

# COMMON MARKET LAW REVIEW

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**Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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### Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## **GAPS AND OPPORTUNITIES: THE RUDIMENTARY PROTECTION FOR “DATA-PAYING CONSUMERS” UNDER NEW EU CONSUMER PROTECTION LAW**

ZOHAR EFRONI\*

### **Abstract**

*Recent adjustments to consumer protection law have played a significant role in the strategic steps taken by the EU in attempts to adapt EU law to the digital economy and to the rising importance of data and data markets. The Directive on certain contractual aspects concerning the provision of digital goods and digital services stands out in its unequivocal recognition of business models that rely on data as contractual counter-performance and of the need to protect (also) consumers who “pay” with data instead of money. This article analyses the novel provisions of the Directive and assesses its impact specifically on data-paying consumers within the broader context of recent EU legislation in the area of consumer protection and data protection. The article identifies some gaps in the legislative scheme and possible opportunities for domestic laws and courts to fill these gaps for granting effective protection to such consumers.*

### **1. Introduction**

Not all the ostensibly free content, services and products offered in digital form over the internet are expressions of sheer gratuitousness. Very often, traders monetize data and content that is being provided and generated over the course of using the content or service instead of charging money for that use. For instance, Google, with its extremely popular search engine and many useful web applications, does not charge its users a cent for taking advantage of its high-quality products, provided that Google is permitted to use and monetize the data, including personal data.<sup>1</sup>

One key question is whether such arrangements constitute a valid contract, where the user’s counter-performance is reduced to merely providing data.

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1. See <policies.google.com/privacy?hl=en-US> (all websites last visited 20 March 2020).

Should that be the case, the next questions are what kind of a contract this is, and whether the user may benefit from consumer protection law with respect to the digital content or services, even though no price was paid for it.

Against this backdrop and the unsuccessful attempt to harmonize European sales law more generally,<sup>2</sup> in December 2015 the European Commission published two proposals for directives that would regulate *certain* aspects concerning contracts for the supply of digital content (COM-DCD)<sup>3</sup> and for the online sale of goods.<sup>4</sup> The proposals have triggered a lively debate that continued during the various phases of the legislative process,<sup>5</sup> with the European Parliament and the Council proposing significant changes to the

2. See <[www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law](http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law)>.

3. Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015)634 final (hereinafter: COM-DCD).

4. Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015)635 final.

5. See e.g. Schulze, Staudenmayer and Lohsse (Eds.), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps, Münster Colloquia on EU Law and the Digital Economy II* (Nomos, 2017); European Law Institute (ELI), “Statement on the European Commission’s proposed directive on the supply of digital content to consumers” (ELI, 2016), <[www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Publications/ELI\\_Statement\\_on\\_DCD.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf)>; Interventions submitted to the JURI Committee at the Workshop on “New rules for contracts in the digital environment” (Brussels, 17 Feb. 2016), <[www.europarl.europa.eu/committees/de/juri/events-workshops.html?id=20160217CHE00181](http://www.europarl.europa.eu/committees/de/juri/events-workshops.html?id=20160217CHE00181)>. For further literature (mostly in German), see Hacker, “Daten als Gegenleistung: Rechtsgeschäfte im Spannungsfeld von DS-GVO und allgemeinem Vertragsrecht”, (2019) *Zeitschrift für die gesamte Privatrechtswissenschaft*, 148–197; Härting, “Digital Goods und Datenschutz: Daten sparen oder monetarisieren? Die Reichweite des vom DinHRL-E erfassten Geschäftsmodells”, 11 *Computer und Recht* (2016), 735–740; Metzger, “Data as counter-performance: What rights and duties do parties have?”, 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (2017), 2–8; Sattler, “Personenbezogene Daten als Leistungsgegenstand: Die Einwilligung als Wegbereiter des Datenschuldrechts”, 72 *JZ* (2017), 1036–1046; Schmidt-Kessel et al., “Die Richtlinienvorschläge der Kommission zu Digitalen Inhalten und Online-Handel – Teil 1”, (2016) *European Union Private Law Review Fokus*, 2–8; Teil 2, *ibid.*, 54–70; Specht, “Daten als Gegenleistung: Verlangt die Digitalisierung nach einem neuen Vertragstypus?”, 72 *JZ* (2017), 763–770; Spindler, “Verträge über digitale Inhalte: Anwendungsbereich und Ansätze Vorschlag der EU-Kommission zu einer Richtlinie über Verträge zur Bereitstellung digitaler Inhalte”, 19 *MultiMedia und Recht. Zeitschrift für IT-Recht und Recht der Digitalisierung* (2016), 147–153; Spindler, “Verträge über digitale Inhalte: Haftung, Gewährleistung und Portabilität Vorschlag der EU-Kommission zu einer Richtlinie über Verträge zur Bereitstellung digitaler Inhalte”, 19 *MultiMedia und Recht. Zeitschrift für IT-Recht und Recht der Digitalisierung* (2016), 219–224; Graf von Westphalen, “Richtlinienentwurf der Kommission betreffend die Bereitstellung digitaler Inhalte und das Recht des Verbrauchers auf Schadensersatz”, (2016) *BB*, 1411–1418; Graf von Westphalen und Wendehorst, “Hergabe personenbezogener Daten für digitale Inhalte – Gegenleistung, bereitzustellendes Material oder Zwangsbeitrag zum Datenbinnenmarkt?”, (2016) *BB*, 2179–2187.

original proposals along the way (EP-DCD and Council-DCD respectively).<sup>6</sup> At the conclusion of the trilogue negotiations in March 2019, the texts of the Digital Content and Digital Services Directive (DCSD) and the Sale of Goods Directive (SGD) received their final form<sup>7</sup> and they were consequently published on the online portal of the EU Parliament.<sup>8</sup> On 22 May 2019, both directives were published in the Official Journal of the European Union.<sup>9</sup>

Some of the concerns addressed *data-related aspects* of the new instruments,<sup>10</sup> including (i) coverage of situations in which the consumer provides data as counter-performance instead of a price for digital content and services (referred to for convenience as “data-paying consumers”); (ii) the inclusion of embedded digital content (in the current texts of the directives: “goods with digital elements”) within the scope of the DCD proposal; (iii) data portability under the scheme of the DCD proposal and its relationship to the GDPR; and (iv) aspects related to conformity, modification, and termination.

Within the emerging legal framework as applied to data-paying consumers, the explicit inclusion of (only) *personal data* (but possibly not any other data) as counter-performance under the DCSD and the simultaneous application of the GDPR to such situations, drew a great deal of attention during the legislation phase.<sup>11</sup> Another important question focused on the application of the Commission’s proposal only to data that is *actively* provided by the

6. For the draft of the Digital Content Directive, see Council, “Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) – General approach”, 9901/17 ADD 1, 2015/0287 (COD), 1 June 2017 (hereinafter: Council-DCD); European Parliament, “Report on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (COM(2015)0634 – C8-0394/2015 – 2015/0287(COD))”, A8-0375/2017, 27 Nov. 2017 (hereinafter: EP-DCD).

7. Sajn, “Briefing, ‘Contracts for the supply of digital content and digital services’”, PE 635.601 – March 2019, <[www.europarl.europa.eu/RegData/etudes/BRIE/2019/635601/EPRS\\_BRI\(2019\)635601\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/635601/EPRS_BRI(2019)635601_EN.pdf)>.

8. See <[www.europarl.europa.eu/news/en/press-room/20190321IPR32116/parliament-boasts-consumer-rights-online-and-offline](http://www.europarl.europa.eu/news/en/press-room/20190321IPR32116/parliament-boasts-consumer-rights-online-and-offline)>.

9. 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, O.J. 2019, L 136/1 (hereinafter: DCSD); 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, O.J. 2019, L 136/28 (hereinafter: SGD).

10. Metzger et al. “Data-related aspects of the Digital Content Directive”, 9 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (2018), <[www.jipitec.eu/issues/jipitec-9-1-2018/4682](http://www.jipitec.eu/issues/jipitec-9-1-2018/4682)>, at 90–109.

11. See e.g. Zoll, “Personal data as remuneration in the proposal for a directive on supply of digital content” in Schulze, Staudenmayer and Lohsse, op. cit. *supra* note 5, at p. 178.

consumer, rather than also to data that is *passively* collected under the consumer's general permission to conduct such collection.<sup>12</sup>

With the entry into force in June 2019 of both directives under their amended titles (adding “digital services” to the title of the Commission proposal)<sup>13</sup> it is a suitable time to revisit these issues while devoting special attention to the application of the DCSD – alongside other digital consumer protection instruments in the EU – to data-paying consumers.

## 2. Level of harmonization

The aim of the DCSD is to fully harmonize certain requirements concerning contracts between traders and consumers for the supply of digital content or services (Recital 11 DCSD). As stated there, the DCSD is explicitly designed to harmonize “rules on the conformity of digital content or a digital service with the contract, remedies in the event of a lack of such conformity or a failure to supply and the modalities for the exercise of those remedies, as well as on the modification of digital content or a digital service”.

Article 4 prohibits Member States from introducing more or less stringent provisions concerning DCSD-regulated areas, unless specially provided otherwise in the Directive. Recitals 12 through 17 lay out a fairly long list of matters in which Member States are not strictly bound by the DCSD. These matters include national rules on the formation, validity, nullity, or effects of contracts, the legal nature or classification of the contract, remedies for hidden defects, and claims against any third party that is not the trader (Recitals 12–13).

In order to complete the picture: the Sale of Goods Directive has a similar maximum harmonization agenda regarding those aspects of its targets.<sup>14</sup> The DCSD's definition of a “trader” (Art. 2(5) DCSD)<sup>15</sup> is virtually identical to the

12. Metzger et al., op. cit. *supra* note 10, at 95–96.

13. The title of the Directive concerning the sale of goods has been amended to cover “certain aspects concerning contracts for the sale of goods”, while changing the originally proposed title covering “contracts for the online and other distance sales of goods” in order to include also goods that are sold face-to-face by retailers. The intention was to avoid divergent regulation. See Recital 9 SGD. In addition, also the title of the DCD proposal has been amended to explicitly cover digital services alongside digital content.

14. SGD, Recital 10.

15. “‘Trader’ means 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, in relation to contracts covered by this Directive.”

SGD's definition of a "seller" (Art. 2(3) SGD).<sup>16</sup> Member States enjoy a broad latitude to extend the application of the DCSD to parties that are not strictly "consumers" in the meaning of the DCSD (Recital 16). There is a parallel statement in Recital 21 SGD. At the same time, Member States might be more restricted in expanding the general application scope of the Directive to parties that are not strictly "traders" in the meaning of the DCSD. This conclusion can be derived from Recital 18 DCSD, which allows for the extension of the scope of the Directive specifically to platform providers that do not fulfil the requirements of a trader under the DCSD.<sup>17</sup> There is a parallel provision in Recital 23 SGD. That said, it appears that Member States have a broader leeway in extending the scope of *liability to third parties* that do not qualify as traders.<sup>18</sup>

The new DCSD harmonizes the duty of the trader to supply (Art. 5), which in usual situations should take place without undue delay after the conclusion of the contract. It further imposes on traders extensive duties of objective and subjective conformity in performing their part of the contract (Arts. 6, 7, and 8). Among other things, the Directive contains burden of proof rules that benefit consumers (Art. 12) and sets forth the rights to a consumer remedy where the trader fails to supply (Art. 13) or fails to comply with the conformity requirements. The remainder of this article focuses on the implications of the DCSD (and relevant legal instruments that apply in parallel) for data-paying consumers and highlights some gaps in the consumer protection scheme in this specific context.

### 3. Data as counter-performance

#### 3.1. *Data as counter-performance in consumer contracts*

##### 3.1.1. *Recognition in the final DCSD text*

The COM-DCD included a provision that extended the scope of the Directive to cases where the consumer actively provides, in exchange for digital content,

16. "Seller" means any natural person or any 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, in relation to contracts covered by this Directive."

17. See also Sein and Spindler, "The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of application and trader's obligation to supply – Part 1", 15 *European Review of Contract Law* (2019), 257, 261 (noting that the platform provider must in such case undertake the obligation to provide the digital content or service).

18. Recital 13, DCSD: "Member States also remain free, for example, to regulate liability claims of a consumer against a third party other than a trader that supplies or undertakes to supply the digital content or digital service, such as a developer which is not at the same time the trader under this Directive."



counter-performance other than money in the form of *personal data or any other data*.<sup>19</sup>

This language and the accompanying recitals triggered amendment proposals by the European Parliament and the Council, as well as an opinion by the European Data Protection Supervisor. The latter was quite critical towards the idea of personal data functioning as counter-performance in transactions in a commercial context.<sup>20</sup> Several commentators recommended explicit recognition of data (including personal data) as counter-performance within the scope of the DCD in order to avoid unwarranted discriminatory treatment based on the type of counter-performance the consumer provides.<sup>21</sup>

The DCSD now clarifies this central question: personal data that is provided by the consumer in exchange for digital content or digital services constitutes a transaction that is in principle covered by the Directive. This coverage rule is subject to two exceptions: (1) when the personal data provided by the consumer is exclusively processed by the trader for the purpose of supplying the digital content or digital services, or (2) when personal data is provided to allow the trader to comply with legal requirements to which the trader is subject – and in both cases, the trader does not process that data for any other purpose.<sup>22</sup> The two exceptions address situations in which the data users provide has a function other than as a contractual *quid pro quo*. Since questions of contractual formation and validity are left to be answered by domestic laws,<sup>23</sup> domestic classification of the exchange as a “contract” remains a general threshold for the application of the DCSD.

At the same time, the DCSD (as opposed to the Commission proposal, COM-DCD) no longer includes the phrase “counter-performance” in connection with personal data provided by the consumer. It further omitted the phrase “in exchange” which referred in the COM-DCD directly to the phrase “a consumer actively provid[ing] counter-performance other than money in the form of personal data or any other data”.

19. Art. 3(1) and Recital 13, 14 COM-DCD.

20. EDPS, “Opinion 4/2017 on the proposal for a directive on certain aspects concerning contracts for the supply of digital content” (EDPS, 14 March 2017), <edps.europa.eu/sites/edp/files/publication/17-03-14\_opinion\_digital\_content\_en.pdf>. The opinion noted that “[t]here might well be a market for personal data, just like there is, tragically, a market for live human organs, but that does not mean that we can or should give that market the blessing of legislation”, para 17.

21. See e.g. Mak, “The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content – In-depth analysis” in *The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content*, Workshop for the JURI Committee, EP (2016) 10–11; Metzger et al., op. cit. *supra* note 10, at 96.

22. DCSD, Art. 3(1).

23. Ibid., Recitals 12, 24 and Art. 3(10).

The reason for this new wording seems to be the wish to avoid the impression that the Directive actually encourages transactions in which consumers commercialize their personal data.<sup>24</sup> However, this attempt to downplay the commercial dimension obviously does not indicate that the DCSD in fact excludes situations where personal data replaces other forms of contractual consideration (mainly, money paid by the consumer).<sup>25</sup> Rather, the provisions of Article 3(1) DCSD, which delineate the scope of the Directive and the limitations thereto, are decisive on this matter. In light of the clear language of the second sentence of Article 3(1) DCSD, dropping the phrase “counter-performance” turns out to be rather a semantic, not a substantive, alteration.

### 3.1.2. Normative priority of EU data protection and privacy law

Regarding the application of the EU General Data Protection Regulation (GDPR) to personal data that is provided as counter-performance, the DCSD now states that in the case of any conflict, the GDPR overrides provisions under the DCSD.<sup>26</sup> The same applies to conflicts with the e-Privacy Directive (Directive 2002/58/EC).<sup>27</sup> The clear priority rule favouring EU data protection and privacy law is helpful at least at a formal-theoretical level for resolving questions of parallel application. The “consumer” in terms of the DCSD and the “data subject” in terms of data protection law, are often one and the same person in a situation covered by both legal instruments. Similarly, a “controller” in terms of data protection law often qualifies as a “trader” under the DCSD. As the two regimes apply in parallel,<sup>28</sup> points of tension will certainly emerge.

Essentially, data protection law provides instructions on the conditions under which personal data may be used. Those instructions continue to apply in scenarios related to consumer contracts, in which the parties regard the provision of personal data as a central part of the bargain, and, indeed, as a performance mandated by contract. As data protection law intervenes in the operation of contract law<sup>29</sup> and, essentially, in the ability of the parties to

24. Cf. *Ibid.*, Recital 24: “While fully recognizing that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity ....”

25. Sein and Spindler, *op. cit. supra* note 17, at 263.

26. DCSD, Art. 3(8).

27. *Ibid.*

28. Langhanke and Schmidt-Kessel, “Consumer data as consideration”, 6 *Journal of European Consumer and Market Law* (2015), 218–223, at 219 et seq. (suggesting that two “layers” of consumer protection apply in such cases).

29. One example of such explicit intervention concerns the obligation of the trader in the case of termination of a contract, in which the consumer has provided personal data as consideration, Art. 16(2) DCSD states that “[i]n respect of personal data of the consumer, the trader shall comply with the obligations applicable under Regulation (EU) 2016/679”.

determine autonomously the terms of the bargain and the nature of their mutual obligations, it is important to understand how far this intervention reaches and what the consequences for the parties are.

The bright-line rule stated in the DCSD regarding the overriding normative power of data protection law should help domestic legislatures and courts that are faced with those points of tension with the task of interpreting and applying the “correct” legal regime if they do not both lead to the same result. This rule represents the general understanding that neither contract law in general nor specific consumer protection provisions, can derogate from the level of protection persons enjoy under data protection and privacy law. More precisely, consumer protection under the DCSD should be “without prejudice” to the body of law covered by the EU data protection and privacy legislation mentioned.

Indeed, according to Article 3(8) DCSD, data protection and privacy law prevails in the case of a conflict with the provisions of the DCSD. Following this instruction, a case in which data protection and privacy laws are *more restrictive* regarding the use of data as counter-performance, would reflect the logic of the priority rule. Simply put, the parties cannot “contract around” data protection and privacy law to the detriment of the data subject with regard to the conditions under which using personal data is permissible, and the DCSD can neither dictate nor underpin less stringent, private arrangements in this respect.

A prominent example of a point of tension between the two regimes, which has been intensively discussed in the literature but not yet conclusively resolved, is the interplay between the “personal data as counter performance” model supported by the DCSD and the restriction on coupling between consent to data processing and the provision of goods or services where the personal data is not necessary for the performance of the contracts (Art. 7(4) GDPR and Recital 43 GDPR). A strict interpretation of the GDPR on this point would invalidate consent in many cases the DCSD would cover; specifically, where personal data is *not* being exclusively processed by the trader for the purpose of supplying the digital content or digital service and where providing the data replaces payment of a price for those “free” content and services provided online.<sup>30</sup> But such a strict interpretation appears to create a striking inconsistency between the GDPR and the DCSD, which has led some commentators to advocate a more permissive interpretation of the GDPR’s prohibition on coupling, to the effect that it does not outlaw what

30. Härting, op. cit. *supra* note 5, at 738–749.

Article 3(1) DCSD permits and targets as an area in which consumer protection is warranted.<sup>31</sup>

The Court of Justice recently had the opportunity to provide some clarity on this critical issue in its *Planet49* decision (albeit considered under former EU law that preceded the enactment of the DCSD), but it preferred not to do so on procedural grounds.<sup>32</sup> There is little doubt that the ECJ will have to revisit this matter soon.

The tension between the GDPR and the DCSD on the issue of coupling exemplifies in a situation where data protection law would be more restrictive regarding the use of personal data in a scenario the DCSD explicitly intends to address. Consider, however, the opposite situation: What should be the implementation strategy if data protection law is *more permissive* about the use of personal data than contracts subject to the DCSD? One example that comes to mind is a termination situation, in which the trader invokes its legitimate interests as the legal ground for a continuous, post-termination use of personal data against the wish of the consumer.<sup>33</sup>

Consider the following hypothetical situation. A music streaming service offers one month of free subscription, on condition that the service may collect personal data (such as the musical preferences of the user) and use this information for targeted marketing. Upon the expiry of the free trial, the user is obliged to pay a monthly subscription fee and has the option to deactivate the collection and use of personal data for targeted marketing. The user in this example, however, decides to terminate the contract before the end of the free

31. Metzger, *op. cit. supra* note 5, under section 4.3. See also, Sattler, “Personenbezug als Hindernis des Datenhandels” in Pertot and Schmidt-Kessel (Eds.), *Rechte an Daten* (forthcoming).

32. Case C-673/17, *Planet49 GmbH v. Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.*, EU:C:2019:801, para 64, “Lastly, it should be noted that the referring court has not referred to the Court the question whether it is compatible with the requirement that consent be ‘freely given’, within the meaning of Article 2(h) of Directive 95/46 and of Article 4(11) and Article 7(4) of Regulation 2016/679, for a user’s consent to the processing of his personal data for advertising purposes to be a prerequisite to that user’s participation in a promotional lottery, as appears to be the case in the main proceedings, according to the order for reference, at least as far as concerns the first checkbox. In those circumstances, it is not appropriate for the Court to consider that question.”

33. Theoretically speaking, under certain interpretations of the GDPR, the legitimate interests of the controller might justify such continuous data processing irrespective of the wish of the data subject to discontinue such use. Cf. Sattler, “Autonomie oder Determinismus – Welchen Weg geht das Datenschuldrecht?” forthcoming in Friedewald, Lamla, Hess and Ochs (Eds.), *Forum Privatheit – Die Zukunft der Datenökonomie: Zwischen Geschäftsmodell, Kollektivgut und Verbraucherschutz* (Springer, 2019), at 15 et seq. For a discussion on the consumer’s termination rights under the DCSD and its intersection with trader’s obligations under the GDPR, see Sein and Spindler, “The new Directive on Contracts for Supply of Digital Content and Digital Services – conformity criteria, remedies and modifications – Part 2”, 15 *European Review of Contract Law* (2019), 365, 379 et seq.

trial period, and the trader claims the right to keep some personal data, as permitted under Article 6(1)(f) GDPR, based on its legitimate interest to prevent the same user from attempting another free trial of the same music service. Assume further that a domestic law generally provides that in case of a data-paying consumer, traders must, upon termination, permanently delete all the data that the consumer has provided as counter-performance.

Strictly applying Article 3(8) DCSD here would mean that such continuous use of the personal data claimed by the trader to be legitimate under the GDPR, is permissible also under the DCSD, since it does not derogate from the rights of the data subject. In addition, the DCSD neither regulates the rights of traders to enforce contractual obligations against consumers to provide personal data nor the trader's entitlement to a continuous use of personal data after termination. It is an interesting question whether a consumer-friendly domestic rule that would prohibit post-termination use of personal data in the case of legitimate interests of the trader under Article 6(1)(f) GDPR would contravene, or rather, reinforce the rule that the DCSD is without prejudice to EU data protection and privacy law. A systematic reading of the DCSD would indicate that such a domestic regulation might breach the DCSD's no-prejudice rule – assuming that, in line with its Recital 4, the GDPR not only secures the rights of data subjects to exercise control over use of their data but also strikes a balance with the interests of others.

### 3.1.3. *Non-personal data*

Under the final text of the DCSD, some ambiguity remains regarding *non-personal data* that may function as counter-performance. The DCSD abandoned the phrase “any other data” that had been included in the COM-DCD. Article 3(1) now speaks merely of cases where the “consumer provides or undertakes to provide personal data to the trader”. The remaining question is whether data that does not qualify as personal data may also fall under this provision.

The DCSD draws systematic distinctions between personal and non-persona data – but in a different context. Such a distinction can be observed in the regulation of user-generated content under Article 16(3)-(4) DCSD. These provisions address termination, as well as traders' obligations generally to “refrain from using any content . . . which was provided or created by the consumer when using the digital content or digital service supplied by the trader” after termination<sup>34</sup> and also to make available to the consumer any such content at the request of the consumer.<sup>35</sup>

34. DCSD, Art. 16(3).

35. *Ibid.*, Art. 16(4).

Such a distinction also seems to be made regarding conformity obligations, so it appears according to the context; Recital 50 DCSD provides that “traders should make use of standards, open technical specifications, good practices and codes of conduct, including in relation to the commonly used and machine-readable format for retrieving the *content other than personal data*, which was provided or created by the consumer when using the digital content or digital service” (emphasis added). These examples demonstrate that the drafters of the DCSD use a specific wording when they want to refer to non-personal data (“content other than personal data”) similar to the way in which the drafters of the COM-DCD used a specific wording to achieve the same purpose (“any other data”).

Under the final DCSD text, user-generated content is what was generated (that is, “provided or created” in the wording of Art. 16(3)-(4) DCSD) by the consumer in the course of using the digital goods or services. At the same time, that content by definition does not qualify as “personal data”.<sup>36</sup> Further, it is important to mention that references to user-generated content do not appear in the context of data as counter-performance under the DCSD, and indeed, it does not function as such in that specific context. User-generated content is typically content that is uploaded while consumers are using the digital goods or services – almost as a by-product of already ongoing relationships or relationships that have been terminated, but not necessarily as a contractual condition or obligation imposed on the consumer.<sup>37</sup> This is not to say, of course, that user-generated content does not have a commercial value<sup>38</sup> or

36. It has been observed that the likelihood of user-generated content not qualifying as personal data is quite low. See Sein and Spindler, *op. cit. supra* note 33, at 382; Mischau, “Daten als ‘Gegenleistung’ im neuen Verbrauchervertragsrecht”, *Zeitschrift für die gesamte Privatrechtswissenschaft* (forthcoming 2020), at \*5.

37. In practice, traders can draft the contract in such a way that it secures for them the entitlement to commercially exploit user-generated content beyond what is necessary to fulfil the contract – as part of the bargain. But failing to provide such content would likely not breach any contractual obligation of the consumer. For instance, Facebook’s Terms and Conditions currently include the following: “Information and content you provide. We collect the content, communications and other information you provide when you use our Products, including when you sign up for an account, create or share content, and message or communicate with others. This can include information in or about the content you provide (like metadata), such as the location of a photo or the date a file was created . . . Our systems automatically process content and communications you and others provide to analyse context and what’s in them for the purposes described below . . . We use the information we have (including your activity off our Products, such as the websites you visit and ads you see) to help advertisers and other partners measure the effectiveness and distribution of their ads and services, understand the types of and people who use their services and how people interact with their websites, apps, and services.”, <[www.facebook.com/about/privacy/update](http://www.facebook.com/about/privacy/update)> (links removed).

38. See e.g. “Top Examples of Successful User Generated Content Campaigns Worldwide”, <[wedevs.com/141859/user-generated-content-campaigns](http://wedevs.com/141859/user-generated-content-campaigns)>.

that such content cannot be the subject matter of contractual obligations *per se*.<sup>39</sup>

There is no clear explanation in the recitals or elsewhere for the removal of the phrase “any other data” from Article 3(1). The plain language of this provision now mentions only “personal data” as something that consumers can provide or undertake to provide alternatively to price for receiving digital goods or services. The central question with regard to scope is whether the general conclusion that non-personal data is categorically excluded from the type of data that can function as counter-performance is mandatory.

It remains unclear what public policy would support this outcome. Indeed, in light of the GDPR’s broad concept of personal data<sup>40</sup> and the corresponding interpretation by the ECJ,<sup>41</sup> the practical relevance of the question might remain quite marginal. In some particular situations, however, this distinction could raise interesting queries.

Consider the following hypothetical scenario: A trader is manufacturing pet feeders. It launches a promotional campaign promising each customer who goes to a post office branch, fills out an anonymous questionnaire about the nutrition habits of its pet, and anonymously sends it back to the trader *via* a prepaid envelope, that they may immediately collect at the post office, free of charge, a card containing a subscription code to a music streaming service that guarantees three months of free use of the streaming service without a requirement to abide by any additional contract with that service provider.

Assume, further, that it remains impossible for both the trader and the music streaming service to know who sends which questionnaire or to link a specific code to a specific questionnaire/user. It is also impossible to distinguish codes that are distributed as part of the promotional programme from voucher codes that are unrelatedly purchased for money. The consumer later discovers, to their agony, that the free subscription lasts only for one month, not three, as promised by the trader. Should the consumer be prevented from bringing

39. It has been inquired, for instance, whether a user transferring copyrights in the content they generate and provide over a digital platform as a condition for taking advantage of the platform’s services can represent a contractual counter-performance situation. See Mak, *op. cit. supra* note 21, at 10.

40. GDPR, Art. 4(1): “‘personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.

41. Case C-582/14, *Patrick Breyer v. Bundesrepublik Deutschland*, EU:C:2016:779, discussing the definition of “personal data” under Art. 2(a) of Directive 95/46, which is considered equivalent to the definition of the same concept under the GDPR.

claims against the trader<sup>42</sup> under the DCSD for lack of conformity, only because the counter-performance does not qualify as a commitment to deliver personal information? The common interpretation of Article 3(1)<sup>43</sup> would leave the consumer in such cases without redress mandated by the DCSD.

Another question pertains to a situation where the trader sufficiently anonymizes the personal data to the effect that it loses its character as “personal data” under the GDPR<sup>44</sup> and continues to monetize the data in this form. It would seem unjustified to uphold the claim of the trader that the DCSD protections cannot apply because the counter-performance no longer falls under the scope of the Directive.

#### 3.1.4. Evaluation

Overall, the inclusion of (personal) data as counter-performance under the regime of the DCSD – although the explicit terms counter-performance and exchange are missing – is a welcome outcome. It contributes to aligning the level of consumer protection regardless of the question of whether the consumer pays money or provides (personal) data. This regulatory approach reduces the danger of incentivizing traders to prefer personal data over money as counter-performance in order to escape responsibilities under the DCSD,

42. The manufacturer of the feeders should be liable as “trader” under the DCSD even though the performance is being carried out on its behalf by the music service. Cf. Recital 41 DCSD: “There are various ways for the trader to supply digital content or digital services to consumers . . . The digital content or digital service should be considered to be made available or accessible to the consumer *when the digital content or digital service, or any means suitable for accessing or downloading it, has reached the sphere of the consumer and no further action is required by the trader* in order to enable the consumer to use the digital content or digital service in accordance with the contract. Considering that the trader is not in principle responsible for acts or omissions of a third party which operates a physical or virtual facility, for instance an electronic platform or a cloud storage facility, that the consumer selects for receiving or storing the digital content or digital service, it should be sufficient for the trader to supply the digital content or digital service to that third party. *However, the physical or virtual facility cannot be considered to be chosen by the consumer if it is under the trader’s control or is contractually linked to the trader*, or where the consumer selected that physical or virtual facility for receipt of the digital content or digital service but that choice was the only one offered by the trader to receive or access the digital content or digital service.” (emphasis added). In the current example, the trader chooses to perform *via* a third party under a contract between that trader and that third party. The consumer cannot select the platform and the trader remains principally responsible *vis-à-vis* the consumer.

43. Mischau, *op. cit. supra* note 36, at \*5 (concluding that non-personal data is excluded from the scope of the DCSD and criticizing this legislative outcome).

44. On the requisite standard for such anonymization and doubts regarding the feasibility of complete anonymization, see Finck and Pallas, “They who must not be identified: Distinguishing personal from non-personal data under the GDPR”, (2019) Max Planck Institute for Innovation and Competition Research Paper No. 19–14, <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3462948](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462948)>.



because they assume that non-conformity *vis-a-vis* a data-paying consumer bears no (or fewer) legal consequences for them.<sup>45</sup>

Some differentiations between the two consumer categories will persist, however. Different treatment may emanate from the *ontology* of data as informational subject-matter that carries value, but is at the same time non-excludable and its use is not rivalrous. In addition, the legal *typology* of personal data as being subject to data protection and privacy norms, and the intervention of such norms, might affect the legal analysis and the end result for the consumer.<sup>46</sup> Such built-in and structural differences cannot be undone completely, and it is clear that equal treatment at all times cannot be attained. Examples that illustrate this proposition are reimbursement of the consumer after termination<sup>47</sup> or certain remedies for lack of conformity.<sup>48</sup>

### 3.2. Coverage of passively provided data

#### 3.2.1. Should passively provided data qualify as counter-performance under the DCSD?

Early draft proposals highlighted a distinction between actively and passively provided data in connection with the “data as counter-performance” quandary. Whereas the Commission’s proposal referred only to data that is actively provided by the consumer,<sup>49</sup> the Council draft would have allowed Member States to extend the application of the Directive also to passively provided data.<sup>50</sup> Both the Council and the European Parliament refrained from using the term “actively” within their respective amendments to Article 3 of the draft directive. The Council’s draft kept the emphasis on actively provided data, while excluding collected metadata (such as IP addresses) or automatically generated content (such as information collected and transmitted by cookies).<sup>51</sup> By comparison, the EP-DCD would allow for the inclusion of data

45. Sein and Spindler argue that the main effect of the Directive on the position of data-paying consumers would mostly be limited to post-termination damages under national law. See citation *supra* note 17, at 265. Yet, also before termination and damages, such consumers should be able to demand bringing the contract into conformity during its life by invoking important remedies, e.g. demanding updates under Art. 8(2) DCSD.

46. Metzger et al., *op. cit. supra* note 10, at 108–109.

47. DCSD, Art. 16(1): the remedy of reimbursement, in whole or in part, is not available for data-paying consumers.

48. A proportionate price reduction under Art. 14 DCSD cannot be applied when no price has ever been paid. Data-paying consumers may therefore terminate faster than price-paying consumers. Recital 67 DCSD.

49. COM-DCD, Recital 14: “As regards digital content supplied not in exchange for a price but against counter-performance other than money, this Directive *should apply only* to contracts where the supplier requests and the consumer *actively* provides data” (emphasis added).

50. Council-DCD, Article 3(1), at footnote 15.

51. *Ibid.*

that is provided passively (e.g. personal data collected by the trader such as IP address).<sup>52</sup>

It should be noted that the term “actively provides” was not defined in the Commission’s proposal, though some clues to the situations it covered could be found in Recital 14 COM-DCD. The lack of clarity there rendered the distinction between actively and “passively” provided data blurry and the debate on the topic somewhat fuzzy. Several commentators argued that the DCSD should cover in principle both actively and passively provided data;<sup>53</sup> depriving data-paying consumers of remedies simply due to the passive manner in which data is collected appeared neither justified nor compatible with the objectives of the Directive.<sup>54</sup> Furthermore, the distinction between actively and passively provided data might become blurred in certain situations; for instance, if continuous collection of data over time is being performed after having the consumer once agree to such collection by the trader, but the consumer never actually *provides* data to the trader in an active manner (e.g. uploading, sending an email, filling out online forms, or any other engagement).<sup>55</sup> More generally, strictly applying the directive to data that has been actively provided to the trader in exchange for digital goods/services might exclude situations in which the trader already has the data, but now wishes to use it for a certain, new purpose (e.g. sharing with a third party for marketing purposes).<sup>56</sup>

### 3.2.2. *The DCSD approach*

The solution reflected in the DCSD is not entirely clear of ambiguity. The phrase “actively provide[s]” has been removed. This choice supports an interpretation that embraces both actively and passively provided data. Upon closer inspection, however, it might also support the opposite conclusion. One clue can be found in Recital 25 DCSD, which states the following:

52. EP-DCD, Recital 14. The recital also mentioned as covered by the Directive “the name and e-mail address or photos, provided directly or indirectly to the trader, for example through individual registration or on the basis of a contract which allows access to consumers’ photos”. *Ibid.*

53. See e.g. Metzger et al., *op. cit. supra* note 10, paras. 26–28; Schmidt-Kessel et al., “Die Richtlinienentwürfe der Kommission zu Digitalen Inhalten und Online-Handel – Teil 2”, *op. cit. supra* note 5, at 59.

54. Spindler, “Verträge über digitale Inhalte – Anwendungsbereich und Ansätze Vorschlag der EU-Kommission zu einer Richtlinie über Verträge zur Bereitstellung digitaler Inhalte”, *op. cit. supra* note 5, at 149–159; Hacker, *op. cit. supra* note 5, at 166.

55. Cf. Graf von Westphalen and Wendehorst, *op. cit. supra* note 5, at 2180–2181 (recommended to delete the adjective “active” from the text of the COM-DCD).

56. A possible – not extremely satisfactory – answer to this situation might be that an additional, specific consent of the data subject is required for using the personal data for new purposes, and granting this consent qualifies as “providing” the data although the trader already “possesses” them.

“This Directive should also not apply to situations where the trader *only collects metadata, such as information concerning the consumer’s device or browsing history*, except where this situation is considered to be a contract under national law. It should also not apply to situations where the consumer, without having concluded a contract with the trader, is exposed to advertisements exclusively in order to gain access to digital content or a digital service. However, Member States should remain free to extend the application of this Directive to such situations, or to otherwise regulate such situations, which are excluded from the scope of this Directive.” (emphasis added).

The structure of this recital is somewhat confusing. The first sentence begins with an exclusion clause (“should also not apply”) regarding the collection of metadata, and it ends with an “exception” to this exclusion, namely, “where this situation is considered to be a contract under national law”. But this exception is identical to the coverage threshold of the DCSD in general, namely, that there must be a contract recognized under national law for the Directive to apply. It follows that passively provided data that falls under the “metadata” concept will trigger DCSD protection only then.<sup>57</sup> Note that the Directive does not provide a definition of the term “metadata”, and the example it mentioned, namely, “information concerning the consumer’s device or browsing history”, does not offer a conclusive answer to the coverage issue.

Another clue can be found in Recital 24 DCSD:

“The personal data could be provided to the trader either at the time when the contract is concluded or at a later time, such as when the consumer gives consent for the trader to use any personal data that the consumer might upload or create with the use of the digital content or digital service.”

This recital clarifies that providing the data and the conclusion of the contract do not have to happen simultaneously or in any specific time proximity; this leads to a related question of whether the phrase “personal data that the consumer might *upload or create*” supports the conclusion that passive data provision is excluded. At first glance, these verbs seem to imply an active performance of providing or creating the data. At the same time, including in the concept of counter-performance data that is created *after* the

57. Cf. Metzger, “A market model for personal data: State of the play under the new Directive on Digital Content and Digital Services” in Lohsse, Schulze and Staudenmayer (Eds.), *Data as CounterPerformance – Contract Law 2.0? Münster Colloquia on EU Law and the Digital Economy V*, (forthcoming 2020), at \*3.

conclusion of the contract points in the opposite direction: whereas creating the data is a result of an active action, the *provision* of the data can occur passively (from the standpoint of the consumer) during the life of the contract.

This ambiguity becomes relevant *inter alia* in the case of cookies. Cookies typically collect and transfer to the websites various kinds of information that help them to “remember” users, including device information and browsing history. Reading Recitals 24 and 25 together can lead to the conclusion that, for instance, a situation concerning a cookie which tracks, say, browsing history – hence “metadata” that the consumer, strictly speaking, neither uploads nor creates – falls outside the scope of the Directive.<sup>58</sup>

The case of cookies is particularly interesting in light of the ECJ’s recent decision in *Planet49*.<sup>59</sup> The Advocate General published an Opinion according to which the *active* and informed consent of the person is required in relation to placing cookies that collect information covered by the Article 5(3) of Directive 2002/58/EC (the “e-Privacy Directive”) as amended by Directive 2009/136/EC (the “cookie Directive”).<sup>60</sup> The ECJ followed this Opinion and ruled that a pre-selected checkbox does not fulfil the requirements of consent.<sup>61</sup> Active, informed, and specific consent is required for using both personal and non-personal data covered under the e-Privacy Directive,<sup>62</sup> and the user should have a viable option to refuse the implementation of cookies as “user consent may no longer be presumed but must be the result of active behaviour on the part of the user”.<sup>63</sup> The situation is not expected to change under the anticipated e-Privacy Regulation, which is intended to replace the e-Privacy Directive and repeal the cookie Directive.<sup>64</sup>

58. See Spindler and Sein, “Die Endgültige Richtlinie über digitale Inhalte und Dienstleistungen”, *MultiMedia und Recht. Zeitschrift für IT-Recht und Recht der Digitalisierung* (2019), 415–420, at 418 (reading Recital 25 DCSD as excluding cookies information generally, and cookies information that qualifies as personal data specifically).

59. Case C-673/17, *Planet49*.

60. Opinion of A.G. Szpunar, delivered on 21 March 2019 in Case C-673/17, EU:C:2019:246. Specifically, “requiring a user to positively untick a box and therefore become active if he does *not* consent to the installation of cookies does not satisfy the criterion of active consent. In such a situation, it is virtually impossible to determine objectively whether or not a user has given his consent on the basis of a freely given and informed decision. By contrast, requiring a user to tick a box makes such an assertion far more probable”. *Ibid.*, para 88 (emphasis in original).

61. Case C-673/17, *Planet49*, at paras. 49–65.

62. *Ibid.*, paras. 70–71.

63. *Ibid.*, para 56.

64. The Draft e-Privacy Regulation would adopt the definition of consent as stated in GDPR. See, Art. 9(1) to the EC’s Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM(2017)10 final, 2017/0003 (COD), 10 Jan. 2017.

The examples for “metadata” provided in the DCSD could certainly qualify as confidential “electronic communications data” covered under the e-Privacy Directive and proposed e-Privacy Regulation.<sup>65</sup> Although the act of granting consent to data collection *via* cookies needs to be affirmative, it does not necessarily coincide with an affirmative act of providing data (“upload or create”) manifesting a counter-performance. In the case of cookies, then, data collection is a continuous, ongoing process that seamlessly occurs in the background without any action of users to “hand over” their data.

Under the ECJ’s *Planet49* case law, the action that is necessary for legitimizing data collection through cookies under the e-Privacy Directive is the manifestation of an affirmative consent. Obviously, a positive *act* of providing the data is not required. Returning to the DCSD, the fear that including cookies situations under the Directive would lead to regulating the entire Internet<sup>66</sup> appears somewhat overstated, in light of the fact that these situations are already regulated (under privacy and data protection law) and since recognition under national law provides an additional buffer. Normatively, the arguments for excluding such situations from the scope of the Directive are not convincing, especially if its application operates to protect the weaker party in the bargain – the consumer. Divergence between domestic laws on this essential point would be detrimental to legal certainty and to the harmonization aim behind the DCSD. But some aspects will need to be observed uniformly nonetheless: domestically upholding such contracts should in any case be applied without prejudice to the e-Privacy Directive<sup>67</sup> and the anticipated e-Privacy Regulation, and clearly, the DCSD’s transposition cannot derogate from the consent requirements established therein.

#### 4. Digital content and services connected to physical goods

##### 4.1. *How to treat physical objects that are bundled with digital content or services?*

The COM-DCD excluded from its scope “digital content which is embedded in goods in such a way that it operates as an integral part of the goods and its

65. Under the proposed e-Privacy Regulation, “‘electronic communications data’ means electronic communications content and electronic communications metadata”. Art. 4(3)(a) Draft e-Privacy Regulation, COM(2017)10 final, 2017/0003 (COD), 10 Jan. 2017.

66. Cf. Staudenmayer, “Verträge über digitalen Inhalt”, (2016) *Neue Juristische Wochenschrift*, 2719, 2720.

67. DCSD, Art. 3(8) and Recital 37.

functions are subordinate to the main functionalities of the goods”.<sup>68</sup> The Council added a definition for “embedded digital content” in its proposed formulation of Article 2(12), and specifically excluded such content in its proposed Article 3(3a). By contrast, the EU Parliament explicitly included pre-installed embedded digital content within the regulatory scope of the DCD.<sup>69</sup>

Including embedded digital content and related services within the DCD proposal seemed preferable to the alternative of covering such content and services solely under the proposed sale of goods directive.<sup>70</sup> One reason was the wish to avoid coverage gaps in situations of rental, lending, and IoT (Internet of Things) products that are provided gratis (i.e. there is no sales contract) and where the trader receives data instead of money in exchange for providing those products and related services to the consumer.<sup>71</sup>

#### 4.2. *The solution: Excluding “goods with digital elements” from the DCSD*

Ultimately, the DCSD adopted a new definition for what are now called “goods with digital elements”, meaning “any tangible movable items that incorporate, or are inter-connected with, digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions”.<sup>72</sup> It explicitly excludes goods with digital elements from the coverage of the DCSD, while making such goods subject to the Sale of Goods Directive.<sup>73</sup> Since the SGD applies only to sales contracts,<sup>74</sup> and since the definition of sales contract found

68. COM-DCD, Recital 11.

69. EP-DCD, Art. 2(1)(1b), defining “embedded digital content or digital service”; EP-DCD, Art. 3(3).

70. Cf. Mak, op. cit. *supra* note 21, at 8–9 (highlighting demarcation problems under the COM-DCD).

71. Metzger, op. cit. *supra* note 10, at 98–101.

72. DCSD, Art. 2(3).

73. DCSD, Recital 21. “Directive (EU) 2019/771 [SGD] should apply to contracts for the sale of goods, including goods with digital elements. The notion of goods with digital elements should refer to goods that incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions. Digital content or a digital service that is incorporated in or inter-connected with goods in that manner should fall within the scope of Directive (EU) 2019/771 if it is provided with the goods under a sales contract concerning those goods. Whether the supply of the incorporated or inter-connected digital content or digital service forms part of the sales contract with the seller should depend on the content of this contract”.

74. SGD, Art. 3.1.

therein does not include the concept of data as counter-performance,<sup>75</sup> goods with digital elements for which the consumer provides data instead of a price are covered *neither* by the DCSD *nor* by the SGD.

It follows that transactions involving a smart device that do not constitute – or are not underpinned by – a sales contract, fall outside the scope of both the DCSD and the SGD, including cases where the consumer provides data in exchange for obtaining goods and related services. For instance, renting, lending and gratis distribution of goods with digital elements remain outside the regulatory scope of the directives,<sup>76</sup> unless the transaction for the supply of digital elements can be severed from the transaction concerning the physical goods and be treated separately and independently.<sup>77</sup>

### 4.3. Evaluation

#### 4.3.1. The general approach

The solution described above creates a certain “division of labour” between the DCSD and the SGD: sales contracts of goods that include digital elements are solely subject to the SGD, unless the physical component serves merely as a data carrier of digital content; and the question whether the digital element in a given case is essential for the goods to perform their function is to be answered, to a large extent, by the terms of the contract itself and the surrounding circumstances. SGD-covered contracts include “those sales contracts which can be understood as covering the supply of specific digital content or a specific digital service because they are normal for goods of the same type and the consumer could reasonably expect them given the nature of the goods”.<sup>78</sup> In case of doubt regarding the digital component being part of a sales contract of the physical article or not, the SGD applies.<sup>79</sup>

That the notion of “goods with digital elements” covers products which incorporate or are inter-connected with digital content/service in such a way that the absence of that digital content/digital service would prevent the goods from performing their function, reflects a simple reality in which IoT devices

75. Ibid., Art. 2(1), “‘sales contract’ means any contract under which the seller transfers or undertakes to transfer ownership of goods to a consumer, and the consumer pays or undertakes to pay the price thereof”.

76. Cf. Morais Carvalho, “Sale of goods and supply of digital content and digital services: Overview of Directives 2019/770 and 2019/771”, 8 *Journal of European Consumer and Market Law* (2019), 194, 198 (arguing that Member States can extend the scope of the SGD to leasing contracts).

77. DCSD, Recital 21.

78. Ibid.

79. Ibid.

without the digital content/service are pretty much useless.<sup>80</sup> It follows that, from a consumer protection perspective, the guarantees the law provides concerning the digital content/service in principle should not fall short of the guarantees that apply to the physical goods.<sup>81</sup> As we shall see, this is not always the case.

#### 4.3.2. *Interface with the Consumer Rights Directive*

In order to appreciate the consequences of this regulatory choice for consumer protection more broadly, it is helpful to zoom out and take a look at the broader EU legal scheme and the interrelations with other consumer protection instruments. Perhaps most relevant in the present context is the Consumer Rights Directive (CRD) and the changes introduced to it under the recently enacted so-called “Omnibus Directive”.<sup>82</sup>

Like the DCSD, the CRD in its version prior to the Omnibus Directive applied, *inter alia*, to digital content.<sup>83</sup> For the purpose of the CRD, contracts for digital content not supplied on a tangible medium are classified as neither sales contracts nor as services contracts.<sup>84</sup> They are treated rather as a special contract species (similar to contracts for the supply of water, gas or electricity), with digital content being defined simply as “data which are produced and supplied in digital form”.<sup>85</sup> The CRD secures some rights of consumers with respect to digital content; for instance, requirements concerning pre-contractual information duties,<sup>86</sup> or the rights of consumers in the case of withdrawal.<sup>87</sup> One inconsistency that has been identified is the lack of systematic treatment under the CRD of digital services, and the fact that

80. For an overview of IoT and consumer contracts, see Kryla-Cudna, “Consumer contracts and the Internet of Things” in Mak, Tjong Tjin Tai and Berlee (Eds.), *Data Science and Law* (Edward Elgar, 2018), at pp. 83–107. See also Wendehorst, “Sale of goods and supply of digital content – two worlds apart? Why the law on sale of goods needs to respond better to the challenges of the digital age: In-depth analysis”, Study for the JURI Committee, EP (2016).

81. For a pre-DCSD/SGD discussion on the regulative options in the case of smart goods, see Sein “What rules should apply to smart consumer goods? Goods with embedded digital content in the borderland between the digital content directive and ‘normal’ contract law”, 8 *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2017), 96.

82. Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 Nov. 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, O.J. 2019, L 328/7.

83. CRD, Recital 19. For further analysis on the interrelations between the CRD and the COM-DCD, see Schmidt-Kessel et al., “Die Richtlinienentwürfe der Kommission zu Digitalen Inhalten und Online-Handel – Teil 2”, op. cit. *supra* note 5, at 54–55.

84. *Ibid.*, Recital 19.

85. *Ibid.*, Art. 2(11).

86. *Ibid.*, Art. 5(1)(g)-(h), referring specifically to “digital content”.

87. *Ibid.*, Art. 9(1), 9(2)(c).



digital services which are provided “for free” (i.e. the consumer does not pay a price, but provides personal data instead) are not covered under that directive.<sup>88</sup>

The aim of the Omnibus Directive’s amendments to the CRD is to align the scope of application of the CRD to that of the DCSD in respect of the definitions of “digital content” and “digital services”.<sup>89</sup> Recital 31 Omnibus Directive explains that the CRD already applies to contracts for the supply of digital content which is not supplied on a tangible medium, regardless of whether the consumer pays a price in money or provides personal data. To close the gap, Recital 33 Omnibus Directive states that the scope of the amended CRD should be extended so as also to cover contracts under which the trader supplies or undertakes to supply a digital service to the consumer, and the consumer provides or undertakes to provide personal data.

Following this alignment agenda, the Omnibus Directive adopted the SGD’s definition of “goods” to include also “goods with digital elements”.<sup>90</sup> It further amended the CRD’s definitions to “sales contract”<sup>91</sup> and “service contract” – with the latter bringing digital services under the definition of a service contract.<sup>92</sup> Under the revision, the CRD will henceforth also cover digital content which is not supplied on a tangible medium, as well as digital services, where the consumer provides or undertakes to provide personal data to the trader. At the same time, it imports verbatim the two exceptions from the DCSD concerning personal data that is exclusively provided for supplying the digital content/service or for complying with legal obligations of the trader.<sup>93</sup>

88. Šajn, “Modernisation of EU consumer protection rules: A new deal for consumers”, Briefing, EU Legislation in Progress, PE 623.547 (European Parliament, April 2019) at 3, <[www.europarl.europa.eu/RegData/etudes/BRIE/2018/623547/EPRS\\_BRI\(2018\)623547\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623547/EPRS_BRI(2018)623547_EN.pdf)>.

89. See Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules, COM(2018)185 final, 2018/0090(COD), 11 April 2018, <[eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523880940100&uri=COM:2018:185:FIN](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1523880940100&uri=COM:2018:185:FIN)>, para 1.3.

90. Omnibus Directive 2019/2161, Art. 4(1)(a).

91. *Ibid.*, Art. 4(1)(c)(5): “‘sales contract’ means any contract under which the trader transfers or undertakes to transfer ownership of goods to the consumer, including any contract having as its object both goods and services”.

92. *Ibid.*, Art. 4(1)(c)(6): “‘service contract’ means any contract other than a sales contract under which the trader supplies or undertakes to supply a service, including a digital service to the consumer”.

93. *Ibid.*, Art. 4(2)(b) (amending Art. 3 CRD to cover data-paying consumers “except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content which is not supplied on a tangible medium or digital

The Commission's proposed definition for a "contract for the supply of digital content which is not supplied on tangible medium", to include digital goods provided in exchange for personal data, has been deleted<sup>94</sup> apparently based on the understanding that such contracts are already covered under the CRD. In addition, the Omnibus Directive imported into the CRD consumer protection provisions regarding user-generated content that is not personal information, which are virtually identical to the DCSD's provisions on the subject.<sup>95</sup>

On the whole, an important aspect of the Omnibus Directive is the explicit recognition by yet another EU directive (viz. the CRD) of the market phenomenon of contractual payment with personal data instead of money and the desire to extend consumer protection in such cases. But what are the implications for IoT products (or generally, "goods with digital elements") that are provided in exchange for data instead of a price?

Indeed, the Omnibus Directive amended Article 5 CRD (concerning pre-contractual information requirements for contracts other than distance or off-premises contracts) to include goods with digital elements under the information duties to consumers regarding functionality ((1)(g)) and interoperability ((1)(h)). Article 6 CRD (on information requirements for distance and off-premises contracts) will include similar information requirements that are generally applicable regarding digital goods and service contracts also regarding goods with digital elements.<sup>96</sup>

Under the revised Article 3(b)(1a), if the consumer provides personal data in exchange for the digital content/services, the CRD would cover only such content that is *not provided on a tangible medium*.<sup>97</sup> This leaves outside the CRD's scope IoT goods and other smart devices that are supplied with pre-installed software and other digital content if they were provided in exchange for data, only. As noted, such devices are principally covered under the SGD and the CRD as "goods", but the definition of a "sales contract" to which the SGD applies requires the transfer of ownership *and* the payment of a price, whereas the parallel definition of "sales contract" in the revised CRD does not require the payment of a price.

The applicability of the various DCSD-SGD-CRD provisions to goods with digital elements – and specifically, to the *digital content* involved in the transaction, as distinguished from the physical good – can be set out as follows:

service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose").

94. Art. 2(1)(d), COM(2018)185 final, cited *supra* note 89.

95. Omnibus Directive, Art. 4(10) (Cf. Art. 16(3) et seq. DCSD).

96. *Ibid.*, Art. 4(4)(a)(iv).

97. *Ibid.*, Art. (4)(2)(b).

IoT Product ("products with digital elements")	Ownership transfer for money, pre-installed digital content	Ownership transfer for money, post-installed digital content	Ownership transfer for personal data, pre-installed digital content	Ownership transfer for personal data, post-installed digital content	No transfer of ownership (lending, rental etc.)
<b>DCSD</b>	X (products w/ digital elements excluded)	X (unless the post-installed digital content can be severed from the sales contract, Recitals 21–22 DCSD)	X (products w/ digital elements excluded)	X (unless the post-installed digital content can be severed from the sales contract, Recitals 21–22 DCSD)	X (products w/ digital elements excluded)
<b>SGD</b>	✓ (SGD "sales contract" for goods with digital elements)	✓ (Recital 14 SGD, the digital content can be installed subsequently)	X (data as counter- performance not covered)	X (data as counter- performance not covered)	X (no SGD "sales contract")
<b>Revised CRD</b>	✓ (CRD "sales contract" for the device + some coverage of the digital elements)	✓ (CRD "sales contract" for the device + CRD's coverage of "digital content" contracts)	X (digital content not covered under amended Art. 3 since provided on a tangible medium)	✓ (digital content covered under amended Art. 3, since not provided on a tangible medium + device covered under "sales contract" since payment of price is not required)	X/✓ (no CRD "sales contract" for the device, but possibly separate recognition in a contract for digital content/services provided online)

One important consequence is that digital content for consumer IoT devices that are provided in exchange for data is only covered by the CRD, and even then, under the condition that the digital content is not provided on a tangible medium. Typically, this would mean that the content should not be embedded in the device as initially delivered to the consumer but rather be available through another (most likely online) source. Although the definition of “goods” under the SGD and the CRD includes the concept of “goods with digital elements”, digital content that is embedded in a physical IoT product which is not sold for money remains entirely outside this new EU consumer protection scheme. This result is curious.

Interestingly, as shown in the table above, the CRD’s new definition of a “sales contract” – unlike the definition of a “sales contract” under the SGD – does not require that the ownership of goods is transferred to the consumer for a price.<sup>98</sup> Therefore, the CRD will potentially cover instances where smart goods are sold (but not lent or rented) in exchange for data, but the digital content that is necessary for the proper functioning of the device must not be provided on a tangible medium. This result is curious as well.

The emerging kaleidoscopic landscape is inexplicable and largely unwarranted. Especially remarkable is the inferior status of smart devices with pre-installed digital elements that are provided in exchange for personal data. Probably, the exclusion from the DCSD/SGD scheme of IoT goods that are not sold for money was not required and perhaps not even intended.

For consumer IoT devices with digital elements covered by the revised CRD but excluded from the DCD/SGD scheme, (i.e. ownership transfer of devices with post-installed digital content in exchange for personal data), the level of consumer protection is clearly inferior to the DCSD/SGD consumer protection, including the lack of the detailed conformity requirements regarding the digital elements as laid out in the two aforementioned directives.

An additional implication of the way that digital content/services provided in exchange for personal data (with and without connection to an IoT device) are covered under the CRD concerns the trader’s duty therein to provide information about the price. Namely, Article 5(c) CRD requires the trader to provide clear and comprehensible information concerning the *total price* of the goods/services in the case of contract other than a distance or an off-premises contract. A similar information obligation exists regarding distance and off-premises contracts under Article 6(1)(e) CRD. Also Article 8(4) CRD includes a pre-contractual information duty as part of the formal requirements for distance contracts.

The question discussed in the literature is whether such provisions obliging traders to provide consumers with information about the price change where

98. Ibid., Art. 4(1)(c).

the payment is not (entirely) in the form of money, but (in whole or in part) in the form of data.<sup>99</sup> The argument is that traders must be transparent about the fact that data, especially such data that is collected *via* smart devices, is being monetized. Data monetization opportunities might indeed constitute an essential element of the total price. It has been argued on the one hand that hiding this fact might violate the CRD and, possibly, also consumer protection under Directive 2005/29 on unfair commercial practices.<sup>100</sup> On the other hand, the term “price” is consistently used in the DCSD to indicate a situation of money payment, in contrast to payment *by means of* data.<sup>101</sup> Assuming a uniform terminology, the CRD provisions that impose price transparency duties possibly do not apply to data-paying consumers. Furthermore, the consumer, now in the role of data subject, should benefit from quite extensive transparency obligations already imposed on the data processor, for example under Articles 12 to 14 GDPR.

#### 4.3.3. *Application of the SGD to IoT goods*

As for goods with digital elements that do fall under the SGD, the Directive’s protection scheme covers the digital components alongside the physical elements.<sup>102</sup> It sets forth specific objective requirements for conformity that are typical for digital content and services, such as the duty to inform the consumer and to supply updates, including security updates, that are necessary to keep those goods in conformity.<sup>103</sup>

At the same time, some of the protections embodied in the DCSD are lacking in the SGD, such as the obligations of the trader regarding user-generated content in the case of termination. In addition, the SGD does not include a detailed provision comparable to Article 19 of the DCSD regarding modifications in the digital content or services and the consumer protection safeguards therein (e.g. the requirements that unilateral modifications in the digital components initiated by the trader should be made without additional cost to the consumer).<sup>104</sup> It has been argued that on the matter of remedies for lack of conformity, the SGD is expected to effectively reduce the level of consumer protection in some Member States, due to the hierarchical structure of remedies, which bars immediate termination by the

99. For analysis and further sources, see Kryla-Cudna, *op. cit. supra* note 80, at 90–94.

100. *Ibid.*, at 92–94.

101. DCSD, Art. 2(7): “‘price’ means money or a digital representation of value that is due in exchange for the supply of digital content or a digital service”.

102. SGD, Recitals 14–15.

103. *Ibid.*, Art. 7(3).

104. Metzger, “Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?”, 12 JZ (2019), 577–586, at 578.

consumer (with some exceptions).<sup>105</sup> As a consequence of bringing all goods with digital elements under the wings of the SGD, both price-paying and data-paying consumers will suffer from these gaps in protection.

## 5. Data portability

### 5.1. *Data portability rights under the DCSD*

Do data-paying consumers have a “right to data portability” fashioned in the shape of the GDPR model? Already on the basis of earlier drafts for a directive on digital content, it was observed that the GDPR rights are more vigorous than the slightly comparable arrangement the COM-DCD had proposed.<sup>106</sup> It therefore seemed preferable to subject personal data directly and exclusively to the GDPR regime when such personal data was the means of consumer counter-performance.<sup>107</sup>

In the end, the DCSD adopted a clear GDPR-priority rule for personal data concerning the obligations of the trader in case of termination.<sup>108</sup> As indicated above, the DCSD more generally cannot derogate from the rights of the data subject under the GDPR (the “no prejudice” rule), which covers, among other things, the rights to withdraw consent to data collection and processing anytime at will, to demand deletion of data collected based on withdrawn consent, and to require the retrieval and transfer of personal data to another entity.<sup>109</sup>

If, for instance, a data-paying consumer withdraws consent for the processing of personal data they have provided as counter-performance, Article 20 GDPR governs the data portability rights with respect to that personal data. It is debatable whether this act of withdrawal also constitutes (consequential) termination of the contract by the consumer,<sup>110</sup> which would trigger Article 16 DCSD and its more limited portability rights concerning “any content other than personal data” which was “provided or created” by the consumer when using the digital service. Alternatively, the consumer must

105. Carvalho, *op. cit. supra* note 76, at 201.

106. Metzger et al., *op. cit. supra* note 10, at 103–105.

107. *Ibid.*, at 105. Cf. Janal, “Data portability: A tale of two concepts”, 8 *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2017), 59, 68 (proposed a consumer right of choice regarding data portability in case of parallel application of the DCD draft and Art. 20 GDPR).

108. DCSD, Art. 16(2).

109. See *supra* 3.1.2.

110. Mak, *op. cit. supra* note 21, at 9 (discussing the tension between withdrawal of consent and its consequences under data protection law and the contractual consequences of such withdrawal); Schmidt-Kessel et al., “Teil 2”, *op. cit. supra* note 5, at 60.

separately terminate the contract according to the modalities and for grounds recognized under domestic contract law in order to benefit from those rights. Either way, it seems reasonable to allow termination by the trader once consent is withdrawn, which essentially leads to the same result.

## 5.2. Evaluation

It is interesting to pause and observe the slight formulation difference between the phrase “provided or created when using the digital content or digital service” in the context of Article 16 DCSD (obligations of the trader in the case of termination regarding user-generated content) as compared to the phrase “upload or create with the use of the digital content or digital service” in the context of the coverage rule of Article 3 as explained in Recital 24 DCSD.

In the former case, the language of the provision indicates affirmative conduct by the consumer. Such a conclusion is supported by the examples listed in Recital 69, which mentions “digital images, video and audio files and content created on mobile devices”. At the same time, passively provided non-personal data is not explicitly excluded from the scope of the DCSD’s data portability right. The debate described in the context of Article 3 COM-DCD (see section 3.2 above) might assume similar contours, also when data portability under Article 16 DCD is the focus; namely, whether consumers who provide non-personal data passively rather than actively are entitled to the rights under Article 16(3)–(4) DCSD. The practical implications will be less dramatic, though, as scenarios in reality – specifically involving user generated content, which the directive explicitly targets – are less likely to raise doubts.

As indicated, the newly available data portability rights, such as regarding the traders’ obligation to discontinue use or the right of data retrieval, are limited to termination situations. They are further subject to broad exceptions under Article 16(3) DCSD, as was also the case under the earlier versions of the DCD draft. Commentators criticized this, but the flaw was not rectified in the final DCSD text.<sup>111</sup> Unlike a data subject under Article 20 GDPR, the DCSD consumer does not have a right to demand data to be transferred directly to a third party.<sup>112</sup> In this sense, the DCSD does not contain fully-fledged portability rights in the meaning of the term under the GDPR. Further, as the DCSD generally does not regulate relationships between

111. See e.g. Metzger, *op. cit. supra* note 104, at 583.

112. Cf. Art. 20(2) GDPR: “In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible”.

consumers and third parties (e.g. a service provider that contracts with the trader to provide certain digital content or perform digital services), the consumer has no retrieval rights against third parties under the DCSD. Instead, Recital 13 DCSD provides generally that regulating liability claims of a consumer against a third party, other than a trader that supplies or undertakes to supply the digital content or digital service, remains at the discretion of the Member States.

## 6. Conformity and non-discrimination

The Commission's draft proposed a structural hierarchy between subjective and objective conformity criteria. Namely, objective conformity criteria should be taken into consideration only to the extent that important aspects of the transaction are not stipulated in the contract in a clear and comprehensive manner (Art. 6(2) COM-DCD). That draft suggested taking into consideration – when applying objective conformity criteria – the question whether digital content is supplied in exchange for a price or other counter performance than money.<sup>113</sup>

By comparison, the Parliament's draft suggested introducing more elaborate objective conformity requirements, and importantly, removing the hierarchy between subjective and objective conformity factors. It also removed the objective conformity criterion taking into account the type of counter-performance (money versus other types of counter-performance, such as data). In the end, the argument for eliminating from the draft, to the extent possible, provisions that discriminated between money-paying consumers and data-paying consumers gained a small victory on this point.

In line with the Parliament's approach, the argument for putting subjective and objective conformity criteria on equal footing in order to achieve a higher level of consumer protection is now also anchored in the DCSD. Both objective and subjective conformity criteria must be considered, and there is no priority to subjective criteria.<sup>114</sup> Protection is essentially independent of the type of counter-performance, and Article 8 now stipulates a fairly detailed scheme of objective conformity requirements that includes the obligation to provide updates (including security updates), as well as any accessories and instructions which the consumer may reasonably expect to receive.

In the final analysis, many coverage and discrimination concerns against data-paying consumers have been resolved. DCSD essentially provides

113. Art. 6.2(a) COM-DCD.

114. Art. 6 DCSD; Art. 8(1) DCSD (listing objective requirements for conformity “[i]n addition to complying with any subjective requirement for conformity ...”).



similar protection to consumers, irrespective of the type of counter-performance also in some other important areas such as the trader duty to supply (Art. 5), burden of proof (Art. 12), and the rights of consumers in case of modifications of the digital content or service (Art. 19).<sup>115</sup> Yet, especially in the area of conformity obligations, it will be interesting to see whether in the future these become a meaningful instrument in the hands of data-paying consumers, or whether such consumers will predominantly prefer the remedy of termination instead.

## 7. Concluding remarks

Discussions surrounding the DCSD have kept EU legislatures and legal experts in the area of consumer protection, contracts, and data protection quite busy in recent years. The centre of gravity has now shifted to national legislatures. After all, central elements affecting *inter alia* data-paying consumers, such as contract formation and validity, remain unharmonized. Particularly on the issue of data as counter-performance, denying or limiting protection at the level of national contract law might punch large holes in the harmonization agenda envisaged by the Directive.

A heterogeneous landscape remains in the case of multiparty scenarios. Participants in the chain of transaction alongside direct vendors – such as providers of technical support, security and/or maintenance services, third-party suppliers of content or services, storage or data processors of any kind (especially, but not exclusively, in the context of IoT) – are not affected by the Directive.<sup>116</sup> Despite admonitions by legal experts, the DCSD did not introduce more uniformity in this area. Another “blind spot” in the DCSD/SGD structure is its silence on potential legal obligations of data-paying consumers with respect to the data they provide, e.g. duty to provide, commitments regarding data quality, authenticity and accuracy.<sup>117</sup> This domain is left entirely to domestic law.

115. For more discussion on the consumer's rights, see Staudenmayer, “Auf dem Weg zum digitalen Privatrecht: Verträge über digitale Inhalte”, 35 *Neue Juristische Wochenschrift* (2019), 2497–2501, at 2498 et seq.

116. See e.g. discussion under section 2 (level of harmonization) and section 5.2 (data portability) *supra*. See also, Sein and Spindler, *op. cit. supra* note 14, 275: “if the seller has made it sufficiently clear that the consumer has to acquire the ‘digital elements’ from a third party, then the seller himself only remains liable for the ‘plastic and metal’ part of the good”.

117. Cf. Specht, “Datenverwertungsverträge zwischen Datenschutz und Vertragsfreiheit – Eckpfeiler eines neuen Datenschuldrechts” in Briner and Funk (Eds.), *DGRI Jahrbuch 2017* (Dr. Otto Schmidt, 2018); Metzger, “Dienst gegen Daten: Ein synallagmatischer Vertrag”, (2016) *Archiv für die civilistische Praxis*, 817–856, at 851 et seq.; Hacker, *op. cit. supra* note 5, 180 et seq.

Courts will also have to weigh in, specifically as regards areas to which the harmonized scheme does apply, but leaves room for interpretation. The DCSD has indeed resolved many discussions on key elements raised during the legislative process. It is still early, however, to assess its consolidated effect on consumer protection and commerce at large throughout the EU. One reason is the questions of interpretation which remain open regarding its scope and interplay with other consumer protection instruments, as well as privacy and data protection law.

Only when national legislatures and courts have reached these junctions will it be possible to make a more precise assessment regarding the Directive's implications for consumers who provide data as counter-performance, and consumers and traders more generally. Nonetheless, the Directive sends out a clear message about the need to provide viable and adequate protection to consumers of digital content and digital services, which cannot turn a blind eye to the very significant and growing consumers category that pays with data instead of money.

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