New EU rules on business-to-consumer and platform-to-business relationships

Caroline Cauffman*

Abstract
Recently, two EU instruments relating to business-to-consumer (B2C) relationships have been adopted: a new consumer sales directive and a directive on the supply of digital content. Three further EU instruments are in the pipeline: the so-called Omnibus Directive and a directive on collective redress together known as the ‘New Deal for Consumer’, and a Platform-to-Business regulation (P2B). This editorial aims to give a brief overview and a prima facie evaluation of the content of these instruments and to invite contributions offering a more in-depth analysis of the new rules and their expected impact.

Keywords
EU consumer law, consumer sales, P2B, digital content, digital services, omnibus directive, collective redress

1. Introduction
Recently, two EU instruments relating to business-to-consumer (B2C) relationships have been adopted: a new consumer sales directive¹ and a directive on the supply of digital content.² Three

1. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22 May 2019, p. 1 (hereinafter: Digital Content Directive).
2. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136, 22.5.2019, p. 1 (hereinafter: New Consumer Sales Directive).

* Associate Professor, Private Law, Faculty of Law, Maastricht University, Maastricht, Netherlands

Corresponding author:
Caroline Cauffman, Maastricht University Faculteit der Rechtsgeleerdheid, Bouillonstraat 1-3, Maastricht, 6200, Netherlands.
E-mail: caroline.cauffman@maastrichtuniversity.nl
further EU instruments are in the pipeline: the so-called Omnibus Directive\(^3\) and a directive on collective redress\(^4\) together known as the ‘New Deal for Consumer’, and a Platform-to-Business regulation (P2B).\(^5\) This editorial aims to give a brief overview and a \textit{prima facie} evaluation of the content of these instruments and to invite contributions offering a more in-depth analysis of the new rules and their expected impact.

## 2. Directives on consumer sales and the supply of digital content

As part of the Digital Market Strategy, the Commission published two proposals for directives on 9 December 2015: one for the provision of digital content and one for the online and other distance selling of movable goods.\(^6\) The second proposal provoked a lot of criticism because it led to further fragmentation of the law on sales. The Commission was therefore invited to draw up an amended proposal that would cover both online and offline consumer purchases. The new proposal was published on 31 October 2017.\(^7\) On 20 May 2019 two new Directives were signed: a new consumer sales directive and a directive concerning contracts for the supply of digital content and digital services.\(^8\) Both Directives need to be transposed into national law by the Member States by 1 July 2021. The new rules will need to be applied as of 1 January 2022. Conversely, they may not be applied to contracts concluded before that day.\(^9\)

While the current Consumer Sales Directive only aims at minimum harmonisation, the new Directive aims at maximum harmonisation. However, on a number of points, it allows Member States to exempt certain types of contracts from the rules of the Directive and to adopt a higher level of protection on other points.\(^10\) Contracts for the sale of living animals may for example be excluded from the scope of the implementation legislation\(^11\) and, Member States may extend the

---

3. European Parliament Legislative Observatory, ‘EU consumer protection rules: enforcement and modernisation 2018/0090(COD)’, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0090(COD)&l=en, (hereinafter: Proposed Omnibus Directive). See for a further analysis, M.B.M. Loos, ‘The Modernization of European Consumer Law: A Pig in a Poke?’, \textit{ERPL} (2019), p. 113-134.

4. European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final; Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final - 2015/0287 (COD).

5. European Parliament Legislative Observatory, ‘Fairness and transparency for business users of online intermediation services 2018/0112(COD)’, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?&reference=2018/0112(COD).

6. Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635 final; Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final - 2015/0287 (COD).

7. Amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, amending Regulation (EC) No 2006/2004 of the European Parliament and of the Council and Directive 2009/22/EC of the European Parliament and of the Council and repealing Directive 1999/44/EC of the European Parliament and of the Council COM/2017/0637 def. – 2015/0288 (COD).

8. See footnotes 1 and 2.

9. Article 24 New Consumer Sales Directive; Article 24 Digital Content Directive.

10. Article 4 of the New Consumer Sales Directive.

11. Article 3(5) of the New Consumer Sales Directive.
period during which the non-conformity must become apparent to lead to the seller’s liability beyond the two years period required by the Directive.\textsuperscript{12}

Digital content only falls within the scope of the Consumer Sales Directive when it is incorporated in or interconnected with a movable asset; in all other cases, it will be subject to the directive on the supply of digital content.\textsuperscript{13}

The Directive no longer uses the confusing presumption of conformity if certain criteria are fulfilled from the previous Consumer Sales Directive, but clearly and extensively defines the criteria the goods need to fulfill in order to conform to the contract.\textsuperscript{14} A novelty compared to the current Consumer Sales Directive is also the provision dealing with the case where the delivered good is encumbered with rights of third parties.\textsuperscript{15}

The main improvement of consumer rights follows from the extension of the period during which defects are deemed to have already been present at the time of delivery from six months to one year. Member States may also extend this period up to a maximum of two years.\textsuperscript{16}

The graduated system of primary and secondary remedies is maintained.\textsuperscript{17} However, if the defect is so serious as to justify an immediate price reduction or termination, the consumer does not need to request a primary remedy first.\textsuperscript{18} In addition, the seller will have the right to refuse to repair or replace the goods where these primary remedies are impossible or would entail disproportionate costs for the seller.\textsuperscript{19} The rule of \textit{Weber and Putz}\textsuperscript{20} according to which the mere fact that the only possible primary sanction would be disproportionate with respect to a secondary remedy is not sufficient to refuse that primary remedy, is hereby eroded. The new Directive will also provide for a right of suspension, although the determination of the conditions for exercising this right is left to national law.\textsuperscript{21} Member States may determine whether and to what extent account is taken of the fact that the consumer has contributed to the existence of the defect.\textsuperscript{22} They may also provide for a specific remedy if the defect manifests itself within a short period of time not exceeding 30 days after the delivery.\textsuperscript{23}

The Directive on certain aspects concerning contracts for the supply of digital content and digital services aims at full harmonization of some key elements of such contracts concluded in B2C relationships in order to contribute to the proper functioning of the internal market while providing for a high level of consumer protection.\textsuperscript{24} The Directive is intended to contribute to this aim in particular by increasing legal certainty for consumers and businesses.\textsuperscript{25} It concerns rules

\textsuperscript{12} Article 10(3) of the New Consumer Sales Directive.
\textsuperscript{13} Article 3(3) and (4) of the New Consumer Sales Directive.
\textsuperscript{14} Articles 5-8 of the New Consumer Sales Directive.
\textsuperscript{15} Article 9 of the New Consumer Sales Directive
\textsuperscript{16} Article 11 of the New Consumer Sales Directive.
\textsuperscript{17} Articles 13-16 of the New Consumer Sales Directive.
\textsuperscript{18} Article 13(4) of the New Consumer Sales Directive.
\textsuperscript{19} Article 13(3) of the Directive New Consumer Sales Directive.
\textsuperscript{20} Joined Cases C-65/09 and C-87/09 \textit{Gebr. Weber GmbH v. Jürgen Wittmer and Ingrid Putz v. Medianess Electronics GmbH}, ECLI: EU: C:2011:396.
\textsuperscript{21} Article 13(6) of the New Consumer Sales Directive.
\textsuperscript{22} Article 13(7) of the New Consumer Sales Directive.
\textsuperscript{23} Article 3(7) of the New Consumer Sales Directive.
\textsuperscript{24} Article 1 in conjunction with Article 4 of the Digital Content Directive.
\textsuperscript{25} Recitals 3 and 6 of the Directive on certain aspects concerning contracts for the supply of digital content and digital services.
that have not been harmonized before and of which an equivalent does not even exist is most member states.\textsuperscript{26} The Directive aims to define its scope in a clear an unequivocal manner and to provide clear substantive rules. Moreover, it aims to formulate its content in a way that is technologically neutral and future-proof.\textsuperscript{27}

The central concepts defining the substantive scope of application of the Directive are ‘digital content’ and ‘digital services’. Digital content is defined as ‘data which are produced and supplied in digital form’; ‘digital service’ is defined as either ‘a service that allows the consumer to create, process, store or access data in digital form; or (…) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service’.\textsuperscript{28} In order to prevent the rules from differing according to the medium by which the digital content is delivered, the Directive also applies to any tangible medium which serves exclusively as a carrier of digital content.\textsuperscript{29} However, it does not apply to digital content or digital services which are incorporated in or inter-connected with ‘goods with digital elements’, and which are provided with the goods under a sales contract concerning those goods. In the event of doubt as to whether the supply of incorporated or inter-connected digital content or an incorporated or inter-connected digital service forms part of the sales contract, the digital content or digital service shall be presumed to be covered by the sales contract.\textsuperscript{30} Where a single contract between the same trader and the same consumer includes in a bundle elements of supply of digital content or a digital service and elements of the provision of other services or goods, the Directive shall only apply to the elements of the contract concerning the digital content or digital service.\textsuperscript{31}

The Directive does not only apply to contracts where the consumer pays or undertakes to pay a price, but also where the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process that data for any other purpose.\textsuperscript{32}

The key elements that are harmonized concern the obligation to supply to the digital content or digital service, the conformity of digital content or a digital service with the contract, remedies in the event of a lack of such conformity or a failure to supply, the modalities for the exercise of those remedies, and the modification of digital content or a digital service.\textsuperscript{33}

If, under national law, the trader is only liable for a lack of conformity that becomes apparent within a period of time after supply, that period shall in principle not be less than two years from the time of supply.\textsuperscript{34} The burden of proof with regard to whether the supplied digital content or digital service was in conformity at the time of supply shall be on the trader for a lack of conformity

\textsuperscript{26} Recital 9 of the Digital Content Directive.\textsuperscript{27} Recital 10 and 19 of the Digital Content Directive.\textsuperscript{28} Article 2(1) and (2) of the Digital Content Directive.\textsuperscript{29} Article 3(3) of the Digital Content Directive.\textsuperscript{30} Article 3(4) of the Digital Content Directive.\textsuperscript{31} Article 3(6) of the Digital Content Directive.\textsuperscript{32} Article 3(1) of the Digital Content Directive.\textsuperscript{33} Article 1 of the Digital Content Directive.\textsuperscript{34} Article 11(2) of the Digital Content Directive.
which becomes apparent within a period of one year from the time when the digital content or
digital service was supplied.\textsuperscript{35}

Where the contract provides for continuous supply over a period of time, the trader shall be
liable for a lack of conformity under Articles 7, 8 and 9 of the Digital Content Directive, that occurs
or becomes apparent within the period of time during which the digital content or digital service is
to be supplied under the contract.\textsuperscript{36} the burden of proof with regard to whether the digital content or
digital service was in conformity within the period of time during which the digital content or
digital service is to be supplied under the contract shall be on the trader for a lack of conformity
which becomes apparent within that period.\textsuperscript{37}

The reversal of the burden of proof will not apply where the trader demonstrates that the digital
environment of the consumer is not compatible with the technical requirements of the digital
content or digital service and where the trader informed the consumer of such requirements in a
clear and comprehensible manner before the conclusion of the contract.\textsuperscript{38} Moreover, the consumer
shall cooperate with the trader, to the extent reasonably possible and necessary, to ascertain
whether the cause of the lack of conformity of the digital content or digital service at the time
specified in Article 11(2) or (3) of the Digital Content Directive, as applicable, lay in the con-
sumer’s digital environment. The obligation to cooperate shall be limited to the technically avail-
able means which are least intrusive for the consumer. Where the consumer fails to cooperate, and
where the trader informed the consumer of such requirement in a clear and comprehensible manner
before the conclusion of the contract, the burden of proof with regard to whether the lack of
conformity existed at the time specified in Article 11(2) or (3) of the Digital Content Directive,
as applicable, shall be on the consumer.\textsuperscript{39}

In the case of a lack of conformity, the consumer shall be entitled to have the digital content or
digital service brought into conformity, to receive a proportionate reduction in the price, or to
terminate the contract.\textsuperscript{40} These are the only remedies that are harmonized. The Recitals of the
Directive pay a lot of attention to the fact that the Directive does not affect national rules relating to
other types of remedies, such as national rules on the right to withhold performance or on dam-
ages.\textsuperscript{41} Even the question whether and under which conditions a person who concludes a contract
for purposes that are partly within and partly outside its trade, and where the trade purpose is so
limited as not to be predominant in the overall context of the contract, qualifies as a consumer, is
left to the Member States.\textsuperscript{42}

Furthermore, Recital 18 of the Digital Content Directive specifies that platform providers can
only be considered to be traders under the Directive if they act for purposes relating to their own
business and as the direct contractual partner of the consumer for the supply of digital content or
digital service. It is up to the Member States to determine whether the rules of the Directive
apply to platform providers that do not fulfil the requirements for being considered a trader under
this Directive.

\textsuperscript{35} Article 12(2) of the Digital Content Directive.
\textsuperscript{36} Article 11(3) of the Digital Content Directive.
\textsuperscript{37} Article 12(3) of the Digital Content Directive.
\textsuperscript{38} Article 12(4) of the Digital Content Directive.
\textsuperscript{39} Article 12(5) of the Digital Content Directive.
\textsuperscript{40} Article 14(1) of the Digital Content Directive.
\textsuperscript{41} Recitals 12-15 the Digital Content Directive.
\textsuperscript{42} Recital 17 of the Digital Content Directive.
In its mid-term review of the Digital Single Market Strategy, the Commission announced that it would deliver concrete actions on unfair contracts and trading practices in platform-to-business relations. On 26 April 2018, the Commission published a proposal for a regulation on this matter. On 13 February 2019, the European Parliament, the Council of the European Union and the European Commission reached a political deal on this Regulation. The proposed P2B Regulation finds its origin in the increasing importance of online intermediary platforms. Moreover, online intermediary platforms function as two-sided markets: the more suppliers that use a certain platform, the more attractive it becomes for customers; the more customers use a certain platform, the more attractive it becomes for suppliers. This leads to the concentration of supply and demand on a limited number of online intermediary platforms. Since a large part of B2C transactions take place on such platforms, it becomes very important for traders to have access to such a platform and as such, it places them in a weak position vis-à-vis platforms. Platforms may abuse their relatively stronger position in order to impose unfair terms and conditions upon traders and/or to use unfair commercial practices towards them. When the process of concentration has gone so far as to place the network in a dominant position in terms of competition law, Article 102 TFEU (and/or its national equivalents) can be used to address these practices. However, there is still a lot of uncertainty as to how to determine the market in the case of online intermediary services, and as a result, it may be very difficult to prove that a platform has a dominant position. Moreover, even before the platform is dominant in terms of competition law, it may have enough relative market power vis-à-vis the suppliers willing to use the platform to impose unfair terms and conditions upon them and to use unfair commercial practices vis-à-vis them. EU law did not provide substantive rules or remedies to address these problems and many national legal systems did not have such rules either. The P2B regulation aims to fill this gap and ‘to establish a fair, predictable, sustainable and trusted online business environment, while maintaining and further encouraging an innovation-driven ecosystem around online platforms across the EU’.

The Regulation imposes requirements as to the clarity, the content and the modification of terms and conditions used by providers of online intermediation services. In particular, any differentiated
treatment given to goods or services offered to consumers through those online intermediation services by the provider itself or any business users which that provider controls and other business users has to be mentioned as well as information relating to the ranking of search results, a description of the technical and contractual access, or absence thereof, of business users to any personal data or other data, or both, which business users or consumers provide for the use of the online intermediation services concerned or which are generated through the provision of those services and a description of the type of ancillary goods and services offered, if any, a description of whether and under which conditions the business user is also allowed to offer its own ancillary goods and services through the online intermediation services and if applicable, of the grounds for restricting the ability of business users to offer the same goods and services to consumers under different conditions through other means than through those services.49

The Regulation attempts to facilitate compliance with the Regulation by requiring providers of online intermediation services to provide for an internal system for handling the complaints of business users50 and to identify in their terms and conditions two or more mediators with which they are willing to engage to attempt to reach an agreement on the settlement, out of court, of any disputes between the provider and the business user arising in relation to the provision of the online intermediation services concerned.51 It also provides that judicial proceedings by representative organizations or associations and by public bodies must be possible. Finally, it provides that the Commission shall encourage the drawing up of codes of conduct by providers of online intermediation services and by organizations and associations representing the interests of business users of platforms.52

4. New deal directives

The full name of the so-called proposal for an Omnibus directive is the ‘proposal for a directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules’.53 On 29 March 2019, a provisional interinstitutional agreement was reached between the European Parliament and the Council about this proposal and in the meantime, on 17 April, it has been adopted by the European Parliament.54

The proposal extends the notion of ‘goods’ in the Unfair commercial practices directive (UCPD) to include digital content and digital services.55 The Consumer rights directive already applied to contracts for digital goods even when the consumer pays with personal data and to

49. Articles 3-10 of the Proposal for a P2B Regulation.
50. Article 11 of the Proposal for a P2B Regulation.
51. Articles 12-13 of the Proposal for a P2B Regulation.
52. Article 14 of the Proposal for a P2B Regulation.
53. COM(2018)0185 – C8-0143/2018 – 2018/0090(COD).
54. European Parliament Legislative Observatory, ‘EU consumer protection rules: enforcement and modernisation 2018/0090(COD)’, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0090(COD)&l=en, (hereinafter: Proposed Omnibus Directive). See for a further analysis, M.B.M. Loos, ‘The Modernization of European Consumer Law: A Pig in a Poke?’, ERPL (2019), p. 113-134.
55. Article 1(1)(a) of the Proposed Omnibus Directive.
contracts for digital services. The proposal now extends its scope to contracts for digital services
where the consumer pays with data.\textsuperscript{56}

The proposal introduces into the Consumer rights directive a highly needed obligation for
platform operators to mention whether a party offering goods or services is operating as a trader
or not and, consequently, whether or not the consumer protection rules apply to contracts con-
cluded by a consumer. Currently, that is often not clear, so that the consumer buying goods and
services on a platform does not know whether he is entitled to the consumer protection rules. A
weakness of the introduced rule is that the platform may base its information on the status of the
provider of goods and services on the statements that the latter has made to the platform, without
introducing an obligation for the platform to check the veracity of this statement. It is under-
standable that the EU refrained from introducing such an investigation duty on the platform, inter
alia because the question whether a person acts as a trader or not is in practice not always easy to
answer. Although the currently proposed rule does not protect consumers against traders present-
ing themselves as not being traders in order to avoid increased legal burdens, the consumer is at
least informed about the fact that he should not count of the application of consumer protection
rules if the supplier is presented as not being a trader.\textsuperscript{57}

A further novelty of the proposed Omnibus directive is the introduction into the UCPD of an
obligation for traders (not online search tools) who present offers resulting from a search query in a
certain order, to be transparent about the main parameters determining the ranking of products
presented to the consumer, and the relative importance of those parameters as opposed to other
parameters.\textsuperscript{58} Moreover, where a trader provides access to consumer reviews of products, he is
obliged to provide information about whether and how he ensures that the published reviews
originate from consumers who have purchased or used the product.\textsuperscript{59}

The proposal further seeks to avoid confusion caused by any marketing of a good, in one
Member State, as being identical to a good marketed in other Member States, while that good
has significantly different composition or characteristics (dual quality goods), unless justified by
legitimate and objective factors, by declaring such a practice misleading if, in its factual context,
taking account of all its features and circumstances, it causes or is likely to cause the average
consumer to take a transactional decision that he would not have taken otherwise.\textsuperscript{60}

\textsuperscript{56} Recital 31 and Article 2(2)(b) of the Proposed Omnibus Directive.
\textsuperscript{57} Article 2(5) of the Proposed Omnibus Directive.
\textsuperscript{58} Article 1(4)(b) of the Proposed Omnibus Directive.
\textsuperscript{59} Article 1(4)(c) of the Proposed Omnibus Directive.
\textsuperscript{60} Article 1(3) of the Proposed Omnibus Directive.
information in different ways that allow consumers to access the necessary information. Alternatives to providing information on the label of goods should generally be preferred by traders. The relevant Union sectorial rules and rules on free movement of goods should be respected.\(^{61}\)

In addition, a few new entries to the black list of misleading unfair commercial practices are introduced, such as ‘Providing search results in response to a consumer’s online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results’.\(^{62}\)

Furthermore, the Omnibus directive inter alia introduces some exceptions to the full harmonization principle of the consumer rights directive and the UCPD,\(^{63}\) a right of access to proportionate and effective remedies, including compensation for damages suffered by the consumer and, where relevant, price reduction or the termination of contract for consumers harmed by unfair commercial practices,\(^{64}\) and with regard to the unfair terms directive it introduces rules on penalties, while specifying such rules in other Directives that already contained rules on penalties.\(^{65}\)

On 26 March 2019, the European Parliament adopted an amended version of the European Commission’s proposal for a Directive on representative actions for the protection of collective interests of consumers.\(^{66}\) It still requires agreement by the Council before it can be signed and published in the Official Journal.\(^{67}\)

The current Injunctions Directive\(^{68}\) enables qualified representative entities to bring representative actions aimed at ending and prohibiting infringements of Union law harmful to the collective interests of consumers. The proposal aims to replace this Directive and to enable qualified representative entities, representing the collective interest of consumers, to bring a wider range of actions: in addition to seeking an order to end or prohibit an infringement, they will be able to bring an action aimed at a decision confirming that an infringement took place and to seek redress, such as compensation, reimbursement of the price paid, repair, replacement, removal or contract termination as available under national laws.\(^{69}\) The range of infringements for which such actions will be available will also be extended and will cover a variety of areas such as data protection,

---

61. Recital 43 of the Proposed Omnibus Directive.
62. Article 1(7) of the Proposed Omnibus Directive.
63. It allows Member States for example to adopt provisions intended to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers (Article 1(2) amending the UCPD) and to extended the withdrawal period to 30 days for such contracts (Article 2(8) amending the consumer rights Directive). In both cases the national rules must be proportionate, non-discriminatory and justified on grounds of consumer protection.
64. Article 1(5) and Recital 16 of the Proposed Omnibus Directive.
65. Article 1(3) and 2(13) of the Proposed Omnibus Directive.
66. European Parliament legislative resolution of 26 March 2019 on the proposal for a directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC (COM(2018)0184 – C8-0149/2018 – 2018/0089(COD)) (hereinafter: Proposed Collective Actions Directive). See further B. van Hattum, ‘The New Consumer Deal Een gamechanger op het gebied van de afwikkeling van massaclaims?’, Nederlands tijdschrift voor Europees Recht (2018), p. 55-62.
67. European Parliament Legislative Observatory, ‘Representative actions for the protection of the collective interests of consumers 2018/0089(COD)’, https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2018/0089(COD)&k=EN.
68. Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests, [2009] OJ L 110, p. 30.
69. Recitals 1, 2 and 16 of the Proposed Collective Actions Directive.
financial services, travel and tourism, energy, telecommunications, environment and health. The actions will be available as soon as an infringement affects at least two consumers. 70

The proposal aims to overcome common hurdles for individual actions by consumers, such as uncertainty about the applicable rules, psychological reluctance to take action and the negative balance of the expected costs and benefits of the individual action. 71 Abuse of the mechanism of collective action is prevented by defining criteria to be recognized as a qualified representative entity, as well as the nature of the information required to support the representative action, should be laid down. In addition, punitive damages must not be available and the unsuccessful party should bear the costs of the proceedings (without however being held to compensate unnecessarily or disproportionate costs). 72

The proposed Directive aims at a minimum harmonization. It does not prevent Member States from maintaining their existing framework for collective actions. Member States may choose to implement the rules of the Directive into their own system of collective redress or to implement them in a separate procedure. 73 The proposal also encourages collective out-of-court settlements, such as mediation, aimed at providing redress to harmed consumers. It allows Member States to provide that a settlement reached by a qualified entity and a trader may at their joint be approved by a court or administrative authority. The settlement should be final and binding upon all parties. 74

5. Evaluation and conclusion

The combination of the new Consumer Sales Directive and the Directive on the Supply of Digital Content create legal certainty about the rules applicable to the ever increasing number of contracts for the supply of digital goods and services. Both Directives contain a clear indication of the criteria to be used to determine conformity with the contract. The Directive on the Supply of Digital Content is furthermore to be applauded for determining rules on non-conformity that are tailored to the specific characteristics of digital content and digital services.

The extension of the presumption of conformity from six months to one year by the new Consumer Sales Directive is beneficial to the consumer. The six-month period in the current Directive was of course only a minimum required by the Directive, but it seems to have be taken over by most EU Member States.

The fact that the New consumer sales directive allows Member States to determine whether and to what extent account is taken of the fact that the consumer has contributed to the existence of the defect 75 and to provide for a specific remedy if the defect manifests itself within a short period of time not exceeding 30 days after the delivery, 76 as well as the right to exclude certain types of contracts from the scope of the implementation legislation, undermines the idea of preventing legal fragmentation that is used to justify full harmonization within the scope of the Directive. The same applies for the fact that the Digital content directive permits the application of national rules on

70. Recitals 6-6a of the Proposed Collective Actions Directive.
71. Recital 3 of the Proposed a collective actions directive.
72. Recitals 4 and 10 of the Proposed Collective Actions Directive.
73. Recital 24 of Proposed Collective Actions Directive.
74. Recitals 26-27 of Proposal for a Collective Actions Directive.
75. Article 13(7) of the New Consumer Sales Directive.
76. Article 3(7) of the New Consumer Sales Directive.
other remedies than those harmonized by the Directive, although the availability of additional remedies will generally be in the consumer’s interest.

More problematic is Recital 17 of the Digital content directive that leaves it up to the Member States to determine whether and under which conditions a person who concludes a contract for purposes that are partly within and partly outside its trade, and where the trade purpose is so limited as not to be predominant in the overall context of the contract, qualifies as a consumer, is left to the Member States. This recital in fact comes down to limiting the personal scope of the Directive to consumers who act exclusively for purpose outside their trade. This clearly contravenes the approach taken by the Court of Justice to interpret the notion consumer extensively.

The P2B regulation aims to protect professional sellers against unfair terms and unfair practices applied by platforms. The possibility for representative organisations to bring actions against platforms is certainly useful since it overcomes the risk that individual sellers refrain from bringing actions against a platform out of fear of harming future relationships with the platform operator. However, the protection offered largely remains limited to transparency obligations imposed on platform operators. It remains to be seen whether this is sufficient to offer professional sellers the desired protection.

The Omnibus directive seems to introduce a number of highly needed rules to deal with the increasing use of intermediary platforms. The efficiency and effectiveness of introducing penalties in view of ensuring higher compliance with consumer protection rules will depend on the (perceived) risk of being caught for an infringement. In order to fully benefit from the deterring effect of penalties, a close market monitoring will be required.

The availability of collective actions for infringements of EU law affecting consumers is important, since the harm caused to an individual consumer is often too limited for the consumer to invest the required time and money in starting court procedures against a trader. Moreover, consumers are often not aware of their rights. Unfortunately, the Directive comes a bit late, since many Member States have introduced their own systems of collective action in the meantime. The introduction of an additional EU law-based system of collective action may cause confusion and the amendment of existing procedures that have been developed with great effort may be perceived as burdensome.