

Digitalization and Law: Latest Trends in the European Union

Professor Christian TWIGG-FLESNER



WARWICK
THE UNIVERSITY OF WARWICK

Introduction

Digitalisation and the Law

- Phase 1:
 - *dematerialisation and delocalisation*
- Phase 2:
 - interaction of goods and software;
 - connectivity;
 - artificial intelligence / algorithms
 - data



Digitalisation and the Law

- Impossible to anticipate technological developments and commercial utilisation
- Law behind developments
- Legislation too soon could mean outdated/irrelevant law
- Picking correct moment important

Digitalisation and Law

- Lawmaking:
 - Develop law incrementally to maintain coherence?
 - Departure from established laws to target new developments creatively?
 - Changes to paradigms from linear supply to “unbundled” supply



Updating EU Consumer Law

- Consumer Rights Directive:
 - Recognition of “digital content” and modernised rules for consumer e-commerce
 - Updated to include digital services and special rules for online platforms

Updating EU Consumer Law

- Unfair Commercial Practices Directive
 - Prohibition of misleading, aggressive or unfair practices
 - Recognition of *vulnerable* consumers as target group
 - mental or physical infirmity, age or credulity
- Modernised to include digital content and digital services within notion of “product”



Digital Content and Digital Services

- Rules on conformity with the contract and remedies
- Aligns with pattern already in place for goods
- **Digital Content**
 - data which are produced and supplied in digital form
 - computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications

Digital Content and Digital Services

- **Digital Services**

- services allowing a consumer to “create, process, store or access data in digital form”,
- services for sharing or interacting with data in digital form either uploaded or created by the consumer or other users of the relevant service
- software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media

Digital Content and Digital Services

- Digital content/services must be “in conformity with the contract”
 - Subjective and objective elements
 - fit for the purposes for which content/services of the same type would normally be used
 - quality which a consumer might reasonably expect in light of a range of relevant circumstances
 - functionality (“the ability of the digital content or digital service to perform its functions having regard to its purpose”),
 - compatibility (“the ability of the digital content or digital service to function with hardware or software with which digital content or digital services of the same type are normally used, without the need to convert the digital content or digital service”)
 - interoperability (“the ability of the digital content or digital service to function with hardware or software different from those with which digital content or digital services of the same type are normally used”)

Digital Content and Digital Services

- Remedies:
 - bring digital content/service into conformity,
 - price reduction;
 - or termination

Digital Content and Digital Services

- Updates:
 - fix “bugs”, performance updates, new features
 - Digital content/service must be in conformity after updates
 - Consumer must instal updates within reasonable time
 - Significant changes affecting use/access by consumers permit termination

Digital Content and Digital Services

- **Data**

- Supply of digital content/service in return for access to personal data
- Termination of contract
 - Trader's ability to use personal data and other obligations determined by data protection rules
 - Directive governs non-personal data: return to consumer and obligation on trader to refrain from processing

Smart Goods

- Physical items using operating software
- “Goods with digital elements”
 - “any tangible movable items that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions”
- Conformity requirement and remedies under new Consumer Sales Directive (2019/771/EU)
 - Including for non-conformity due to digital content/service



Data Protection and Consumers

- Collection of personal data generated from digital activities
 - Aggregation, processing, profiling, selling
- Profiling
 - Profiling individuals based on their data and online behaviour
 - Targeted marketing based on profile
 - Access to goods/services and price could be based on profiling

Data Protection and Consumers: Profiling

- General Data Protection Regulation 2019/679 (GDPR)
- Profiling is a form of data processing “consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements” (Art.4(4))
- Art.21: right to object to profiling based on that individual’s personal data
 - Including direct marketing based on profiling
- Art.22: right not to be subjected to automated decision-making
 - includes decision-making based on profiling, where such a decision affects the legal situation of the individual

Artificial Intelligence

- Proposal for an Artificial Intelligence Act
 - proposed prohibition of the use of AI which would exploit “any of the vulnerabilities of a specific group of persons due to their age, physical or mental disability, in order to materially distort the behaviour of a person pertaining to that group in a manner that causes or is likely to cause that person or another person physical or psychological harm” (Art.5(1)(b) of the Proposal)

Artificial Intelligence

- Reform of Product Liability Directive (85/374/EEC)
 - Strict liability of producer for personal injury/damage caused by defective product
 - Reform needed for digital products (e.g., because of updates)
- Liability for artificial intelligence?
 - Actions causing personal injury/damage, e.g., smart homes or IoT systems
- European Law Institute *Innovation Paper: Guiding Principles for Updating the Product Liability Directive for the Digital Age*



Digitalisation of Contract Documents

- Shift from paper-based documents to alternatives
- “Durable medium” as central concept
 - “any instrument which enables the consumer or the trader to store information addressed personally to that person in a way that is accessible for future reference, for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.”
 - E.g., paper, DVDs, CDs, USB sticks, memory cards or hard disks, emails
- EU Consumer Law generally requires information and communication on a “durable medium”

**Thank you
for listening!**