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### [Review of: S. Grundmann (2018) European Contract Law in the Digital Age]

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**Publication date**

2020

**Document Version**

Final published version

**Published in**

European Review of Private Law

[Link to publication](#)

**Citation for published version (APA):**

Loos, M. B. M. (2020). [Review of: S. Grundmann (2018) European Contract Law in the Digital Age]. *European Review of Private Law*, 28(4), 973-975.

<https://kluwerlawonline.com/journalarticle/European+Review+of+Private+Law/28.4/ERPL2020057>

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## S. Grundmann (ed.), *European Contract Law in the Digital Age*<sup>\*</sup>

Marco B.M. Loos<sup>\*\*</sup>

This book contains a selection of papers dealing with the ‘digitalization of contract law’. In their introduction (page 3–45), Grundmann and Hacker provide for an overview of the interactions between digital technologies and contract law. They distinguish between 3 ‘pillars’: (1) the regulatory framework, (2) digital interventions over the life-circle of a contract, and (3) digital objects of contracting, with the second and third pillar shaping the first. The second pillar consists of four key technologies that are used at different stages of the contractual process: digital platforms, Big Data analytics, artificial intelligence and blockchain. The third pillar consists of different forms and types of digital content. With regard to this third pillar, they argue that the new Digital Content Directive fails to address important matters for the supply of digital content. First (page 41), they challenge that in the case of ‘free digital content’, the characteristic performance under the contract is the supply of the digital content – instead, they argue, the provision of personal data by the consumer (or other recipient) is in such cases as characteristic as the digital content. If this view is accepted, it first and foremost has consequences for the application of private international rules pertaining to the applicable law. Secondly, since it is difficult to determine the value of personal data, how is it to be established whether there is a serious imbalance between the obligations of the parties, potentially giving rise to remedies for, for instance, unfair terms? And thirdly, how should issues of discrimination arising at the precontractual stage be addressed? They appear to argue that the divergence between the General Data Protection Directive and the Digital Content Directive is about to create a lawyer’s paradise.

Part II of the book deals with the institutional framework. First, Svantesson picks up on the private international law aspects (page 49–86), adding the matter of choice of forum to the point on applicable law. He argues that the territoriality principle underlying private international law is simply not suited to deal with matters of internet jurisdiction, but only a few alternatives have been advanced so far. For consumer protection the current legislation entails that the court of the consumer is competent and that (at least the mandatory rules of) the consumer’s national law should be applied in case the trader *targets* that consumer’s country. Svantesson sets out why this ‘targeting criterion’ may prove to be ‘hopelessly

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<sup>\*</sup> Cambridge/Antwerp/Portland: Intersentia, 2018, xi + 332 p.

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difficult to apply in too large a number of practical situations'. The lawyer's paradise revisited.

In the second paper of this part (page 87-102), V. Mak discusses the regulation of Airbnb relationships. She notes that Airbnb's standard contract terms - and in particular its term on 'forced arbitration' - are in breach of EU consumer law. The notion of platform services deserves further attention from the legislator and court, in particular with regard to the matter of liability, which basically is denied by platform service providers almost altogether. In the following papers, Estevan de Quesada discusses crowdfunding in Europe (page 103-134) and Pałka (page 135-161) argues that 'terms of service' (i.e. standard contract terms) are not contracts for service as they typically do not contain obligations or promises on the part of the provider. In his view, consumer law should not only focus on the substance of these terms of service, but also and primarily on what the service providers *do* with the programming code and the algorithms applied.

The third and fourth parts of the book contain (sometimes highly abstract) ideas about digital contract formation and development. In his paper (page 165-204), Brownsword argues that online contracting is materially different than offline contracting, as a result of which consumers have even less contracting power and influence than in offline situations. In his view, the regulatory view needs to be adjusted to prevent defaults and nudges from (further) compromising consumers' autonomy. Idelberger discusses the matter of smart contracts as contractual networks (page 205-235). Are smart contracts actually contracts at all? He argues that the development of smart contracts calls for the conceptualization of transnational contract law, and explores a social-legal concept of smart contracts that incorporates Latour's sociological concept of networks, Luhmann's system-theoretical approaches and Teubner's descriptions of connected contracts. His hope is that this may serve as a methodological tool for the future and to describe smart contracts at a higher level of abstraction. For me, the level of abstraction applied in *this article* was already too high, so I hope the reader will forgive me for not painting a clearer picture. Similarly, I did not succeed in understanding much of Schollin's discussion of money transactions inside the bitcoin system (page 238-260). Sartos (page 263-278) discusses whether and to what extent artificially intelligent agents should be able to conclude contracts. He argues that the rules applying to human agents should in principle also apply to autonomously acting agents, but that this need not imply that these agents should also obtain legal personality. Instead, their users could simply bear the normative effects of their activity - which would seem to imply strict liability for the agent's actions.

In the final part V, Spindler (page 281-313) and Ramberg (page 315-328) bring us back to earth. They both discuss (the proposal for) the Digital Content Directive. Of the two, Ramberg is clearly critical of the whole idea of a special directive for digital content. In her view, most - if not all - matters raised in the proposed directive can be dealt with properly through general contract law. She argues that the very limited scope of the directive - only digital content - may lead

to micro-rules that could constitute a hindrance to trade themselves as the problem to determine whether or not the directive is applicable may be more problematic than just applying general contract law. There is much truth in this when it comes to the original proposal. However, it should be noted that the way the new Consumer Sales Directive and the Digital Content Directive have ultimately been developed does go a long way in solving the problem that Ramberg mentions - if only because for most situations where classification as sales or digital content could be problematic, the outcome is immaterial as the rules have been harmonized.

Spindler is much more favourable to the proposed directive. He argues that the proposal is a bold step in the right direction, but criticizes many problems attached to the proposal, in particular relating to the scope of and exceptions to the directive and the factors determining (lack of) conformity. For instance, why should 'the Internet of Things' be regulated in a separate directive? Moreover, what does 'Internet of Things' actually mean - and therefore: what is and what is not within the scope of this directive? The reader will most likely know that this matter has largely been solved in the final versions of the new Consumer Sales Directive and the Digital Content Directive, leaving some issues to the first and other to the latter directive. The same holds true for the rightly criticized priority of subjective conformity over objective conformity.

Obviously, that is often the problem with papers in a book discussing pending legislation - by the time the papers are published, the discussed problems may already have been solved in the legislative process. Nevertheless, the book raises a number of issues which will fuel the debate on the further development of the field even after the implementation of the new directives.

