



**Vilniaus
universitetas**

Paying with data in digital consumer contract law

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Outline – 4 legal issues

1. Contracts for „free“ digital content/services
2. Is personal data a commodity?
3. What happens where consumer withdraws his/her consent to process data?
4. How restitution should be provided where one party gave proper value and other party failed to do the same?



1. Contracts for „free“ digital content/services



Create an account

Username*

Password*

Confirm Password*

Birth date*

Email*

Gender*

Country*

State/Province

City

[sign up](#)



“there’s
no such thing
as a free
lunch.”

Legislative choice

- Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (DCD)
- DCD Art. 1: the purpose of this Directive is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection, by laying down common rules on certain requirements concerning contracts between traders and consumers for the supply of digital content or digital services, in particular, 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, and
 - the modification of digital content or a digital service.
- DCD Art. 3(1): This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and **the consumer provides or undertakes to provide personal data** to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose.

Application of DCD rules

- This Directive aims to strike **the right balance** between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity (recital 2) .
- **Certain aspects** concerning contracts for the supply of digital content or digital services should be harmonised, taking as a base a high level of consumer protection, in order to achieve a genuine digital single market, increase legal certainty and reduce transaction costs, in particular for small and medium-sized enterprises ('SMEs') (recital 3) .
 - This Directive **should not affect national law** to the extent that the matters concerned are not regulated by this Directive, such as national rules on the formation, validity, nullity or effects of contracts or the legality of the digital content or the digital service (recital 12) .
- This Directive should **fully harmonise** certain key rules that have, so far, not been regulated at Union or national level (recital 9).
- Union law provides a comprehensive framework on the protection of personal data. In the event of a conflict between this Directive and Union law on the protection of personal data, **the latter should prevail** (recital 37)

Breaking down the contract

- Contracts for supply of digital performance (content/services) in exchange of personal data
- Structure of contractual obligations according to the DCD (recital 24, Art 3(1):
 - the trader supplies, or undertakes to supply, digital content or a digital service to the consumer,
 - Data in digital form and/or related services
 - Online/offline
 - the consumer **provides, or undertakes to provide, personal data**
 - Extra data
 - Direct data
- Contractual obligations may be provided at the time when the contract is concluded or at a later time (consensual element).
- Therefore, it is bilateral (synallagmatic), onerous and consensual contract.

2. Is personal data a commodity?



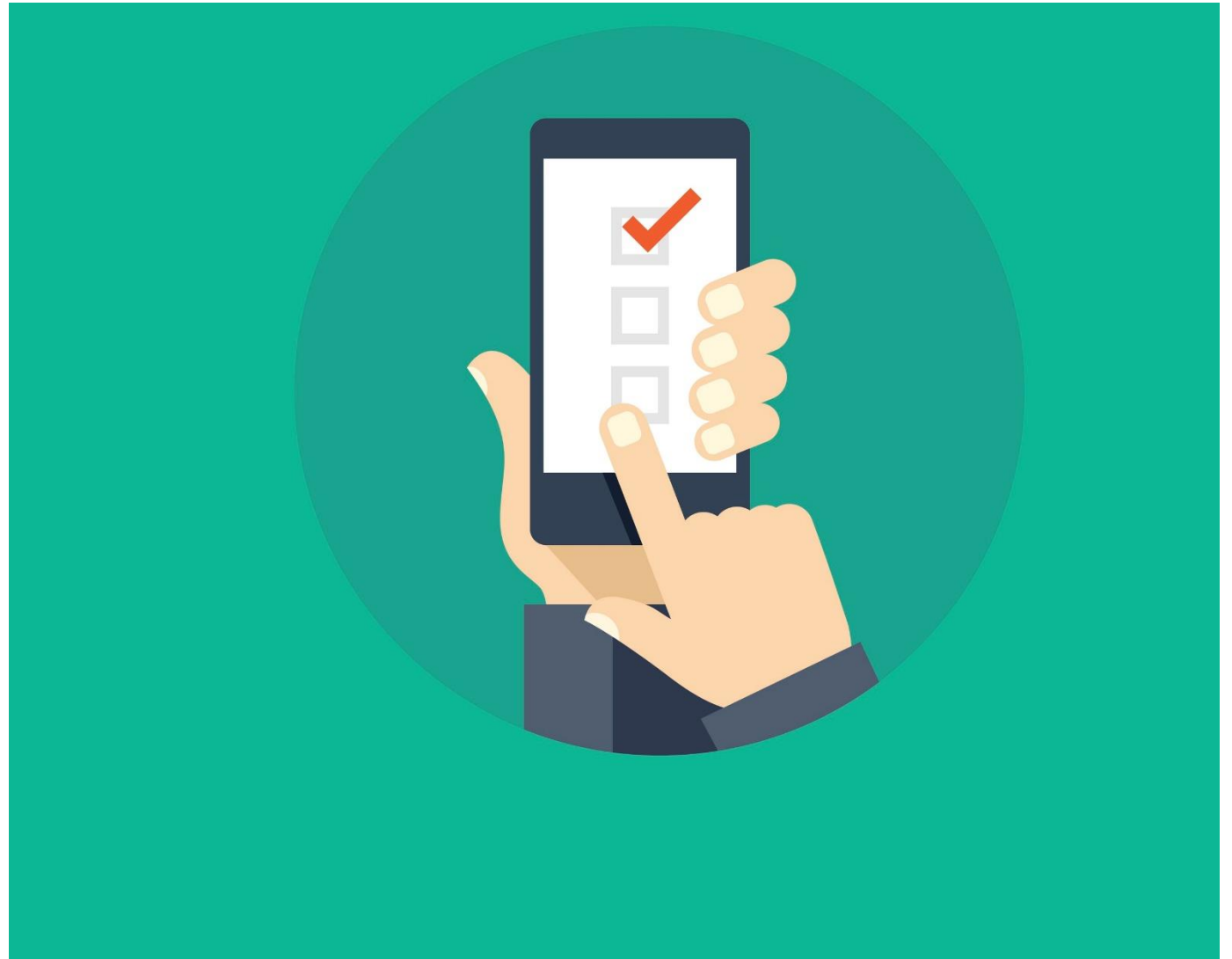
Status of personal data in contract (I)

- Initial EC proposal: Digital content is often supplied not in exchange for a price but against **counter-performance other than money** i.e. by giving access to personal data or other data.
- EDPS reaction: The EDPS warns **against** any new provision introducing the idea that people can **pay with their data the same way as they do with money**. Fundamental rights such as the right to the protection of personal data cannot be not be reduced to simple consumer interests, and **personal data cannot be considered as a mere commodity**. <...>There 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. One cannot monetise and subject a fundamental right to a simple commercial transaction, even if it is the individual concerned by the data who is a party to the transaction.
- DCD final text: While fully recognising that the protection of personal data is a fundamental right and that therefore **personal data cannot be considered as a commodity**, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies.

Status of personal data in contract (II)

- Can we agree with EDPS?
- Maybe personal data is new money in digital markets?
- Personal data is an economic asset and object of personality rights, not property rights

3. What happens where consumer withdraws his/her consent to process data?



Lawful use of a personal data

- The consumer has contractual obligation to provide personal data, including give consent for the the lawful processing.
- DCD recital 24: Union law on the protection of personal data provides for an exhaustive list of legal grounds for the lawful processing of personal data.
- GDPR Article 6. Lawfulness of processing
 - 1. Processing shall be lawful only if and to the extent that at least one of the following applies:
 - (a) the data subject **has given consent** to the processing of his or her personal data for one or more specific purposes;
 - (b) processing is **necessary for the performance of a contract to which the data subject is party** or in order to take steps at the request of the data subject prior to entering into a contract;
 - Not applicable, since its permits data processing, which is ancillary to performance of some obligation, not the essence of it.
 - (c) processing is necessary **for compliance with a legal obligation** to which the controller is subject;
 - Not applicable since its consumer's legal obligation to provide data, not trader's

Consumer consent (I)

- Consent to contract – essential precondition of valid contract under all European legal systems
 - The phrase 'matters relating to a contract', as used in Article 5(1) of the Convention, is not to be understood as covering a situation in which there is no **obligation freely assumed** by one party towards another (ECJ C-26/91)
- Consent for personal data (GDPR Art. 7)
 - 1. Where processing is based on consent, **the controller shall be able to demonstrate** that the data subject has consented to processing of his or her personal data.
 - 2. If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is **clearly distinguishable from the other matters** <...>.
 - 3. The data subject shall have the right **to withdraw his or her consent at any time**. The withdrawal of consent **shall not affect the lawfulness of processing** based on consent **before its withdrawal**.<...> It shall be as easy to withdraw as to give consent.

Consumer consent (II)

- Consent to contract v consent to use personal data
 - Consent to contract does not automatically encompass consent to process personal data (GDPR Art. 7(2)).
 - Consent to contract is necessary for validity of a contract, second for its performance.
 - Withdrawal of consent to process personal data is a breach of contract, which may entitle the trader to terminate the contract due to non-performance by consumer.
 - Termination of contract presupposes will to terminate all relationships between trader and consumer, including consent for personal data.

4. How restitution should be ordered where one party gave proper value and other party failed to do the same?



Termination matrix in DCD

- Grounds for termination by the consumer
 - DCD Art. 13 - termination for the failure to supply digital content/services
 - DCD Art. 14 – termination for the lack of conformity
 - DCD Art. 19 – termination after unsatisfactory modification of digital content
 - Is there a general right of withdrawal/termination without breach of the contract?
- Procedure
 - DCD Art. 15 - a statement to the trader expressing the decision to terminate the contract.
 - No additional requirements and immediate effect
- Consequences
 - Release from performances and limited restitution
 - In comparison – under CESL Art. 173 (6), no restitution at all in case of payment by personal data.
 - DCD Art. 16 - obligations of the trader in the event of termination
 - DCD Art. 18 - time limits and means of reimbursement by the trader
 - DCD Art. 17 - Obligations of the consumer in the event of termination

Obligations of the trader in the event of termination (DCD Art. 16, 18).

- Reimbursement of the consumer for all sums paid under the contract
 - Should be done within 14 days
 - Only for payment of money, not provision of personal data
 - How to prevent unjust enrichment of the trader by the use of personal data without proper consideration?
 - No usual unjust enrichment remedies, since it will interfere with DCD regulation
 - Damages for fraud, where possible
- In respect of personal data of the consumer, the trader shall comply with the obligations applicable under GDPR
 - Since termination supposes withdrawal of consent, becomes relevant:
 - Right to erasure ('right to be forgotten') (Art. 17)
 - Right to restriction of processing (Art. 18)
 - Right to data portability (Art. 20)
- Duties related to consumers' digital content, other than personal data
 - Duty to refrain from using such content
 - Duty to give access to consumer for such content

Obligations of the consumer in the event of termination (DCD Art. 17)

- No return of digital content
 - Online content - no return of data files, only refraining from using the digital content or digital service and from making it available to third parties
 - Offline content - return of tangible medium
- The consumer shall not be liable to pay for any use made of the digital content or digital service in the period, prior to the termination of the contract, during which the digital content or the digital service was not in conformity
 - General duty to pay for proper digital content/services
 - If consumer withdraws consent or provides the incorrect/incomplete personal data, it should pay the price for digital content/services instead of personal data
 - By analogy with CRD Art. 14 (3) - the consumer shall pay to the trader a standard price offered by the trader to the other consumers, or where trader offers excessive price or accepts only personal data – market value of digital content/services.
 - The consumer should be clearly and sufficiently informed about his/her obligations in advance (CRD Art. 6).

One-sided justice?

- Inadequacy of restitution in data exchange contracts:
 - where consumer fails to provide personal data he should pay the price for proper digital content
 - where trader fails to provide proper digital content it has no obligation to pay for proper personal data. At least where there is no fraud on part by the trader.
- Possible solutions:
 - mitigation in national private law with restitution and enrichment claims?
 - CESL approach
 - Amendment of DCD



Conclusions

- Contract for supply of digital performance (content/services) in exchange of personal data is a bilateral (synallagmatic), onerous and consensual contract. In case of digital content it is the contract for data exchange (proprietary for personal).
- Personal data in fact is a counter-performance, alternative to payment by money. If data is defective, the consumer should pay the money instead.
- Normally, withdrawal of consent to process personal data should not impact the validity of contract and be characterised as a breach of contract.
- In contrast, avoidance/termination of contract presupposes the end for all relationships between trader and consumer, including consent for personal data.
- There is unresolved issue how to deal with unjustified enrichment of the trader which used consumer's personal data without proper consideration.