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Role of Private Law for Europe's Digital Future

- **ABSTRACT:** *The digital transformation of the EU single market actualizes numerous issues regarding the regulation of private law relations in the digital market. The key issue is whether the digital transformation requires a complex reform of the existing rules brought by the European legislator to provide for individual rights in various private law relations in the offline market (e.g., consumer contracts, labor contracts, and contracts on the provision of services in individual economic sectors), and if that is the case, how this reform must be implemented. An answer to this question mostly depends on whether, by the existing legal instruments in the digital market, namely efficient protection and enforcement of fundamental rights, EU market freedoms and individual rights can be ensured in the same way they are protected in the offline market. This paper deals with the changes in the regulation of EU private law relations caused by the establishment of the Digital Single Market. The main aim is to consider the perspectives of the EU private law in the digital transition, and whether a different approach to the regulation of private law relations in the digital market is necessary.*
- **KEYWORDS:** digital law, Digital Single Market, private law, digital transformation, digital rights, information duty, directives, regulations, harmonization

1. Introduction

In this decade, the full functioning of the Digital Single Market based on European values has been the most important strategic goal of the European Union. The digital transformation of society and economy is thus in the limelight of all European strategies. The aim is to establish a connected, strong, open, and competitive Digital Single Market where

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the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under the conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.¹

For this reason, the EU's digital strategy for 2030 is based on four cardinal points: digitally skilled population and highly skilled digital professionals, secure and sustainable digital infrastructures, digital transformation of businesses, and digitalization of public services.² It is of the outmost importance that digital transformation remains human-centered and founded on democratic values and the protection of fundamental rights and that it contributes to a sustainable, climate-neutral, and resource-efficient economy and sustainable society as a whole.³ Human-centered digital transformation calls for the recognition and protection of the rights and freedoms of individuals as guaranteed by the law of the Union—particularly fundamental rights, which, due to the development of digital technology, are exposed to new risks and serious infringements and abuses (protection of personal data, protection of privacy, freedom of expression and information, freedom to conduct a business, non-discrimination, fair and just working conditions, and so on). Digital transformation must guarantee highly specific digital rights, and it must be based on specific principles defined by the European Commission as '*the principles for the Digital Decade*,' such as putting people at the center of digital transformation; solidarity and inclusion; freedom of choice; participation in the digital public space; safety, security, and empowerment; and sustainability.⁴

The processes of digital transformation—and in particular the digital transformation of businesses—have had a significant impact on the private law relations established in the digital market between various participants. The digital market is largely shaped and developed by consumers, traders, the employed or self-employed, private internet platforms, and service providers by the realization of a variety of private law relations governing the online market exchange of goods and services. The legal framework for the digital market is mostly based on private law

1 Taken from the European Commission Communication: A Digital Single Market Strategy for Europe, Brussels, 6/5/2015, COM(2015) 192 final.

2 See the European Commission Communication: 2030 Digital Compass: the European Way for the Digital Decade, Brussels, 9/3/2021, COM(2021) 118 final, pp. 4–12.

3 See the European Commission Communication: Shaping Europe's Digital Future, Brussels, 19/2/2020, COM(2020) 67 final.

See the European Commission Communication: 2030 Digital Compass: the European Way for the Digital Decade, Brussels, 9/3/2021, COM(2021) 118 final.

See the European Commission Communication: Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26/1/2022, COM(2022) 27 final.

4 See the European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26/1/2022, COM(2022) 28 final.

rules providing for the rights and obligations of the parties in horizontal private law relations; therefore, the market's digital transformation actualizes numerous issues regarding the regulation of private law relations in the digital market. The key issue is whether the digital transformation requires a complex reform of the existing rules enacted by the European legislator to provide for individual rights in various private law relations in the offline market (e.g., consumer contracts, labor contracts, and contracts on the provision of services in specific economic sectors), and if that is the case, how this reform must be implemented. An answer to this question mostly depends on whether, by the existing legal instruments in the digital market, namely efficient protection and enforcement of fundamental rights, EU market freedoms and individual rights can be ensured in the same way they are protected in the offline market. On the one hand, undoubtedly, both in the digital market and in the offline market, the same or similar problems frequently occur when exercising or protecting individual rights in private law relations resulting from the infringements of contractual obligations or caused by the existing imbalance between the parties because of their weaker negotiating position or inferior level of information. In such cases, by extending the area of application of the already existing private law rules (adopted to protect the parties to the contract in the offline market), to the private law rules emerging in the online market, a satisfactory level of protection of individual rights can be achieved. On the other hand, within the framework of private law relations established in the online market, specific risks are created for individuals, as well as specific infringements of their rights. When dealing with private law relations in the digital market, specific risks in terms of the violation of fundamental rights and market freedoms may not appear to be possible in the offline market. Indeed, new private law relations are created in connection with new products (e.g., digital content), new services (e.g., digital services), new assets (e.g., crypto assets), and new contracts are concluded (e.g., supply of digital content). In private law relations in the digital market, personal data are becoming more and more commercialized, and an economic value is attached to them. Thus, they become a specific form of counter-performance in contract relations in the digital market (e.g., in contracts for the supply of digital content). Specific multisided legal relations (e.g., buyer↔online platform↔seller) where online platforms have an increasingly more dominant position even when it comes to the users of their services also exist. In the digital market, the asymmetry of information between the parties becomes increasingly obvious even when dealing with B2B contractual relations. The sharing economy, which is based on digital transactions and internet platforms, emphasizes the protection of individual rights in the so-called peer-to-peer (P2P) contractual relations. Business processes become more automatized through artificial intelligence, blockchain technology, smart contracts, and the Internet of Things. On a daily basis, such automatization of business transactions raises new questions on the liability for the damage suffered by the users of new

technologies and third persons, particularly in connection with the protection of fundamental rights. This all leads to specific disputes involving private law relations, to new conflicts and tensions between the parties in the digital market. However, it is disputable whether, in such cases, a corresponding application of the existing EU private law rules created for the offline market or an appropriate interpretation of general private law principles (e.g., freedom to contract, private autonomy, and prohibition of the abuse of law) can always achieve satisfactory standards in the protection of individual rights in the digital market. It is highly probable that within the framework of the traditional private law rules designed for the protection of individual rights in the offline market, it will not always be possible to find an effective legal remedy for the protection of these rights, particularly in the cases of cross-border transactions in the digital market. A Digital Single Market poses many new and specific challenges to EU private law.

This paper deals with the changes in the regulation of EU private law relations caused by the establishment of the Digital Single Market. The European concept of the private law adjustment of new trends in the regulation of legal transactions in the digital market is analyzed, as well as the effects of the digitalization on the private law of the European Union and of the Member States. The role that EU private law should have in the future in the digitalization of the single market is also analyzed, particularly with regard to the digital rights and principles in the human-centered digital transition of the single market. The main aim is to consider the perspectives of EU private law in the digital transition and whether a different approach to the regulation of private law relations in the digital market is necessary.

2. Recent developments in EU private law caused by digital transformation

■ 2.1. General

The development of EU private law has always been determined by the objectives of the European integration processes and sector policies, especially those that are significant for the development and functioning of the single market. In the European Union, private law has always primarily been oriented toward the establishment of a competitive social market economy; an internal market based on free movement of goods, workers, services and capital; and the creation of an area of freedom, security, and justice without any internal frontiers and for all citizens of the Union.^{5,6} The main objective of EU private law has been to remove the obstacles

5 Art. 3/2 of TEU; Arts. 26 et al. of TFEU.

6 See Basedow, 2021, pp. 35, 36.

to market freedoms and to establish and upgrade the functioning of the internal market by observing private autonomy and freedom of contract. Therefore, the development and concept of EU private law are both primarily determined by the Union's competences to adopt legally binding acts for the functioning of the internal market in accordance with the principles of subsidiarity and proportionality.

Because of the limited competences of the Union in the adoption of legally binding acts on the approximation of laws, the regulation of private law relations in the offline market has been characterized by a few crucial circumstances. Private law relations used to be regulated fragmentarily and by sectors. Only some aspects of private law relations were regulated in a substantial manner—in particular, those of significance for the removal of obstacles to cross-border transactions in the internal market⁷ as well as some specific private subjective rights⁸ and legal persons of the Union,⁹ also important for the functioning of the internal market. The lack of an integral regulation of private law relations was bypassed by legally binding acts adopted within the framework of judicial cooperation in civil matters.^{10,11} When substantive private law was regulated at the EU level, an approach prevailed whereby private law rules, in accordance with the principles of subsidiarity and proportionality,¹² were provided by directives.¹³ Directives first achieved minimal harmonization and subsequently targeted the maximal harmonization¹⁴ of individual private law rules of Member States that were barriers to cross-border transactions, the protection of fundamental rights, and market freedoms. It was mostly the harmonization of private law rules of the Member States restricting EU market freedoms whose application in practice could not be eliminated by negative harmonization—in other words, by the application of the principle of primacy of EU law.¹⁵ Individual (private

7 For example, certain types of contracts (or only some aspects of contracts) tort liability for specific cases, such as product liability or damage caused by infringement of the competition law, etc.

The legal bases for legal acts have mostly been Arts. 114, 153, 46, 50, 53, 59, 62, 64 of TFEU.

8 For example, the European Union Trade Mark, Community Design, et al.

9 For example, European Company/SE, European Cooperative Society/SCE, European Economic Interest Grouping/EEIG.

10 Art. 81 of TFEU.

11 Lack of any substantial private law regulation at the level of the Union is solved by legal acts on mutual recognition and enforcement of judgments, common rules concerning conflict of laws and of jurisdiction, optional procedural instruments for cross-border cases (e.g., European Small Claims Procedure, European Order for Payment Procedure, European Account Preservation Order Procedure, etc.).

12 Arts. 5/3, 4 of UEU.

13 Art. 288/3 of TFEU.

14 For more, see Basedow, 2021, pp. 102–116.

15 It was mostly the application of the judgments of the Court of Justice where the Court interpreted that the EU law precludes the application of some national law provisions of Member States as incompatible with EU law. See Basedow, 2021, pp. 75–79; Josipović, 2020, pp. 624–630.

law) rights were, in directives, mostly regulated by their mandatory rules, whose application could not be neglected by the parties. Most frequently, their objective was to ensure cross-border private autonomy and the weaker parties' freedom of entering into contracts for the transactions in the internal market (consumers, workers). However, such approximation of laws could not always contribute to a consistent private law regulation in EU law and to an efficient and standardized protection of individual rights in private law relations in the internal market. The harmonization was usually concerned with only some aspects of private law relations governed by national private law, so that the need for a subsidiary application of numerous national law provisions (not aligned with EU law) to private law relations in the internal market continued to exist. In the end, this approach resulted in significant differences in the legal position of individuals in the internal market as well as different standards of protection of their rights in cross-border transactions. In addition, the provisions of directives, when they have not been transposed or have been improperly transposed to national private law, can never have horizontal direct effects and direct applicability to the legal relations between individuals. It is only possible (depending on the methods of legal interpretation of national law) that the untransposed provisions of directives have indirect effects (individual→state→individual) in private law relations coming into play by the consistent interpretation of domestic private law in conformity with directives. This is why the level of protection of individual rights in private law relations under partially transposed directives largely and precisely depended on national private law and on the standards and level of protection of individual rights in the law applicable to a specific private law relation.

The traditional concept of the regulation of private law relations in the internal market by directives has turned out to be inappropriate for the accomplishment of specific requirements for the protection of individuals in the Digital Single Market. Human-centered digital transformation calls for a different approach to the protection of individual rights in the Digital Single Market. Private law rules, like those in an analogous market, must continue contributing to the removal of obstacles to the functioning of the market. In the context of digital markets, this means that private law must contribute to the development of cross-border e-commerce as well as better access to the digital market and its responsible functioning. However, private law must also increasingly contribute to a fair and competitive economy for the digital market based on a fair online environment. More transparency and fairness in private law relations, a more efficient protection of fundamental rights and EU market freedoms in horizontal legal relations between individuals, a more efficient protection of consumers, and more efficient legal remedies for the protection of individual rights are needed. These new requirements have impacted the concept of the private law regulation of the EU Digital Single Market in various ways. Many changes have occurred in the nomotechnical approach to the regulation of private law relations in the

digital market, in the substantive regulation of some individual rights, in the legal remedies for the protection of individual rights in private law relations, and in the role of public law for the protection of individual rights.

■ 2.2. A turn from directives to regulations

The development of the EU digital market has changed the European legislator's nomotechnical approach to the regulation of private law relations of significance for the Digital Single Market. Some kind of 'Copernican revolution' took place in the methodology of regulating private law relations. Instead of by directives, private law relations for the digital market are now mostly governed by regulations,^{16,17} which, for the first time, provide for specific segments of the digital market and also for private law relations (e.g., prohibition of geo-blocking, portability of online content, transparency for online platforms, and crowdfunding). However, there is also a trend of substituting the existing directives by regulations which, although with significant changes, provide for the same aspects of the digital market and of individual rights.¹⁸ The same legislative choice is also present in all

16 Art. 288/2 of TFEU.

Previously, regulations were exceptionally drafted to govern private law relations within specific sectoral policies (e.g., contracts on transport services within common transport policies, Arts. 91, 100 of TFEU) and within the scope of judicial cooperation in civil matters (e.g., mutual recognition and enforcement of judgments, conflicts of law, and the like Art. 81 of TFEU), and the so-called optional instruments were listed pursuant to Art. 352 of TFEU (subsidiary legislative powers of the Union).

17 See, for example, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation/GDPR); Regulation (EU) 2017/1128 on the cross-border portability of online content services in the internal market (Portability Regulation); Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market; Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union; Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market; Regulation (EU) 2018/644 on cross-border parcel delivery services; Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services; Regulation (EU) 2020/1503 on European crowdfunding service providers for business; Regulation (EU) No 531/2012 on roaming on public mobile communications networks; Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market.

18 For example, the General Data Protection Regulation repealed Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market repealed Directive 1999/93/EC on the Community framework for the electronic signature.

Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market repealed Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading.

the Proposals of the European Commission for the regulation of the new areas of importance for the Digital Single Market, such as artificial intelligence, crypto-assets, digital services, and digital identity.¹⁹ At the same time, the legal basis for the adoption of regulations has not changed, and it continues to be Art. 114 of TFEU, which is also otherwise considered as the main legal basis for the approximation of laws for the functioning of the internal market. Apart from Art. 114 of TFEU, sometimes the TFEU provisions on freedom of establishment and free movement of capital²⁰ or that on the protection of personal data²¹ are cited. Very few directives on the digital market have recently been passed, and it seems that the regulation of private law relations by way of directives—of importance for the Digital Single Market—is gradually becoming an exception. It only applies when the TFEU expressly establishes that in a specific field, harmonization must be made by directives,²² when only some aspects of a private law concept are harmonized, when the harmonization by a regulation requires more detailed and more comprehensive rules,²³ or when it is necessary to leave a margin of manoeuvring for the Member States, considering the aim to be achieved by a directive.²⁴

The main reason for the organization of legal relations in the digital market by regulations is their direct applicability in all Member States—in other words, throughout the whole Digital Single Market. The direct applicability of regulations

19 Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), Brussels, 21/4/2021, COM(2021) 206 final; Proposal for a Regulation markets in Crypto-Assets, Brussels, 24/9/2020, COM(2020) 593 final; Proposal for a Regulation on a single market for digital services (Digital Services Act), Brussels, 15/12/2020, COM(2020) 825 final; Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), Brussels, 15/12/2020, COM(2020) 842 final; Proposal for a Regulation amending Regulation (EU) No 910/2014 as regards establishing a framework for the European Digital Identity, Brussels, 3/6/2021, COM(2021) 281 final; Proposal for a Regulation on European data governance (Data Governance Act), Brussels, 25/11/2020, COM(2020) 767 final; Proposal for a Regulation on roaming on public mobile communications networks within the Union, Brussels, 24/2/2021, COM(2021) 85 final.

20 Arts. 53, 62 of TFEU.

21 Art. 16 of TFEU.

22 For example, it proposes to regulate, by a new directive, the working conditions in platform work. The legal basis for the new measure is Art. 153/2/b of TFEU, where it is expressly established that harmonization is conducted by directives. See the Proposal for a directive on improving working conditions in platform work, Brussels, 9/12/2021 COM(2021) 762 final 2021/0414 (COD).

23 For example, by directives based on targeted maximal harmonization, some aspects of consumer sales contracts and contracts for the supply of digital content and digital services are provided for. See, for example, Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods; Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

For an explanation of the choice of instruments see, for example, the Proposal for certain aspects concerning contracts for the supply of digital content, Brussels, 9/12/2015, COM(2015) 634 final – 2015/0287(COD), point 2, Explanatory Memorandum.

24 See, for example, the Proposal for a directive on copyright in the Digital Single Market, Brussels, 14/9/2016, COM(2016) 593 final, 2016/0280(COD), point 2, Explanatory Memorandum.

avoids any implementation period and eliminates the need, within their field of application, for the participants in the market to become subjects to specific national rules. By regulations, a single coherent regulatory framework and a single set of rules for all market participants are established. The direct applicability of regulations makes a coherent, effective, and uniform application of their provisions, as well as their simultaneous entry into force throughout the single market, possible. It is repeatedly emphasized that EU regulations reduce legal fragmentation and prevent divergences hampering the functioning of the digital market. They ensure necessary clarity, uniformity, and legal certainty to enable all market participants to fully benefit from their rules. Therefore, the regulations ensure an efficient protection of individual rights, fundamental rights, and EU market freedoms. A uniform protection of rights and obligations, and the same level of legally enforceable rights, obligations, and responsibilities for market participants is thus established. With regard to the protection of fundamental rights, a consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons is provided. In addition, a uniform and effective protection of EU market freedoms is maintained in the cases of direct and indirect discrimination based on customers' nationality, place of residence, or place of establishment. The regulations also ensure consistent monitoring, equivalent sanctions in all Member States, and effective cooperation between the supervisory authorities of different Member States. Moreover, their provisions are not overly prescriptive, and they leave room for different levels of a Member State's action for the elements that do not undermine the objectives of the regulations.²⁵

The regulations providing for individual rights in private law relations, in a special way, connect private law and public law stipulation of a particular segment of the digital market. Private law provisions establish the market participants' rights and obligations in particular business transactions in the digital market; these are mostly mandatory rules from which the parties may neither withdraw

25 See Regulation (EU) No 531/2012 on roaming on public mobile communications networks (point 20 of Recital); Regulation (EU) No 910/2014 on electronic identification (points 2,12, Recital); General Data Protection Regulation (points 10, 1 of Recital); Portability Regulation (point 12 of Recital); Regulation (EU) 2018/1807 on a framework for the free flow of non-personal data in the European Union (point 7 of Recital); Regulation (EU) 2018/302 on addressing unjustified geo-blocking (point 41 of Recital); Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (point 7 of Recital); Regulation (EU) 2020/1503 on European crowdfunding service providers (point 7 of Recital).

See Explanatory Memorandum (point 2 of Choice of the Instrument) in the Proposal for a regulation on artificial intelligence; Proposal for a regulation on markets in crypto assets; Proposal for a regulation on a single market for digital services; Proposal for a regulation as regards establishing a framework for European digital identity; Proposal for a regulation on European data governance; Proposal for a regulation on roaming on public mobile communications networks.

nor rule out their application.²⁶ On the other hand, various public law rules lay down the conditions for the establishment or service provision in a particular economic sector in the digital market, or its supervision, sanctions, or the like.

The most important effects of the changes in the nomotechnic regulation of private law relations in the digital market are reflected in a better protection of subjective private rights of individuals in business transactions. The provisions of the regulations providing for the parties' rights and obligations in private law relations are directly applicable and have a horizontal direct effect (individual↔individual) as well as priority in application over the national law of Member States. The provisions of the regulations are thus a direct legal basis for the acquisition of subjective private rights, for their enforcement and protection. The regulations directly recognize the rights and obligations in horizontal relations between individuals on the entire Digital Single Market. Subjective private rights are acquired directly based on EU law, without the necessity of adopting any normative acts at the level of a Member State. It is an approach that has ensured uniformity and legal certainty in the regulation of private law relations in the digital market. In private law relations, established in a regulation, all participants in the market are recognized the same content-related individual rights for which the same standards of protection must be guaranteed in the entire digital market. Finally, this has all led to a situation where the process of unification of EU private law, little by little, supersedes the traditional approach in the regulation of EU private law based on the harmonization/approximation of the national private law bodies of Member States.

Moreover, the regulations providing for private relations in the digital market have also increased the protection of EU market freedoms and fundamental rights. Sometimes, in addition to private law relations in the digital market, the regulations also lay down the rules on enforcement and the protection of EU market freedoms and fundamental rights and freedoms in the digital market. Such linkage between subjective private individual rights and EU market freedoms and the protection of fundamental rights has significantly changed the private law concept for the digital market, particularly because the provisions of regulations have horizontal direct effects. The regulation of private law relations is determined not only by a requirement for an efficient protection of private rights of individuals in their mutual relations but also by the requirement that an appropriate implementation of the public order of the Union regarding EU market freedoms and protection of fundamental rights is ensured in the digital market. A turn from directives to regulations has resulted in a situation where the realization and protection of market freedoms and fundamental rights based on directly applicable provisions of regulations have become crucial components

²⁶ For example, it is expressly prescribed that any contractual provisions that are contrary to the regulation shall be unenforceable. See Art. 7/1 of Portability Regulation.

for the regulation of private law relations on the digital market and important correctives for the regulation of the parties' rights and obligations.

■ 2.3. *Horizontal direct effects of EU market freedoms*

The TFEU provisions on market freedoms²⁷ have vertical direct effects in the relations between individuals and Member States (individual→state), based on which individuals are recognized their subjective rights to a non-discriminatory treatment while exercising their market freedoms. In relation to Member States, by vertical direct effects, market participants are protected against discrimination based on nationality and unjustified restrictions of market freedoms arising from various government measures or treatment by state authorities. The impact of vertical direct effects has been significantly extended by a very broad interpretation of the concept 'Member State.'²⁸ It arises from the case law of the European Court of Justice (ECJ)—albeit exceptionally—that EU market freedoms also have horizontal direct effects in the legal relations between individuals (individual↔individual). As a rule, these are the cases where private law subjects act in relation to other private law subjects by discriminatorily taking some collective measures (strikes, boycotts) or by applying collective regulatory measures (strikes, boycotts, collective agreements, statutes of professional associations and the like) contrary to the rules on EU market freedoms.²⁹

In private law for the digital market, a different trend is visible. Increasingly noticeable is the recognition of the horizontal direct effects of EU market freedoms. In some specific private law relations, horizontal direct effects between individuals are expressly recognized by EU regulations. The proper functioning of the Digital Single Market implies that direct effects of EU market freedoms are extended to also include legal relations between individuals. This is essential for an efficient elimination of obstacles to online cross-border transactions; for example, the regulation addressing unjustified geo-blocking expressly prohibits that a trader, through the use of technological measures or otherwise, blocks or limits a customer's access to the trader's online interface for the reasons related to the customer's nationality, place of residence, or place of establishment.³⁰ In addition, a trader must not apply different general conditions of access to goods or services for reasons related to a

27 Arts. 26, 28–66 of TFEU.

28 In the context of vertical direct effects of EU market freedoms, the concept of 'Member State' comprises all the organs of its administration, including decentralized authorities; organizations or bodies that are subject to the authority or control of the state; and organizations, even governed by private law, to which a Member State has delegated the performance of a task in the public interest. See the judgment of October 10, 2017, Farrell, C-413/15, ECLI: EU:C:2017:745, points 33–35.

29 See Josipović, 2020, pp. 160–201.

See, for example, the judgment of December 18, 2007, Laval, C-341/05, ECLI:EU:C:2007:809; the judgment of December 11, 2007, Viking, C-438/05, ECLI:EU:C:2007:772.

30 Art. 3/1.

customer's nationality, place of residence, or place of establishment.³¹ The application of different conditions for a transaction against payment for the reasons related to a customer's nationality, place of residence, or place of establishment; the location of the payment account; the place of establishment of the payment service provider' or the place of issuance of the payment instrument within the Union are also prohibited.³² In brief, traders are obliged to ensure non-discriminatory access to online interfaces on the digital market for their customers as well as non-discriminatory access to goods or services and non-discriminatory treatment related to payments. These are obligations established in the directly applicable rules of the regulations having horizontal direct effects. By these provisions, horizontal direct effects are achieved by prohibiting discrimination based on nationality in the context of exercising EU market freedoms (free movement of goods, persons, services, and capital).

Due to the existence of horizontal direct effects of EU market freedoms on the digital market, based on the law of the Union, individuals directly acquire their subjective rights to request, from the other contractual party in a particular segment of the digital market, non-discriminatory treatment based on citizenship. Indeed, individuals are granted their right to seek court protection before the national courts of their subjective right to non-discriminatory treatment or to seek measures to avoid the violation of non-discriminatory rules. The horizontal direct effects of market freedoms bind all market participants to act in a non-discriminatory manner toward other individuals in the digital market and not to block their access to the market because of nationality, place of residence, or place of establishment. By extending the direct effects of market freedoms on private law relations, a higher level of legal security is ensured, as well as a clear regulation of private law relations and better protection of individuals and their increased presence in the digital market. Individuals are thus brought into a position to contribute to the proper functioning of the digital market by way of the so-called private enforcement of EU law before their national courts, at the same time protecting their subjective right to non-discriminatory treatment. However, the implementation of measures for adequate and effective enforcement and remedies, in case of violation of the obligations ensuing from the horizontal direct effects of EU market freedoms, is left to the Member States. They decide freely, and in accordance with their national law, whether they will stipulate public or private remedies against infringements. It is only important that the measures are effective, proportionate, and dissuasive.³³

■ 2.4. *Horizontal direct effects of fundamental rights*

This trend of regulating private law relations in the digital market has led to a specific constitutionalization of EU private law. A different approach to the protection

31 Art. 4/1.

32 Art. 5/1.

33 See, for example, Art. 8 of Geoblocking-Regulation.

of fundamental rights is evident. The obligations of specific market participants are prescribed, and their purpose is, among other things, the protection of fundamental rights in legal relations between individuals. There is a danger, however, that some fundamental rights become particularly jeopardized by the use of digital technology. The same risks also exist in private law relations, where various digital technologies are used to conclude and execute contracts to automatize business processes. Therefore, some provisions are focused on the explicit regulation of the protection and exercise of fundamental rights and freedoms on the digital market (e.g., the right to the protection of personal data, freedom of expression and information, the right to engage in work, freedom to conduct a business, and non-discrimination). Some provisions mainly aim at ensuring a uniform and effective protection of fundamental rights in the digital environment regardless of whether the actions of public bodies or individuals are at issue within the framework of specific private law relations. For example, the General Data Protection Regulation (GDPR) provides a series of rules that also apply in horizontal private law relations regarding the processing of personal data between natural persons (data subjects) and the processors, controllers, recipients, and others.³⁴

To the extent to which such provisions also apply to private law relations, fundamental rights and freedoms have horizontal direct effects between individuals. The provisions of the regulations then directly bind market participants to respect the fundamental rights and freedoms of other participants in the market and with whom they enter into business transactions. This obligation arises from directly applicable provisions of the regulations providing for the exercise and protection of fundamental rights in the digital market or those by which the users of digital technologies are bound to respect and protect fundamental rights. Such horizontal direct effects of fundamental rights specified in the regulations are also valid when it comes to private law relations for the digital market regulated by other legal acts of the Union (e.g., directives).³⁵ Based on the primacy of EU law,

34 See, for example, the Proposal for a regulation establishing harmonized rules on artificial intelligence where it is proposed to draw up harmonized rules for placing on the market, into service, and in use artificial intelligence systems ('AI systems') in the Union, among other things, for the protection of fundamental rights and the elimination of risks to the fundamental rights throughout the 'AI systems' lifecycle. It is emphasized that 'AI systems' will have to comply with a set of horizontal mandatory requirements for trustworthy AI and follow the conformity assessment procedures before those systems can be placed on the Union market. See Explanatory Memorandum, 1 Context of the Proposal, 1.1. Reasons for the Objectives of the Proposal, pp. 1-3.

35 Although it already arises from the regulations, some other legally binding acts expressly provide for the obligation to observe fundamental freedoms in private law relations. Thus, for example, Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, in Art. 3/8 expressly refers to the application of the GDPR. Indeed, it is expressly laid down that 'in the event of conflict between the provisions of this Directive and Union law on the protection of personal data, the latter prevails.' This trend of expressing a regulation of the protection of fundamental rights in private law relations is also visible in some new proposals for directives aimed at new regulation of

the horizontal direct effects of fundamental rights established in the regulations are also valid when dealing with any other private law relations regulated by the national laws, if these relations fall under the scope of application of EU law.

■ 2.5. *New rights and obligations of the participants in the digital market*

The development of new products and services in the digital market (e.g., digital content, online content services, online intermediation services, electronically supplied services, and so on) called for a specific substantive regulation of the new rights and obligations emerging in the participants' contractual relations. The aim was to ensure the protection of all market players (business users, consumers) in their access to the digital market, to increase their trust in the digital market, and to develop some new business models. Numerous new contractual rights and obligations were introduced, which, because of the nature and content of private law relations in the analogous market, could not exist before. For example, some new and highly specific obligations were prescribed for online content service providers in relation to the cross-border portability of online content services,³⁶ for traders/suppliers of digital content regarding the supply and requirements for conformity of the digital content or digital services,³⁷ and for the providers of online intermediation services offered to business users.³⁸

some contractual relations adapted to digital technologies. Thus, for example, the European Commission, in the Proposal for a directive on consumer credits of June 30, 2021, proposes a separate provision on non-discrimination (Art. 6) encompassing the prohibition of discrimination based on nationality or place of residence or on any ground as referred to in Art. 21 of the Charter of Fundamental Rights of the European Union. In addition, a special protection of consumers is proposed in the cases where the creditworthiness assessment involves the use of profiling or other automated processing of personal data (Art. 18/6). See the Proposal for a directive on consumer credits, Brussels, 30/6/2021, COM(2021) 347 final, 2021/0171(COD).

36 For example, the provider of an online content service against payment is obliged to enable a subscriber, who is temporarily present in a Member State, to access and use the online content service in the same manner as in the Member State of residence. The provider must enable access to the same content, on the same range and number of devices, for the same number of users, and with the same range of functionalities. For such access, the provider must not charge the subscriber for any additional amount. See Art. 3 of Portability Regulation, which establishes specific obligations for online content service providers.

37 For example, when a continuous supply of digital content or digital services over a period of time is stipulated, the trader is responsible for the lack of conformity throughout this period and is also obliged to supply the most recent version of digital content available at the time of the conclusion of the contract, unless the parties have agreed otherwise. In respect of the consumer's personal data, the trader is obliged to comply with the obligations under EU law on the protection of personal data, etc. See Arts. 8/4, 6, 11/3, 16/2, 3 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. On the other hand, the trader is recognized special rights under the contracts for the supply of digital content and digital services, such as the modification of the digital content or digital service. See Art. 19 of Directive (EU) 2019/770.

38 See, for example, Arts. 4, 8,11,12 et al. of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services on the obligations of the providers of online intermediation services in case of restriction, suspension, and

When regulating private law relations on the digital market, it is necessary to consider various duties to inform (information duties). For informed decisions and for the effective protection of rights and fundamental freedoms in the digital market, it is decisive to provide the necessary level of information on specific aspects of contractual relations between individuals, on the parameters for data processing by digital technology, on the results of automatic data processing, and so on. It is crucial for individuals to be adequately informed about their legal and economic position in the digital market in order for them to be able to act responsibly. In conformity with the European digital principle of a safe and reliable internet environment, access to various, reliable, and transparent information is considered a fundamental digital right of citizens.³⁹ Objective, transparent, and reliable information is a prerequisite for a fair online environment and for informed decisions on the choice of online services in the digital environment.⁴⁰

However, the concept of the protection of individuals in the digital market based on the duty to inform did not start developing only with the development of the digital market. It is a concept that had already existed in EU private law long ago. Its development had already begun when private law relations in the offline market were regulated—particularly those related to consumer contracts and mostly in connection with the rules on the traders' pre-contractual duties.⁴¹ The aim of expressly prescribing the traders' information duties in consumer contracts was to ensure freedom of contracting for consumers.⁴² By informing the consumers, the asymmetry of the level of information with the consumers and traders was intended to be removed, and the consumers were to be brought in the position to be able to reach informed decisions when entering into contracts. These processes finally contributed to the development of the internal market and to market competition. The extensive regulation of the duties in the digital market to provide information has also been used as an instrument to remove the asymmetry of the amount of information received by different market players. In that sense, information duties are important not only for consumer contracts in the digital market but also for other private law relations in which only business market participants take part. In the digital market, there are much greater risks than those of asymmetry in the level of information; they can jeopardize legal certainty, fair market access,

termination of the provision of services; changes to the terms and conditions for the provision of services (prohibition of retroactive changes); establishment of an internal system for the complaints of business users; obligation to identify mediators; and the like.

39 See the European Commission Communication: 2030 Digital Compass: the European Way for the Digital Decade, Brussels, 9/3/2021 COM(2021) 118 final, pp. 12–14.

40 See the European Declaration on Digital Rights and Principles for the Digital Decade, Brussels, 26/1/2022 COM(2022) 28 final, Chapter III: Freedom of Choice.

41 For example, within the rules on the trader's obligation to precontractual provision of information for consumers before entering into subtypes of consumer contracts.

42 See Heiderhoff, 2016, p. 114; Riesenhuber, 2013, p. 86; Ebers, 2021, p. 210; Reich and Micklitz, 2014, pp. 45, 46.

business transparency, freedom of contracting, and the protection of individual rights and fundamental freedoms. Such risks are particularly obvious in the transactions involving various online platforms, which often have a dominant position in the digital market.⁴³ This has resulted in a situation where information duties are given an even more important role in EU private law for the digital market than the one they used to have in private law relations in the offline market. On the one hand, the traders' information duties in consumer contracts have become more serious, while on the other hand, new information duties in business transactions have been introduced where business users take different roles.

In consumer contracts made in the digital market, the scope of application of the rules on information duties has become larger. The list of obligatory information that the traders are obliged to provide to consumers when entering into contracts on the supply of new products and services in the digital market is now more extensive.⁴⁴ At the same time, special information duties for providers of an online marketplaces have been introduced in consumer contracts. The providers' duty is to inform the consumer—before they are bound by a contract—on the main parameters determining the ranking; whether or not the third party offering goods, services, or digital contents is a trader or not; and so on. Indeed, the provider of an online marketplace has the duty to inform the consumer even when they provide only an intermediary service for the use of software, website, or an application, allowing the consumers to conclude distance contracts with third persons (traders or consumers)—in other words, even the provider is not a party to a consumer contract.^{45,46}

New information duties are expressly provided in many other legally binding acts establishing particular private law relations in the digital market

43 See De Franceschi and Schulze, 2019, pp. 5–9; Staudenmayer, 2020, pp. 78–81.

44 See, for example, Directive (EU) 2019/2161 as regards the better enforcement and modernization of the Union's consumer protection rules (Enforcement and Modernisation Directive/Omnibus Directive).

In Omnibus Directive, among other things, the provisions of Directive 2011/83/EU on consumer rights on information requirements for contracts other than distance or off-premises contracts have been amended (Art. 5) and information requirements for distance and off-premises contracts (Art. 6) with regard to specific information on digital content and digital services. See Arts. 4/3, 4 of Omnibus Directive.

See, for example, Art. 7 of Regulation (EU) 2018/644 on cross-border parcel delivery services by which, for contracts falling within the scope of Directive 2011/83/EU for all traders concluding sales contracts with consumers that include the sending of cross-border parcels, special information duty is prescribed regarding cross-border delivery options and charges payable by consumers for cross-border parcel delivery.

45 For example, Art. 4/5 of Omnibus Directive inserted in Directive 2011/83/EU on consumer rights, a new Art. 6a on additional specific information requirements for contracts concluded on online marketplaces. See Cauffmann, 2019, p. 476.

46 The concept of the extension of remedies by which freedom of contracting is ensured in the analogous market is also present when some other legal institutions are involved, such as the withdrawal of rights. *Criptoassets*, Art. 12.

not belonging to the area of consumer contract law. By the regulation of special duties to provide information, various business users of particular services in the digital market are protected, such as, for example, the business users of online intermediation services,⁴⁷ or clients (actual investors or project owners) as users of crowdfunding services.⁴⁸ At the same time, these duties to provide information also play a very important role in the protection of other values in the digital market, including the protection of fundamental rights during automatic data processing.⁴⁹ The trend of introducing new information duties to protect individuals in the digital market is also visible in the proposals for the regulation of individual segments of the digital market and the use of digital technology.⁵⁰

The development of particular rules on the duty to provide information in the digital market is based on the same principles also valid for the analogous market. According to the first principle, the provided pieces of information must be transparent; they must be drafted in a plain and intelligible language and in a clear and comprehensible manner.⁵¹ The second principle is that the rules on information duties do not bind the traders to include particular content in their

47 See, for example, Arts. 3–11 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, which provide for various obligations of the providers of online intermediation services to business users, regarding the provision of information on their terms and conditions, restrictions, suspensions, and termination of services; parameters determining ranking; and the like.

48 See, for example, Arts. 19, 23, 24 of Regulation (EU) 2020/1503 on European crowdfunding service providers for business regarding the duty of crowdfunding service providers to provide information to clients about the costs, financial risks, and charges related to crowdfunding services or investments; about the crowdfunding project selection criteria; and about the nature of—and risks associated with—their crowdfunding services, about key investment information; and the like.

49 See, for example, Arts. 12, 13, 14 et al. of the General Data Protection Regulation on the controllers' obligation to take appropriate measures to provide the data subjects with any information when personal data are collected from them.

50 See, for example, Arts. 13, 52 et al.; Proposal for a regulation establishing harmonized rules on artificial intelligence on the duty to provide information to user of high-risk artificial intelligence systems, the duty to inform natural persons about certain AI systems intended to interact with natural persons, etc. See Busch, 2019, pp. 62–68.

See, for example, Arts. 5, 17, 46, et al.; Proposal for a regulation on markets in crypto assets, on the content and form of the crypto-asset white paper binding the issuer of crypto assets, on offers of crypto assets to provide specific information on their type, the issuer, the rights and obligations attached to crypto assets, etc.

See, for example Arts 3–5, 20, 24, 29, 20; Proposal for a regulation on contestable and fair markets in the digital sector.

51 See Art. 6a/1 of Directive 2011/83/EU on consumer rights inserted by Art. 4/5 of Omnibus Directive; Art. 12 of General Data Protection Regulation; Art. 3 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services; Arts. 23/7, 24/3 of Regulation (EU) 2020/1503 on European crowdfunding service providers for business.

See Art. 5/2 of Proposal for a regulation markets in crypto assets; Arts. 13, 52 of Proposal for a regulation establishing harmonized rules on artificial intelligence; Art. 24, Proposal for a regulation on contestable and fair markets in the digital sector.

terms and conditions for the supply of goods or services in the digital market. Separate provisions on information duties only define the content of catalogs, lists, and types of information that must be provided and the way in which they are provided, as well as when this must be done. These rules only ensure some kind of ‘procedural fairness’⁵² of the legal relations in the digital market based on an orderly and timely execution of information duties in accordance with EU law. In other words, the European legislator, by the rules on the duty to provide information, does not substantially regulate private law relations in the digital market. Traders are only bound to provide a certain type of information for the other party to the contract, and they autonomously decide on the content of such information. The aim of information duties is not to restrict private autonomy of participants in the market when regulating their business and when deciding on the conditions under which they will offer their goods and services. Their main aim is to eliminate any imbalance regarding the information received by those who participate in the digital market and to protect individual rights and fundamental freedoms of those who are considered to be in a weaker position. The participants in the digital market must be brought into a position to be acquainted with the existing conditions and business operations of traders and service providers, the reasons for their actions, and the ranking criteria to be able to compare the participants’ offers and make informed decisions on the selection of their co-contractor. At the end of the day, it all contributes to the fulfillment of public interest of the Union in terms of the establishment and proper functioning of the fair and transparent Digital Single Market. The last and the third principle is a determination that the measures taken to enforce and sanction the violation of the duty to inform are within the competence of EU Member States. The legally binding acts of the EU, establishing the duty to provide information, only prescribe that the relevant national measures must be effective, proportionate, and dissuasive.^{53,54} Only exceptionally does EU law expressly establish that the terms and conditions not complying with the requirements for transparency are null and void.⁵⁵

■ 2.6. *Personal data as a ‘counter-performance’ in the digital market*

The development of the digital market is connected with the establishment of the European single market for data as well as the European data space founded

52 See Busch, 2020, p. 134.

53 See, for example, Art. 15 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

54 EU law provides for special remedies for the collective protection of business users in the cases of the violation of the obligation to transparent provision of information by service providers. See, for example, Art. 14 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services, on judicial proceedings by representative organizations or associations and by public bodies.

55 See, for example, Art. 3/3 of Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

on the European rules and values. Various types of data (personal, impersonal, public, and industrial) are at the center of digital transformation.⁵⁶ Personal data are now usually considered as ‘oil for the internet and a new kind of currency in a digital market.’⁵⁷ Therefore, in the European digital transformation, special attention is paid to the protection of the consumers’ personal data in digital market transactions.⁵⁸ This trend is particularly obvious in directives providing for the protection of consumers in contracts on the supply of a digital content or digital services. Among other things, these directives also provide for consumer protection in cases where the consumer does not pay—or does not undertake to pay—a price to the trader for the supplied digital content or digital services but rather provides—or undertakes to provide—personal data to the trader.⁵⁹ The main rule is that the consumer, who has not paid any price for a digital content or digital services but has provided their personal data to the trader enjoys the same protection of their contractual right as the consumer who has paid for digital content or a digital service. The protection of the consumers’ contractual rights has thus been provided in a normative way despite the increasingly more frequent practice in the digital market where the trader only seemingly supplies digital content or a digital service while actually processing the consumer’s personal data to make money. Legally, the position of the consumer who has paid for digital content or a digital service is the same as that of the consumer who has not paid anything but has provided their personal data and agreed to their processing by the trader. The consumer has the same rights in the cases of non-conformity of digital content or a digital service, failure to supply, or withdrawal from the contract.⁶⁰

Although it is not expressly provided in the directives on the consumers’ contractual rights that the provision of personal data is considered a counter-performance for the supply of digital content or digital services, it is indisputable that in practice, personal data are then held to be specific assets and that, under EU law, the possibility of commercial use of personal data is recognized in the

56 See, for example, the European Commission: European Strategy for Data, Brussels, 19/2/2020, COM(2020) 66 final, Intr. DR 2–4.

57 This quotation is taken from Meglena Kuneva, European Consumer Commissioner, Keynote Speech – Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 March 2009.

58 See, for example, the European Commission Communication: New Consumer Agenda – strengthening consumer resilience for sustainable recovery, Brussels, 13/11/2020, COM (2020) 696 final (3.2. Digital Transformation).

59 See Art. 3/1 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services; Art. 4/2 of Omnibus Directive to which a new Art. 1a has been added, Directive 2011/83/EU on consumer rights (the scope of application of Directive 2011/83/EU has been extended to contracts on the supply of digital content or digital services when the consumer provides personal data to the trader). See Cauffmann, 2019, p. 475.

60 See Arts. 13, 14 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, Arts. 13, 14 *et al.* of Directive 2011/83/EU on consumer rights, added Art. 4 of Omnibus Directive.

digital market. However, undoubtedly, no economic value can be specified when it comes to personal data, and their protection is proclaimed to be one of the EU fundamental rights.⁶¹ This is why the contractual relations of the consumer who has provided their personal data and the trader in a contract for the supply of digital content or a digital service are much more complex. To some extent, their design and content depart from the traditional rules on which the concept of the trader's liability for the lack of conformity of goods/services has up to now been based in EU private law. The trader's liability for the lack of conformity has traditionally been based on the violation of the principle of equal value of mutual performances in synallagmatic contracts because the lack of conformity results in the unequal validity of performance and consideration in a contract against payment. An extension of the rule on the protection of consumers in the case of the lack of conformity to the case where the consumer has not paid a price for a digital content or digital service but has provided their personal data, whose economic value cannot be specified, requires a different explanation of the trader's obligation in case of non-conformity of digital contents or digital services. Consumer protection, when the lack of conformity of digital content or of a digital service is involved, is then primarily based on the requests that special consumer protection is ensured in contractual relations because the consumer is the weaker contractual party. At the same time, it must be considered that the consumer has provided their personal data to the trader, which is why it is necessary to establish the specific rights and obligations of consumers and traders in case of a lack of conformity and if the consumer provided their personal data for digital content or a digital service. Neither the traditional rules on the proportionate reduction of the price, nor the same rules on the rights and obligations of the parties can then be applied in the cases of termination of contract due to lack of conformity, withdrawal from the contract, and an obligation to pay back what has been received under the contract. Providing personal data, as a specific form of counter-performance, also requires the regulation of special obligations of traders regarding the processing of consumers' personal data after the termination of a contract or withdrawal from it.⁶²

The provision of personal data requires that in consumer contracts, the provisions of EU law are parallelly and simultaneously applied, providing for contractual rights and obligations as well as directly applicable EU rules on the protection of personal data as a fundamental right. In fact, between the consumer

61 See Art. 8 of Charter of Fundamental Rights of the European Union.

62 See Arts. 14/4, 16/2 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services; Arts. 13/4, 14 of Directive 2011/83/EU, amended Arts. 4/10, 11 of Omnibus Directive.

Pursuant to GDPR, the trader, in such cases, is considered a 'controller' or 'processor,' and all the obligations from GDPR continue to be effective for them regarding the processing of personal data. See Twigg-Flesner, 2020, pp. 285–287.

and the trader, two parallel and mutually connected legal relations arise: the first is a contractual relation (contract for the supply of a digital content or a digital service) to which the national law provisions apply, harmonized with the Directive on the supply of digital contents or digital services. The second legal relation is the one created by the provision of personal data or by giving the consent to the trader for the processing of a consumer's personal data for one or more specific purposes.⁶³ The trader, to be brought in the position to lawfully process the consumer's personal data, must possess a valid legal basis for such processing.⁶⁴ Therefore, during the entire period of the validity of a contract—and even upon its termination—the obligations exist for the trader to lawfully process personal data as established in the General Data Protection Regulation. However, all other obligations and rights of contractual parties under the contract for the supply of digital content or a digital service must be interpreted in the context of the right to the protection of personal data as the basic right, also considering that the provisions of the GDPR directly apply and have primacy in the application. As a result, a parallel and coordinated application of various provisions of the EU law is essential. A legal remedy because of a lack of conformity, or a failure to deliver digital content or a digital service (e.g., termination of a contract) will sometimes impact the consumers' rights to the protection of personal data provided for in the Data Protection Regulation.⁶⁵ Vice versa, to exercise the right to the protection of personal data as a fundamental right (e.g., withdrawal of consent) will sometimes impact contractual relations.⁶⁶ However, the Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services does not contain any detailed and express provisions on the coordinated protection and exercise of contractual rights and on the protection of personal data. It only generally establishes that 'the Union law on the protection of personal data shall

63 Art. 6/1/a of GDPR.

64 In practice, this legal basis will be the consent given based on Art. 6/1/a of GDPR. See Staudenmayer, 2020, p. 72.

65 A question arises of how the termination of a contract or withdrawal from a contract impacts consent for the processing of personal data. The key to this is whether the contract and the consent are dependent or independent acts, or whether a causal link exists between the contract and the consent so that the validity of the consent depends on the validity of the contract. Schmidt, 2019, pp. 81, 82.

A viewpoint in literature argues that the termination of a contract for non-alignment or non-delivery has the effect of a withdrawal of consent to the processing of personal data. See Twigg-Flesner, 2020b, p. 287; Mischau, 2020, p. 350.

66 The question arises of how withdrawing consent for the processing of personal data (Art. 7/3 of GDPR) impacts the contract for the supply of digital content or a digital service; namely, after withdrawing consent, the trader no longer has a valid legal basis for the processing of personal data. Another question is whether this withdrawal would automatically result in the contract's cancellation. The literature contains different opinions on this issue. See Metzger, 2020, p. 35; Zoll, 2017, p. 184; Landhanke and Schmidt-Kessel, 2015, p. 222; Twigg-Flesner, 2020a, p. 277.

apply to any personal data processed in connection with contracts.⁶⁷ Therefore, in the largest number of cases, the regulation of the relations between the protection of contractual rights and the fundamental right to the protection of personal data depends on the interpretation of the provisions of EU law (primarily the GDPR provisions) and on the subsidiary application of national law. It is left to the Member States to regulate in more detail—in their national bodies of law and in conformity with the objectives of EU Directive and EU rules on the protection of personal data—the rights and obligations of the contractual parties for which there is no obligation for harmonization at the level of the Union.⁶⁸

3. Conclusion

The development of EU private law for the digital market has so far been focused primarily on the establishment of the same level of protection for market participants that they enjoy in the offline market. The main goal has been to maintain the same standards of protection of individual rights in both offline and online markets⁶⁹; therefore, in principle, the same remedies by which individual rights are protected in the offline market are used to protect individual rights of the participants in the online market.⁷⁰ In addition, the same remedies have been extended to include consumer protection in the new contractual relations where the trader delivers the contents and services specific only to the digital market.⁷¹ The remedies and methods for the protection of consumers introduced earlier for an offline market have only been modernized and adjusted, in more detail, to an online environment. There is also a visible trend that extends the traditional instruments for the protection of individual rights in consumer contracts (e.g., duties to provide transparent information, withdrawal rights, protection of collective interests, and prohibition of waiving the rights) to the new private law relations emerging in the digital market between business market participants

67 Art. 3/8 of Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services.

68 See Staudenmayer, 2020, pp. 72, 73.

69 See the European Commission Communication: New Consumer Agenda – Strengthening Consumer Resilience for Sustainable Recovery, Brussels, 13/11/2020, COM (2020) 696 final (3.2. Digital Transformation); European Commission Communication: Shaping Europe's Digital Future, Brussels, 19/02/2020 (Fair and Competitive Economy).

70 For example, in consumer contracts of sale, the same remedies apply to the protection of consumers in case of the lack of conformity of goods for all sales channels—in other words, for all businesses selling goods to consumers (domestic, cross-border, online, offline, distance or off-premises sales, and so on).

71 For example, the concept of consumer protection due to lack of conformity of digital content or a digital service is, in principle, based on the same rules on which consumer protection for the lack of conformity of goods in the consumer contracts of sale is based.

(e.g., between internet platforms and business users, P2B).⁷² The application of traditional remedies is also recommended when the law of the Union provides for the new private law relations in the digital market involving new digital assets⁷³ and digital services⁷⁴ or when dealing with the legal relations where automated decision-making systems are used.⁷⁵ In principle, private law regulation for the digital market contains no new remedies and very few new substantial private law rules. The European legislator's approach to the regulation of private law relations for the digital market has been quite restrained, and the measures that have been taken are mostly directed to the *ex post* removal of the already existing risks for the functioning of the digital market and for the protection of fundamental rights. The most significant changes in the substantial regulation of private law relations in the digital market seem to be evident in the recognition of the specific status of personal data as a 'consideration' in specific consumer contracts. Although it is only the harmonization of individual aspects of a contract where the consumer provides their personal data to the trader, this has been the first step to a reform of the Union's contract law for data economy. Another important change has been the new nomotechnical approach to the regulation of private law relations, which is a contribution to the unification of private law rules by directly applicable regulations. By the regulations—most frequently by the application of traditional remedies—a uniform enforcement and protection of individual rights in private law relations in the digital market is ensured. In addition, the regulations also provide for a better protection of fundamental rights in private law relations. This is particularly important in the context of data processing for the supplied digital content or digital service.

A traditional approach to the regulation of private law relations in the digital market is a logical consequence of the fact that private law for a digital market is developing within the same policies of the Union and on the same legal bases on which private law for the offline market has so far been developing. The functional approach has been kept to solve specific problems in private law relations, which, in specific market sectors, become an obstacle to the development of the digital market. Private law for a digital market, just like private law for an offline market, is fragmentary and sectorial. Only some aspects of private law relations that must be harmonized at the level of the Union have been regulated to ensure the

72 For example, see Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.

73 For example, in the Proposal for a regulation of markets in crypto assets, it is proposed to provide for the right of withdrawal for consumers who buy crypto assets. See Art. 12.

74 For example, in the Proposal for a directive on consumer credits, the same rules and the same remedies are, in principle, recommended for the protection of consumers in credit agreements and crowdfunding credit services.

75 For example, in the Proposal for a regulation establishing harmonized rules on artificial intelligence, separate rules are proposed on the transparency and provision of information to users of an AI system. See Arts. 13, 52.

cross-border private autonomy and freedom of contracts in the digital market. The challenges of digitization have not given impetus to the development of EU private law in terms of increasing the standards of the protection of individual rights in the offline market. For all these reasons, the role of private law in the development of the digital market and digital transformation is relatively limited. The application of traditional remedies that cannot always fully provide for the efficient protection of individuals in the offline market cannot achieve it in the digital market, either. Indeed, because of the specificity of digital services, digital contents, and digital assets, whether it is even possible to ensure the efficient protection of individual rights in the digital market by the application of remedies applied in the offline market raises significant doubts.⁷⁶ The past development of digital technologies, and their effects on business, shows that a digital revolution may have serious disruptive effects on private law relations, whose elimination requires different reactions by the European legislator.⁷⁷ Problems may arise not only in connection with the protection of fundamental rights in private law relations but also in the realization of private autonomy and freedom of contracts in online environment because of an increasingly dominant position of internet platforms. Therefore, it would be useful to consider the possibilities of taking measures to prevent the risks and unfavorable effects of digitalization on private law relations or to think of a different approach to the approximation of private relations in the law of the Union based on systematic and substantial regulation to achieve higher standards of protection of individual rights in private law relations in both digital and offline markets. The circumstance by which many aspects of private law relations for a digital market are still not regulated—neither in the law of the Union nor in the Member States—may be a justified reason to begin a systematic regulation of private law relations that are important for a digital market. In such a way,

76 For example, numerous problems are connected with the efficient protection of individuals based on the duty to provide transparent information. An extensive application of the rules on information duties and constant extension of the catalogue of information has already challenged this legal concept in the offline market. It is doubtful whether participants in the offline market have already been able (because of the quantity and complexity of information) to determine everything that is important for their legal and economic position. These risks are even greater in the online market. Therefore, a question justifiably arises of whether it is necessary to also regulate some other instruments for the digital market to ensure informed decisions by market participants. See Metzger, 2020, pp. 43, 44.

77 On the possible approaches to the regulation of disruptive effects of the digital revolution on law, see Twigg-Flesner, 2016, pp. 25, 28, 47, 48.

A viewpoint in literature argues that before the adoption of new measures, it is necessary to determine whether it is possible, by the existing rules, to eliminate the negative consequences of the digital revolution. See Twigg-Flesner, 2016, pp. 25–28, 47, 48; Staudenmayer, 2020, pp. 83–86.

Some authors propose that in some areas (e.g., consumer protection law), in the cases of disruptive effects in the market caused by digital revolution, traditional consumer rules or general principles should perhaps continue to be applied because they are sufficiently flexible to be adapted to any novelties. See Howells, 2020, pp. 146–149, 171.

and on the basis of the existing legal bases for harmonization, the possible negative effects of the technological development on the functioning of the digital market could be prevented (the so-called preventive harmonization).⁷⁸ In such regulatory interventions, the European legislator may come across numerous new challenges, such as the choice of legal instruments, the legal basis for different measures, the level of generality and flexibility of private law rules with regard to a fast technological development, the field of application of the new private law rules, and the like. One of the biggest challenges (it always emerges when a substantial regulation of private law in the body of law of the Union is involved) will then be the establishment of an optimal balance between private autonomy and freedom of contract on the one hand and the requirements for efficient protections of private law individual rights and fundamental rights in the digital market on the other. Precisely the approach to this problem will determine the role of private law for Europe's digital future, namely whether private law will continue to have only a very specific role in *ex post* minimalization of risks posed by the use of digital technologies, or whether it will become one of key factors for digital transformation.

78 For example, the non-existence of digital content rules at the level of the Union and at the national level is indicated as one of the reasons for the harmonization of the rules on digital contents in Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital contents and services. See point 9 of the Recital.

This Directive was adopted based on Art. 114 of TFEU as the legal basis for the approximation of laws for the establishment and functioning of the internal market.

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