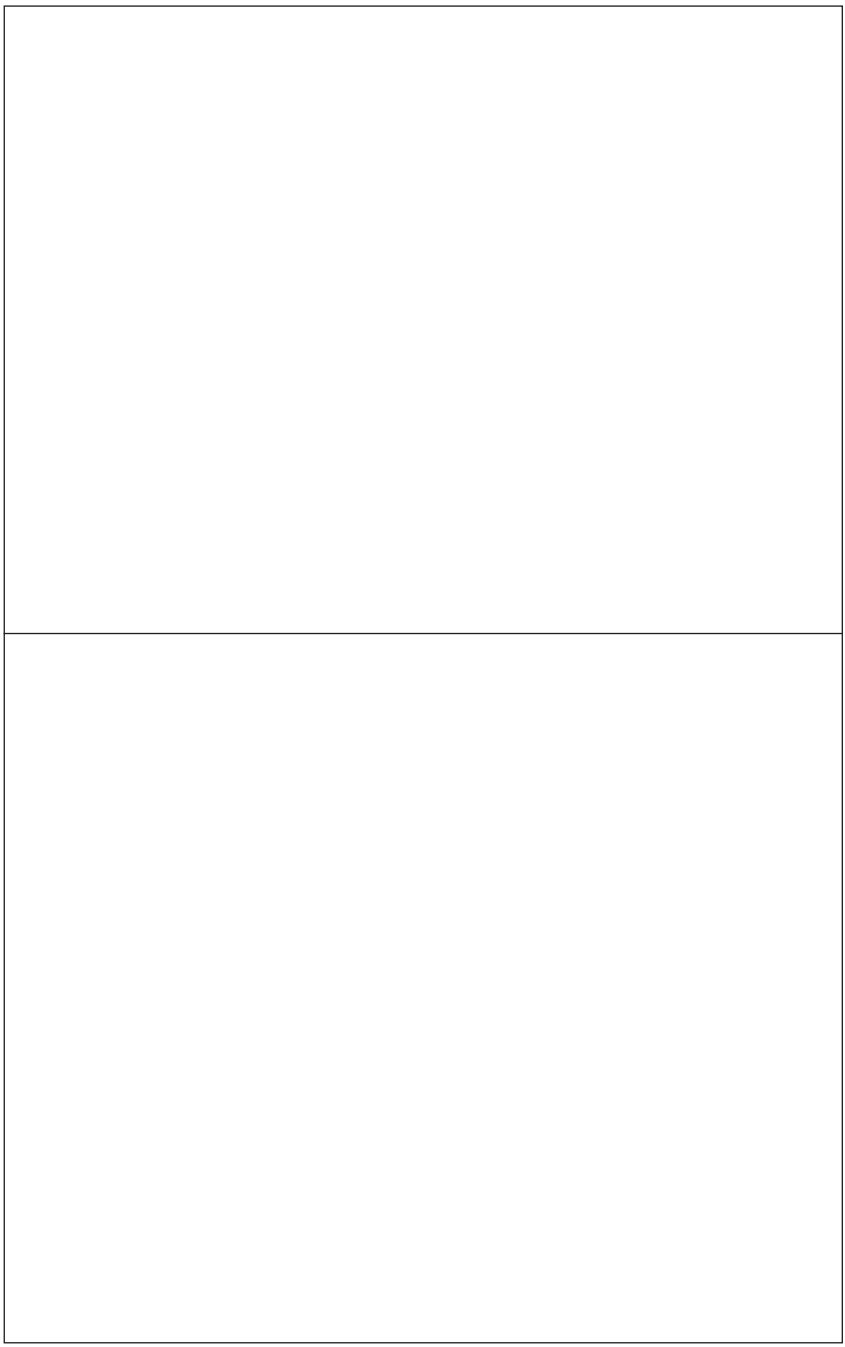
Sebastian Lohsse/Reiner Schulze/Dirk Staudenmayer (eds.)

Data as Counter-Performance – Contract Law 2.0?

Münster Colloquia on EU Law and the Digital Economy V

Nomos



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Foreword

With ongoing digitization, data is increasingly seen as a tradable asset. Accordingly, digital content and digital services are frequently provided in return not for money but for data. The 5th Münster Colloquium on EU Law and the Digital Economy, held on 16th and 17th May 2019, brought together scholars and practitioners from across Europe for an in-depth discussion of issues surrounding this role of 'data as counter-performance'. Its impact on the economy and contract practice will be one of the central aspects in the further development of contract law and of consumer protection in the digital age. This is true, in particular, since data as counter-performance has also become a subject of European legislation with the new EU Directive 'on certain aspects concerning contracts for the supply of digital content and digital services' (whose publication in May 2019 coincided with the Colloquium).

The publication of the results of the 5th Münster Colloquium in this volume aims to stimulate the further discussion on this subject matter and to contribute to the development of modern private law. The editors kindly thank Karen Schulenberg for her role and support in the organisation of the Colloquium and in the preparation of this volume.

June 2020

Sebastian Lohsse
Reiner Schulze
Dirk Staudenmayer

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Data as Counter-Performance – Contract Law 2.0? An Introduction

Sebastian Lohsse / Reiner Schulze / Dirk Staudenmayer[*]

I. Background

With the new EU Directive on certain aspects concerning contracts for the supply of digital content and digital services[1] (hereinafter 'Digital Content Directive', 'DCD'), 'data as counter-performance' has become a subject of European legislation. The Commission proposal[2] for this Directive explicitly used the term 'counter-performance' in relation to data provided by the consumer to the supplier under a contract 'in exchange' for the supply of digital content.[3] It provided that counter-performance in this form would be equivalent to counter-performance in the form of payment of a price.

The Digital Content Directive contains essentially the same assessment in this respect, even if it does not explicitly denote the consumer's performance as 'counter-performance'. Like the underlying Commission proposal, the Digital Content Directive characterises contracts falling within its scope by describing the performance to be rendered by both parties. The trader must provide or undertake to provide the consumer with digital

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1 Directive (EU) 2019/770, [2019] OJ L136/1. For an overview of the Directive see Dirk Staudenmayer, 'Auf dem Weg zum digitalen Privatrecht – Verträge über digitale Inhalte' (2019) 35 NJW 2497; for a more detailed explanation of its main features see Dirk Staudenmayer, 'The Directives on Digital Contracts – First steps towards the Private Law of the Digital Economy' (2020) 2 ERPL 219, and Reiner Schulze, 'Die Digitale-Inhalte-Richtlinie – Innovation und Kontinuität im europäischen Vertragsrecht' (2019) 4 ZEuP 695. For an article-by-article analysis of the Digital Content Directive see Reiner Schulze and Dirk Staudenmayer (eds), *EU Digital Law – Commentary* (Nomos 2020).

2 COM(2015) 634 final.

3 Art 3(1) COM(2015) 634 final.

content or a digital service. The consumer's performance may consist of either paying, or undertaking to pay a price, or providing, or undertaking to provide personal data to the trader. The provision of personal data in return for the provision of digital content and digital services is treated as counter-performance in the same way as the traditional form of the payment of a price. In short: personal data is regarded as payment.

The Directive, which defines its scope with this 'disruption', is one of the first legislative measures the EU is using to respond to two emerging trends in the 'digital economy'.

First of all, the digital economy has led to the appearance of new products in the form of digital content and digital services, which both constitute a fast-growing part of many retail sectors, as illustrated by the following examples: in 2018 the total amount of worldwide subscriptions to online video services for the first time surpassed the amount of cable subscriptions.[4] In the same year, paid streaming, free streaming, and downloads accounted for 59 % of the total recorded music revenues worldwide and made up more than 50 % of revenue in 38 markets.[5] The percentage of individuals aged 16–74 reading/downloading online newspapers/news magazines in the EU has, within the space of a decade, nearly tripled from 20.7 % in 2007 to 60.6 % in 2017.[6]

Secondly, this development trend on its own is combined with another visible trend in the data economy, i.e. that data is seen as a tradable asset. This has led, in B2C transactions, to the phenomenon that digital content and digital services are no longer paid for exclusively with money but also with access to data. Based on studies and an EU-wide survey, the Commission noted in the Impact Assessment of its proposal that a very large proportion of digital content provided to consumers is not paid with money but supplied against access to personal data granted by the consumer.[7] This was noted as particularly prevalent in the sectors involving audio-visu-

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4 <https://www.mpaa.org/wp-content/uploads/2019/03/MPAA-THEME-Report-2018.pdf> 31, last accessed 28 July 2019.

5 <https://www.billboard.com/articles/business/8505270/ifpi-global-report-2019-music-sales-rise-paid-streaming> (using data from the annual Global Music Report 2019 by International Federation of the Phonographic Industry), last accessed 28 July 2019.

6 <https://stats.oecd.org/> → Information and Communication Technology → ICT Access and Usage by Households and Individuals → ICT Access and Usage by Individuals → indicator D1G: Individuals using the Internet for reading/downloading online newspapers/news magazines, last accessed 28 July 2019.

7 Impact Assessment of 9 December 2015, SWD(2015) 274 final, 15. This is confirmed for instance for Germany, where 76 % of internet users use exclusively or

al access to sports events and other audio-visual content, listening to digital music, playing online games and reading e-books.

At the same time, this trend goes hand in hand with growing consumer awareness that their data has monetary value and that they are indeed 'paying' with data when they are using online products 'for free'.[8]

The Digital Content Directive therefore includes not only digital content and digital services paid for with money[9] but also applies when such content or services are provided against granting access to personal data, such as the consumer's name, address, email address, age, gender etc. Such data is often requested if one 'registers' for supply of 'free' digital content or a digital service. The Digital Content Directive recognises thereby that data, if it is not already a 'currency' today, probably will become a *de facto* 'currency' of tomorrow.

The adoption of the Digital Content Directive by the legislator, however, is only a part of a much broader reaction to the transition towards the digital economy. Digital content and digital services are not the sole subject of consumer contracts (to which the scope of the Directive is limited[10]). Personal and non-personal data as subject of contracts are at least as important in business-to-business transactions.

The digitalisation of our economy and society, in particular, the rollout of the Internet of Things (IoT) and the datafication of business processes, has resulted in a data economy with a huge mass of processed and stored data: the so-called phenomenon of 'big data'. Big data is often characterised by the 3 Vs[11]: high *volume*, high *velocity* and high *variety*. The 'volume' aspect of 'big data' can be best illustrated by the following example:

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above all online offers where no money is paid; cf Deutsches Institut für Vertrauen und Sicherheit im Internet (DIVSI) study 'Daten – Ware und Währung' (2014) 10, available under <www.divsi.de>,last accessed 28 July 2019.

8 This applies to three quarters of German Internet users. Cf *DIVSI* (n 7) 11.

9 Art 3(1) subpara 1, Art 2 No. 7 and Recital 23 DCD. It includes also digital representations of value such as electronic vouchers or e-coupons as well as virtual currencies, but only if the latter are recognised by national law.

10 For more detail on the scope of the Digital Content Directive see the commentary on Art 3 DCD by Dirk Staudenmayer in *Schulze/Staudenmayer* (n 1).

11 It is unclear who came up first with this very frequently mentioned characterisation. In the meantime, other Vs and characteristics without 'V' have also been added.

by 2013[12], Google was processing more than 24 petabytes[13] of data in a single day. This corresponds to thousands of times the quantity of all printed material in the US Library of Congress. Already by 2013, the global amount of stored information was estimated at 1,200 exabytes[14]. If this had been saved on CD-ROMs, the result would have created five towers of CD-ROMs reaching the moon. However, the year 2013 is, in terms of data processed and stored, the modern equivalent to the Stone Age. The rapid increase of processing and storing data is even more impressive. It is estimated[15] that in 2016 and 2017, 90 % of the data worldwide was created. In its recently published Data Strategy[16] the European Commission mentions that the volume of data produced globally is estimated to grow from 33 zettabyte[17] in 2018 to 175 zettabyte in 2025. The Commission therefore announced to look, inter alia, into possible legislative action on B2B data sharing.[18]

Moreover, it is not only the objects of contracting but also its instruments and methods that are changing considerably as a result of digitalisation. With its development, rollout and increasing use, artificial intelligence may not only decide, for instance, which contracts are concluded with which contractual partners when a contract is concluded 'machine-to-machine', but also determine the content of the contracts according to the market situation, without human intervention.[19] The implementation of

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12 The following examples are taken from Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data* (John Murray 2013) 8ff.

13 A petabyte is 10^{15} or 1 000 000 000 000 000 bytes, while 1 byte is a single character.

14 An exabyte is 10^{18} or 1 000 000 000 000 000 000 bytes.

15 www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#2d35a00560ba, last accessed 28 July 2019.

16 Communication of 19 February 2020, COM 2020(66) final, 2.

17 A zettabyte is 10^{21} or a 1 with 21 zeros.

18 For an analysis of the legal problems concerning access and transfer of data, see Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), *Trading Data in the Digital Economy: Legal Concepts and Tools* (Nomos 2017). As regards the new dependencies in B2B contracts created in the Digital Economy see Dirk Staudenmayer 'Towards a European Private Law of the Digital Economy? – Trends' in André Janssen and Hans Schulte-Nölke (eds), *Researches in European Private Law and Beyond – Contributions in Honour of Reiner Schulze's Seventieth Birthday* (Nomos 2020) 74ff.

19 On questions surrounding liability for artificial intelligence see Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), *Liability for Artificial Intelligence and the Internet of Things* (Nomos 2019).

the contract and the reactions to behaviour contrary to the contract may also profoundly change through the use of 'smart contracts' in the blockchain[20]. Self-executing contracts[21], for example, can block the use of a purchased or rented item where payments under the corresponding credit of rental agreement have not been made. New applications can take care of automatic payment of compensation for airline passengers in the event of delays.

These and many other examples suggest that the far-reaching changes in contract practice resulting from digitalisation may require a corresponding adaptation of contract law. However, this in no way means that a completely new contract law or a separate *'Datenschuldrecht'* (i.e. a 'law of *data* obligations') would have to be created. Rather, the adaptability of contract law has been demonstrated in the past in the face of far-reaching technological and social changes such as the 'industrial revolution'. In view of the new challenges posed by digitalisation, it is therefore likely to be a matter above all of further developing the terminology, principles and norms of contract law in line with the changed conditions of contract practice. Similar to 'Web 2.0', which does not refer to a fundamentally new type of technology, but to a socio-technically changed use of the Internet,[22] the phrase 'Contract Law 2.0'[23] can serve to mark this new stage in the development of contract law.

II. The response of the European legislator

Digitalisation is one of the fundamental trends of this century. There is a clear political willingness in the EU to rise to this challenge, in order to

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20 For an overview of the blockchain technology and its legal aspects cf Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code* (Harvard University Press 2018). As to the large number of business models possible, cf Don Tapscott and Alex Tapscott, *Blockchain Revolution* (Penguin 2016) 178ff.

21 As an introduction cf Nikolas Guggenberger, 'The Potential of Blockchain Technology for the Conclusion of Contracts' in Reiner Schulze, Dirk Staudenmayer and Sebastian Lohsse (eds), *Contracts for the Supply of Digital Content: Regulatory Gaps and Challenges* (Nomos 2017) 83ff.

22 As defined (in German) by Richard Lackes in *Gabler Wirtschaftslexikon*, available online under <https://wirtschaftslexikon.gabler.de/definition/web-20-51842> last accessed 10 March 2020.

23 As used e.g. by Alexander Savelyev, 'Contract law 2.0: "Smart" contracts as the beginning of the end of classic contract law' (2017) 2 Information & Communications Technology Law 116.

harvest the economic growth potential of the 'digital economy' and the societal benefits of digitalisation. As the internal market is thought to be the most appropriate European tool for this, the European Commission's 'Digital Single Market Strategy'[24] (hereinafter 'DSM Strategy') of 2015 was a starting point for the EU to create a framework to promote and steer this transition process, among others in contract law. Making 'Europe fit for the Digital Age' has recently become an even stronger political priority.[25]

Individual legislative provisions primarily addressing other subject matters have already been adopted, reacting to the new situation in contract law brought about by digitalisation (e.g. in the context of information obligations and the right of withdrawal under the Consumer Rights Directive in its initial[26] and amended form[27]). Furthermore, the 2011 proposal for a Common European Sales Law[28] (CESL) already included provisions on the supply of digital content in a set of rules covering core contract law matters including the conclusion of the contract, restitution after termination of the contract, and prescription.[29] However, despite approval by the European Parliament, this attempt at optional harmonisation ultimately failed in Council, due to the resistance from a number of Member States.

In its 'DSM Strategy', the Commission drew the lessons from the experiences with the Consumer Rights Directive and the CESL[30] and in December 2015 put forward one of the first digital-specific legislative projects in

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24 COM(2015) 192 final.

25 Cf Political guidelines of Commission President von der Leyen, available online under <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> 13ff., last accessed 23 January 2020.

26 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, [2011] OJ L304/64.

27 Directive (EU) 2019/2161/EU of the European Parliament and the Council of 27 November 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 modernisation of Union consumer protection rules, [2019] OJ L328/7.

28 COM(2011) 635 final. For an overview see Dirk Staudenmayer (ed.), *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Textbook* (C.H. Beck 2012) VIIff. For more details see Schulze (ed.), *Common European Sales Law – Commentary* (Nomos 2012).

29 For an explanation to what extent both the Digital Content Directive and the Sales of Goods Directive use CESL provisions as a model, see *Staudenmayer* in ERPL (n 1).

30 As to the approach of the Commission proposals see Dirk Staudenmayer, 'Digitale Verträge – Die Richtlinienvorschläge der Europäischen Kommission' (2016) 4 ZEuP 802.

this area, namely the 'Proposal for a Directive on certain aspects concerning contracts for the supply of digital content', which ultimately was adopted – after modifications during the legislative process – as the Digital Content Directive 2019/770. In December 2015 the Commission also presented a 'Proposal on certain aspects concerning contracts for the online and other distance sales of goods'[31], which formed the basis for the Sale of Goods Directive 2019/771[32], adopted in 2019, again simultaneously with the Digital Content Directive. The legislative impact of the 'DSM Strategy' is, however, not limited to these two new Directives, but rather also includes two Regulations which have already entered into force, namely the Geo-blocking Regulation[33] and the Portability Regulation[34], and the Platform Regulation[35], which will apply from 12 July 2020. Each of these Regulations deal with consequences of digital marketing and have also an effect on contract law.[36]

The Digital Content Directive is therefore part of a package of legislative measures responding to the effects of digitalisation on contract law. Although the Portability Regulation also regulates online content services provided without payment of money[37], it was only in relation to the Digital Content Directive that the discussion about data as counter-performance became, due to its significance in terms of economic impact and legal policy, very controversial. A minority in Council and in the European Parliament was reluctant to include data as counter-performance into the scope of the Directive. This minority in Council insisted on a consultation

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31 COM(2015) 635 final.

32 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, [2019] OJ L136/28. See for an overview of the Directive *Staudenmayer* in NJW (n 1) and for a more detailed explanation of its main features see *Staudenmayer* in ERPL (n 1).

33 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, [2018] OJ L60I/1.

34 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, [2017] OJ L168/1.

35 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, [2019] OJ L186/57.

36 See for instance as to the link between the Geoblocking Regulation and the remedies under the Sale of Goods Directive *Staudenmayer* in ERPL (n 1).

37 In its Arts 6 and 9(2). On these provisions see the comments by Nils Rauer and Lea Kaase in *Schulze/Staudenmayer* (n 1).

from the European Data Protection Supervisor. The fundamental concern was, as expressed in the opinion of the European Data Protection Supervisor, that 'personal data cannot be compared to a price, or money. Personal information is related to a fundamental right and cannot be considered as a commodity'[38] or as it was put in simpler words in the discussion 'you cannot put a price tag on a fundamental right'. The counter-argument in the discussion was 'of course, one can', quoting for instance the example of the fundamental right to one's own image and its commercialisation. The minority, however, was of the opinion, as it was put by the European Data Protection Supervisor, that '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.'[39] This was countered by the argument that a huge number of these contracts happen every day and nobody thinks about treating them like trade in live organs. Not including data in the scope of the Digital Content Directive would mean that consumers who paid with their data would be without protection if the digital content or digital service in question is not in conformity with the contract.

An additional concern was that the Digital Content Directive could be interpreted as interfering with the legal grounds for data processing, which are exhaustively regulated in Art 6 of the General Data Protection Regulation (GDPR)[40]. Beside the fact that nothing in the wording of the Commission proposal or the Directive itself points to this, the argument was made that consent according to Art 6(1)(a) GDPR, and the acceptance to a contract for supply of digital content or digital services, are legally speaking two different acts even if in practice they may both take place in a single document. While the Directive would regulate the contract law aspects, the GDPR would regulate the data protection aspects.

Ultimately, the respective majority followed the Commission's proposal thus the scope of the Digital Content Directive extends to contracts where the consumer provides data to the supplier. However, this controversial

38 European Data Protection Supervisor, 'Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content' (March 2017), para 14, available online under <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf>, last accessed 28 December 2019.

39 *European Data Protection Supervisor* (n 38) para 17.

40 Regulation 2016/679 of 27 April 2016.

discussion had several impacts on the drafting of the relevant clauses and recitals. The Directive avoids mentioning, in contrast to the wording under the Commission proposal, that 'in exchange, … the consumer … provides counter-performance other than money in the form of personal data or any other data…'.[41] Nevertheless, the wording adopted in Art 3(1) 2nd subpara DCD, fails to disguise that in practice that is precisely the case. Recital 24 DCD recognises the main arguments of the discussion mentioned above. On the one hand, it mentions that data protection is a fundamental right and that therefore personal data cannot be considered a commodity. On the other hand, it recalls that business models where consumers provide data instead of paying a price exist and have a considerable market share. As the principal reason for the inclusion of data within the scope, it stresses that the Directive should ensure that consumers are entitled to contractual remedies. In addition, the Directive, in Art 3(8) and the Recitals 24, 37–39, emphasises that it is the GDPR[42] and not the Directive that regulates the conditions of lawful processing of data and the rights of the data subject. Compared to the Commission proposal which had already contained the same rule and explanation[43] with far fewer words, this seems to be an exaggerated emphasis, but it needs to be understood as part of the overall legislative compromise.

III. Provision of data and conclusion and performance of contract

Against the background of these developments, this volume concentrates on questions that arise in contract law with a view to the fact that 'data as counter-performance' has become a subject of European legislation. In view of the forthcoming implementation of the Digital Content Directive in the Member States, the impact of the inclusion of data in Art 3(1) 2nd subpara DCD for the regulation of conclusion, effect and performance of contracts in the law of the Member States must be considered.

Although the equal treatment of payment of a price and provision of personal data in Art 3(1) DCD serves only to determine the scope of the Directive, it is likely to be of further significance for the laws of the Member States. In particular, the relationship between the performance obligations of the parties to consumer contracts which provide for such provi-

41 Art 3(1) DCD.
42 Regulation 2016/679 of 27 April 2016.
43 Art 3(8) and Recital 22 DCD.

sion of data can in principle be characterised in the same way as in the case of contracts which, instead, stipulate a cash payment by the consumer. If the latter is a relationship of performance and counter-performance, the former contracts would in principle be subject to the provisions on reciprocal contracts, with corresponding further consequences under national law for the consumer's performance obligations and the trader's rights in the event of non-performance or non-conforming performance.

The first question to be answered, however, is whether and under what conditions a contract is concluded if a consumer does not pay a price in money, but provides or promises to provide personal data. There is no answer, or at least no immediate answer, to this question in the Directive. Rather, the conclusion and validity of contracts do not fall within the scope of the Directive, but are matters of national law.[44] Several problems may arise in this respect. It is not beyond doubt, for example, whether the traditional notion of contracts being concluded by means of offer and acceptance can be appropriately employed where 'free' online services in fact rely upon the collection of data generated by the user. From the point of view of the service provider, the use of his services may well be interpreted as an implicit offer – or an implicit acceptance of his own offer as it may be – even though the user himself may not be aware that in providing data he is indicating an intention to bind himself. However, if, and because, users may generally not think of such services as being provided on a contractual basis at all, it is doubtful whether there is an acceptance by the service provider (or an offer by the service provider in the first instance). While the binding nature of the service provider's behaviour is indeed intentional, the user may nevertheless fail to interpret the service provider's behaviour accordingly.

Comparably fundamental problems are raised with a view to questions of validity. The fact that data is provided for the use of a service that processes data does not depend on the age of the user. However, if provision of data is to be governed by contractual agreements, how can these agreements be valid where concluded by minors? Furthermore, and beyond the issue of minors and capacity in general, questions of validity may also arise from the extent of data collected from the user or their use by the service provider. Does the consent to process data, for example, automatically extend to the generation of a personality profile by the service provider? And should consent to generate such personality profile, even where explicitly

44 Art 3(10) DCD; Recital 12 DCD.

provided, be possible or should it rather be regarded as lying beyond party autonomy?[45]

Similarly, questions with a view to formation of contract and validity can arise from the interaction of contract law and data protection law.[46] Which contract law consequences, for example, arise from an agreement to transfer data where such transfer would constitute an infringement of the GDPR? To what degree are traditional concepts, such as the rule that contracts violating legal prohibitions cannot be upheld, to be adhered to in case of violations of data protection rules? Should data protection issues rather be dealt with separately from contract law?

Assuming that contract law in general, albeit with the necessity of some adaptations, is an appropriate means for dealing with the issues at stake, further questions arise in relation to performance and withdrawal from the contract. Generally speaking, the pivotal question relates to the interaction of the different legal rules regulating data and their relation to contract law. What role does, and what role can, contract law play within the spheres of these rules? Questions of this kind in particular, arise in relation to the validity of the contract where there is a conflict between contract law and data protection law. Assuming that, for example, an obligation to transfer unlawfully processed data does not render the contract void, would a transfer of such data constitute valid counter-performance?[47] There are strong arguments that the GDPR was elaborated without its relationship to contract law in mind. If provision of data by a consumer in violation of GDPR was not regarded as valid counter-performance, this would lead to the undesirable result that the consumer in turn would be barred from exerting his contractual rights against the trader supplying the service and, that the trader would thus be favoured as a result of his own non-compliance with the GDPR. Could such a result be correct?

Similarly, another problem arises from the fact that consent to processing of personal data may be freely withdrawn at any time pursuant to Art

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45 For all these questions see Axel Metzger, 'A Market Model for Personal Data: State of Play under the New Directive on Digital Content and Digital Services', in this volume.

46 A detailed account is provided for by Philipp Hacker, 'Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive', in this volume.

47 On this question, see Philipp Hacker, 'Regulating the Economic Impact of Data as Counter-Performance: From the Illegality Doctrine to the Unfair Contract Terms Directive', in this volume.

7(3) GDPR.[48] Even if such right to withdrawal does not necessarily question the binding nature of a contract as such, it inevitably leads to complications. For example, may there be claims for damages if, due to the right to withdrawal, obligations of the data subject are not enforceable in kind? And should there be a possibility to limit the (so far mandatory) right to withdraw consent, for example by introducing an optional 'enriched consent' which would exclude such right? Furthermore, how far does the free right to withdrawal determine the consequences of withdrawal, most importantly its restitutionary aspects?[49]

Last, but by no means least, questions also arise with respect to performance and the corresponding property law issues. In particular, at present there appears to be no appropriate qualification of the right relating to data that would be transferred in satisfaction of the contract. Traditional concepts of ownership and the rules for its transfer are targeted at an unambiguous assignment of physical objects. Data, however, is fundamentally different from physical objects, not least because data is a non-rivalrous resource, which means that the use of data by one market player does not limit the availability of the same data for use by another market player. While not all assets need an owner, all assets need to be managed and the corresponding rights to control assets are very important in commercial practice. One might therefore consider potentially supplementing possible contract law amendments with a property law approach that differs somewhat from the traditional concepts centred around physical objects.[50] In any event, questions of access to data and control of data belong to the most fundamental questions of our data economy in the years to come.[51]

IV. Conclusion and outlook

With a view to the manifold implications of qualifying the provision of data as counter-performance, such qualification may well seem questionable. In particular, one has to bear in mind that such qualification is not necessarily called for under EU law: Art 3(1) DCD does not prescribe such quali-

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48 See Andreas Sattler, 'Autonomy or Heteronomy – Proposal for a Two-Tier Interpretation of Art 6 GDPR', in this volume.

49 See Martin Schmidt-Kessel, 'Right to Withdraw Consent to Data Processing – The Effect on the Contract', in this volume.

50 See Sjef van Erp, 'Management as Ownership of Data', in this volume.

51 See already the contributions in *Lohsse/Schulze/Staudenmayer* (n 19) and most recently the European Data Strategy of the European Commission (n 16).

fication, but merely states that the application of the Directive requires a consumer to undertake to provide personal data to the trader. A more pragmatic approach to the subject-matter might thus be feasible even with a view to the starting point of all discussions gathered in this volume. Quite the same might be true for all follow-up questions. Independently whether the provision of data is to be qualified as counter-performance, it is important to think through the concepts necessary to make the provision of data, which is a reality in the digital economy, legally operational in practice. For this purpose it appears to be clear that in these early stages of the development one should not focus too intensively on doctrinal aspects and traditional categories and qualifications. Rather, it seems feasible to deal with specific problems on a step-by-step approach, trying to identify both the economic rationales underlying the parties' behaviour as well as appropriately balancing their interests, in order to equip the digital economy with the necessary legal tools for its transactions.

Legal Nature and Economic Value of Data in the Contractual Relationship

A Market Model for Personal Data: State of Play under the New Directive on Digital Content and Digital Services

Axel Metzger[*]

I. Data as counter-performance in consumer contracts

Article 3(1) subpara. 2 of the new Directive (EU) 2019/770 'on certain aspects concerning contracts for the supply of digital content and digital services' (DCSD) signifies a paradigm shift in the law of personal data.

According to the old paradigm, 'free services' were offered to consumers who gave their consent to the processing of their data. Both transactions were seen as being independent of each other. The leading search engines, social media platforms and many 'content' providers did not – and still do not – demand for a money consideration from the users. Those services therefore appeared as if they would be gratuitous for the consumer, whereas the service providers earned their revenues on the other side of the market by selling advertisements to business customers. The processing of the data, either based on consent or on the other legal grounds of Article 6(1) General Data Protection Regulation (GDPR), was interpreted as an ancillary unilateral legal act besides the service contract. This model was already queried in legal literature before the Proposal of the Directive was published in 2015.[1] However, those early voices did not lead to any changes in the business practices of the services which designed – and still do so – the two transactions as being split up. The 'terms of use' and the 'privacy statements' were often drafted as separate documents, the services being described as offered for free.

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1 See eg Peter Bräutigam, 'Das Nutzungsverhältnis bei sozialen Netzwerken – Zivilrechtlicher Austausch von IT-Leistung gegen personenbezogene Daten' (2012) 15(10) MMR 635; Benedikt Buchner, 'Die Einwilligung im Datenschutzrecht – vom Rechtfertigungsgrund zum Kommerzialisierungsinstrument' (2012) 34(1) DuD 39, 41; Patricia Maria Rogosch, *Die Einwilligung Im Datenschutzrecht* (Nomos 2013) 41 –46.

It therefore appeared as an innovative approach, when the Proposal of the new Directive, published in December 2015,[2] suggested in Article 3(1) subpara. 2 to apply the new rules on the supply and conformity of digital content and digital services both on paid services and on services where the consumer provides 'a counter-performance other than money in the form of personal data or any other data'. The idea to treat money consideration and personal data equally was already expressed in a recital of the later dropped Common European Sales Law of 2011 (CESL).[3] However, the broader public that is interested in data protection issues only took notice when the concept reappeared in the regulatory part of the DCSD. Since that time, a lively debate has arisen both in the industry[4] and among data protection officers[5] and academics.[6] It is no exaggeration to say that we are

2 European Commission, '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, 2015/0287 (COD), 09.12.2015.

3 European Commission, 'Proposal for a Regulation on a Common European Sales Law' COM(2011) 635 final, Recital 18.

4 See eg, Eurochambres, 'Reaction to the European Commission's proposal on the distance sales of digital content (COM(2015) 634 final)' (18 April 2016), <http://www.eurochambres.eu/custom/ECH_Reaction_to_DC_proposal-2016-00095-01.pdf> accessed 27 September 2019.

5 See European Data Protection Supervisor, Opinion 4/2017.

6 For academic publications during the legislative procdure see: Marietta Auer, 'Digitale Leistungen' (2019) 5(2) ZfPW 130; Hugh Beale, 'Conclusion and Performance of Contracts: An Overview' in Reiner Schulze, Dirk Staudenmayer and Sebastian Lohsse (eds), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps* (Nomos 2017) 33; European Law Institute (ELI), 'Statement on the European Commission's proposed directive on the supply of digital content to consumers' (ELI, 2016) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Statement_on_DCD.pdf> accessed 27 September 2019; Beate Gsell, 'Der europäische Richtlinienvorschlag zu bestimmten vertragsrechtlichen Aspekten der Bereitstellung digitaler Inhalte' (2018) 62(2) ZUM 75; Philipp Hacker, 'Daten als Gegenleistung: Rechtsgeschäfte im Spannungsfeld von DS-GVO und allgemeinem Vertragsrecht' (2019) 5(2) ZfPW 148; Niko Härting, 'Digital Goods und Datenschutz – Daten sparen oder monetarisieren? Die Reichweite des vom DinhRL-E erfassten Geschäftsmodells' (2016) (11) CR 735; Ruth Janal and Jonathan Jung, 'Spezialregelungen für Verträge über digitale Inhalte in Theorie und Praxis' (2017) 32(9) VuR 332; Axel Metzger, 'Data as Counter-Performance – What Rights and Duties do Parties Have?' (2017) 8(1) JIPITEC 2; Axel Metzger et al, 'Data-Related Aspects of the Digital Content Directive' (2018) 9(1) JIPITEC 90; Andreas Sattler, 'Personenbezogene Daten als Leistungsgegenstand – Die Einwilligung als Wegbereiter des Datenschuldrechts' (2017) 72(21) JZ 1036; Martin Schmidt-Kessel et al, 'Die Richtlinienvorschläge der Kommission zu

facing a shift of paradigm in the law of personal data with this new approach.

The language of Article 3(1) subpara. 2 DCSD-Proposal was at the same time explicit and narrow. It was explicit that personal data or other data could be interpreted as counter-performance of the consumer[7] which provoked the severe criticism of the European Data Protection Supervisor.[8] However, the scope of application was rather narrow with regard to personal data that could qualify as counter-performance. Article 3(1) subpara. 2 only mentioned 'actively provided' data. Recital 14 excluded data automatically generated and collected by cookies and also data 'necessary for the digital content to function in conformity with the contract, for example geographical location where necessary for a mobile application to function properly', and data collected 'for the sole purpose of meeting legal requirements'. These restrictions were criticised both by academics[9]

Digitalen Inhalten und Online-Handel – Teil 1' [2016] GPR Fokus 2; Martin Schmidt-Kessel et al, 'Die Richtlinienvorschläge der Kommission zu Digitalen Inhalten und Online-Handel – Teil 2' [2016] GPR Fokus 54; Martin Schmidt-Kessel and Anna Grimm, 'Unentgeltlich oder entgeltlich? – Der vertragliche Austausch von digitalen Inhalten gegen personenbezogene Daten' (2017) 3(1) ZfPW 84; Louisa Specht, 'Daten als Gegenleistung – Verlangt die Digitalisierung nach einem neuen Vertragstypus?' (2017) 72(15-16) JZ 763; Gerald Spindler, 'Verträge über digitale Inhalte – Anwendungsbereich und Ansätze – Vorschlag der EU-Kommission zu einer Richtlinie über Verträge zur Bereitstellung digitaler Inhalte' (2016) 19(3) MMR 147; Gerald Spindler, 'Verträge über digitale Inhalte – Haftung, Gewährleistung und Portabilität – Vorschlag der EU-Kommission zu einer Richtlinie über Verträge zur Bereitstellung digitaler Inhalte' (2016) 19(4) MMR 219; Friedrich Graf von Westphalen, 'Richtlinienentwurf der Kommission betreffend die Bereitstellung digitaler Inhalte und das Recht des Verbrauchers auf Schadensersatz' (2016) BB 1411; Friedrich Graf von Westphalen and Christiane Wendehorst, 'Hergabe personenbezogener Daten für digitale Inhalte – Gegenleistung, bereitzustellendes Material oder Zwangsbeitrag zum Datenbinnenmarkt?' (2016) BB 2179. For publications after the enactment of the Directive see n 13.

7 'This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data.'.

8 European Data Protection Supervisor (n 5) 7: '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.'.

9 See European Law Institute (n 6) 15; Metzger et al, 'Data-Related Aspects of the Digital Content Directive' (n 6) paras 25–28; Gerald Spindler, 'Verträge über digitale Inhalte – Anwendungsbereich und Ansätze Vorschlag der EU-Kommission zu einer Richtlinie über Verträge zur Bereitstellung digitaler Inhalte' (2016) 19(3) MMR 147, 150.

and consumer organisations,[10] a criticism that was finally taken up by the European Parliament which requested a broader inclusion of personal data into the framework of the Directive.[11]

The final text of Article 3(1) subpara. 2 DCSD addresses both concerns. The revised text avoids the words 'personal data as counter-performance' to make clear that the European legislature does not encourage a further commercialisation of personal data.[12] All the safeguards of the GDPR remain untouched, see Article 3(8) and Recital 38 DCSD. Consent must be freely given and may be withdrawn at any time, see Article 7(1), (2) GDPR. The crucial question, if and under which conditions such a consent may be given within the framework of a contract, will be discussed in the next section of this paper. And yet, besides all these precautions, the substance of Article 3(1) subpara. 2 DCSD has not been changed during the legislative procedure. The Directive remains applicable both for consumers who pay money and for consumers who provide personal data.[13] Whether the personal data of the consumer should be interpreted as a synallagmatic

10 Verbraucherzentrale Bundesverband, 'Digitale Inhalte: Für eine zielgenaue und kohärente Gesetzgebung – Stellungnahme zum Vorschlag der EU-Kommission für eine Richtlinie über bestimmte vertragsrechtliche Aspekte der Bereitstellung digitaler Inhalte – COM(2015) 634 endg.' (1 September 2017) 16 <https://www.vzbv.de/sites/default/files/17-01-10_vzbv_stellungnahme_digitale_inhalte.pdf> accessed 27 September 2019.

11 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) 634 – C8-0394/2015 – 2015/0287(COD))' A8-0375/2017, Amendments 21 and 80.

12 See also Recital 24: 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.

13 For publications after the enactment of the Directive see: Ivo Bach, 'Neue Richtlinien zum Verbrauchsgüterkauf und zu Verbraucherverträgen über digitale Inhalte' (2019) 72(24) NJW 1705, 1706; Cornelia Kern, 'Anwendungsbereich der Warenkauf- und der Digitale Inhalte-RL', in Wolfgang Stabentheiner, Christiane Wendehorst and Brigitta Zöchling-Jud (eds), *Das neue europäische Gewährleistungsrecht* (Manz 2019), 33; Axel Metzger, 'Verträge über digitale Inhalte und digitale Dienstleistungen: Neuer BGB-Vertragstypus oder punktuelle Reform?' (2019) 74(12) JZ 577; Lena Mischau, 'Daten als „Gegenleistung" im neuen Verbrauchervertragsrecht' (2020) 28(2) ZEuP 335; Thomas Riehm, 'Freie Widerruflichkeit der Einwilligung und Struktur der Obligation – Daten als Gegenleistung?' in Tereza Pertot (ed), *Rechte an Daten* (unpublished manuscript 2019) 4; Gerald Spindler and Karin Sein, 'Die endgültige Richtlinie über Verträge über digitale Inhalte und Dienstleistungen Anwendungsbereich und grundsätzliche Ansätze' (2019)