civil Code’. While such a tool may seem too far-reaching for many, the underlying vision of laying ‘down some basic principles on contracts pertaining to the trading or use of data’ can be an important benchmark for

For example ELI (n 34) 8.


the present discussion. Data is the blood in the veins of the Digital Economy and needs to flow smoothly in the Digital Single Market. For that purpose, traditional private law may not be properly equipped with the adequate rules. Legislators and legal scholars are thus faced with the task of considering whether current provisions are sufficient, require adaptations or whether new rules are to be created and, if so, what such adapted or new rules are to look like. With such perspective, the aforementioned Communication may be followed by further European initiatives that are to shape European private law in the ‘digital age’.

There are indeed a number of regulatory challenges and gaps along the path towards digitalisation, going beyond the proposed Digital Content Directive. The proposed Directive on certain aspects concerning contracts for the supply of digital content represents a first step in a new direction.