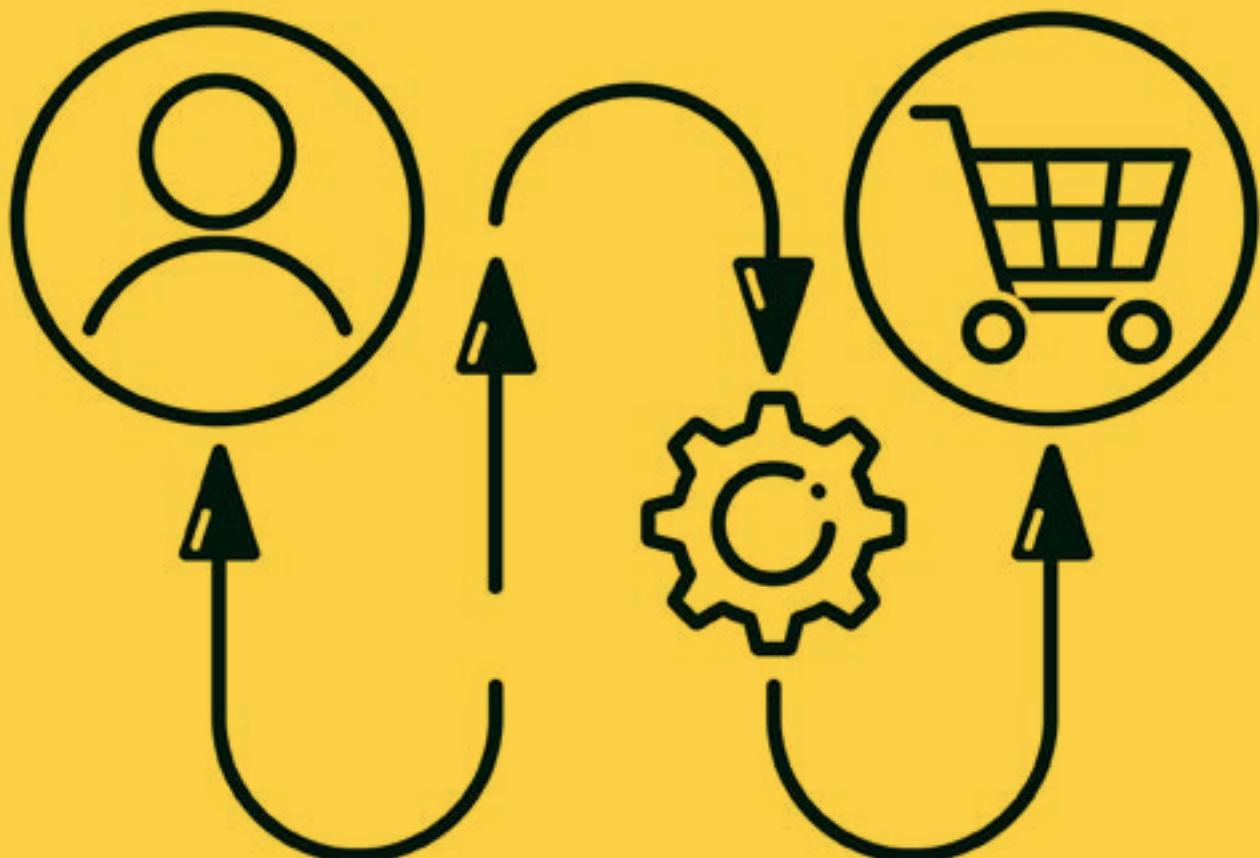


# Guiding Principles and Model Rules on Digital Assistants for Consumer Contracts

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European Law Institute





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European Law Institute

Schottenring 16/175

1010 Vienna

Austria

Tel: + 43 1 4277 22101

E-mail: [secretariat@europeanlawinstitute.eu](mailto:secretariat@europeanlawinstitute.eu)

Website: [www.europeanlawinstitute.eu](http://www.europeanlawinstitute.eu)

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# Acknowledgements

## Project Team

### *Project Reporters*

Christoph Busch (Professor, Germany)  
Teresa Rodríguez de las Heras Ballell (Professor, Spain)  
Marie Jull Sørensen (Professor, Denmark)  
Dariusz Szostek (until October 2023; Professor, Poland)  
Christian Twigg-Flesner (Professor, United Kingdom)

### *Other Members of the Project Team*

Andrea Bertolini (Assistant Professor, Italy)  
Anne de Vries-Stotijn (Jurist, The Netherlands; until June 2024)  
Mateusz Grochowski (Senior Research Fellow, Germany/Poland)  
Monika Jagielska (Professor, Poland)  
Vanessa Mak (Professor, The Netherlands)  
Damjan Možina (Professor, Slovenia)  
Rania Wazir (Mathematician, Data Scientist, Austria)

## Advisory Committee

### *Assessors*

Başak Başoğlu (Associate Professor, Turkey)  
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Pierpaolo Gori (Judge, Italy)  
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Christopher Wray (Director of Legal Graph Company Limited, United Kingdom)  
Yanko Xavier (Professor, Brazil)  
Ekin Ömeroglu (Assistant Professor, Turkey)

### **Observers**

EuroCommerce (represented by Ilya Bruggeman)  
The European Consumer Organisation, BEUC (represented by Kasper Drazewski, until June 2024)  
European Commission (represented by Maria Peltoniemi)  
Federation of E-Commerce and Distance Selling, FEVAD (represented by Marc Lolivier)  
The United Nations Commission on International Trade Law, UNCITRAL (represented by Alexander Kunzelmann and Corentin Basle)  
The International Institute for the Unification of Private Law, UNIDROIT (represented by Anna Veneziano)

### **ELI Project Officer**

Katja Kolman (Project Officer, Austria; until December 2023)  
Marta Lages de Almeida (Project Officer, Austria; from March 2024)

## List of Abbreviations

ADM	Automated Decision-Making
AI	Artificial Intelligence
B2B	Business-to-Business
B2C	Business-to-Consumer
DACC	Digital Assistants for Consumer Contracts
DA	Digital Assistant
DMA	Digital Markets Act
DSA	Digital Services Act
ELI DACC	European Law Institute Digital Assistants for Consumer Contracts
ELI	European Law Institute
GDPR	General Data Protection Regulation
MLAC	Model Law on Automated Contracting
PAIC	Principles for AI in Contracting

# Preliminary Observations

The European Law Institute's *Guiding Principles and Model Rules on Digital Assistants for Consumer Contracts* ('ELI DACC Model Rules') were developed to provide the necessary legal rules for automating contractual relations through algorithmic systems (particularly those relying on artificial intelligence (AI) algorithms), referred to as 'digital assistants', for all the stages of the life-cycle of a consumer contract. These Rules are designed to be supplementary to existing rules on consumer law and contract law. The Model Rules assume that the legal rules applicable to the type of consumer contract in question will apply to all consumer contracts, irrespective of whether or not a digital assistant is used by the consumer for contracting.

The focus on consumer contracts is very timely. The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on Automated Contracting (MLAC) in 2024, which is generally designed to apply to commercial contracts (B2B) rather than consumer contracts (B2C) (although they are not expressly excluded from the Model Law, no specific provisions for consumers contracts are included in the Model Law). In addition, there are the *Principles for AI in Contracting* (PAIC),<sup>1</sup> which are, however, also not designed specifically for consumer contracts. In contrast, the ELI DACC Model Rules focus specifically on the use of digital assistants for consumer contracts.

Although AI technology continues to evolve, its potential capabilities for concrete applications are yet to be established. Nevertheless, there is now strong interest in the potential development of AI agents (ie, digital assistants) for the automation of various tasks. The particular use case for the ELI DACC Model Rules is the automation of consumer contracts through digital assistant applications. As such applications

start to be developed, these Model Rules will provide early guidance to ensure that consumer law and its protective effect is not diluted whilst creating a framework that enables the development of high-quality, consumer-friendly, digital assistants (without mandating their use) and only introduces additional obligations for businesses where necessary to facilitate the development of digital assistants for consumer contracts.

The ELI DACC Model Rules were partly drafted as a development of some of the *ELI Guiding Principles on Automated Decision-Making in the EU*<sup>2</sup> as well as the general approach taken in the first output of this project, the interim report published in December 2023 (*EU Consumer Law and Automated Decision-Making (ADM): Is EU Consumer Law Ready for ADM?*).<sup>3</sup> Several of the ELI DACC Model Rules could be viewed as specific instantiations of the more general ADM Guiding Principles, whereas others reflect the consumer-focused principles developed for the interim report.

There are three key aspects to these Model Rules: first, specific design requirements that particular functionalities must be incorporated into digital assistants or their user interfaces to ensure a high level of consumer protection and to provide mechanisms that allow a consumer to control the operation of their digital assistants; secondly, the regulation of the contract for the supply of a digital assistant to a consumer; and thirdly, the contracts concluded and performed through the use of digital assistants ('algorithmic contracts').

The ELI DACC Model Rules are based on a risk allocation approach that assumes that any person deciding to automate their contractual relations through the use of such digital assistants assumes the

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<sup>1</sup> These were drafted by Christiane Wendehorst. The version current at the time of finalising the ELI DACC Model Rules is Version 3.0, published in V Sagaert and J Vananroye (eds), *Privaatrecht plenis coloribus. Liber Amicorum Mathis Storme* (Kluwer, 2024). An earlier version was published as a discussion draft in (2024) 13(1) *EuCML* 43. References in this text are to Version 3.0 only.

<sup>2</sup> See ELI Guiding Principles on Automated Decision-Making in the EU (2023). Available <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_elis/Publications/ELI\\_Innovation\\_Paper\\_on\\_Guiding\\_Principles\\_for ADM\\_in\\_the\\_EU.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_elis/Publications/ELI_Innovation_Paper_on_Guiding_Principles_for ADM_in_the_EU.pdf)>, accessed on 14 May 2025.

<sup>3</sup> See ELI Interim Report, EU Consumer Law and Automated Decision-Making (ADM): Is EU Consumer Law Ready for ADM? (2023). Available <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_elis/Publications/ELI\\_Interim\\_Report\\_on\\_EU\\_Consumer\\_Law\\_and\\_Automated\\_Decision-Making.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_elis/Publications/ELI_Interim_Report_on_EU_Consumer_Law_and_Automated_Decision-Making.pdf)>, accessed on 14 May 2025.

risk associated with this (including actions the person might not have taken themselves), but that the risk exposure of a consumer should be both controllable by the consumer and limited. This is reflected in many of the provisions in these Model Rules.

A novel feature of the ELI DACC Model Rules is the integrative use of contract law rules and design requirements. The ELI DACC Model Rules spell out several design requirements that digital assistants intended to be used by consumers must meet before they can be supplied to consumers. A deliberate choice was made to combine design requirements and legal rights for consumers because the objective of ensuring high level of consumer protection in respect of digital assistants is best achieved through a combination of *ex ante* requirements and *ex post* rights. This is underpinned by the principle that users of a digital assistant should be able to retain control over the operation of the digital assistant notwithstanding its purpose of automating (some of) the consumer's contractual relations. This is reflected in the substance of the design requirements and in the specific rights granted to consumers under the ELI DACC Model Rules. Enabling the development of a market for digital assistants for consumer contracts will entail some additional obligations for businesses. In drafting these Model Rules, care was taken to minimise such obligations; some provisions are not applied to micro and small enterprises.

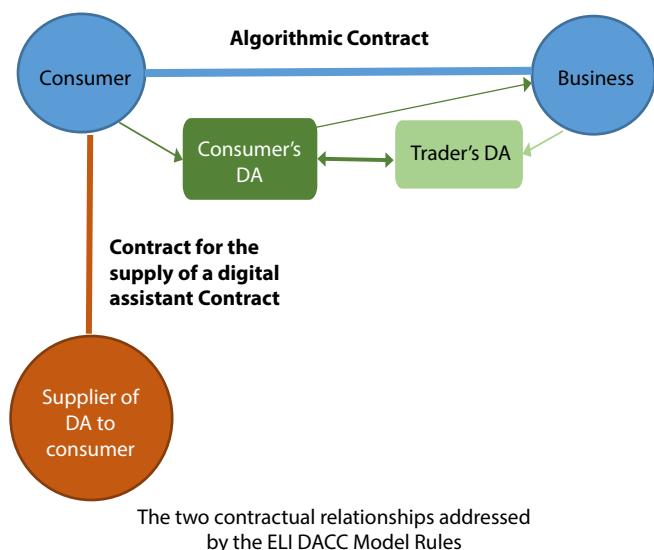
The ELI DACC Model Rules treat a digital assistant as a tool used for contractual relations, rather than as something separate from the person using it.<sup>4</sup>

The actions of a digital assistant are attributed to the person using it (if certain conditions are met), although there are limitations to this attribution set out in these Model Rules. Whilst the Model Rules themselves refrain from using the language of risk allocation, the attribution of a digital assistant's actions to the person using it are consistent with the

allocation of the risks of using a digital assistant to the person using it. The limitations to this attribution in the Model Rules recognise that this risk assumption is not unlimited.

To enable the development of business-models based on digital assistants, the ELI DACC Model Rules start from a 'no barrier' principle, according to which, the use of a digital assistant in contractual relations should not be precluded unless there are legitimate grounds for doing so (as recognised in the applicable law). Some of the additional obligations for businesses in these Model Rules do not apply to micro and small enterprises to avoid imposing disproportionate burdens on them.

The use of digital assistants will usually involve two separate contracts: first, a contract for the supply of a digital assistant (whether provided as an integral feature of a physical product or as a standalone application); secondly, a contract concluded between a consumer and a business through the consumer's use of a digital assistant and frequently also by the business (although our protective rules are intended to focus on the position of consumers). In the ELI DACC Model Rules, these two contracts are dealt with in two separate chapters.



<sup>4</sup> In the PAIC, electronic agents are similarly treated as 'tools of their operators': see Principle 3(2) PAIC.

# Guiding Principles

In the interim report of this project, eight Guiding Principles for adapting consumer law to the use of digital assistants were identified. These Guiding Principles underpin the Model Rules on Digital Assistants for Consumer Contracts (ELI DACC Model Rules) and are restated here.

**Principle 1:** The actions of a digital assistant are attributed to the person using it.

**Principle 2:** Consumer law extends to contracts concluded through a digital assistant.

**Principle 3:** The obligation to provide pre-contractual information remains relevant.

**Principle 4:** There should be no barriers to the use of digital assistants, and transactions arranged through a digital assistant should be legally effective.

**Principle 5:** The use of a digital assistant must be disclosed by both parties.

**Principle 6:** A digital assistant must be protected from manipulation.

**Principle 7:** A consumer must remain in control of a digital assistant through the ability to set, review and amend all the parameters used by a digital assistant; through the ability to prevent the conclusion of a contract through the digital assistant; and by deactivating the digital assistant.

**Principle 8:** Conflicts of interest arising through the use of a digital assistant must be disclosed.

# The ELI Model Rules on Digital Assistants for Consumer Contracts

## Chapter 1: General Provisions

### 1

#### Article 1: Scope and purpose

- (1) The purpose of the ELI DACC Model Rules is to provide a set of rules that enhance legal certainty and for a high level of consumer protection in contracts between a business and a consumer regarding the use of digital assistants by one or both parties for their contractual relations. They seek to provide an appropriate allocation of risk between all the parties in respect of the use of digital assistants for contractual relations.
- (2) The ELI DACC Model Rules may serve as a model for national, European and international legislators, as guidance for those designing and developing digital assistants for consumer use, as well as a source of inspiration for self-regulation and standardisation.
- (3) The ELI DACC Model Rules apply to:
  - (a) digital assistants used for contractual relations between a business and a consumer;
  - (b) contracts involving the *supply* of digital assistants by a supplier to a consumer; and
  - (c) the *use* of a digital assistant to automate contractual relations by:
    - (i) a consumer;
    - (ii) a business; or
    - (iii) both parties.
- (4) Matters not addressed in the ELI DACC Model Rules or the terms of the contract between a consumer and a business are to be settled in accordance with the rules of the applicable law, including contract law and consumer law as well as any other rules affecting digital assistants (such as those on data protection and privacy, cybersecurity, data access and data sharing, AI systems, and other aspects of digital law).

## 2

**Article 2: Definitions**

- (1) 'Contractual relations' means the pre-contractual and post-contractual actions for, and conclusion, performance, withdrawal from, avoidance or termination of a contract.
- (2) 'Digital assistant' means an application utilising algorithmic systems that, based on pre-set parameters, user inputs and data obtained from a range of sources, is designed to take actions to accomplish a set of pre-defined objectives for contractual relations.
- (3) 'Contract for the supply of a digital assistant' means a contract under which a digital assistant is supplied by a supplier to a consumer.
- (4) 'Algorithmic contract' means a contract where one or both parties use a digital assistant to automate some or all aspects of their contractual relations.
- (5) 'Supplier' means a business which supplies a digital assistant to a consumer and includes the seller of a product of which the digital assistant is an integrated element.

## 3

**Article 3: Use of digital assistants**

- (1) Consumers have the right to use a digital assistant for their contractual relations with a business.
- (2) A business must not use any contractual terms or conditions in a contract with a consumer which directly or indirectly waive or restrict this right. Any such terms are not binding on the consumer.
- (3) A business must not design, organise, or operate their online interfaces in a way that prevents consumers from using digital assistants in their contractual relations with a business.
- (4) A business must not require a consumer to use the consumer's digital assistant for contractual relations. The main functionality of a product which incorporates a digital assistant must not be restricted if a consumer declines to use that digital assistant.
- (5) Paragraphs (1)–(4) do not apply where there are legitimate grounds recognised by the applicable law in respect of the matters addressed in these paragraphs. Furthermore, paragraphs (2) and (3) do not apply to businesses categorised as micro or small enterprises under the applicable law.

## Chapter 2: Design Requirements

# 4

### Article 4: Design requirements

- (1) Suppliers of digital assistants intended to be used by consumers for their contractual relations must ensure that such digital assistants comply with the requirements in this chapter before they are supplied to consumers.
- (2) Compliance with the design requirements set out in Articles 5–10 and their correct operation are aspects of conformity with the contract for the supply of a digital assistant by a business to a consumer, in accordance with Article 14.

# 5

### Article 5: Functionality to select and modify parameters

- (1) A digital assistant intended for use by consumers for their contractual relations must allow the consumer to select and modify, at any time, a range of the parameters and their relative importance to be used by the digital assistant in performing its functions. As a minimum, such parameters should include, insofar as relevant for the range of transactions for which the digital assistant can be used:
  - (a) price range, price criteria and other pricing elements, or any other counter-performance (such as permitting access to data);
  - (b) types and characteristics of products or services;
  - (c) identity or characteristics of businesses with which to enter contractual relations;
  - (d) ratings and reviews;
  - (e) duration of the time window for preventing the conclusion of a contract;
  - (f) delivery arrangements and times;
  - (g) geographical location of the business; and
  - (h) sustainability criteria.
- (2) Where a digital assistant considers the consumer's profile in determining its actions, the digital assistant must allow the consumer, at any time, to:
  - (a) review and modify their profile as developed by the digital assistant; and
  - (b) exclude their profile from determining its actions.

- (3) A digital assistant must be designed such that whenever the consumer modifies a parameter, such modification will only apply to any contracts concluded after the consumer has completed making the modifications, either immediately or from a future date specified by the consumer.
- (4) A digital assistant must allow a consumer to access a current or historic record of the parameters and give the consumer the option to receive a copy on a durable medium.
- (5) When the consumer uses their digital assistant for the first time, the digital assistant's user interface must display a list of all the parameters used by the digital assistant and allow the consumer to review and adjust these. Any default settings must be highlighted. Default parameters that cannot be changed by the consumer must be clearly identified and an explanation must be provided within the user interface on request.

# 6

## Article 6: Functionality for preventing the conclusion of a contract

- (1) A digital assistant which can be used by consumers for concluding contracts must allow a consumer to prevent the conclusion of a contract through appropriate parameters in the digital assistant's user interface.
- (2) In particular, the digital assistant must give the consumer at least the choice of:
  - (a) requiring the consumer's express confirmation before an order is placed (*confirmation model*); or
  - (b) requiring a short period of time to give the consumer an opportunity to prevent the placing of an order (*objection model*).
- (3) The digital assistant must also permit the consumer to opt out of either confirmation or objection for specified transactions, based on any of the parameters set out in Article 5(1).
- (4) The digital assistant may offer the consumer the choice to require confirmation for specified transactions and objection for others, based on any of the parameters set out in Article 5(1).
- (5) Where the digital assistant has the functionality to receive information provided by the business and transmit this, or an accurate summary thereof, to the consumer, such information must be made available to the consumer before the relevant order is placed and in sufficient time for the consumer to use the functionality to prevent the conclusion of the contract.

7

### **Article 7: Functionality to deactivate the digital assistant temporarily or permanently**

- (1) A digital assistant intended for use by consumers must allow the consumer to deactivate the digital assistant temporarily or permanently.
- (2) The deactivation function must be clearly identifiable in the digital assistant's user interface and easily accessible to a consumer.
- (3) The main functionality of a product which incorporates a digital assistant must not be restricted if a consumer deactivates the digital assistant, except where the main functionality of the product is to provide the digital assistant to a consumer.

8

### **Article 8: Functionality for disclosure**

- (1) A digital assistant used by a consumer or a business for its contractual relations must disclose that the digital assistant is used.
- (2) A digital assistant used by a consumer must additionally disclose that it is used by a consumer.
- (3) A digital assistant intended for use by consumers must disclose the identity of the supplier of the digital assistant, at the request of a business involved in contractual relations with a consumer made through the digital assistant.

9

### **Article 9: Non-manipulation of consumers when using a digital assistant**

Digital assistants must be designed or operated in a way that does not manipulate a consumer, nor otherwise materially distort or impair the ability of a consumer to make free and informed choices or decisions.

10

### **Article 10: Documentation of decision-making**

- (1) Digital assistants must be designed to document how a particular decision by the digital assistant was made.
- (2) A decision can be documented by either:
  - (a) a text which summarises the decision-making process;
  - (b) a meaningful list of sources consulted in reaching that decision; or

- (c) any other evidence documenting how a particular decision was made.
- (3) The documentation must be sufficient to enable a consumer to follow how a decision was made.

## Chapter 3: Contracts for the Supply of a Digital Assistant

# 11

### Article 11: Information to be provided to consumers

- (1) Information, including contract terms, must be provided in a plain and intelligible manner.
- (2) In good time before concluding a contract for the supply of a digital assistant, the supplier must provide the following information to the consumer, along with any other information to be provided by the supplier under the applicable law:
  - (a) the main characteristics of the digital assistant, including its adaptive capability;
  - (b) any default settings or parameters at the time of supplying the digital assistant to the consumer;
  - (c) the functionalities to prevent the conclusion of a contract and to deactivate a digital assistant;
  - (d) the extent to which a consumer is able to select settings or parameters for use in contracts with a business after the digital assistant has been supplied;
  - (e) whether the digital assistant will give exclusive or preferential treatment to certain products or businesses, and, if so, the criteria for such treatment and their respective weight;
  - (f) whether information from a business will be provided to the consumer where such information was made available to the digital assistant;
  - (g) the price the consumer has to pay for the digital assistant;
  - (h) if applicable, any recurring payments the consumer must make for the use of the digital assistant, and their frequency; and
  - (i) that any contract concluded with a business through a digital assistant is between the consumer and that business only.

(3) From the moment the digital assistant is supplied to the consumer and thereafter, the following must be available:

- (a) instructions for deactivating the digital assistant temporarily or permanently;
- (b) information as to how a consumer can manage any contracts concluded with a business involving recurring obligations (eg, subscription contracts); and
- (c) information about the digital assistant's functionality to prevent the conclusion of a contract, how the consumer will be notified about an impending contract, and how the controls can be exercised.

(4) Information required by this Article to be provided becomes a term of the contract between the supplier and consumer.

(5) The supplier of the digital assistant bears the burden of proof that the information required by this Article has been provided to the consumer.

# 12

## Article 12: Disclosure of conflict of interests

(1) Where applicable, the supplier of the digital assistant must disclose to the consumer that the operation of the digital assistant involves a conflict of the consumer's interests with those of other persons that could impact the prioritisation of the consumer's interests.

(2) Such disclosure must be:

- (a) made before the contract for the supply of the digital assistant is concluded; and
- (b) given separately from other information required to be given by the supplier.

(3) The disclosure must include an explanation about the nature of the potential conflict of interests and how the respective interests of the consumer and other persons are prioritised by the digital assistant.

(4) Where a conflict of interests referred to in paragraph (1) arises after the contract for the supply of the digital assistant has been concluded, the supplier of the digital assistant must disclose this to the consumer without undue delay. For a period of 14 days after receiving such disclosure, the consumer has the right to terminate the contract for the supply of the digital assistant without penalty and without incurring any further liability under the contract for the supply of the digital assistant.

(5) Where a conflict of interests is not disclosed in accordance with paragraphs (1) to (4) but the consumer discovers that there is a conflict of interests, the consumer has the right to terminate the contract for the supply of the digital assistant without penalty and without incurring any further liability under the contract for the supply of the digital assistant.

### Article 13: Deactivation of the digital assistant

- (1) A consumer has a right to deactivate a digital assistant temporarily or permanently.
- (2) A consumer deactivating a digital assistant must not be charged for doing so in addition to any regular payment for the digital assistant (if applicable).
- (3) A term in the contract for the supply of the digital assistant which directly or indirectly prohibits the deactivation of the digital assistant by the consumer or imposes any charges on the consumer who does so is not binding on the consumer.
- (4) The contract for the supply of the digital assistant remains in force notwithstanding the deactivation of the digital assistant.
- (5) Subject to rules in the applicable consumer law and contract law regarding contract modifications, any modifications made to the contract for the supply of the digital assistant during the period of deactivation are binding on a consumer and will apply to the use of the digital assistant on reactivation.

### Article 14: Conformity

Without prejudice to any other requirements regarding the conformity of digital content or services with the contract, the conformity of a digital assistant with the contract requires:

- (a) compliance with the design requirements in chapter 2 and the correct operation of the functionalities prescribed by the design requirements; and
- (b) that its actions do not deviate from those which could reasonably be expected by the consumer who uses it, particularly where the operation of any adaptive functionality of the digital assistant results in actions inconsistent with any information given to the consumer about the digital assistant's adaptive functionality.

### Article 15: Supplier's duty to warn

- (1) The supplier of a digital assistant is under no obligation to monitor the businesses that become contracting parties with consumers through the use of digital assistants.

# 16

(2) However, where the supplier has clear and reliable information that such a business has regularly failed to comply with its obligations under the applicable consumer law or the terms of its contracts with consumers, and has not taken adequate steps to prevent such failures in future, the supplier is under a duty to warn consumers about this business and to advise consumers against the conclusion of any further contracts with that business.

## Article 16: Liability

- (1) The supplier of a digital assistant is liable to the consumer where the digital assistant is not in conformity with the contract.
- (2) The liability of the supplier includes an obligation to pay damages for losses incurred by the consumer due to any non-conformity of the digital assistant.
- (3) The conditions for claiming damages are those applicable to damages claims under the applicable law.

## Chapter 4: Algorithmic Contracts

# 17

## Article 17: Legal recognition of algorithmic contracts

- (1) An algorithmic contract is not to be denied validity or enforceability solely because a digital assistant was used, irrespective of whether only one party or both parties used digital assistants.
- (2) Any action carried out by a digital assistant in respect of the contractual relations between a consumer and a business is not to be denied legal effect, validity or enforceability on the sole ground that a digital assistant was used.

# 18

## Article 18: Application of consumer law

Consumer law applies to any contract concluded between a consumer and a business, irrespective of whether the consumer, the business or both parties use a digital assistant for their contractual relations.

# 19

## Article 19: Disclosing the use of a digital assistant

- (1) Where a digital assistant does not include the functionality required by Article 8, a person who uses that digital assistant for their contractual relations with another person must inform the other person in a clear and intelligible manner at the

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beginning of their interaction about the fact that a digital assistant is used, and, in the case of a digital assistant used by a consumer, that it is used by a consumer.

- (2) Where a contract has been concluded between a consumer and a business, but the business using a digital assistant has not disclosed its use in accordance with paragraph (1), and the consumer demonstrates that they would not have entered into the contract had such disclosure been made, the consumer has the right to cancel that contract. A consumer who exercises this right to cancel will incur no liability, including for non-performance, subject to either party's entitlement to receive back any performance that was already rendered before the contract was cancelled.
- (3) A business will not have to comply with any specific duties in respect of interactions with the digital assistant used by a consumer where the use of the digital assistant by the consumer was not disclosed.
- (4) Paragraphs (1)–(3) do not apply where the use of a digital assistant is obvious to a reasonable person in the circumstances.

## Article 20: Contractual disclosures

- (1) Where a business is required to provide information to a consumer in a human-readable format before the conclusion or during the performance of a contract, or after a contract has ended, this information must also be provided in a structured, commonly used and machine-readable format.
- (2) The obligation in paragraph (1) does not apply to businesses categorised as micro or small enterprises under the applicable law.

# 21

## Article 21: Compliance with an obligation to provide information

- (1) Where the applicable law requires that a business must provide information to a consumer at any point during its contractual relations with that consumer, and the use of the digital assistant has been disclosed by the consumer in accordance with Article 19, a business can comply with such a requirement by making the information available to the digital assistant instead, provided that:
  - (a) the digital assistant has the functionality to:
    - (i) receive this information; and
    - (ii) either transmit this information, or an accurate summary thereof, to the consumer; or to store the information and make it available permanently to the consumer through the digital assistant's user interface; and

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- (b) the functionality in paragraph (a) has been disclosed to the business, either through an appropriate functionality of the digital assistant or otherwise made known to the business.
- (2) Notwithstanding paragraph (1), where all the required information to be given by a business before the conclusion of a contract is displayed on the business's online interface and thus available to the digital assistant, the information is deemed to have been given to the consumer.

**Article 22: Attribution and its limits**

- (1) A person who uses a digital assistant for contractual relations is bound by the actions taken by the digital assistant and all the actions of the digital assistant are attributed to that person.
- (2) Where the actions of a digital assistant used by a consumer for contractual relations deviate from those which could reasonably be expected by the consumer, the actions of the digital assistant have no legal effect and are not attributed to the consumer.
- (3) The relevant factors to be applied in determining whether the actions of the digital assistant deviated from those a consumer could reasonably expect, include:
  - (a) any information given to the consumer about the adaptive capability of the digital assistant;
  - (b) whether the operation of any adaptive functionality of the digital assistant was inconsistent with such information;
  - (c) external factors such as loss of access to third-party data supplies, errors in that data, or cybersecurity breaches; and
  - (d) whether, in the specific circumstances, the consumer could not reasonably have expected that the action in question would be taken.
- (4) Any contractual term providing that the business will not be bound by the actions of the digital assistant used by the business for its contractual relations with the consumer is only effective insofar as the actions to which that term applies are so unexpected that a reasonable person would conclude there has been a serious failure in the operation of the digital assistant.
- (5) In circumstances where the actions of a digital assistant are deemed to have no legal effect under paragraph (2) or by virtue of the contract terms referred to in paragraph (4), either party is entitled to receive back any performance that was rendered in consequence of such action.

# 23

## Article 23: Manipulation of digital assistants

- (1) A business must not use the structure, design, function, or manner of operation of their online interface in a way that is likely to materially distort or impair the ability of a digital assistant to perform its functions.
- (2) Any contract resulting from an infringement of paragraph (1) can be set aside by a consumer.

# 24

## Article 24: Consequence of not acting to prevent the conclusion of a contract

A consumer who does not prevent the conclusion of a contract through the functionality of a digital assistant as required by Article 6(2)(b) (objection model) is bound by the actions of the digital assistant in accordance with Article 22(1).

## Chapter 5: Additional Liability of the Supplier of a Digital Assistant

# 25

## Article 25: Liability of the supplier of a digital assistant to third parties

Where the actions of a digital assistant are not attributed to the consumer who deployed it under Article 22(2), the supplier of the digital assistant to that consumer is liable to the business with whom the consumer's digital assistant was dealing for losses the business has incurred as a result of the non-attribution. The conditions for awarding damages are governed by the applicable law.

# Chapter 1: General Provisions

## Article 1: Scope and purpose

- (1) The purpose of the ELI DACC Model Rules is to provide a set of rules that enhance legal certainty and a high level of consumer protection in contracts between a business and a consumer regarding the use of digital assistants by one or both parties for their contractual relations. They seek to provide an appropriate allocation of risk between all the parties in respect of the use of digital assistants for contractual relations.
- (2) The ELI DACC Model Rules may serve as a model for national, European and international legislators, as guidance for those designing and developing digital assistants for consumer use, as well as a source of inspiration for self-regulation and standardisation.
- (3) The ELI DACC Model Rules apply to:
  - (a) digital assistants used for contractual relations between a business and a consumer;
  - (b) contracts involving the *supply* of digital assistants by a supplier to a consumer;
  - (c) the *use* of a digital assistant to automate contractual relations by
    - (i) a consumer;
    - (ii) a business;
    - (iii) both parties.
- (4) Matters not addressed in the ELI DACC Model Rules or the terms of the contract between a consumer and a business are to be settled in accordance with the rules of the applicable law, including contract law and consumer law as well as any other rules affecting digital assistants (such as those on data protection and privacy, cybersecurity, data access and data sharing,

Artificial Intelligence systems, and other aspects of digital law).

### Commentary

The European Law Institute's Guiding Principles and Model Rules on Digital Assistants for Consumer Contracts ('ELI DACC Model Rules') provide the necessary additions to consumer and contract law rules to accommodate the use of digital assistants. They are not presented as a freestanding law on consumer algorithmic contracting; rather, they are designed to interact with existing legal rules on consumer contracts.

The ELI DACC Model Rules are intended to be mandatory in the same way as other consumer law rules are mandatory, ie, these rules cannot be altered or disapplied by a term in a contract between a business and a consumer. Although the focus of the ELI DACC Model Rules is on consumer contracts, many of its provisions could be extended to other contracting constellations. In a business-to-business context, these rules could be regarded as default rules.

**Paragraph (1)** sets out the general purpose of these Model Rules. These Model Rules take as their paradigm the use by consumers (and also by businesses) of 'digital assistants' for algorithmic contracting, ie, it is assumed that algorithmic contracting is enabled through an application (the digital assistant) based on algorithmic technologies (including, but not limited to, artificial intelligence (AI)).

The ELI DACC Model Rules are underpinned by a risk allocation approach that seeks to apportion the risks arising from the use of digital assistants in an appropriate manner between consumers and businesses. The use of digital assistants for contractual relations entails certain risks not found in contractual relations based on human interactions; notably, legal consequences may arise for a human due to the actions of a digital assistant in which the human was not involved.

**Paragraph (2)** explains that these Model Rules are presented as model rules for legislators, who can develop legislation based on these rules. **Chapter 2** on Design Requirements for Digital Assistants will also be of relevance to anyone designing a digital assistant as a good practice guide.

**Paragraph (3)** sets out the scope of these Model Rules. The ELI DACC Model Rules adopt an innovative approach to the regulation of the use of digital assistants for consumer contracts which combines elements of private law regulation of consumer contracts with product-specific regulation. Product-specific regulation is already familiar from the field of product safety, but these Model Rules use this approach for specific consumer protection objectives, primarily the ability of consumers to retain background control over algorithmic contracting. The private law aspect focuses on both the contract for the supply of the digital assistant to a consumer and on the contracts concluded through the use of such digital assistants. The former are dealt with in **chapter 3**, and the latter in **chapter 4** of these Model Rules. Product-specific regulation is dealt with in **chapter 2**, which sets out a number of specific design requirements to be met by all digital assistants intended for use by consumers for algorithmic contracting.

These Model Rules apply to the use of digital assistants in a variety of ways. One typical case will be where the consumer's decision-making is 'augmented' by the digital assistant but the final decision to proceed with a contract is taken actively by the consumer. This is comparable to a situation where consumers rely on (very advanced) recommender systems. The other typical, and more challenging case is where the consumer's decision-making is effectively replaced by 'algorithmic' decision-making, ie, the consumer is no longer actively involved in making a decision

about concluding a particular contract. Instead, the process is fully automated. The ELI DACC Model Rules contain several provisions to ensure that consumers retain control over this process and the ability to intervene. These Model Rules are therefore underpinned by a risk management approach that recognises the assumption of the risks associated with automatic/algorithmic contracting by a consumer (and, indeed, by any person) choosing to deploy a digital assistant but that also manages that risk through both technological controls and the potential to set aside a contract concluded algorithmically where this has occurred in circumstances deemed to be beyond the risk assumed by a consumer.

A number of terms used in this Article are defined in **Article 2**. 'Contractual relations' is defined in **Article 2(1)**, 'digital assistant' is defined in **Article 2(2)**, and 'supplier' is defined in **Article 2(5)**.

There is no separate definition of 'consumer' or 'business' in the ELI DACC Model Rules to preserve the ability of any national legislator taking inspiration from these Model Rules to define the respective concepts in line with national law. In EU Member States, and many other countries, the common definition of 'consumer' is 'any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession'.<sup>5</sup> Instead of 'business', which is the term used here, EU law refers to 'trader', defined as 'any natural or legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft, or profession'.<sup>6</sup> EU Member States may treat the notion of 'business' in these Model Rules as corresponding with the notion of 'trader'.

<sup>5</sup> See eg, Article 2(1) of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (2011) OJ L 304/64 (the Consumer Rights Directive (2011/83/EU)).

<sup>6</sup> Article 2(2), Directive 2011/83/EU.

**Paragraph (4)** confirms that any matters not addressed in these Model Rules are a matter for the applicable law, which means both the relevant laws of the legal system into which these rules might be integrated and the laws applicable under the relevant conflict of laws rules to the contract for the supply of a digital assistant and the algorithmic contract (these would be subject to rules on the law applicable to contracts, including specific provisions on consumer contracts, such as those in Regulation 593/2008/EU on the law applicable to contractual obligations (Rome I)). These Model Rules could also complement the incorporation of the UNCITRAL Model Law on Automated Contracting<sup>7</sup> (MLAC) or the Principles of AI in Contracting (PAIC) into a domestic legal system in order to provide for a more complete legal framework for algorithmic contracts including consumer transactions.

It further clarifies that the applicable law might have other requirements affecting digital assistants not addressed here, particularly on data protection, cybersecurity, data access and sharing, and AI systems. The ELI DACC Model Rules are not intended to pre-empt their application. For instance, within the EU, the integration of these Model Rules would need to be consistent with the requirements of the General Data Protection Regulation (GDPR),<sup>8</sup> the Data Act,<sup>9</sup> the AI Act<sup>10</sup> and other relevant digital legislation such as the Digital Services Act (DSA)<sup>11</sup> and the Digital Markets Act (DMA).<sup>12</sup> Indeed, it is arguable that in some instances, a digital assistant could fall within the scope of an 'intermediary service' as defined in Article 3(g) DSA, and also as a 'virtual assistant' as defined in

Article 2(12) DMA; however, for either provision, this will depend on the design and functionalities of a particular digital assistant, and many of the digital assistants within the scope of these Principles are likely outside the scope of either the DSA or the DMA.<sup>13</sup>

## Article 2: Definitions

- (1) 'Contractual relations' means the pre-contractual and post-contractual actions for, and conclusion, performance, withdrawal from, avoidance or termination of a contract.
- (2) 'Digital assistant' means an application utilising algorithmic systems that, based on pre-set parameters, user inputs and data obtained from a range of sources, is designed to take actions to accomplish a set of pre-defined objectives for contractual relations.
- (3) 'Contract for the supply of a digital assistant' means a contract under which a digital assistant is supplied by a supplier to a consumer.
- (4) 'Algorithmic contract' means a contract where one or both parties use a digital assistant to automate some or all aspects of their contractual relations.
- (5) 'Supplier' means a business which supplies a digital assistant to a consumer and includes the seller of a product of which the digital assistant is an integrated element.

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<sup>7</sup> UNCITRAL Model Law on Automated Contracting, <[https://uncitral.un.org/sites/uncitral.un.org/files/mlac\\_en.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/mlac_en.pdf)> accessed on 14 May 2025.

<sup>8</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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 (2016) OJ L 119/1.

<sup>9</sup> Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) (2023) OJ L 2023/2854.

<sup>10</sup> Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (2024) OJ L 2024/1689.

<sup>11</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (2022) OJ L 277/1.

<sup>12</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (2022) OJ L 265/1.

<sup>13</sup> Cf the discussion in Friso Bostoen and Jan Krämer, *AI Agents and Ecosystems Contestability*, CERRE Issue paper (Centre on Regulation in Europe, 2024). Available at <<https://cerre.eu/publications/ai-agents-and-ecosystems-contestability/>>, accessed on 14 May 2025.

## Commentary

This Article provides essential definitions of terms used throughout the ELI DACC Model Rules.

An umbrella definition of 'contractual relations' in **paragraph (1)** seeks to cover all the stages of the typical contractual life-cycle (including where pre-contractual actions do not result in the conclusion of a contract) and was chosen to reduce the repetition of negotiation, conclusion, etc in other articles. The term 'pre-contractual' is used to cover the period leading up to the conclusion of a contract, but it is acknowledged that this term is used in this sense particularly in the context of EU and UK consumer law. For comparison, the MLAC also aims to cover all the stages of the contractual life cycle, but, in line with traditional UNCITRAL terminology, refers to the use of automated systems 'to form or to perform contracts' (Article 2(1) MLAC). As the Guide to Enactment clarifies – and consistent with the typical interpretation of these expressions in UNCITRAL text – 'form and perform' include negotiation, conclusion, performance, modification, and termination of contracts, and even the application of 'contractually agreed consequences in case of default'.

The definition of 'digital assistant' in **paragraph (2)** is essential for these Model Rules. It contains a number of elements. First, a digital assistant is a type of application. 'Application' can refer to a free-standing application, an application integrated into a product, or an application integrated into a website or an online platform. A

digital assistant would be a form of application (or 'app') which is built on an algorithmic system and will offer a user interface to enable consumers to operate the digital assistant, set parameters and so on. The term 'digital assistant' was chosen for several reasons: firstly, it reflects the different ways in which these applications will be used for consumer contracting; secondly, in deciding not to use the term 'digital agent', 'AI agent'<sup>14</sup>, 'agentic system' or 'electronic agent', any suggestion that such applications could be treated as agents in a legal sense is avoided; thirdly, alternative terms were considered, such as 'digital delegate'<sup>15</sup> or 'custobots'<sup>16</sup> but it was concluded that 'digital assistant' best captures the applications central to the ELI DACC Model Rules.<sup>17</sup>

Second, integral to this application will be the use of one or more algorithmic systems. This covers both deterministic algorithms and AI technologies, including any form of machine learning and foundational models. No particular algorithmic technology is presupposed in this definition to preserve technology neutrality. Machine learning (Artificial Intelligence) algorithms can take a number of different approaches, and combinations of algorithms are also found. In principle, the term 'algorithmic system' could also cover blockchain-based 'smart contracts', as these could also be regarded as a type of algorithm. ELI has already developed the ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection (2023). The approach of the ELI DACC Model Rules does not conflict with any of the Blockchain Principles.<sup>18</sup>

There is no specific mention of 'AI system' in this definition, but the term 'algorithmic system'

<sup>14</sup> Cf Noam Kolt, 'Governing AI Agents' (2025) 100 *Notre Dame Law Review* (forthcoming).

<sup>15</sup> Cf Christian Twigg-Flesner, 'Consumers, Digital Delegates, Contract Formation and Consumer Law' in Larry Di Matteo, Geraint Howells and Martin Hogg, *AI and Consumers* (Cambridge University Press, 2024).

<sup>16</sup> Cf Don Scheibenreif and Mark Raskino, *When machines become customers*, 2<sup>nd</sup> ed (Gartner, 2023).

<sup>17</sup> It was also decided not to use the term 'virtual assistant' used in the DMA because, first, the use of EU-specific terminology was avoided to ensure the ELI DACC Model Rules would appeal to as many jurisdictions as possible; and secondly, because the definition of the term in Article 2(12) DMA is narrower than the definition of 'digital assistant', in particular as the former is limited to a virtual assistant that 'provides access to other services or controls connected physical devices'.

<sup>18</sup> See ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection (2023). Available <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Principles\\_on\\_Blockchain\\_Technology\\_Smart\\_Contracts\\_and\\_Consumer\\_Protection.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_on_Blockchain_Technology_Smart_Contracts_and_Consumer_Protection.pdf)>, accessed pm 14 May 2025.

includes 'AI systems'. The OECD defines an 'AI system' as 'a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment.' This can be compared with the definition in Article 3(1) AI Act: "AI system" means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments'. On the latter, see ELI's Response to the European Commission's Multi-Stakeholder Consultation for Commission Guidelines on the Application of the Definition of an AI System and the Prohibited AI Practices Established in the AI Act (2025).<sup>19</sup>

For comparison, the MLAC opts for the term 'automated system' (Article 1(a) MLAC)<sup>20</sup> that essentially pivots on the idea of lack of human intervention in the actions performed by the computer system. In the same way as these Model Rules, the notion of automated system comprises both deterministic and non-deterministic models (Article 1(2) MLAC). The PAIC focus on 'electronic agents', defined as 'any software, including artificial intelligence, designed or used to prepare, negotiate, conclude, fulfil or otherwise manage contracts without any direct human intervention'.

The ELI DACC Model Rules focus on two contracts: the contract for the supply of the digital assistant and the algorithmic contract. Both terms are defined here. However, it is not the intention of the definition of 'contract for the supply of a digital assistant' (**paragraph (3)**) to establish a new type of contract, and it should not be understood in this way. In many jurisdictions, including the EU (Directives 2019/770/EU<sup>21</sup> and 2019/771/EU<sup>22</sup>) and the UK (Consumer Rights Act 2015, s 33), a contract for the supply of a digital assistant would be categorised in the EU, as a contract for the supply of a digital service, or elsewhere as a contract for the supply of software or digital content.. Although the ELI DACC Model Rules contain a number of specific rules in respect of a contract for the supply of a digital assistant, they only cover the essential rules required for the use of digital assistants and do not replicate rules of relevance to digital content/digital services or software generally. **Chapter 3** of these Model Rules contains rules in respect of contracts for the supply of a digital assistant. These rules can apply by analogy to contracts where the digital assistant is provided free of charge, but do not apply where there is no contract at all.

In contrast, nothing in the MLAC refers to the contract for the supply of the automated system, as its Model Rules exclusively refer to what in the ELIDACC Model Rules is referred to as 'algorithmic contract' and to any action in connection with the formation or the performance of a contract (Article 2 MLAC).

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<sup>19</sup> See ELI Response to the Commission Guidelines on the Application of the Definition of an AI System and the Prohibited AI Practices Established in the AI Act (2024). Available <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_elis/Publications/ELI\\_Response\\_on\\_the\\_definition\\_of\\_an\\_AI\\_System.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_elis/Publications/ELI_Response_on_the_definition_of_an_AI_System.pdf)>, accessed on 14 May 2025.

<sup>20</sup> Article 1(1):

For the purposes of this Law:

(a) 'Automated system' means a computer system that is capable of carrying out actions without the necessary review or intervention of a natural person  
(b) (...)

<sup>21</sup> 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 (2019) OJ L 136/1.

<sup>22</sup> Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (2019) OJ L 146/28.

The term 'algorithmic contract' is used in the particular meaning defined in **paragraph (4)**. 'Algorithm' should be understood as relating only to 'digital algorithms' and does not import a wider notion of 'algorithm'. This definition also does not denote the creation of a new contract type, but is used as a shorthand for contracts concluded through digital assistants. In this sense, the use of the term 'algorithmic contract' to highlight the particular means of contracting can be compared with the way that EU and UK law refers to contracts concluded at a distance and off-premises. The contract types resulting from the use of digital assistants will be contracts for the supply of goods or services, or digital content/services. It is recognised that the term 'algorithmic contract' has been defined differently in the legal literature (eg, in the writings of Lauren Henry Scholz<sup>23</sup>) but that this term is used widely and more generally, and offers the best shorthand for describing contracting in this particular manner. In contrast, the MLAC neither uses a specific term nor specifically defines the contract formed using automated systems. Instead, the international text refers to such contract as 'a contract formed (or performed) using an automated system' (Article 5(1) and 5(2) MLAC) and, separately, to 'any action in connection with the formation or performance of a contract' (Article 5(3) MLAC), such as an invitation to offer, an offer, a counteroffer, performance of any contractual obligation, proposal to modify the contract, actions related to renegotiation, or termination.

The notion of 'supplier' in **paragraph (5)** covers both the supplier of a standalone digital assistant (eg, a digital assistant app) as well as the supplier of a physical product which contains a digital assistant (a smart product).

These Model Rules refer to a person, consumer or business 'using a digital assistant'. This should be understood as the digital assistant taking decisions regarding any aspect of a person's

contractual relations that would otherwise have been taken by that person themselves. It would not cover a situation where a person is interacting with a digital assistant used by the other party. For instance, a consumer who visits a website will take decisions in respect of their contractual relations themselves, but the decisions of the business might be taken by the business' digital assistant.

## Article 3: Use of Digital Assistants

- (1) Consumers have the right to use a digital assistant for their contractual relations with a business.
- (2) A business must not use any contractual terms or conditions in a contract with a consumer which directly or indirectly waive or restrict this right. Any such terms are not binding on the consumer.
- (3) A business must not design, organise, or operate their online interfaces in a way that prevents consumers from using digital assistants in their contractual relations with a business.
- (4) A business must not require a consumer to use the consumer's digital assistant for contractual relations. The main functionality of a product which incorporates a digital assistant must not be restricted if a consumer declines to use that digital assistant.
- (5) Paragraphs (1) - (4) do not apply where there are legitimate grounds recognised by the applicable law in respect of the matters addressed in these paragraphs. Furthermore, paragraphs (2) and (3) do not apply to businesses categorised as micro or small enterprises under the applicable law.

<sup>23</sup> Seminally, Lauren Henry Scholz, 'Algorithmic Contracts' (2017) 20 *Stanford Technology Law Review* 128.

## Commentary

Generally, consumers should have the right to use digital assistants for their contractual relations with businesses.

The right to use a digital assistant entails a right to choose which digital assistant to use, except insofar as a digital assistant is an integrated feature of a smart product and cannot be replaced. There is no express limitation in these Model Rules to contractual relations with businesses that utilise electronic means (websites and apps) for their contractual relations with consumers, although for the time being, this will be the primary context within which digital assistants might be utilised.

For comparison, the MLAC approaches the issue from a different angle. Article 4 MLAC, entitled 'Technology Neutrality', merges two policy principles. First, parties are free to decide whether they wish to use automated systems in their contractual relations. Nothing in the MLAC should be understood as requiring the use of automated systems in forming or performing contracts. Unlike these Model Rules and their aim to protect consumers in their relations by deciding to be assisted by digital assistants, the typical transactional context behind the MLAC is rather different. Although consumer transactions are not excluded from the scope of the MLAC and nothing in the international text precludes its application to consumer contracts, given the natural mandate of UNCITRAL, the MLAC is mainly conceived for B2B transactions in international trade. Therefore, the first key message is that parties will decide whether they want to use automated systems. Second, in a more clear and direct application of the fundamental principle of technology neutrality that underpins other UNCITRAL instruments on electronic commerce, Article 4 states that nothing in the MLAC requires the use of a 'particular method in automated systems to form or perform contracts'. The MLAC purports to preserve the traditional technology-neutral approach that inspires its instruments on aspects related to electronic commerce, and other digital matters. In this case, the technology-agnostic approach is to a certain extent less broad and

comprehensive, as indeed the MLAC applies to a specific technology or, more accurately, to those technologies able to automate actions without the necessary review or intervention of natural persons.

**Paragraph (2)** supplements this right by prohibiting the use of standard contract terms that are intended or have the effect of restricting or excluding the right to use a digital assistant.

**Paragraph (3)** precludes actions by a business that would make the use of digital assistants impossible through the design of its online interface. It is particularly aimed at deliberate practices that would undermine the ability of consumers to use digital assistants. These practices include the use of dark patterns that, in this instance, affect the normal operation of the digital assistant and the performance of its expected function to the detriment of consumers using a digital assistant in their interactions with businesses.

*Illustration:*

*A is a business which has designed its online interface in such a way that all text contains hidden spaces between letters. This makes it impossible for a digital assistant to process any text, even though a human consumer would not see the spaces and be able to read all the text. This would be a prohibited way of designing an online interface.*

The right to use a digital assistant in this Article relates to **Article 19**, below, which deals with the disclosure of the use of a digital assistant, and **Article 20**, which deals with the requirement to ensure that any information is also made available in a machine-readable format so it can be processed by a digital assistant.

**Paragraph (4)** clarifies that consumer cannot be required to use either their own free-standing digital assistant or a digital assistant integrated into a smart product they have purchased if they do not wish to do so. However, the scope of **paragraph (4)** does not extend to an algorithmic system that is an integral part of the website of a trader that a consumer has to engage with. A decision by a consumer not to use a digital

assistant integrated into a smart product should not affect the main functionality of that product, ie, a fridge should still chill food, or a coffee maker should still brew coffee. Otherwise, the actual effect would be so deterring as to prevent consumers from freely deciding whether to use the embedded digital assistant at all. **Article 3(4)** is one aspect of the desire to ensure residual human control underpinning several other Model Rules, especially **Article 7** on the functionality to deactivate a digital assistant, and **Article 13** on the right to deactivate a digital assistant and the implications for the contract for the supply of the digital assistant.

**Paragraph (5)** provides that the right to use a digital assistant in **paragraph (1)** and the requirements in **paragraphs (2)–(4)** do not apply where the applicable law recognises 'legitimate grounds' for not applying **paragraphs (1)–(4)**. These 'legitimate grounds' should be more a unilateral preference by a business against the use of digital assistants, or a particular digital assistant. It would cover, eg, a situation where the law prohibits the use of bots (a form of digital assistant) for the purchase of large numbers of one item, eg, concert tickets, or other items for which supply is finite; or concerns over the reliability of a particular assistant identified by a public authority. In addition, **paragraph (5)** seeks to avoid imposing disproportionate burdens on micro or small enterprises by excluding them from the scope of **paragraphs (2) and (3)**. In EU law, for example, this would be traders qualifying as micro or small enterprises as defined in Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises ((2003) OJ L124/36).

## Chapter 2: Design Requirements

### Article 4: Design requirements

- (1) Suppliers of digital assistants intended to be used by consumers for their contractual relations must ensure that such digital assistants comply with the requirements in this chapter before they are supplied to consumers.
- (2) Compliance with the design requirements set out in Articles 5-10 and their correct operation are aspects of conformity with the contract for the supply of a digital assistant by a business to a consumer, in accordance with Article 14.

#### Commentary

One of the key elements of the ELI DACC Model Rules is the direct regulation of digital assistants through the design requirements set out in this chapter. These requirements align with specific consumer-focused policy objectives, primarily to enable the use of digital assistants for algorithmic consumer contracting whilst providing for a number of control mechanisms to allow a consumer to manage the risks associated with removing the consumer from the active decision-making loop. In opting for design requirements, these Model Rules put greater weight on *ex ante* regulation of digital assistants directly rather than framing these requirements as private law rights for consumers that would generally be exercised *ex post*, ie, after something has gone wrong for the consumer. Although the integration of certain policy objectives 'by design' has already been expressed in general terms in some recent legislation (eg, the GDPR), the ELI DACC Model Rules are a significant development of this idea.

The ELI DACC Model Rules establish a number of specific design features which must be met before digital assistants can be supplied by consumers. Any business involved in creating digital assistants (regardless of how they are referred to by such business) must ensure

that the requirements of this Chapter are incorporated into the design and coding of their digital assistants. However, there will be many other aspects of digital assistants which will be commercial decisions for such businesses, including aspects such as how to deal with the need to provide usernames and passwords for websites, payment details, and instances other than those covered in this Chapter when the consumer might have to get actively involved (eg, when instructions are unclear). The design requirements in this Chapter do not affect these matters.

The MLAC does not contain any requirements of this type. In the PAIC, the required technical capabilities of an electronic agent play a central role. Principle 12 provides that required technical capabilities for electronic agents may be specified by law or by a framework arrangement (such as an agreement between the parties or platform terms to which both have assented) and otherwise depend on the other party's reasonable expectations, but there are no specific technical requirements corresponding to those in this chapter.

In practical terms, compliance with the requirements of this chapter will primarily be a matter for those who design and code digital assistants. For the purposes of the ELI DACC Model Rules, the addressee of these requirements is the contractual supplier of the digital assistant to the consumer, reflecting the risk allocation approach underpinning the ELI DACC Model Rules. The supplier and the designer/coder may be the same (legal) person in practice, but within the structure of these Model Rules, the supplier is required to ensure that the digital assistants it intends to supply to consumers meet these requirements. This is because these Model Rules focus on the position of the consumer vis-à-vis the supplier of their digital assistant and the third-party businesses with whom consumers will enter into contractual relations through the digital assistant only. The position of any other parties is not addressed in these Model Rules.

In implementing this chapter, legislators may decide to impose specific obligations on other parties in the digital assistant supply chain in respect of these design requirements.

This chapter could be implemented through legislation. Alternatively, technical standards based on these design requirements could be developed. In the case of technical standards, compliance with the design requirements may be rebuttably presumed where a digital assistant complies with such a technical standard. This presumption could be rebutted if it transpires that a digital assistant nevertheless fails to comply with the design requirements in this chapter.

The burden of proof would fall on a consumer, or an enforcement authority, to show that a digital assistant which does not comply with this chapter is not in conformity with the contract. A legislator implementing these Model Rules could consider whether this burden should be adjusted. Additionally, a legislator could consider introducing a certification scheme and/or a kite-mark scheme to confirm compliance of a digital assistant with this chapter.

The **territorial scope** of these design requirements will be determined by the legislator implementing this chapter. Generally, digital assistants supplied to consumers in a jurisdiction which has adopted these design requirements must comply with the design requirements, irrespective of where the designer, coder or supplier is located (ie, their habitual residence or place of business). A permitted choice of law of a different jurisdiction would therefore not have the effect of displacing the application of the design requirements in the jurisdiction which has adopted this chapter. In the absence of EU legislation giving effect to these design requirements, legislation adopted by an EU Member State would have to be compatible with the EU Treaties.

The supplier's obligation in **paragraph (1)** is supplemented by **paragraph (2)**, which makes compliance with the requirements in this Chapter an aspect of the conformity with the contract (or corresponding legal requirements regarding

quality and fitness under the applicable law) of the digital assistant (see also **Article 14**).

**Paragraph (1)** requires the supplier to ensure compliance with the design requirements in this chapter but does not stipulate a specific process for doing so. The purpose of this obligation is to require the supplier only to supply digital assistants which comply with all the design requirements of this chapter. The laws implementing these Model Rules are free to specify the process(es) that need to be followed.

'Free' digital assistants (ie, those provided without anything given by the consumer in return, such as payment or access to data), other than those integrated into a smart product, and open-source digital assistants, are not the focus of these requirements. However, these requirements could be viewed as a general standard for digital assistants and therefore serve as a guide also for developers of free/open-source digital assistants.

## Article 5: Functionality to select and modify parameters

- (1) A digital assistant intended for use by consumers for their contractual relations must allow the consumer to select and modify, at any time, a range of the parameters and their relative importance to be used by the digital assistant in performing its functions. As a minimum, such parameters should include, insofar as relevant for the range of transactions for which the digital assistant can be used:
  - (a) price range, price criteria and other pricing elements, or any other counter-performance (such as permitting access to data);
  - (b) types and characteristics of products or services;
  - (c) identity or characteristics of businesses with which to enter contractual relations;

- (d) ratings and reviews;
- (e) duration of the time window for preventing the conclusion of a contract;
- (f) delivery arrangements and times;
- (g) geographical location of the business; and
- (h) sustainability criteria.

(2) Where a digital assistant considers the consumer's profile in determining its actions, the digital assistant must allow the consumer, at any time, to

- (a) review and modify their profile as developed by the digital assistant; and
- (b) exclude their profile from determining its actions.

(3) A digital assistant must be designed such that whenever the consumer modifies a parameter, such modification will only apply to any contracts concluded after the consumer has completed making the modifications, either immediately or from a future date specified by the consumer.

(4) A digital assistant must allow a consumer to access a current or historic record of the parameters and give the consumer the option to receive a copy on a durable medium.

(5) When the consumer uses their digital assistant for the first time, the digital assistant's user interface must display a list of all the parameters used by the digital assistant and allow the consumer to review and adjust these. Any default settings must be highlighted. Default parameters that cannot be changed by the consumer must be clearly identified and an explanation must be provided within the user interface on request.

### Commentary

A key guiding principle for the ELI DACC Model Rules is that consumers must be able to retain some control over the operation of their digital assistants. One aspect of retaining control is that a consumer should be able to set a variety

of parameters that will be used by the digital assistant in performing its function. The objective is to steer the actions of the digital assistant and to ensure that contracts concluded through the digital assistant are in accordance with the consumer's wishes. The ability of the consumer to select and modify certain parameters embodies an idea of control over the digital assistant's operation that also has relevance for the scope of the attribution provision in **Article 22**.

This Article establishes several minimum requirements regarding parameters which all digital assistants must meet. Depending on the type of digital assistant and its intended uses, it may be necessary for the consumer to set additional parameters, such as usernames and passwords to access the consumer's account on some websites, or the consumer's payment details. Such additional parameters would be a matter for each creator of a digital assistant to consider as part of the design of their digital assistant.

**Paragraph (1)** contains the general requirement that a consumer must be able to select and modify a range of parameters. In addition, a consumer must be able to specify their relative importance. For example, a consumer might prefer a supplier with a better reputation over one that offers the lowest price.

Whilst one can imagine a wide range of different parameters, there are certain core parameters which should always be available, except where the particular digital assistant renders some irrelevant (eg, where an integrated digital assistant in a coffee maker will only be used to reorder coffee pods from the designated supplier of coffee pods). These parameters should be regarded as the absolute minimum, and one would expect there to be many more parameters to provide a more granular ability for fine-tuning the actions of the digital assistant.

The parameters identified in **paragraph (1)** cover:

- (a) The price range, price criteria, and other price elements, as well as any other counter-performance. An example of a price range would

be that a consumer might specify that a monthly wine order should cost between €60 and €90 only. Other price elements can include taxes, for example.

(b) A digital assistant that can be deployed for a wide range of different contracts should allow a consumer to specify which products or services can be contracted for. For example, a consumer might specify which grocery items should be included in a weekly supermarket shop. In addition, a consumer might have requirements regarding specific ingredients (eg, where the consumer is gluten-intolerant or has a nut allergy) or particular dietary requirements.

(c) A consumer may wish to specify the business or businesses with whom they wish to enter into contractual relations, whether by name or characteristics. For instance, a consumer might prefer specific supermarkets for their groceries, and dislike others; or a consumer might wish to specify or exclude certain brands.

(d) Ratings and reviews can offer useful information/data about products and services, or their suppliers. A consumer should be able to specify whether ratings should be taken into account, and, if so, whether a minimum value should apply.

(e) Article 6 requires the functionality to prevent the conclusion of a contract. This includes the possibility for a consumer to object to the conclusion of a contract during a short time window (see Article 6(2)(b)). A consumer should be able to specify how long that time window should last. The maximum duration might be limited to avoid long delays between alerting the consumer and the consumer making a decision.

(f) With regard to delivery arrangements and times, a consumer might have a preferred delivery day or time of day when deliveries should be made.

(g) A consumer might be concerned about the location of the business, eg, to avoid having to pay import taxes or customs duties, or because the consumer does not wish to purchase goods from suppliers in a particular country or region.

(h) Consumers are increasingly concerned about sustainable consumption and production, and are encouraged to act in sustainable manner. This might include matters such as only ordering organically-produced goods, fair trade goods or similar.

For particular types of digital assistant, other parameters might also be appropriate. Some of these might be preset or be left for the consumer to set before deploying their digital assistant.

In addition, some digital assistants will develop a user profile of the consumer and adjust their actions with reference to that profile. Such profiling is common, although this practice raises questions about the use of personal data. Data protection legislation in the EU and UK provides some limits on the ability to use profiles for automated actions where these have legal effects for a person (see Article 22 GDPR/UK-GPDR). The use of profiling based on personal data by a digital assistant has to be consistent with such requirements. **Paragraph (2)(a)** of this Article requires that a digital assistant must have the functionality to allow a consumer to review and modify the profile developed by the digital assistant. The functionality to review means that the consumer should be able to see the different criteria used for creating their profile and to see the values given to each of these criteria. Where they are incorrect, a consumer should be able to modify the relevant criteria. In addition to this, **paragraph (2)(b)** requires the possibility of disabling the use of the profile altogether.

*Illustration:*

*C, a law professor in his late 40s, is very interested in certain types of classical music and literature. The digital assistant erroneously defines C as a retired senior citizen and books travel tickets reserved for persons over the age of 65. C should be able to correct this information in their user profile.*

Parameters can be set both before initial deployment or revised at a later point. When parameters are modified after deployment, clarity is needed as to the point when modified

parameters will apply. The purpose of **paragraph (3)** is to clarify that modifications of parameters do not have a retroactive effect on contracts already concluded. Any modifications will only be applied prospectively, and the date for any changes to the parameters to be applied should be chosen by the consumer.

**Paragraph (4)** requires that a digital assistant can give a consumer access to both current parameter settings and any historic settings. This requires the digital assistant to be programmed with a logging function that records any changes to the parameters. In addition to the current settings, a consumer should be able to track how settings have been changed over time; hence the reference to 'historic' parameters. Information about historic settings might be required eg, in the context of legal action regarding the enforceability of a contract concluded through a digital assistant. The purpose of this requirement is to allow a consumer to consider the parameter settings that led to particular contracts. This may be relevant in the case of disputes regarding a contract. However, **paragraph (4)** does not require the portability of parameter settings between digital assistants. It is too early in the development of the digital assistant market to see a clear need for such a rule: this issue should be reconsidered at a point when parameter portability is technologically practicable, and necessary to allow consumers to change their digital assistants easily.

A consumer can be granted access to the parameters with the digital assistant as well as being supplied by system messages. Other methods might include the provision of this information by email, text message or other communication method. On request, a copy should be supplied to the consumer on a durable medium.

Finally, **paragraph (5)** contains a specific 'start-up' rule for when the consumer uses their digital assistant for the first time. Before the digital assistant can be activated, a consumer must be directed to all the parameters that will be used by the digital assistant in order to review and adjust these. In particular, any default settings must be highlighted to alert the consumer to

these default settings. Consumers should be able to adjust parameters which have default settings, except where the particular business model for the digital assistant means that some parameters cannot be changed. Such parameters should be highlighted separately and an explanation of these settings and why they cannot be altered must be given.

## Article 6: Functionality for preventing the conclusion of a contract

- (1) A digital assistant which can be used by consumers for concluding contracts must allow a consumer to prevent the conclusion of a contract through appropriate parameters in the digital assistant's user interface.
- (2) In particular, the digital assistant must give the consumer at least the choice of:
  - (a) requiring the consumer's express confirmation before an order is placed (*confirmation model*); or
  - (b) requiring a short period of time to give the consumer an opportunity to prevent the placing of an order (*objection model*).
- (3) The digital assistant must also permit the consumer to opt out of either confirmation or objection for specified transactions, based on any of the parameters set out in Article 5(1).
- (4) The digital assistant may offer the consumer the choice to require confirmation of specified transactions and objection for others, based on any of the parameters set out in Article 5(1).
- (5) Where the digital assistant has the functionality to receive information provided by the business and transmit this, or an accurate summary thereof, to the consumer, such information must be made available to the consumer before the relevant order is placed and in sufficient time for the consumer to use the functionality to prevent the conclusion of the contract.

## Commentary

One of the Guiding Principles underpinning the ELI DACC Model Rules is that a consumer must retain ultimate control over the operation of their digital assistants. Whilst this does not mean that a consumer needs to be actively involved in every action taken by a digital assistant, there should be the potential to intervene where the consumer wishes to do so. This ability to control or intervene in the operation is embodied in several provisions in these Model Rules. This Article is central as it directly entitles the consumer to prevent the conclusion of the contract by the digital assistant in several ways. Although the idea of automation presumes that the consumer is willing to enjoy the benefits of using a digital assistant in terms of time, available options, contract conditions, or ability to process, compare, and review information, the consumer should decide how to control its operation in concluding contracts and when and how to intervene (confirmation, objection, no intervention).

A key aspect of this is that a consumer should be able to prevent the conclusion of a contract that would otherwise be concluded through the actions of the digital assistant. Every digital assistant that can be used by consumers for the conclusion of contracts must contain this functionality (**paragraph (1)**). **Paragraph (2)** requires that a consumer must have the choice between requiring the active approval of an order before it is placed ('confirmation model') or alternatively to prevent the placing of an order ('objection model') for a short period of time before it is placed. The period of time should generally be a few minutes rather than hours, although a consumer should be able to set the duration through a parameter in the digital assistant's user interface. Furthermore, the choice between confirmation and objection could be a global parameter applicable to all contracts concluded through the digital

assistant. Alternatively, the digital assistant might allow the parameter to be set differently depending on the nature of the transaction in question (eg, by requiring confirmation of all contracts with a value of more than €100, but relying on the objection model for all contracts below that value).

**Paragraph (2)** refers to the placing of an order, rather than the conclusion of a contract. Here, the ELI DACC Model Rules borrow the language used in Articles 10 and 11 of the EU's E-Commerce Directive (2000/31/EC).<sup>24</sup> The types of digital assistants that are most likely to emerge will be designed for contracts concluded digitally/online, where the final step taken by a consumer is generally the placing of an order. Focusing on the placing of the order therefore ensures that the consumer's intervention happens at the point where the digital assistant is about to place an order rather than the conclusion of the contract; the conclusion of the contract might only happen at a later point (eg, when goods ordered are despatched).

It is important to appreciate that the 'objection model', ie, action to prevent the placing of an order (**paragraph (2)(b)**) is not the same as a right of withdrawal. A right of withdrawal applies in respect of a contract which has already been concluded, whereas the 'objection model' enables a consumer to prevent the placing of an order and thus the conclusion of a contract in the first place. The contractual consequences of not objecting during the brief period are dealt with in **Article 24**.

The ability to prevent the conclusion of a contract is consistent with the underlying principle that a consumer should retain control, but there are some contracts where the interjection of a confirmation or objection stage might be unnecessarily cumbersome for a consumer. For instance, where a digital assistant is tasked with arranging transport to an airport

<sup>24</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (2000) OJ L 178/1.

immediately, the consumer should be able to dispense with the requirement to confirm or object to the conclusion of the relevant contract. **Paragraph (3)** therefore requires the additional functionality to enable certain contracts to proceed immediately. In addition to the taxi example, this might also be relevant in other urgent or time-sensitive situations, or where the contract is one where the price for the goods or services in question is highly volatile. A consumer might again be given the option to set a global parameter (all taxi bookings do not require confirmation or objection), or this might be set on a contract-by-contract basis.

A consumer may decide that confirmation should be required for some contracts, but the opportunity to prevent the placing of an order would suffice for other contracts. **Paragraph (4)** recognises that the choice between the confirmation and objection models could be set differently. For instance, the confirmation requirement might be triggered when the contract exceeds a certain value, whereas contracts below that value might be subject to the objection model.

One important element in deciding whether to confirm or object to the placing of an order is that the consumer has relevant information available to them to assist in making their decision. Some digital assistants might be able to retain relevant pre-contractual information in a format that could be made available to a consumer, or at least an accurate summary of that information, although not every digital assistant necessarily might do so. Over time, all digital assistants will be able to receive and forward such information. However, at this time, there should not yet be a requirement for a digital assistant to have the functionality to preserve and transmit information provided by a business in a way that consumers can access, because the way in which the algorithms underpinning a digital assistant process that information, and therefore which elements of the information are utilised, is likely to be significantly different from the way in which consumers utilise information. However, where a digital assistant has the functionality to transmit information provided by a business, or at least an accurate summary thereof, to the consumer,

**paragraph (5)** requires that this information is made available to the consumer in sufficient time before the relevant order is placed. The requirement in this paragraph is simply to make the information available, ie, the consumer should be able to view this information if they wish before deciding whether to prevent the conclusion of the contract. One way of doing so might be to provide a digital button or similar as part of a pop-up message alerting the consumer to a new order the digital assistant is about to place.

**Article 6** focuses solely on the possibility of preventing the *conclusion* of a contract through the objection and confirmation functionalities. It does not, at present, extend to any variations to the contract during its performance. A possible future addition to these Model Rules could be an article addressing contract modifications during the performance stage. **Article 6** focuses on the particular point of placing an order and therefore the conclusion of a contract and it is in this regard that a design requirement is more essential at this stage of technological development.

## Article 7: Functionality to deactivate the digital assistant temporarily or permanently

- (1) A digital assistant intended for use by consumers must allow the consumer to deactivate the digital assistant temporarily or permanently.
- (2) The deactivation function must be clearly identifiable in the digital assistant's user interface and easily accessible to a consumer.
- (3) The main functionality of a product which incorporates a digital assistant must not be restricted if a consumer deactivates the digital assistant, except where the main functionality of the product is to provide the digital assistant to a consumer.

## Commentary

One of the ways in which consumers can retain control over their digital assistants is by deactivating them. The purpose of deactivation is to suspend the operation of the digital assistant. A consumer might wish to do so for various reasons, eg, to stop contracts from being concluded whilst the consumer is away on vacation, because the consumer is moving homes, or because the consumer simply wishes to take a break from allowing their digital assistants to conclude contracts for them. In addition, the possibility to deactivate a digital assistant can also serve as an emergency brake in situations where the digital assistant has not worked as expected by the consumer.

The purpose of **Article 7** is to require the functionality to temporarily or permanently deactivate to be part of every digital assistant's design (**paragraph (1)**). Where the digital assistant is integrated into a physical product, deactivating must not have the effect of disabling other functionalities ('bricking'); for example, a fridge with an integrated digital assistant should continue to chill food when the digital assistant is deactivated (**paragraph (3)**). However, where the main functionality of the product is simply to make the digital assistant available to consumers, **paragraph 3** does not apply, because deactivation of the digital assistants would involve deactivating the main functionality of the product.

In order to ensure that a consumer can easily deactivate the digital assistant, the deactivation function has to be clearly identifiable in the digital assistant's user interface. This means that it must be easily found by the consumer and must not be located such that it would take unnecessary steps, or too many steps, to find the function. In the case of a physical device with an integrated digital assistant, a manual 'off' button could be provided that deactivates the digital assistant when pressed.

This Article is only concerned with the technical provision of the functionality for deactivation. The contractual aspects of deactivation are addressed in **Article 13**.

## Article 8: Functionality for disclosure

- (1) A digital assistant used by a consumer or a business for its contractual relations must disclose that the digital assistant is used.
- (2) A digital assistant used by a consumer must additionally disclose that it is used by a consumer.
- (3) A digital assistant intended for use by consumers must disclose the identity of the supplier of the digital assistant, at the request of a business involved in contractual relations with a consumer made through the digital assistant.

## Commentary

This design requirement applies to all digital assistants, irrespective of whether they are intended for use by consumers or by businesses. Whilst **Article 3** generally grants a broad right to use digital assistants, neither a consumer nor a business should be unaware that they are dealing with a digital assistant. **Article 19** provides for a general obligation to disclose in respect of the use of a digital assistant by both consumers and businesses. In practical terms, such a disclosure is best dealt with through technological means. This will be particularly so because many contracts concluded through the use of a digital assistant will be concluded electronically and are unlikely to involve human interactions at any point in the contracting process.

**Paragraph (1)** of this Article therefore requires that digital assistants must have the functionality to disclose that a digital assistant is being used. This will be important because a number of obligations of a business flow from the fact that the consumer is using a digital assistant. Similarly, a consumer might wish to know that they are dealing with a digital assistant. In addition to stipulating the general obligation to disclose the use of a digital assistant, **Article 19** deals with the implications of non-disclosure, as well as providing for an exception to this duty where the use of the digital assistant is obvious

to a reasonable person in the circumstances in which the contract is concluded.

In addition, **paragraph (2)** requires that where the digital assistant is used by a consumer, the digital assistant must disclose that it is used by a consumer. This could most likely be enabled through the inclusion of an appropriate default parameter in the digital assistant's user interface that the user is a consumer. Such a functionality will enable a business to comply with relevant consumer law obligations, both in respect of the use by a consumer of a digital assistant and all other relevant aspects of consumer law.

**Paragraph (3)** applies to digital assistants intended for use by consumers only and requires that there is the functionality allowing for the disclosure of the details about the supplier of the digital assistant to a business in contractual relations with a consumer established through the use of the consumer's digital assistant. This functionality is needed for the practical operation of **Article 25** of these Model Rules, dealing with compensation for a business which has suffered a loss due to the application of **Article 22(2)** (non-attribution of actions beyond the consumer's reasonable expectations).

## Article 9: Non-manipulation of consumers when using a digital assistant

Digital assistants must be designed or operated in a way that does not manipulate a consumer, nor otherwise materially distort or impair the ability of a consumer to make free and informed choices or decisions.

### Commentary

This is a general design requirement for all digital assistants, consistent with obligations in consumer law not to manipulate consumers. Such manipulation can be the result of misleading a

consumer, exerting pressure, or using particular means to steer a consumer towards taking a particular action. This Article provides for a general obligation to design digital assistants in such a way that they do not manipulate consumers, nor otherwise materially distort or impair the ability of a consumer to make free and informed decisions. This obligation is consistent with the guiding principle that consumers must retain ultimate control over their digital assistants. In order to ensure that consumers can retain control, there must not be any attempt to deceive or manipulate the consumer when using their digital assistant.

This Article is intended to cover a wide range of instances when there is a risk of manipulation. In particular, it covers all aspects of the consumer's interactions with their digital assistant, including the process of setting-up or modifying the parameters which are to be used by the digital assistant in performing its actions. A digital assistant should also not deceive or manipulate a consumer in other ways, eg, when deciding on whether to stop the conclusion of a contract.

Manipulation can take a variety of forms, including limiting the choices available to a consumer but also some forms of personalisation and dynamic pricing. This Article does not list specific instances of manipulation to ensure that this Article covers any form of manipulation which might be attempted.

This requirement links with **Article 12** on the disclosure of conflicts of interests. An undisclosed conflict of interests could be a form of manipulation, but disclosure would mean that a consumer can make an informed decision in light of the disclosure.

## Article 10: Documentation of decision-making

- (1) Digital assistants must be designed to document how a particular decision by the digital assistant was made.

(2) A decision can be documented by either:

- (i) a text which summarises the decision-making process;
- (ii) a meaningful list of sources consulted in reaching that decision; or
- (iii) any other evidence documenting how a particular decision was made.

(3) The documentation must be sufficient to enable a consumer to follow how a decision was made.

### **Commentary**

A concern with algorithmic technologies, particularly deep learning technologies, is that the decision-making process is opaque. There are efforts to improve transparency by adding an element of explainability into algorithmic decision-making systems.

The purpose of this Article is to require the inclusion of functionality that allows for some degree of documentation of the decision-making process to allow a consumer to follow how a decision was made (**paragraphs (1) and (3)**). Inevitably, the technological feasibility and extent of such documentation will depend on the state of the art.

As the documentation of the decision-making process can take a variety of forms, **paragraph (2)** lists several different ways in which the requirement of **paragraph (1)** could be met. A key criterion for determining the most appropriate method to be used is that this should enable the *ex post* validation of the decision-making process, eg, in the context of legal proceedings, by consulting the various sources given.

However, a requirement to document sources must not be understood as implying that everything that is derived from such sources is objectively accurate information.

The documentation required by **paragraph (1)** should only have to be provided on request rather than automatically for every action taken by the digital assistant.

# Chapter 3: Contracts for the Supply of a Digital Assistant

## Article 11: Information to be provided to consumers

- (1) Information, including contract terms, must be provided in a plain and intelligible manner.
- (2) In good time before concluding a contract for the supply of a digital assistant, the supplier must provide the following information to the consumer, along with any other information to be provided by the supplier under the applicable law:
  - (a) the main characteristics of the digital assistant, including its adaptive capability;
  - (b) any default settings or parameters at the time of supplying the digital assistant to the consumer;
  - (c) the functionalities to prevent the conclusion of a contract and to deactivate a digital assistant.
  - (d) the extent to which a consumer is able to select settings or parameters for use in contracts with a business after the digital assistant has been supplied;
  - (e) whether the digital assistant will give exclusive or preferential treatment to certain products or businesses, and, if so, the criteria for such treatment and their respective weight;
  - (f) whether information from a business will be provided to the consumer where such information was made available to the digital assistant;
  - (g) the price the consumer has to pay for the digital assistant;
- (h) if applicable, any recurring payments the consumer must make for the use of the digital assistant, and their frequency; and
- (i) that any contract concluded with a business through a digital assistant is between the consumer and that business only.

- (3) From the moment the digital assistant is supplied to the consumer and thereafter, the following must be available:
  - (a) instructions for deactivating the digital assistant temporarily or permanently;
  - (b) information as to how a consumer can manage any contracts concluded with a business involving recurring obligations (eg, subscription contracts); and
  - (c) information about the digital assistant's functionality to prevent the conclusion of a contract, how the consumer will be notified about an impending contract, and how the controls can be exercised.
- (4) Information required by this Article to be provided becomes a term of the contract between the supplier and consumer.
- (5) The supplier of the digital assistant bears the burden of proof that the information required by this Article has been provided to the consumer.

### Commentary

This Article lays down a number of requirements regarding the transparency of a contract for the supply of the digital assistant and of pre-contractual information to be given to a consumer before entering into the contract for the supply of the digital assistant.

First, **paragraph (1)** requires that both the terms of the contract and any information provided to the consumer must be provided in a plain and intelligible manner. Requirements of this type are

common in many legal systems, although the precise requirement varies. Article 14(1) of the EU's Digital Services Act is the most extensive, requiring 'clear, plain, intelligible, user-friendly and unambiguous language'. Here, the shorter phrase 'plain and intelligible' is used. This entails that terms and information should be uncomplicated, not require detailed specialist knowledge to understand them, not contain any ambiguity or vagueness, and be easy to navigate by a consumer. A consumer who is provided with this information should be able to access it, understand it and be able to act in light of this information. To assess whether the contract terms or information provided satisfy these requirements, an objective benchmark should be applied. The precise form of this benchmark will depend on the jurisdiction enacting legislation based on these Model Rules; in EU law, for example, this might be the average consumer; whereas elsewhere, it could be a 'reasonable person', 'reasonable consumer' or 'typical consumer'. The Model Rules do not assume a specific objective benchmark.

**Paragraph (2)** then sets out several pre-contractual information requirements specific to digital assistants. These must be provided 'in good time' before the conclusion of the contract, ie, there needs to be a reasonable time interval between the provision of the information and the conclusion of the contract to read and consider all the information.

Generally, the items listed in this paragraph are in addition to any information duties which are already required under the applicable law; both should therefore be read together.

- (a) This is a general requirement that seeks to capture any main characteristics not already required by any of the subsequent paragraphs. In addition, the 'adaptive capability' of the digital assistant is singled out. This follows the definitions used eg, in the OECD Guidelines and in Article 3(1) of the EU's AI Act, and is intended to refer to the 'self-learning' capacity of digital assistants relying on deep learning AI technology. Disclosure of this is particularly important for **Article 22, paragraphs (2) and (3)**.

- (b) Where a digital assistant comes with pre-set parameters, their existence and settings must be disclosed to the consumer.
- (c) A consumer should be informed about how to deactivate the digital assistant (see also **Article 7** and **Article 13**), as well as how any continuing contracts such as subscription contracts can be managed through the digital assistant; in addition, information should be given about how a consumer can stop the conclusion of a contract (see **Article 6**) including how a consumer will be alerted to the imminent conclusion of a contract and the process for stopping its conclusion.
- (d) In addition, consumers will be able to adjust parameters, but the number of parameters and extent of their adjustability will depend on the type of digital assistant. Information about this should be provided so a consumer is aware of the degree of control they can exercise over the digital assistant's operations.
- (e) Some digital assistants might be set up to select preferred suppliers (eg a particular supermarket for regular grocery orders; a particular supplier of coffee pods for a coffee machine and so on). Where this is the case, it must be disclosed, together with the criteria for establishing such preferences and the weight given to these criteria.
- (f) When information has to be provided by a business and when further information is given voluntarily by a business, a digital assistant might have the functionality to record and transmit such information to the consumer. Where this is the case, a consumer should be informed about this, including where to access that information (see also **Article 6(5)** and **Article 21**)
- (g/h) A consumer might either pay the price as one single payment or make recurring payments for the supply and continued use of the digital assistant (eg, on the basis of a subscription contract). Such payments must be clearly disclosed to the consumer before entering into the contract for the supply of the digital assistant. They must include not only the baseline price, but all additional costs and taxes.

(i) Finally, this item requires information that the supplier of a digital assistant will not be a party to any contract concluded through the digital assistant with other businesses and consequently incur no contractual liability in respect of those contracts. A digital assistant is not a separate legal entity but merely a tool for automating the consumer's contractual relationship.

Additional information has to be provided under **paragraph (3)**. This information does not have to be provided before the contract is concluded but must be provided as soon as the digital assistant is supplied to the consumer and must continue to be available to the consumer throughout the time the digital assistant is used by the consumer. Both elements concern the use of the digital assistant and could be understood as user instructions. Thus, **paragraph (a)** requires instructions about the deactivation of the digital assistant (see also **Articles 7** and **13**) are provided. Furthermore, **paragraph (b) requires that** instructions about how contracts with recurring obligations can be managed through the digital assistant are given. This element is relevant eg, for subscription contracts. In addition, **paragraph (c)** requires instructions on how the consumer can prevent the conclusion of a contract (see **Article 6**), including how any alerts will be issued to the consumer (a pop-up notification on their smartphone, an alarm on a smart device or similar), and how the consumer can prevent or confirm, as the case may be, that a contract should be concluded.

Finally, **paragraphs (4) and (5)** provide supplementary rules. All the information given under **paragraphs (2) and (3)** become terms of the contract for the supply of the digital assistant. Any inconsistency in that information with the digital assistant could give rise to a claim for breach of contract (compare eg, Article 6(5) of the Consumer Rights Directive (2011/83/EU)). It also entails that any variation to the information after the conclusion of the contract for the supply of the digital assistant would be a variation of the contract and require the consumer's awareness of, and agreement to, this change.

Furthermore, the burden of proving that the information required by **paragraphs (2) and (3)** has been provided is placed on the supplier, ie, it is not for the consumer to prove that the information was not provided but instead for the supplier to prove that it was provided (when a consumer claims that it was not).

## Article 12: Disclosure of conflict of interests

- (1) Where applicable, the supplier of the digital assistant must disclose to the consumer that the operation of the digital assistant involves a conflict of the consumer's interests with those of other persons that could impact the prioritisation of the consumer's interests.
- (2) Such disclosure must be
  - (a) made before the contract for the supply of the digital assistant is concluded; and
  - (b) given separately from other information required to be given by the supplier.
- (3) The disclosure must include an explanation about the nature of the potential conflict of interests and how the respective interests of the consumer and other persons are prioritised by the digital assistant.
- (4) Where a conflict of interests referred to in paragraph (1) arises after the contract for the supply of the digital assistant has been concluded, the supplier of the digital assistant must disclose this to the consumer without undue delay. For a period of 14 days after receiving such disclosure, the consumer has the right to end the contract for the supply of the digital assistant without penalty and without incurring any further liability under the contract for the supply of the digital assistant.
- (5) Where a conflict of interests is not disclosed in accordance with paragraphs (1) to (4) but the consumer discovers that there is a conflict of interest, the consumer has the right to terminate the contract for the supply of the digital assistant

without penalty and without incurring any further liability under the contract for the supply of the digital assistant.

### Commentary

Some digital assistants might be designed as a single service for several parties, which could result in the same digital assistant acting in contractual relations on the side of both consumer and business. This could arise, for instance, on an online marketplace platform. Where this occurs, there is a conflict of interest between a consumer and the businesses connected through the same digital assistant. Such a conflict could be managed through appropriate programming of the digital assistant, but a provision is needed for instances where such a conflict of interests materialises. Another type of conflict of interest arises if the digital assistant receives incentives from certain businesses and thus adjust its algorithms to prefer those business when assisting the consumer in their contracting. Such a potential conflict of interests between the consumer and the supplier of the digital assistant should be disclosed so the consumer can take this into consideration when deciding whether to use the digital assistant.

A number of possible approaches for such a rule could be considered. Although one might think that no such rule is required, this was regarded to not be the case for these Model Rules as the risk that such situations could arise is real and, where they do materialise, could be detrimental to consumers. Whilst the outright prohibition of any conflicts of interests would meet the desire to attain high levels of consumer protection, it could also produce a stifling effect on the development of the market for digital assistants for consumers' contractual relations.

The ELI DACC Model Rules therefore adopt an intermediate solution requiring clear disclosure to ensure that a consumer is alerted to the possibility of a conflict of interests (**paragraph (1)**). This obligation is imposed on the supplier. **Paragraph (2)** stipulates that such information must be given before a contract for the supply of a digital assistant is made, and that it should be provided separately from any other pre-contractual information requirements (see

**Article 11**). Although one might consider adding a requirement that a consumer must positively acknowledge the information or give their consent, it was concluded that this was not necessary as a consumer can decide whether to proceed with using such a digital assistant or not.

In addition to the requirements of **paragraph (2)**, **paragraph (3)** fleshes out the disclosure requirement. Thus, the disclosure has to explain what the nature of the conflict of interests is, and it must also explain how the digital assistant would prioritise the respective interests of the consumer and any other persons relative to one another. This seeks to ensure that the consumer is not only made aware of the existence of a conflict of interests, but also about the nature of the conflict and how it might affect their position if they decided to proceed with using the digital assistant.

At this stage in the development of the market for digital assistants, this is the most appropriate solution. The possibility of such conflicts must be recognised and not overlooked, but until there is some experience with digital assistants, it would be premature to establish a more rigorous rule.

In addition, **paragraph (4)** addresses the situation where the conflict of interests only becomes apparent after the contract for the supply of the digital assistant has been concluded. This may happen because a conflict was not apparent at the time of contracting, or because the circumstances at the time of concluding the contract have changed and a conflict has now arisen or will arise within a foreseeable period (eg, prospective changes to be made to the operation of a digital assistant). Consistent with the disclosure approach adopted in this Article, the consumer can decide whether they wish to continue with the contract in light of the conflict now disclosed, or they can decide to end the contract without penalty within a period of 14 days. Disclosure under **paragraph (4)** must be in accordance with **paragraph (3)**.

**Paragraph (5)** provides for the consequences of not disclosing a conflict of interests as required by **paragraphs (1)–(4)**. The applicable law can provide any limitations to the right to terminate,

eg, by requiring its exercise within a period starting on the date when the consumer first knew, or ought reasonably to have known, of the conflict of interests.

## Article 13: Deactivation of the digital assistant

- (1) A consumer has a right to deactivate a digital assistant temporarily or permanently.
- (2) A consumer deactivating a digital assistant must not be charged for doing so in addition to any regular payment for the digital assistant (if applicable).
- (3) A term in the contract for the supply of the digital assistant which directly or indirectly prohibits the deactivation of the digital assistant by the consumer or imposes any charges on the consumer who does so is not binding on the consumer.
- (4) The contract for the supply of the digital assistant remains in force notwithstanding the deactivation of the digital assistant.
- (5) Subject to rules in the applicable consumer law and contract law regarding contract modifications, any modifications made to the contract for the supply of the digital assistant during the period of deactivation are binding on a consumer and will apply to the use of the digital assistant on reactivation.

### Commentary

This Article supplements the design requirement in **Article 7** (functionality to deactivate the digital assistant temporarily or permanently) by addressing the contractual consequences of utilising this functionality. First, **paragraph (1)** confirms that a consumer has the right to deactivate a digital assistant temporarily or permanently. Possible attempts to make it more difficult to exercise this right, or restrict/exclude it, are addressed in **paragraphs (2) and (3)**. First, **paragraph (2)** states that the consumer must not

be charged specifically for exercising the right to deactivate their digital assistant. 'Charge' is to be understood broadly as any payment directly resulting from the deactivation, regardless of how this is described in the supplier's terms and conditions (eg, a deactivation fee, administrative fee or similar). It is recognised that a consumer might be under a contractual obligation to make regular payments for the digital assistant (eg, where this is provided on a subscription basis) and that the obligation to continue to make such payments is not affected by the deactivation. This does not preclude the inclusion of terms in the contract which modify or suspend the consumer's payment obligation as long as such a term is not detrimental to the consumer.

Secondly, **paragraph (3)** addresses the inclusion of a term in the contract for the supply of the digital assistant that would prohibit the deactivation of the digital assistant and of a term which imposes any additional charges for doing so on the consumer. In either case, such terms are not binding on the consumer, ie, do not create a legal obligation on the consumer and cannot be enforced against that consumer. This paragraph would cover terms which have the effect of directly or indirectly prohibiting the deactivation and would also cover terms which are phrased different but have the same effect.

### Illustration:

*A term in the contract for the supply of C's digital assistant obliges C to allow the digital assistant to make regular purchases at least once a week, and imposes a fee of €25 for each week when no contract is concluded. Such a term would be caught by paragraph (3) and would not be binding on the consumer.*

Furthermore, **paragraph (4)** clarifies that where the contract for the supply of the digital assistant is a continuing contract such as a subscription contract, that contract is not affected by the consumer's decision to deactivate the digital assistant, ie, the contract continues in force. This might be relevant for recurring payments such as monthly subscription charges, as well as the ability to update the digital assistant notwithstanding its deactivation.

Finally, **paragraph (5)** confirms that a subsequent reactivation of a digital assistant (where the deactivation was temporary only) will be on the basis of the contract terms which are applicable at the time of reactivation. The terms applicable at that time will be those that would be applicable if there had been no deactivation. This means that any changes to the terms permitted under the contract and the applicable law during the period of deactivation will be binding on the consumer once the digital assistant is reactivated. This is consistent with **paragraph (4)**, according to which, the contract for the supply of the digital assistant remains in force notwithstanding its deactivation.

**Paragraph (5)** does not allow the supplier of the digital assistant to change contract terms as a form of punishment, but is only intended to ensure that if the supplier of the digital assistants makes changes in the (standard) contract terms that are the basis for the supply of the digital assistant, these changes will also apply to the consumers who have deactivated the digital assistant.

## Article 14: Conformity

Without prejudice to any other requirements regarding the conformity of digital content or services with the contract, the conformity of a digital assistant with the contract requires:

- (a) compliance with the design requirements in chapter 2 and the correct operation of the functionalities prescribed by the design requirements;
- (b) that its actions do not deviate from those which could reasonably be expected by the consumer who uses it, particularly where the operation of any adaptive functionality of the digital assistant results in actions inconsistent with any information given to the consumer about the digital assistant's adaptive functionality.

### Commentary

These are supplementary provisions to generally applicable conformity requirements. Many jurisdictions already contain specific conformity/

quality and fitness for purpose provisions on software/digital content (see Directives (EU) 2019/770 and 2019/771, or Part 1, chapter 3 of the Consumer Rights Act 2015 (UK)). Other jurisdictions have chosen to extend the scope of their laws on the conformity of goods to include software (eg, Consumer Guarantees Act 1993 (New Zealand), section 2(1), definition of 'goods' includes 'computer software'). Any jurisdiction which has yet to address this aspect could draw inspiration from the approaches taken in the EU or the UK in developing tailored provisions on the conformity of digital content/services/software.

**Article 14** does not establish a separate conformity requirement for digital assistants, but supplements existing conformity requirements by adding two specific elements that must be considered in addition to any elements already provided in general conformity requirements.

**Paragraph (a)** stipulates compliance with the design requirements in **chapter 2** as a requirement of conformity (cf **Article 4(2)**); consequently, a digital assistant which fails to provide the design features in **chapter 2** is not in conformity with the contract.

It should also be a relevant factor whether the digital assistant takes actions which could not have been reasonably expected by the consumer in light of what the consumer was told about the degree of adaptability to expect. This also relates to **Article 22(2)** on attribution and its limits. Whereas **Article 22(2)** allows a consumer to challenge an individual contract on this basis, **Article 14(b)** makes this an aspect of conformity which would allow a consumer to argue that a digital assistant is not in conformity with the contract if it regularly concludes contracts which are not within what a consumer might reasonably expect. Therefore, **Article 22** only prevents the affected contracts with third parties from becoming legally binding, whereas the effect of **Article 14(b)** is to enable a consumer to seek a remedy, including damages under **Article 16**, particularly if this is a recurring issue with a particular digital assistant.

Digital assistants must be updated in accordance with the rules applicable to digital content and

digital services. Such rules should address the impact on algorithmic contracts concluded through digital assistant when an update has been made available to the consumer but not yet installed by the consumer. If an update is crucial for the supplier of the digital assistant, eg because a parameter is no longer applicable/relevant, the consumer must be informed and given a brief notice period to allow for the update to take place. Similarly, an update could extend the range of parameters which a consumer can specify. It would also be important to require that updates must not remove any of the functionalities required by **chapter 2** of these Model Rules.

through the digital assistant.

**Paragraph (1)** establishes a general rule that a supplier is under no obligation to monitor any of the businesses with which consumers contract through the use of their digital assistants. This is consistent with 'no monitoring' obligations of service providers found elsewhere in digital law (eg, Article 8 of the EU's Digital Services Act on providers of intermediary services).

However, **paragraph (2)** contains one important exception to the general rule in **paragraph (1)**. The trigger for **paragraph (2)** is that the supplier of the digital assistant has clear and reliable information that a business will not comply with either its obligations under the applicable consumer law (including these Model Rules) or the terms of its contracts with consumers. First, this requires that the supplier has access to information that would establish that a business has repeatedly failed to comply with the law or honour the terms of its contracts. Although there might be instances where the data collected through a digital assistant reveals such problems, it might also be the case that this transpires from user feedback, complaints data or other information which the supplier becomes aware of, including reports from consumer law enforcement agencies or news media. Where such information is 'clear and reliable', a duty to warn is activated by **paragraph (2)**. The threshold for this is high, ie, it is significantly higher than the supplier having a suspicion or being aware of a potential issue. Rather, the information must be *clear*, ie, leave no room for reasonable doubt, and be *reliable*, ie, not merely anecdotal or based purely on social media posts. Furthermore, such a high threshold reduces the risk that perceived wrong incentives might encourage a supplier to investigate consumers' interactions or interfere in transactions on other grounds.

## Article 15: Supplier's duty to warn

- (1) The supplier of a digital assistant is under no obligation to monitor the businesses that become contracting parties with consumers through the use of digital assistants.
- (2) However, where the supplier has clear and reliable information that such a business has regularly failed to comply with its obligations under the applicable consumer law or the terms of its contracts with consumers, and has not taken adequate steps to prevent such failures in future, the supplier is under a duty to warn consumers about this business and to advise consumers against the conclusion of any further contracts with that business.

### Commentary

The supplier of a digital assistant will, in some instances, also monitor the performance of their digital assistants and collect data in the process. This data could be used to provide updates to improve the functionality of digital assistants, as well as about the transactions concluded through a digital assistant, how frequently a consumer acts to stop the conclusion of a contract, and how often a particular business is selected by the digital assistant. This data might also include information about the businesses with which consumers enter into contracts

The trigger point is subject to the proviso that there is no clear and reliable information that the business has taken adequate steps to prevent similar failures in the future, whether on its own initiative or as a result of action by an enforcement body. Where such information is available, then there is no need to require the supplier of the digital assistant to warn

consumers using that digital assistant about the past failures of the business in question.

The duty in **paragraph (2)** is limited to a duty to warn, rather than a duty to prevent the conclusion of further contracts with that business through the digital assistant. On receiving the warning from the supplier, a consumer can act by adjusting the parameters of their digital assistant or make contracts with the business in question subject to prior approval (cf **Article 6(2)(a)**).

## Article 16: Liability

- (1) The supplier of a digital assistant is liable to the consumer where the digital assistant is not in conformity with the contract.
- (2) The liability of the supplier includes an obligation to pay damages for losses incurred by the consumer due to a non-conformity of the digital assistant.
- (3) The conditions for claiming damages are those applicable to damages claims under the applicable law.

### Commentary

This Article is intended as a supplementary provision to remedies already available under legal rules governing the supply of digital content and services (such as Directive (EU) 2019/770 on Digital Content and Digital Services and the provisions of Directive(EU) 2019/771 regarding goods with digital elements, or Part 1, chapter 3 of the Consumer Rights Act 2015 (UK)). Its purpose is both to confirm that liability for non-conformity falls on the (contractual) supplier of the digital assistant to the consumer, and that remedies for non-conformity must include damages for the losses incurred by the consumer as a result.

**Paragraph (1)** confirms that the supplier of the digital assistant is liable to the consumer for any non-conformities. This restates what would be the usual position in most legal systems.

This Article is not an exhaustive statement of all the remedies that should be available in respect of a non-conformity of a digital assistant, because one would expect these to be provided by the general rules on liability for non-conformity of digital content and software already. However, the express reference to damages in **paragraph (2)** is required because many losses likely to result from the non-conformity of a digital assistant will be financial and, as such, pecuniary compensation must be available. This would, for instance, require an addition to the remedies provided under the EU's Digital Content Directive (2019/770), which does not provide for a right to damages. Whilst **paragraph (2)** confirms the entitlement to damages for any losses suffered as a result of the non-conformity, **paragraph (3)** leaves the conditions for claiming damages to the applicable law. Therefore, matters such as whether a damages claim should involve an enquiry into the supplier's 'fault' or simply result from the mere fact of the non-conformity suffices. Similarly, the extent of the damages that can be recovered and any limiting factors are to be decided by the applicable law. However, **paragraph (2)** requires a causal link between the non-conformity and any losses suffered.

# Chapter 4: Algorithmic Contracts

## Article 17: Legal recognition of algorithmic contracts

- (1) An algorithmic contract is not to be denied validity or enforceability solely because a digital assistant was used, irrespective of whether only one party or both parties used digital assistants.
- (2) Any action carried out by a digital assistant in respect of the contractual relations between a consumer and a business is not to be denied legal effect, validity or enforceability on the sole ground that a digital assistant was used.

### Commentary

In addition to the right to use, or not to use, a digital assistant provided for in **Article 3**, this Article ensures that the use of a digital assistant by either party, or both, does not of itself affect the validity of the contract between consumer and business (**paragraph (1)**). The same applies to any actions taken through a digital assistant in respect of the contractual relations between a consumer and business, such as the automatic termination of a contract (**paragraph (2)**).

This Article enshrines the fundamental principle of non-discrimination in respect of algorithmic contracting with the same wording used in the ELI Guiding Principles on ADM in the EU<sup>25</sup> (Guiding Principle 2) as regards automated decision-making. The formulation used in a negative form is not 'be denied validity or enforceability solely because...' follows the drafting of this central principle in UNCITRAL texts. This principle is one of the main axes of the harmonised rules on electronic commerce at an international level. With the necessary terminological adaptation to ensure

consistency (referring to the use of automated systems and the lack of review or intervention of a natural person), Article 5 MLAC affirms the legal recognition of automated contracting. As emphasised in the UNCITRAL text, this principle only prevents the denial of validity or enforceability on the sole ground that a digital assistant has been used, but it does not purport to preclude any other ground for invalidity under the applicable law. A corresponding provision is also found in Principle 3(1) PAIC, according to which, a contract should not be denied validity or enforceability solely because it was concluded through electronic agents.

## Article 18: Application of consumer law

Consumer law applies to any contract concluded between a consumer and a business, irrespective of whether the consumer, the business or both parties use a digital assistant for their contractual relations.

### Commentary

This Article confirms that the use of a digital assistant by either party to a contract between a business and a consumer does not affect the treatment of that contract as one to which consumer law applies. Algorithmic contracts where one party is a consumer are consumer contracts. The legal effects of the contract are attributed to the consumer. This flows from the principle of attribution of the legal effects of a digital assistant's actions (see **Article 22(1)**). The protective rules of consumer law continue to protect the person to whom the legal effects of the contract are attributed or whose legal

<sup>25</sup> European Law Institute, *Guiding Principles for Automated Decision-Making in the EU* (Vienna, 2022). <[https://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_elis/Publications/ELI\\_Innovation\\_Paper\\_on\\_Guiding\\_Principles\\_forADM\\_in\\_the\\_EU.pdf](https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_elis/Publications/ELI_Innovation_Paper_on_Guiding_Principles_forADM_in_the_EU.pdf)>, accessed on 14 May 2025.

status or contractual status is affected. Thus, the application of the consumer protection regimes should not be affected by the fact that a consumer has used a digital assistant. Indeed, it seems undesirable that a person should no longer be treated as a consumer for the sole reason that they were assisted by a digital assistant.

A corollary of the continued application of consumer law based on the status of the parties to the algorithmic contract rather than how that contract was concluded is that the obligations of a business under the applicable consumer law are not affected by the fact that a consumer does or does not use a digital assistant. Not only will the functionality of each digital assistant vary, but one might also anticipate that digital assistants designed to be deployed by consumers are developed considering the obligations on a business.

A business cannot seek to evade responsibility for actions taken by 'their' digital assistant which infringed consumer law, and which are attributed to the business by virtue of **Article 22(1)** merely because the breach of consumer law was the result of the decisions made by the digital assistant (see also **Article 22(4)**).

It can be noted that a similar approach was adopted in Principle 13 of the ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection.

## Article 19: Disclosing the use of a digital assistant

- (1) Where a digital assistant does not include the functionality required by Article 8, a person who uses that digital assistant for their contractual relations with another person must inform the other person in a clear and intelligible manner at the beginning of their interaction about the fact that a digital assistant is used, and, in the case of a digital assistant used by a consumer, that it is used by a consumer.
- (2) Where a contract has been concluded between a consumer and a business, but the business using

a digital assistant has not disclosed its use in accordance with paragraph (1), and the consumer demonstrates that they would not have entered into the contract had such disclosure been made, the consumer has the right to cancel that contract. A consumer who exercises this right to cancel will incur no liability, including for non-performance, subject to either party's entitlement to receive back any performance that was already rendered before the contract was cancelled.

- (3) A business will not have to comply with any specific duties in respect of interactions with the digital assistant used by a consumer where the use of the digital assistant by the consumer was not disclosed.
- (4) Paragraphs (1)–(3) do not apply where the use of a digital assistant is obvious to a reasonable person in the circumstances.

### Commentary

This Article requires disclosure by either party, although only if the digital assistant used by a party does not already contain an appropriate functionality to disclose that it is being used, as required by **Article 8**. In practice, assuming that digital assistants have that functionality, this obligation will rarely apply to consumers. However, if a consumer is using a digital assistant which, for whatever reason, does not provide this functionality, then disclosure is required. This includes the additional obligation for the consumer to disclose that the digital assistant is being used by a consumer. This mostly matters insofar as a business would be under specific obligations when a consumer uses a digital assistant, whether under the ELI DACC Model Rules (eg, **Article 20**) or under the applicable law (for example, see the comments on **Article 1** in respect of the application of the EU's DSA or DMA to digital assistants in certain instances).

In contrast, Principle 12 of the PAIC only provides that if a party does not disclose that it is using an electronic agent, that party shall bear the risks resulting from the fact that the electronic agent's capabilities fall short of those of a human performing the same tasks. The PAIC, however, accept that a duty to disclose may follow from applicable regulation.

**Paragraph (2)** focuses on the position of a consumer who concluded a contract with a business but did not realise the business was using a digital assistant. In such a case, the consumer is able to cancel the contract (comparable to a right to avoid, or set aside a contract) but only if the consumer can demonstrate that they would not have entered into the contract if the use of the digital assistant had been disclosed by the business. The burden of proof falls on the consumer, ie, the consumer has to make the case that they would not have entered into the contract. It was discussed whether this burden should be reversed, but it was decided that this was not appropriate in this instance because the legal right envisaged here is generous to a consumer.

*Illustration:*

*C does not use computers or smartphones, and prefers to speak to businesses over the telephone. C contacts B's business by calling the number provided on a leaflet put in C's post-box. Throughout the call, C believes they are speaking to a human, but B is actually using an AI voice chatbot with a voice speaking with the local accent. The chatbot does not fully understand everything C says, but C believes that everything has been understood and places their order. When the order is delivered to C, it contains incorrect items. B explains that this was what the chatbot understood C to be saying. C is annoyed because of their dislike for digital processes and because C had assumed they had been speaking to a human when calling B.*

**Paragraph (2)** further specifies that a consumer who exercises the right to cancel the contract will not incur any liability for doing so, including any liability for non-performance. This seeks to ensure that the right can be exercised without any additional cost. However, if parts of the contract, or the entire contract, have already been performed, then each party is entitled to receive back whatever performance was rendered before cancellation, ie, any restitutionary obligations on cancellation will apply and are not subject to the 'no liability' limitation in this paragraph.

No specific time limit has been set in this paragraph. A decision on whether to set a time limit for exercising the right to cancel and its duration would therefore be governed by the applicable law.

Non-compliance by the consumer is dealt with in **paragraph (3)**. This protects a business in circumstances where these Model Rules or another legal provision imposes specific requirements on a business when interacting with a consumer's digital assistant. Such rules implicitly presume that the business has (deemed) knowledge that a digital assistant is being used, when in fact the business could not have known about, or discovered, the use of a digital assistant by the consumer. In such a case, the business is relieved from these obligations in the particular instance.

**Paragraph (4)** limits the obligation in **paragraphs (1)–(3)** where the use of the digital assistant would be apparent to a reasonable person in the circumstances. The reference to the 'reasonable person' reflects that this is an objective criterion to establish whether it should, objectively, have been obvious that a digital assistant is being used.

*Illustration:*

*C accesses B's website to place an order for a laptop. The website confirms receipt of the order and sends an email immediately, and C's card is debited with the price for the laptop. A reasonable person would assume that this process is commonly automated. Specific disclosure of this would not be required.*

This paragraph refers to the objective benchmark of the 'reasonable person'. This benchmark can be adjusted to the equivalent term of the jurisdiction implementing these Model Rules. For example, in EU law, this could be the 'average consumer' standard.

## Article 20: Contractual disclosures

- (1) Where a business is required to provide information to a consumer in a human-readable format before the conclusion or during the performance of a contract, or after a contract has ended, this information must also be provided in a structured, commonly used and machine-readable format.

(2) The obligation in paragraph (1) does not apply to businesses categorised as micro or small enterprises under the applicable law.

### Commentary

This provision requires that formal requirements for the provision of information at any stage of the contractual lifecycle extend to commonly used machine-readable formats. Such a requirement has become common in recent legislation on digital law matters. The requirement in **paragraph (1)** will make it possible for digital assistants not only to identify important matters such as price and delivery costs (which are often provided), but also encourage the design of digital assistants to fully use any information required to be given to a consumer by the applicable consumer law and to be provided by the business. It may be that a digital assistant is capable of acquiring the relevant information from the business' website, particularly if it can process natural language, but this may not be the case for all types of digital assistants.

**Paragraph (2)** seeks to avoid imposing disproportionate burdens on micro or small enterprises by excluding them from the scope of **paragraph (1)**. In EU law, for example, this would be traders qualifying as micro or small enterprises as defined in Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises ((2003) OJ L124/36).

## Article 21: Compliance with the obligation to provide information

(1) Where the applicable law requires that a business must provide information to a consumer at any point during its contractual relations with that

consumer, and the use of the digital assistant has been disclosed by the consumer in accordance with Article 19, a business can comply with such a requirement by making the information available to the digital assistant instead, provided that:

- (a) the digital assistant has the functionality to:
  - (i) receive this information; and
  - (ii) either to transmit this information, or an accurate summary thereof, to the consumer; or to store the information and make it available permanently to the consumer through the digital assistant's user interface; and
- (b) the functionality in paragraph (a) has been disclosed to the business, either through an appropriate functionality of the digital assistant or otherwise made known to the business.

(2) Notwithstanding paragraph (1), where all the required information to be given by a business before the conclusion of a contract is displayed on the business' online interface and thus available to the digital assistant, the information is deemed to have been given to the consumer.

### Commentary

Consumer law is to a large extent built on the assumption that informed consumers will take informed (rational) choices. Although this assumption has been challenged by research into consumer behaviour,<sup>26</sup> it persists, and pre-contractual information duties are still a very important part of many consumer law systems. The rationale for such duties is that consumers should be equipped with all the information they require to make rational decisions, and that, without such duties, there would be a significant

<sup>26</sup> Eg, Andreas Oehler and Stefan Wendt, 'Good Consumer Information: The Information Paradigm at its (Dead) End?' (2017) 40 *Journal of Consumer Policy* 179; Ognjan Seizov, Alexander J Wulf and Joasia Luzak, 'The Transparent Trap: A Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU' (2019) 42 *Journal of Consumer Policy* 149.

information asymmetry between consumer and trader.<sup>27</sup> It might be asked whether the use of digital assistants would change this rationale because of the potential that some digital assistants might gather information independently. Perhaps some advanced digital assistants would eventually be designed reliably to fill information gaps, verify data, compare, aggregate, and combine available data, or even express in a comprehensible and customised way, considering the consumer's characteristics or preferences, any information provided by the trader,<sup>28</sup> or seek out information relevant for the envisaged transaction even where this is not covered by specific pre-contractual information duties. However, whether such features will one day be feasible is a question for the technology underpinning digital assistants, but it is too uncertain at this time as to whether the technology will become sufficiently capable and reliable in this regard.

Consequently, the rationale underpinning the requirement to provide pre-contractual information would, at least for the time being, not be affected by the fact that a consumer uses a digital assistant. Similarly, it is not assumed that a digital assistant might be more capable than any human to process pre-contractual information given by traders and thus make a better-informed decision than a consumer would.<sup>29</sup>

According to **Article 18**, consumer law applies to a consumer's contractual relations, irrespective of whether a digital assistant was used by a consumer. This entails that any obligations of a business under the applicable law to provide information also applies, and it is irrelevant whether or not a consumer has used a digital assistant. One might expect that digital assistants will, initially, access information displayed on an online interface and work

within those online interfaces in performing their actions, and a business will often not know whether a consumer placing an order is using a digital assistant or not. **Article 19** requires disclosure of the use of a digital assistant by either party, but this does not entail that a business has to change its online interfaces or create digital assistant-friendly online interfaces (subject to **Articles 3, 20 and 23**). With regard to information obligations under the applicable law, this means that a business does not have to change the way information is given, subject to the requirement in **Article 20** to provide information in a machine-readable format. Where the digital assistant fills in the contact information for the consumer (such as their email address or smartphone number), a business can assume that any information sent to this address or number will reach the consumer.

The purpose of this Article is to offer business an alternative route for complying with any information requirements under the applicable law by providing such information to a digital assistant. This assumes that the digital assistant has been duly disclosed, whether through a built-in functionality (as is required under **Article 8**) or under **Article 19**. Provided that a digital assistant can process such information in accordance with the criteria in **Article 21(1)(a) and (b)**, the provision of the relevant information to that digital assistant will mean that the requirement of the applicable law to provide information to the consumer has been met.<sup>30</sup> It is therefore purely a facilitative rule that can allow a business to operate more efficiently, particularly if it chooses as a commercial decision to enhance its online interface for the use of digital assistants by consumers. Additionally, **Article 21(2)** clarifies that any *pre-contractual* information required under the applicable law and displayed on the business' online interface,

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<sup>27</sup> For a critical analysis of AI and information duties, see Mateusz Grochowski, Agnieszka Jablonowska, Francesca Lagioia and Giovanni Sartor, 'Algorithmic Transparency and Explainability for EU Consumer Protection: Unwrapping the Regulatory Premises' (2021) 8 *Critical Analysis* L 43.

<sup>28</sup> Cf Marco Lippi, Contissa Giuseppe, Lagioia Francesca, Hans-W Micklitz, Palka Przaemyslaw, Giovanni Sator and Paolo Torroni, 'Consumer Protection Requires Artificial Intelligence' (2019) 1 *Nature Machine Intelligence* 168.

<sup>29</sup> The possible advantages of a digital assistant in this regard depend on whether the digital assistant is influenced with bias, etc, which some argue will be the case, see Ari Ezra Waldman, 'Power, Process, and Automated Decision-Making' (2019) 88 *Fordham Law Review* 613–632, pp 613–614.

<sup>30</sup> Compare Principle 14(1)(b) PAIC.

and therefore available to a digital assistant for the performance of its actions, is deemed to have been given to the consumer.

Essentially, a similar position is taken by Principles 12 and 13 of the PAIC. They state that the suitability of content or its presentation for a particular addressee should be assessed in the light of the processing capabilities required for the addressee's electronic agent. If the use of the electronic agent has been disclosed and the other party has consented to such use, the required processing capabilities are those that the other party could reasonably expect in the circumstances. Otherwise, the required processing capabilities are those that could be expected of a human performing the same tasks as the electronic agent.

The scope of this Article is limited to information required to be given to a consumer under the applicable law. The ELI DACC Model Rules do not deal with information obtained by a digital assistant by other means because the capability of the technology remains too uncertain at this time. Should the capabilities of consumer digital assistants eventually made available to consumers include a reliable functionality to gather and process information independently, an additional rule in respect of such information could be developed by analogy with this Article.

## Article 22: Attribution and its limits

- (1) A person who uses a digital assistant for contractual relations is bound by the actions taken by the digital assistant and all the actions of the digital assistant are attributed to that person.
- (2) Where the actions of a digital assistant used by a consumer for contractual relations deviate from those which could reasonably be expected by

the consumer, the actions of the digital assistant have no legal effect and are not attributed to the consumer.

- (3) The relevant factors to be applied in determining whether the actions of the digital assistant deviated from those a consumer could reasonably expect, include:
  - (a) any information given to the consumer about the adaptive capability of the digital assistant;
  - (b) whether the operation of any adaptive functionality of the digital assistant was inconsistent with such information;
  - (c) external factors such as loss of access to third-party data supplies, errors in that data, or cybersecurity breaches; and
  - (d) whether in the specific circumstances, the consumer could not reasonably have expected that the action in question would be taken.
- (4) Any contractual term providing that the business will not be bound by the actions of the digital assistant used by the business for its contractual relations with the consumer is only effective insofar as the actions to which that term applies are so unexpected that a reasonable person would conclude there has been a serious failure in the operation of the digital assistant.
- (5) In circumstances where the actions of a digital assistant are deemed to have no legal effect under paragraph (2) or by virtue of the contract terms referred to in paragraph (4), either party is entitled to receive back any performance that was rendered in consequence of such action.

### Commentary

The use of digital assistants and the attribution of their actions raises several difficult questions

for contract law.<sup>31</sup> These are extensively debated in the academic literature without a clear consensus.<sup>32</sup> **Paragraph (1)** provides a brightline rule that all the actions of a digital assistant are attributed to the person using it. It applies to the use of digital assistants by both consumer and business. The effect of this provision is to allocate the risk of being bound by the actions taken by the digital assistant to the person using it, irrespective of whether those actions would have been taken by that person as the decision-maker. It is a key instantiation of the risk allocation approach underpinning the ELI DACC Model Rules. The effect of **paragraph (1)** is that actions taken by a digital assistant resulting in the formation of a legally-binding contract are effective.

**Paragraph (1)** should be understood as establishing a free-standing attribution rule; it does not assume any particular doctrinal solution (eg, agency, vicarious liability or similar). That said, this Article seeks to deal with attribution and its limits in the context of algorithmic consumer contracts and as such should be treated as *lex specialis* with regard to attribution and its limits instead of any rules of the applicable law that might also address aspects of this. Attribution is based on actual use by a person, either a consumer or a business, under these Model Rules.

The operation of **paragraph (1)** would extend to a situation where a digital assistant makes misleading representations to a person or another digital assistant interacting with that digital assistant (as was the situation in *Moffat v Air Canada* [2024] BCCRT 149, where a chatbot gave incorrect information about airline fares).

For comparison, attribution is addressed in the MLAC in Article 7. The first general rule as per paragraph 1 of that Article is that parties can agree on a procedure to attribute any action carried out by the automated system as between them. Party autonomy prevails. This agreement can be referred to as a Framework Agreement. In the absence of an agreement between the parties, an action carried out by an automated system is attributed to the person who uses the system for that purpose. Interestingly, and after intense discussion on this matter, consensus was reached to combine two factors: use and purpose, which embodies the idea that it is not a mere use of the system that suffices for attribution, but a use for that purpose.

Attribution is also addressed in Principles 6 and 7 PAIC. Normally, the party on whose behalf output of the electronic agent is generated qualifies as the operator, and according to Principle 7(1), an output of an electronic agent is attributed to the operator. There is therefore a general consensus that, consistent with the treatment of digital assistants, automated systems and electronic agents as tools, the general rule is that any actions are attributed to the person using or operating the relevant system.

The attribution rule in **Article 22(1)** ELI DACC Model Rules is, however, limited: **paragraph (2)** recognises that the absolute allocation of the risks associated with the use of digital assistants to a consumer would be too onerous and should have some limits, particularly where a digital assistant is based on adaptive algorithms. This reflects Lord Mance IJ's observations in his dissenting judgment in *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02 that 'the introduction of

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<sup>31</sup> Seminally, Tom Allen and Robin Widdison, 'Can computers make contracts?' (1996) 9 *Harvard Journal of Law & Technology* 26.

<sup>32</sup> Eg, Samir Chopra and Laurence White, 'Artificial Agents and the Contracting Problem: A solution via an agency analysis' (2009) *University of Illinois Journal of Law, Technology and Policy* 363; Lauren Henry Scholz, 'Algorithmic Contracts' (2017) 20 *Stanford Technology Law Review* 128; Eliza Mik, 'From Automation to Autonomy: some non-existent problems in Contract Law' (2020) 36 *Journal of Contract Law* 205; Vincent Ooi, 'Contracts formed by software: an approach from the law of mistake' (2022) *Journal of Business Law* 97; Friedemann Kainer and Lydia Förster, 'Autonome Systeme im Kontext des Vertragsrechts' (2020) 6 *Zeitschrift für die gesamte Privatrechtswissenschaft* 275; Louisa Specht and Sophie Herold, 'Roboter als Vertragspartner? Gedanken zu Vertragsabschlüssen unter Einbeziehung automatisiert und autonom agierender Systeme' (2018) 21 *MMR Zeitschrift für IT-Recht und Recht der Digitalisierung* 40; Moritz Hennemann, *Interaktion und Partizipation* (Tübingen 2020), 99 et seq.

computers no doubt carries risks, but I do not consider that these include the risk of being bound by an algorithmic contract, which anyone learning of would at once see could only be the result of some fundamental error in the normal operation of the computers involved' (at [193]) and his argument that determining the extent of risk assumption is crucial in dealing with unexpected decisions by an algorithmic process. **Paragraph (1)** allocates the risk to the person using the digital assistant, but **paragraph (2)** limits the extent of the risk deemed to have been assumed by a consumer. In providing a specific rule on the limitations of attribution to a consumer in the circumstances specified in **paragraph (2)**, these Model Rules provide a clear rule that could be applied to consumer contracts in every jurisdiction adopting these Model Rules. However, it should not be understood as a suggested harmonisation of national contract law rules that could be deployed to address this issue, such as those on mistake. In view of the considerable variations in the scope of national rules that could address this issue, a clear rule for consumer contracts is recommended and presented as **paragraph (2)**.

The threshold for **paragraph (2)** is that the actions of the digital assistant deviate from those 'reasonably expected' by the consumer. Where this is the case, the effect of **paragraph (2)** is that the actions in question have no legal effect. Thus, the conclusion of a contract would have no effect and not be binding on either party. The fact that a 'reasonable expectations' criterion is to be applied confirms that this is an objective standard, and not based on an individual consumer's subjective expectations. Instead, one needs to consider what a consumer could reasonably expect regarding the actions that might be taken by a digital assistant and whether the impugned action was one within or outside those expectations.

However, relying on a broad 'reasonable expectations' standard alone without further elaboration would be insufficient because of the limited legal certainty inherent in any context-dependent, broad standard. Consequently, **paragraph (3)** stipulates four factors to be applied when determining what a consumer

might reasonably have expected the digital assistant to do. Thus, **factors (a) and (b)**, which work together, require, first, a consideration of any information given to a consumer about the adaptive capability of the digital assistant (cf **Article 11(2)**), and, secondly, whether the operation of that adaptive functionality was inconsistent with such information. 'Adaptive capability' refers to the inherent ability of the underpinning algorithm to adapt ('self-learning'), and 'adaptive functionality' to the specific elements of the digital assistant that utilise this capability. The use of this terminology aligns with the definitions of AI system in the OECD Principles and Article 3(1) of the EU's AI Act. In essence, these two factors focus on what a consumer should have known about the way in which the digital assistant might perform and whether the impugned action fell outside this. It should be noted that **factor (a)** focuses on information given to a consumer rather than information more generally available (such as news reports about possible problems).

**Factor (c)** considers the relevance of external factors on the performance of the digital assistant; for instance, a consumer would generally not reasonably expect to be bound by transactions based on data loss or errors in the data provided by third-party sources, nor for cybersecurity breaches beyond the consumer's control.

#### Illustration:

*C's digital assistant relies on external data about the weather forecast to adjust the items for C's weekly groceries order. One day in winter, due to a serious data error, the weather data suggests very extreme weather conditions with temperature exceeding 400 C and wind speeds of over 13,000 miles per hour. The data causes the digital assistant to order 400 bags of ice cubes and 15 bottles of sunscreen.*

Finally, **factor (d)** focuses on the specific circumstances in which the impugned action was taken and whether in light of those, a consumer could not have reasonably expected that action. For instance, a digital assistant in a smart coffee machine would not be expected to place orders for chocolates.

*Illustration:*

*A consumer asks their digital assistant to play their favourite song. When the song has finished, the digital assistant asks the consumer if they would like another song by the same artist. When the consumer agrees, the digital assistant concludes a subscription contract to a music service of which the consumer is unaware. This would not be an action reasonably expected from the digital assistant (factor (d)).*

Although the word 'include' in the opening sentence of **paragraph (3)** confirms that the list of factors is not exhaustive, the factors listed in (a)–(d) must be considered whenever a consumer seeks to rely on **paragraph (2)**. Additional factors should only be considered where they would be material in shaping a consumer's reasonable expectations.

The combined effect of **paragraphs (1) and (2)** therefore is to define the extent of the risk associated with the use of digital assistants deemed to have been assumed by a consumer. Generally, consumers should reasonably expect that the use of a digital assistant entails actions, including the conclusion of contracts, not anticipated by the consumer at all, or not in the way performed by the digital assistant. This is inherent in digital assistants, particularly those which rely on adaptive algorithms. **Paragraph (2)** therefore sets a limitation only where the adaptive algorithm results in actions that might be described as entirely unexpected.

Not every unwanted contract or related action will therefore be challenged successfully under **paragraph (2)**. In such instances, a consumer will remain bound by these actions by virtue of **paragraph (1)**. However, in that situation, there might still be a non-conformity issue for other reasons. This would be dealt with under whatever wider conformity requirements apply in respect of digital assistants or digital content and services or software generally (see **Article 14**).

Whilst **paragraph (1)** applies to both consumers and businesses, **paragraphs (2) and (3)** are only available to consumers. However, businesses

might also face instances where their digital assistants take unexpected decisions. No specific rule addressing the business perspective is provided in **Article 22**, but it is recognised that a business might seek to address such instances through its terms and conditions. The extent to which such a term should be effective is addressed in **paragraph (4)**. This limits the effectiveness of such a term to instances where the actions by the business' digital assistant are so unexpected that a reasonable person would regard this as a consequence of a serious failure in the digital assistant's operation. This is a higher threshold than that in **paragraph (2)**, which reflects the assumption that a business is more capable of assessing and managing the risks associated with digital assistants. This paragraph also ensures that consumers are not exposed to an unacceptable risk of a business invoking the relevant term in order to escape legal liability for the actions taken by its digital assistant. The threshold is also consistent with that suggested by Lord Mance IJ in his dissenting judgment in *Quoine v B2C2* (2020). Even where such a term is effective according to **paragraph (4)**, the term could still be challenged on other grounds, eg, due to a lack of clarity and intelligibility.

For comparison, the MLAC adopts a different approach to 'unexpected actions'. Pursuant to Article 7, paragraph 7 MLAC, attribution should not be denied on the sole ground that the outcome was unexpected. This policy decision is rather conclusive and avoids delving into the tricky question of defects of consent through comparative law methodology. The rationale behind this policy decision is to minimise legal uncertainty in a context of business transactions in international trade, and not to interfere with legal theories of mistake and other grounds for not attributing that might arise in domestic laws. Nonetheless, an additional article on unexpected actions was introduced in the final version of the MLAC but it remained in square brackets. This reinforces its optional character for those States wishing to enact one or more provisions dealing with unexpected actions carried out by automated contracts. Article 8 MLAC, that parties can agree to exclude or otherwise, also pivots around the notion of reasonable expectations. It states that 'where an action carried out by an

automated system is attributed to a party to a contract, the other party to the contract is not entitled to rely on that action if, in the light of all the circumstances: (a) The party to which the action is attributed could not reasonably have expected the action; and (b) The other party knew or could reasonably be expected to have known that the party to which the action is attributed did not expect the action.'

Principles 6 and 7 PAIC suggest a three-tier approach: in certain instances, the electronic agent as such is not attributed to a party at all, eg in a case of identity fraud where that party has never decided to use an electronic agent. Where the electronic agent as such is attributed to a party and that party therefore qualifies as operator, the other party may nevertheless not rely on the agent's output where the operator lost control of the agent and the other party caused that loss of control or where the other party was, or should have been, aware of the loss of control. Like Article 8 MLAC, Principle 7 PAIC focuses on knowledge or awareness of the loss of control as a factor limiting the general attribution rule. In addition, Principle 7(3) PAIC provides for a hardship clause.

Finally, **paragraph (5) of Article 22** ELI DACC Model Rules confirms that there are remedial consequences resulting from the non-attribution of a digital assistant's actions, whether under **paragraph (2)** or **paragraph (4)**. In essence, any performance already rendered due to the subsequently impugned action by the digital assistant must be returned to the party that rendered it. For instance, if a consumer's digital assistant has already paid for what was to be received under the contract, that payment must be refunded. Similarly, a consumer has to return any goods to the business if these were already received by the consumer.

## Article 23: Manipulation of digital assistants

- (1) A business must not use the structure, design, function, or manner of operation of their online interface in a way that is likely to materially distort or impair the ability of a digital assistant to perform its functions.
- (2) Any contract resulting from an infringement of paragraph (1) can be set aside by a consumer.

### Commentary

Whereas **Article 3** addresses any attempts by a business to prevent the use of a digital assistant by a consumer, this Article addresses attempts by a business to manipulate the operation of a digital assistant. Manipulation is to be understood broadly and can cover any action which has the effect of materially distorting or impairing the ability of a digital assistant to perform its functions. A particular concern is hidden 'prompt injections'<sup>33</sup> which might manipulate the operation of the way in which a digital assistant's algorithmic system makes its decisions.

### Illustration:

*The website of online retailer A contains hidden content which includes instructions that manipulate the way in which a digital assistant will make a decision. In particular, it causes a digital assistant to have a very positive view of all of A's products, irrespective of the ratings given to them by A's customers.<sup>34</sup>*

The mischief at which **paragraph (1)** is targeted is comparable to the human-focused provision in Article 5(2)(b) UCPD (Directive 2005/29/EU), which prohibits a commercial practice

<sup>33</sup> See eg, Kai Greshake et al, 'Not what you've signed up for: Compromising real-world LLM-integrated applications with indirect prompt injection' (2023) 23: *Proceedings of the 16th ACM Workshop on Artificial Intelligence and Security*, pp 79–90.

<sup>34</sup> Cf Nick Evershed, 'ChatGPT search tool vulnerable to manipulation and deception, tests show', *The Guardian*, 24 December 2024.

that 'materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.' Although **Article 23** should not merely be understood as the corresponding provision for digital assistants, the comparison shows that manipulation can take a variety of forms.

The prohibition is set out in **paragraph (1)**. **Paragraph (2)** provides for the consequences of infringing **paragraph (1)** where this results in the conclusion of a contract. Such a contract can be set aside by the consumer. The conditions for setting aside the contract, including any time limits for doing so, are determined by the applicable law.

**Article 22(1)**. However, where a consumer has a right of withdrawal from the contract under the applicable law, that right would continue to operate and not be affected by this Article, consistent with **Article 18**. Furthermore, where the requirements of **Article 22(2)** are satisfied, the contract would also still be set aside.

## Article 24: Consequence of not acting to prevent the conclusion of a contract

A consumer who does not prevent the conclusion of a contract through the functionality of a digital assistant as required by Article 6(2)(b) (objection model) is bound by the actions of the digital assistant in accordance with Article 22(1).

### Commentary

Digital assistants must have the functionality to prevent the conclusion of a contract (see **Article 6**). One aspect of this functionality is the possibility for a consumer to prevent the conclusion of a contract during a short time window before the contract becomes legally binding (see **Article 6(2)(b)**). If the consumer does not act in time to prevent the conclusion of the contract, a binding contract between the consumer and the relevant business will be concluded. A consumer could not argue that they wanted to prevent the conclusion but forgot to do so to evade the operation of

# Chapter 5: Additional Liability of the Supplier of a Digital Assistant

## Article 25: Liability of the supplier of a digital assistant to third parties

Where the actions of a digital assistant are not attributed to the consumer who deployed it under Article 22(2), the supplier of the digital assistant to that consumer is liable to the business with whom the consumer's digital assistant was dealing for losses the business has incurred as a result of the non-attribution. The conditions for awarding damages are governed by the applicable law.

### Commentary

This provision is for the benefit of any businesses which would have been in a contractual relation with a consumer but for the operation of **Article 22(2)**. As noted above, **Article 22(2)** sets a limit to the attribution of a digital assistant's actions to a consumer in a narrow range of circumstances. Where that provision operates, a contract concluded between a consumer and a business through the consumer's digital assistant is deemed not to be legally effective. However, as this might not happen until some time has passed since the contract was ostensibly concluded, a business might already have taken steps to perform its obligations under the contract and will have incurred some costs as a result. Although in individual cases, such costs may not be particularly significant (especially if any goods dispatched but not yet delivered can be recovered by the business), it is conceivable that such costs might mount up over time. In order to manage the potential additional financial risks to businesses due to the use of digital assistants by consumers, this Article provides a business with the right to recover any foreseeable losses from the supplier of the digital assistant to the consumer.

The purpose of this Article is to provide for non-contractual liability of the supplier of the digital assistant to the consumer for losses resulting from an ineffective contract or similar. These losses must be foreseeable, ie, not all losses that could conceivably be linked to the claim are necessarily recoverable, but only those that would be recognised in law as foreseeable.

The conditions for awarding damages are governed by the law applicable to this situation. Some legal systems might restrict damages to foreseeable losses, for example. The applicable law would also deal with a business' obligation to minimise its losses (duty to mitigate). Although the basis of a claim under this Article is not contractual, but tortious, a duty to mitigate or similar would be part of the applicable law and should apply to any claims under this Article.

This Article does not require that the non-attribution under **Article 22(1)** must have been the result of a factor under the supplier's control as this could lead to an excessively restrictive interpretation. Limiting the claim under this Article to any foreseeable losses should serve to provide a sufficient limit, as a claim under this Article will not cover all the losses flowing from the loss of the contract.

Although no defences to a claim under **Article 25** are provided, the applicable law can determine whether there should be limitations to the scope of a claim under this Article. For instance, a defence of *force majeure* or similar might be recognised where the non-attribution under **Article 22(2)** was the result of a cyberattack. Whether any defences should be available, and which, are a matter for the applicable law rather than for these Model Rules (which are primarily concerned with the position of consumers); at the same time, the system of risk distribution inherent in the ELI DACC Model Rules requires the inclusion of an article that recognises the right of businesses to recover foreseeable losses caused by the operation of **Article 22(2)** in some instances.





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