Personal Data as Counter-Performance in Exchange for Contents or Services After Amendments to the Italian Consumer Code

Sofia Maria Lener
Università degli Studi della Tuscia, Italy
ORCID 0000-0003-1980-9152

DOI: 10.54103/milanoup.215.c454

Abstract

The Directive (EU) 2019/770 expressly regulated, for the first time, contracts where the trader supplies digital content or a digital service and the consumer does not pay a price but provides personal data. It was implemented in Italy with the Legislative Decree No. 173/2021, which amended the Consumer Code, by introducing the Chapter I-bis. However, although the Directive and, consequently, the Italian Consumer Code recognize the possibility – and therefore the lawfulness – for personal data to be exchanged for a service, they expressly exclude that personal data can be considered a commodity, comparable to a price, creating serious doubts as to their nature and the qualification of their provision. In addition, the Directive extends its scope of application to contracts for the exchange of digital services and personal data, thus generally extending the scope of consumer protection law to this relationship, but without making any coordination between the different rules, and this is particularly evident and problematic in relation to pre-contractual information and unfair commercial practices. The same can be said for Union law on the protection of personal data, expressly referred to in the Directive, which, however, leaves out the regulation of relevant issues, such as the conditions of lawfulness of processing, whether consent coincides with contractual consent and is compatible with data protection law, and what happens if it is withdrawn. By examining Directive (EU) 2019/770, the Italian Consumer Code, European consumer and data protection law, as well as the opinions of the European Data Protection Supervisor and the Italian Competition Authority, legal scholars and case law, the paper aims to address whether personal data can be considered as the payment for a service and under what conditions their processing can be considered lawful.

Keywords

Directive 2019/770, Italian Consumer Code, Nature of Personal Data, Coordination Problems, Consumer Protection Law, GDPR

1. The adoption in Italy of Directive (EU) 2019/770, the first European regulation on contracts having as consideration the providing of personal data

As part of the Digital Single Market Strategy for Europe,[1] following a complicated legislative process,[2] Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (hereinafter, DCD, Digital Content Directive) was published on 22 May 2019.[3] Member States should have transposed its content by 1 July 2021.[4] In Italy, however, the law delegating authority to the Government to transpose the DCD was approved on 22 April 2021[5] and finally implemented in November of the same year.[6] The implementation of the DCD in Italy resulted in the introduction of Chapter I-*bis*, entitled 'Of contracts for the supply of digital content and digital services', into the Italian Consumer Code (hereinafter, CC, Consumer Code),[7] consisting of arts 135-*octies* to 135-*viciester*, which took effect on 1 January 2022 and applies to supplies of digital content or digital services occurring on or after that date.[8]

Among the most relevant innovations of the DCD is certainly the first explicit recognition in a European law of contracts in which, in exchange for the supply of a digital content or service, the consumer provides personal data. This contractual model, indeed, is now used in various forms and with increasing intensity on the market: to mention the best known, contracts for the use of search engines or social networks fall within this model, where the service provided is apparently free of charge or, at least, is presented as such.[9]

1 Commission 'Communication on a Digital Single Market Strategy for Europe' COM (2015) 192 final.

2 Guido Alpa, 'Aspetti della nuova disciplina delle vendite nell'Unione europea' [2019] Contratto e impresa 825, 825–826.

3 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

4 DCD, art 24.

5 Italian Law No. 53/2021.

6 With Italian Legislative Decree No. 173/2021.

7 Italian Legislative Decree No. 206/2005.

8 Italian Legislative Decree No. 173/2021, art 2.

9 Guido D'Ippolito, 'Commercializzazione dei dati personali: il dato personale tra approccio morale e negoziale' [2020] Diritto dell'informazione e dell'informatica 635, 638; Alberto De Franceschi, 'Il "pagamento" mediante dati personali' in Vincenzo Cuffaro, Roberto D'Orazio

The personal data collected in this way are then used for various purposes, including profiling users in order to produce targeted advertisements or to offer goods and services in line with individual tastes. In particular, these data enable companies to obtain highly detailed knowledge of the needs and preferences of individual consumers that can be used to achieve a high degree of customisation of the products and services offered, which is particularly relevant for online advertising and e-commerce.[10] Hence the enormous relevance of Big Data,[11] defined in the scientific literature through the '4 Vs': the *volume* of data collected, the *variety* of sources, the *velocity* with which data analysis can take place and the *veracity* of the data that could (presumably) be achieved through the analytical process[12] or, alternatively, the *value* that the data assume when analysed.[13] But at the same time, new risks arise in terms of competition, protection of personal data and information pluralism.

Therefore, in the light of the increasing popularity of contracts in which the counter-performance consists of personal data – and the resulting risks – one cannot but look favourably on the first attempt to regulate this contractual scheme.

More specifically, the DCD applies to two contractual models of supply,[14] namely, any contract where the trader supplies a digital content or a digital service and the consumer pays a price and where the trader supplies a digital content or a digital service and the consumer provides personal data, except

---

and Vincenzo Ricciuto (eds), *I dati personali nel diritto europeo* (Giappichelli 2019) 1382; Giorgio Resta and Vincenzo Zeno-Zencovich, 'Volontà e consenso nella fruizione dei servizi in rete' [2018] Rivista trimestrale di diritto e procedura civile 411, 414.

10 Italian Communications Regulatory Authority, Competition Authority and Data Protection Authority, 'Indagine conoscitiva sui *Big Data*' (2020) <https://www.agcom.it/> accessed 30 April 2023, 19.

11 Indeed, the Big Data market in Italy has been growing for years: the Big Data & Business Analytics Observatory of the Politecnico di Milano estimated that the Italian Data Management e Analytics market grew by 20 per cent in 2022, reaching a value of more than EUR 2 billion ('Il tasso di crescita del mercato analytics in Italia, 2017-2022' (2023) <https://www.osservatori.net/it/prodotti/formato/grafici/il-tasso-crescita-mercato-analytics-italia-2017-2022-grafico> accessed 30 April 2023) and Statista predicts that the global Big Data market will grow to USD 103 billion by 2027 ('Big data market size revenue forecast worldwide from 2011 to 2027' (2022) <https://www.statista.com/statistics/254266/global-big-data-market-forecast/> accessed 30 April 2023).

12 Svetlana Sicular, 'Gartner's Big Data Definition Consists of Three Parts, Not to Be Confused with Three "V"s' (2013) Forbes <https://www.forbes.com/sites/gartnergroup/2013/03/27/gartners-big-data-definition-consists-of-three-parts-not-to-be-confused-with-three-vs/> accessed 30 April 2023; 'IT Glossary: Big Data' Gartner <https://www.gartner.com/en/information-technology/glossary/big-data> accessed 30 April 2023.

13 Italian Communications Regulatory Authority, Competition Authority and Data Protection Authority (n 10) 8.

14 Carmelita Camardi, 'Prime osservazioni sulla Direttiva (UE) 2019/770 sui contratti per la fornitura di contenuti e servizi digitali. Operazioni di consumo e circolazione dei dati personali' [2019] Giustizia civile 499, 505.

where the personal data provided are processed exclusively for the purpose of supplying the digital content or the digital service or for allowing the trader to comply with legal requirements to which the trader is subject.[15]

For the second type of contract, it is stipulated that European data protection law applies and that, notably, in the event of a conflict between DCD and data protection laws, the latter will prevail.[16]

As a general rule, the Directive regulates only certain aspects of contracts for the supply of digital content or digital services concluded between a consumer and a trader, including the conformity of the digital content or 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.[17] It does not, therefore, affect the law of the Member States concerning matters not expressly regulated: in Italy, pursuant to art 135-*viciester* CC, the contracts in question are subject to the provisions of the Italian Civil Code on the formation, validity and effectiveness of contracts, including the consequences of the termination of the contract and the right to compensation for damages.

In order to conform with the contract, the digital content or digital service must meet certain subjective[18] and objective[19] requirements, and the trader is obliged to keep the consumer informed of available updates necessary to maintain the conformity of the digital content or digital service.[20]

The trader is liable for failure to supply the content or service, as well as for any lack of conformity that becomes apparent within two years from the time of supply.[21] In both cases, the burden of proof is, as a rule, on the trader.[22] In the event of failure to supply, the consumer, after having invited the trader to

15 DCD, art 3(1) and CC, art 135-*octies*(3) and (4); where, *ex* DCD, art 2(1) and (2) and CC, art 135-*octies*(2)(a) and (b), 'digital content means data which are produced and supplied in digital form' – such as music files, films, games or applications – and 'digital service means (a) a service that allows the consumer to create, process, store or access data in digital form' – such as cloud computing – or '(b) a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service' – such as social networks.

16 DCD, art 3(8); CC, art 135-*novies*(6).

17 DCD, recital n 12 and CC, art 135-*octies*(1).

18 DCD, art 7 and CC, art 135-*decies*(4).

19 DCD, art 8(1) and CC, art 135-*decies*(5).

20 DCD, art 8(2) and CC, art 135-*undecies*(1).

21 The action for conformity defects shall be time-barred within twenty-six months from the date of supply if the defects are apparent within that period: CC, art 135-*quaterdecies*(1), (2), (3) and (4).

22 Moreover, the burden of proof that the digital content or digital service was in conformity with the contract at the time of supply shall be on the trader for a lack of conformity that becomes apparent within a period of one year from the time the digital content or digital service was supplied: DCD, art 12 and CC, art 135-*sexiesdecies*.

supply the digital content or digital service, if the latter again fails to supply it, has the right to terminate the contract.[23] In the event of a lack of conformity, the consumer is entitled, first, to have the digital content or the digital service brought into conformity; second, he is entitled to a reduction in the price, proportional to the reduction in value, or to termination of the contract if: a) the remedy to bring the digital content or digital service into conformity is impossible or disproportionate; b) the trader has not restored the conformity within a reasonable time; c) a lack of conformity becomes apparent despite the trader's attempt to bring the digital content or digital service into conformity; d) the lack of conformity is so serious as to justify an immediate price reduction or termination of the contract; e) it appears that the trader will not bring the digital content or digital service into conformity within a reasonable time or without significant inconvenience to the consumer. With the clarification that the right to a price reduction only applies if the digital content or service is provided in exchange for the payment of a price – thus, not in exchange for personal data – and that, in this case, the consumer has no right to terminate the contract if the lack of conformity is minor.[24]

In the event of termination of the contract, the trader is obliged to reimburse the consumer for all sums paid in performance of the contract and to comply with the obligations arising from Regulation (EU) 2016/679[25] (hereinafter, GDPR, General Data Protection Regulation).[26] Reimbursements due to price reduction or termination of the contract shall be carried out within fourteen days, using the same means of payment used by the consumer to pay, unless the consumer expressly consents to the use of another means.[27]

Lastly, it should be noted that the Italian legislator, in implementing the DCD, has reproduced its provisions almost literally.

2. Critical aspects of the DCD in relation to contracts of

23 DCD, art 13(1) and CC, art 135-*septiesdecies*(1).

24 DCD, art 14 and CC, art 135-*octiesdecies*.

25 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

26 DCD, art 16(1) and (2) and CC, art 135-*noviesdecies*(2) and (3).

27 DCD, art 18 and CC, art 135-*vicies*.

exchange between digital content or services and personal data

A brief exposition of the elements of the new discipline that are relevant to the 'digital content/services versus personal data' negotiation scheme highlights some of its many critical aspects.

Starting with the nature of personal data and the qualification of their provision. Indeed, the DCD (and, consequently, the Consumer Code) distinguishes between *contracts* where the trader supplies or undertakes to supply, a digital content or a digital service to the consumer and the consumer pays, or undertakes to pay, a price, and *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,[28] expressly excluding that personal data can be considered a commodity, comparable to a price.[29] Thus, the legislator poses the problem of the qualification of the act of provision of personal data – and, even before that, that of their nature – but does not solve it.[30]

In addition, the DCD extends its scope of application to contracts for the exchange of digital content/services and personal data, thus generally extending the scope of consumer protection law to those involved in the relationships under consideration, defining, in fact, 'consumer' as 'any natural person who, in relation to contracts covered by this Directive, is acting for purposes which are outside that person's trade, business, craft, or profession'.[31] But having defined data subjects as consumers and having expressly referred to certain consumer protection regulations does not solve the problems of coordination between them and contracts in which, in exchange for the supply of a digital content or service, the consumer provides personal data.

Similarly, the DCD expressly provides the applicability – actually, the prevalence – of the Union law on the protection of personal data and, in particular, of the GDPR to any personal data processed in connection with contracts falling within its scope,[32] without making any coordination between the various rules. Yet, certain provisions of the GDPR do not seem to fit well with the contracts under consideration, as well as with the DCD and the consumer protection laws.

28 DCD, art 3(1) and CC, art 135-*octies*(3) and (4).
29 DCD, recital n 24.
30 Camardi (n 14), 504.
31 DCD, art 2(6).
32 DCD, art 3(8); CC, art 135-*novies*(6).

3. Nature of personal data in the light of the opinions of the European Data Protection Supervisor and the Italian Competition Authority, legal scholars and case law

First of all, it is necessary to address the question of the nature of personal data, which logically precedes all other issues.

The Italian academic debate sees two opposing approaches: one is *protective*, aimed at limiting the data market, in order to protect the individual and his identity; the other is *liberalist*, aimed at liberalising the circulation of data, considered 'goods' with exchange value.[33] The first approach, traditionally accepted by scholars in this field,[34] emphasises the non-pecuniary and non-transferable nature of personality rights, excluding the possibility of transferring personal data.[35] In fact, personality rights have historically been characterised as inalienable, non-transferable, irretrievable and imprescriptible.[36] The second approach, which has spread in more recent times and prevails today,[37] assimilates personal data to assets in the legal sense, susceptible to being the subject of contractual provisions.[38]

The DCD, as mentioned above, has not solved the problem. On the contrary, it has complicated it, having legalised the contractual scheme under consideration, but having, at the same time, excluded the reciprocal nexus between personal data and digital content/service.

It should be noted, however, that the text of the directive initially proposed by the Commission treated these contracts differently.[39] Indeed, recital n 13 stated that 'In the digital economy, information about individuals is often and increasingly seen by market participants as having a value comparable to money. Digital content is often supplied not in exchange for a price but against counter-performance other than money ie by giving access to personal data or other data. Those specific business models apply in different forms in a considerable

33 Guido Alpa, 'La "proprietà" dei dati personali', in Nadia Zorzi Galgano (ed), *Persona e mercato dei dati. Riflessioni sul GDPR* (Wolters-Cedam 2019), 13.

34 D'Ippolito (n 9), 643; Camardi (n 14), 507; Vincenzo Ricciuto, 'La patrimonializzazione dei dati personali. Contratto e mercato nella ricostruzione del fenomeno', in Vincenzo Cuffaro, Roberto D'Orazio and Vincenzo Ricciuto (eds) (n 9), 26; Alberto De Franceschi, *La circolazione dei dati personali tra privacy e contratto* (Edizioni scientifiche italiane 2017), 12.

35 D'Ippolito (n 9), 643–644.

36 Andrea Torrente and Piero Schlesinger, *Manuale di diritto privato* (25th edn, Giuffrè 2021), 128.

37 D'Ippolito (n 9), 636; Ricciuto (n 34), 23 ss.; De Franceschi, 'Il "pagamento" mediante dati personali' (n 9), 1381 ss.

38 Andrea Stazi and Francesco Corrado, 'Datificazione dei rapporti socio-economici e questioni giuridiche: profili evolutivi in prospettiva comparatistica' [2019] Diritto dell'informazione e dell'informatica 443, 457–458.

39 European Commission, 'Proposal for a Directive on certain aspects concerning contracts for the supply of digital content', COM (2015) 634 final.

part of the market. Introducing a differentiation depending on the nature of the counter-performance would discriminate between different business models; it would provide an unjustified incentive for businesses to move towards offering digital content against data. A level playing field should be ensured'. Consequently, art 3 identified the scope of application of the DCD in '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'.

The reasons for the drastic change of course are to be found in the opinion of the European Data Protection Supervisor on the proposed directive, adopted on 14 March 2017,[40] which, while welcoming the initiative to protect consumers who do not pay a monetary price, emphasises that 'fundamental rights such as the right to the protection of personal data cannot be reduced to simple consumer interests, and personal data cannot be considered as a mere commodity'. Coherently, therefore, with the *protective* approach.

The Italian Competition Authority (hereinafter, AGCM, *Autorità Garante della Concorrenza e del Mercato*), on the contrary, takes a different view. In the proceedings initiated against WhatsApp Inc. for the alleged unfairness of certain clauses in the contractual model submitted for acceptance by consumers wishing to use the WhatsApp Messenger application, it stated that 'for the purposes of classifying the relationship established between WhatsApp and the consumer as contractual and of assessing the unfairness of the relevant clauses […], it is of no significance that the services are provided without monetary consideration', because, 'personal data, consumer preferences and other user generated content, have a "de facto" economic value and are being sold to third parties', as argued by the European Commission in the document containing guidelines for the implementation of the Unfair Commercial Practices Directive.[41]

The AGCM expressed the same opinion in a case against Facebook, in which it found that: on the one hand, the companies Facebook Inc. and Facebook Ireland Ltd. did not adequately and immediately inform consumers, during the account activation phase, of the activity of collecting, with commercial intent, their data, inducing them to register on the platform, also emphasising the gratuity of the service; on the other hand, they exercised undue influence

40 European Data Protection Supervisor Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content [2017].

41 AGCM, Decision CV154, 11 May 2017, para 62, which refers to European Commission Staff Working Document Guidance On The Implementation/Application Of Directive 2005/29/EC On Unfair Commercial Practices Accompanying The Document Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A comprehensive approach to stimulating cross-border e-Commerce for Europe's citizens and businesses [2016] SWD (2016) 163 final.

on registered consumers, who suffer, without express and prior consent, the transmission and use by Facebook and third parties, for commercial purposes, of their data.[42] This gave rise to two separate unfair commercial practices, respectively, misleading, under arts 21 and 22 CC, and aggressive, under arts 24 and 25 CC.[43] In particular, the AGCM justified the existence of a consumer relationship between Facebook and its users, and, therefore, the applicability of the Consumer Code, in consideration of the nature of non-pecuniary counter-performance of users' data. Which was confirmed in the *Facebook/Whatsapp* case by the Commission, where, in examining the competition profiles of Facebook's acquisition of WhatsApp, it stated that 'the vast majority of social networking services are provided free of monetary charges. They can however be monetized through other means, such as advertising or charges for premium services'.[44]

The decision was challenged before the Regional Administrative Tribunal (hereinafter, TAR, *Tribunale Amministrativo Regionale*) of Lazio by both Facebook Ireland and Facebook Inc., *inter alia*, on the grounds of absolute lack of attribution by the AGCM, since: (a) it would not be a commercial practice in the absence of pecuniary consideration and (b) the discipline to be applied would be exclusively privacy legislation on the basis of the principle of speciality set out in art 3(4) of the Unfair Commercial Practices Directive.[45] However, according to the TAR, which upheld in part both appeals by annulling the decision of the AGCM in relation to the second contested practice, 'this approach suffers from a biased view of the potentialities inherent in the exploitation of personal data, which may also constitute an "asset" available in a contractual sense, susceptible to economic exploitation and, therefore, capable of assuming the function of "counter-performance" in the technical sense of a contract. In addition to the protection of personal data as the expression of an individual's personality right, and thus subject to specific and unwaivable forms of protection, such as the right to withdraw consent, access, rectification, and to be forgotten, there is also a different field of protection of the data concerned, considered as the

42 AGCM, Decision 27432, 29 November 2018, paras 70–71.

43 Discipline introduced by Italian Legislative Decree No 146/2007, implementing European Parliament and Council Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

44 AGCM, Decision 27432, 29 November 2018, para 54, which refers to European Commission, Case M.7217 – Facebook/WhatsApp, Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, para 47.

45 According to which: 'In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects'.

possible object of a trade, both between market operators and between the latter and the interested parties. The phenomenon of the "patrimonialisation" of personal data, typical of the new digital markets economies, requires operators to comply, in the relevant commercial transactions, with those obligations of clarity, completeness and non-misleading nature of the information laid down by the legislation for the protection of the consumer, who must be informed of the exchange of services that underlies the signing of a contract for the use of a service, such as using a social network'.[46] Therefore, the provisions of the GDPR and those on consumer protection 'stand in terms of complementarity'.[47]

The TAR qualifies personal data as 'possible object of a trade', thus, exchanged with an onerous contract – a purchase contract[48] – with corresponding obligations, as confirmed by art 3(1) DCD, where it is stated that personal data provided must not be 'exclusively processed by the trader for the purpose of supplying the digital content or digital service'. The Tribunal, therefore, identifies the right that an individual has over his or her personal data as a proprietary right that, as such, is transferred to the other party in exchange for the provision of a service.[49]

The two TAR judgments were challenged before the Consiglio di Stato (Council of State), which rejected them, stating that 'the reproach addressed to the trader would consist in not having informed the user, who in this case is technically transformed into a "consumer", when he makes his data available in order to be able to use for free the services offered by the FB companies, prior to this operation, in whose context the user continues to believe that the attainment of the advantages connected with access to the platform is free of charge, not being able, therefore, to recognise and realise that in return for the advantage an automatic profiling for commercial use takes place, which is not clearly and immediately indicated, at the time of the first access, as an inevitable consequence of providing data': social networks, then, although they are presented as free, 'clearly, they are not that free, ending up representing the

46 Twin judgments TAR Lazio, 10 January 2020, No 260 and TAR Lazio, 10 January 2020, No 261, para 6.

47 ibid para 8, according to which 'the non-overlapping of the plans relating to the protection of privacy and consumer protection is inferred from the considerations made by the Court of Justice of the European Union, of 13 September 2018, in Joined Cases C 54/17 and C 55/17, in which it ruled that the consumer rules do not apply "only where provisions, other than those of Directive 2005/29, which regulate specific aspects of unfair business practices, impose on undertakings, in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29"".

48 Fabio Bravo, 'La "compravendita" di dati personali?' [2020] Diritto di internet 521, 535.

49 Beniamino Parenzo, 'Dati personali come "moneta". Note a margine della sentenza TAR Lazio n. 260/2020' [2020] Jus Civile 1364, 1371–1372.

"consideration" of making an individual user's personal data available for commercial purposes'.[50]

In other words, according to the Consiglio di Stato, it is not the personal data that is exchanged to access the service, but only its 'making available', the possibility of using it.[51] But, in any case, both administrative courts recognise the counter-performance nature of personal data, while distinguishing the type of transfer contract.

The Corte di Cassazione (Court of Cassation), the Italian court of last resort, also dealt with contracts for the exchange of services and personal data, in relation to a newsletter service, where, in order to access it, consent for the processing of personal data was required, which would be used not only for the supply of the service, but also for sending promotional communications and commercial information by third parties. The decision relates to the conditions of freedom and specificity of the data subject's consent, but, indirectly, for the first time,[52] also recognises the category of contracts under consideration: 'the legal system does not prohibit the exchange of personal data, but nevertheless requires that such an exchange must be the result of a full and in no way coerced consent'.[53] The Corte di Cassazione, therefore, although not directly ruling on the nature of personal data, acknowledged, to some extent, their nature as counter-performance.

In any case, European data protection law itself argues in favour of the patrimonial nature of personal data. Even the Directive 46/95/EC, in its first recitals, identified the free flow of personal data as necessary for the establishment and functioning of the internal market, in which the free movement of goods, persons, services and capital is ensured.[54] Furthermore, the article on the object of the directive expressly provided that Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection of fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data.[55]

---

50 Twin judgments Consiglio di Stato, 29 March 2021, No 2630 and Consiglio di Stato, 29 March 2021, No 2631, respectively, paras 9–10 and paras 8–9.

51 Beniamino Parenzo, 'Sull'importanza del dire le cose come stanno: ovvero, sul perché della necessità di riconoscere la natura patrimoniale dei dati personali e l'esistenza di uno scambio sotteso ai c.d. servizi digitali "gratuiti"' [2021] Diritto di Famiglia e delle Persone 1457, 1460.

52 Fabio Bravo, 'Lo "scambio di dati personali" nei contratti di fornitura di servizi digitali e il consenso dell'interessato tra autorizzazione e contratto' [2019] Contratto e impresa 34, 35.

53 Corte di Cassazione, 2 July 2018, No 17278, para 2.5.

54 Directive 95/46/EC European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, recital n 3.

55 Directive 95/46/EC, art 1.

Yet, among the objectives of the Italian law transposing the directive there was no reference to guaranteeing the free movement of personal data.[56] And also the so-called Italian Privacy Code,[57] which repealed the previous law implementing the directive, while providing for the free and non-restrictable circulation of personal data, placed the relevant provision outside the purpose of the law.[58] Probably because Italian legal scholars have long understood personal data in the sole sense of absolute subjective rights.[59]

The contractual approach is much more evident in the GDPR, already in art 1: '(1) This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. (2) This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. (3) The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data'. According to some, in fact, this provision puts the *personalist* approach – concerning the protection of natural persons with regard to the processing of personal data – and the *market* approach – concerning the free movement of personal data – on an equal footing[60] and, according to others, the second approach would even prevail over the first, since the third paragraph of the provision changes the order of terms, placing the circulation of data in a superordinate position.[61]

Besides, the legal bases of the data subject consent[62] and of the processing necessity for the performance of a contract[63] seem to confirm the contractual

56 Italian Law No. 675/1996, art 1(1), according to which 'This law guarantees that the processing of personal data is carried out with respect for the rights, fundamental freedoms and dignity of natural persons, with particular reference to privacy and personal identity; it also guarantees the rights of legal persons and any other body or association'.

57 Italian Legislative Decree No. 196/2003, which entirely reorganised the subject of personal data protection due to the regulatory complexity created by the approval of various rules in this field.

58 Compare Italian Legislative Decree No. 196/2003, arts 2(1) ('[…] the "Code", ensures that the processing of personal data is carried out with respect for the fundamental rights and freedoms, as well as for the dignity of the data subject, with particular reference to privacy, personal identity and the right to protection of personal data2) and 42 ('The provisions of this Code may not be applied in such a way as to restrict or prohibit the free movement of personal data between the Member States of the European Union, without prejudice to the adoption, in accordance with the same Code, of any measures in the event of transfers of data carried out in order to circumvent those provisions').

59 Ricciuto (n 34), 26–33.

60 Ricciuto (n 34), 53; D'Ippolito (n 9), 656.

61 Parenzo, 'Sull'importanza del dire le cose come stanno' (n 51), 1465.

62 GDPR, art 6(1)(a).

63 ibid art 6(1)(b).

nature of the processing of personal data.[64] The same is true for the right to data portability and, in particular, for the provision that, where the processing is based on consent or contract and is carried out by automated means, the data subject shall have the right to have his or her personal data transmitted directly from one controller to another, where technically feasible:[65] such a claim can only fall within the concept of obligation, requiring the data controller to perform in satisfaction of an interest of the data subject, in addition, only in relations based on consent or contract and, therefore, interindividual.[66]

In the light of the reconstruction carried out on the basis of European data protection legislation, as well as Italian case law and legal scholars, the dual nature of personal data cannot be denied: on the one hand, personal data as the expression of a personality right and, on the other, as the counter-performance of the supply of a service, which therefore cannot be said to be free of charge. Besides, recognising the patrimonial nature of personal data and classifying the contracts with which they are exchanged as onerous contracts enables the natural person to understand how access to certain services is not without consequences,[67] while also protecting him as a consumer.

Still, as mentioned above, the DCD stands in contrast to this picture. Nevertheless, the fact that the DCD does not qualify as contracts those relations in which personal data are provided in exchange for a service, denying their nature as commodities, does not imply that such transactions cannot be qualified as synallagmatic contracts.[68] Indeed, not only does the description of the economic transaction confirm the possibility of considering the providing of personal information as a contractual service,[69] but, above all, it is a purely nominalistic matter, since the rules governing these relations are the same as those governing contracts in which a monetary consideration is envisaged.[70] In any case, it is undeniable that this dichotomy creates serious problems of interpretation and, above all, application, which can only be solved by the European legislator.

One point still remains to be clarified, however: whether it is the personal data that are transferred with the contract or is it rather a transfer of the enjoyment of them, although most commentators seem to rule out the configurability of a contract of sale, as the data subject does not lose control over his or her personal data, which, in fact, he or she may also make available to other

64 Ricciuto (n 34), 54 ss.; D'Ippolito (n 9), 656.

65 GDPR, art 20(2).

66 Ricciuto (n 34),45-46.

67 Parenzo (n 51), 1466–1467.

68 ibid 1487.

69 Roberto Senigaglia, 'La dimensione patrimoniale del diritto alla protezione dei dati personali' [2020] Contratto e impresa 760, 766.

70 Shaira Thobani, 'Il mercato dei dati personali: tra tutela dell'interessato e tutela dell'utente' [2019] MediaLaws 131, 146.

controllers.[71] This will lead to the qualification of this contract and its legal consequences, which, as said, are left to the Member States.

But apart from that, three levels of protection now apply to the contracts under examination: consumer protection – applied, in fact, by the AGCM, TAR and Consiglio di Stato in relation to unfair commercial practices –, data protection – expressly referred to in the DCD – and contractual protection.[72]

4. Coordination problems with consumer protection law: pre-contractual information and unfair commercial practices

The DCD recognises that the data subject whose data are processed in a contract for the provision of a digital content or service is considered a consumer. A consumer to whom, therefore, consumer protection law shall generally apply. Yet, the directive does not coordinate its content with consumer protection legislation, which is particularly evident and problematic in relation to pre-contractual information and unfair commercial practices.

Starting with pre-contractual information, recital n 42 DCD states that: 'The digital content or digital service should comply with the requirements agreed between the trader and the consumer in the contract. […] The requirements of the contract should include those resulting from the pre-contractual information which, in accordance with Directive 2011/83/EU, forms an integral part of the contract […]'. Thus, under the DCD, the requirements for contracts governed by it also include the pre-contractual information set out in the Directive 2011/83/EU,[73] transposed in Italy in the CC.[74]

In particular, if the relationships under consideration were to be considered contracts, as we have argued so far, they would fall within the definitions of

71 *Ex multis,* Parenzo (n 51), 1468–1469; Bravo (n 48), 535 ss.; Stazi and Corrado (n 36), 464 ss.; Ricciuto (n 34), 48.

72 Bravo (n 48), 534.

73 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64, recently amended by Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ 326/1 and Directive (EU) 2019/2161 of the European Parliament and of 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.

74 CC, art 45 ss.

'service contract', that is any contract other than a sales contract under which the trader supplies a service to the consumer and the consumer pays the price,[75] and of 'distance contract', that is any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.[76]

For these types of contracts, the Directive provides that, before the consumer is bound by a distance contract or any corresponding offer, the trader shall inform the consumer in a clear and comprehensible manner of the total price of the goods or services.[77] Furthermore, if the distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the total price and the trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. Otherwise, the consumer shall not be bound by the contract or order.[78]

However, the Directive does not provide any definition of 'price' or 'payment'. Some suggest, also in the light of the DCD, that these concepts should be interpreted in an evolutionary way, not limiting them to obligations involving the transfer of money, but encompassing all services having economic value, including those involving the exchange of personal data: after all, the Italian Civil Code uses the terms 'payment' and 'performance' indistinctly. It would follow that whenever a trader presented a service as free of charge, neither the contract for the supply of digital services nor the order issued by the consumer would be binding.[79]

With regard to unfair commercial practices, the Directive 2005/29/EC and the CC state that a commercial practice shall be regarded as misleading if it contains false information, deceives or is likely to deceive the average consumer or omits material information, also in relation to the price to be paid, causing him to take a transactional decision that he would not have taken otherwise.[80] Therefore, offering a contract for free, which, in reality, is for consideration, as it implies the providing of personal data, constitutes a misleading unfair commercial practice, having induced consumers to take a commercial decision they would not otherwise have taken, namely to register on the social network, via

75 Directive 2011/83/EU, art 2(6) and CC, arts 45(f) and 46(1).
76 Directive 2011/83/EU, art 2(7) and CC, art 45(g).
77 Directive 2011/83/EU, art 6(1)(e) and CC, art 49(1)(e).
78 Directive 2011/83/EU, art 8(2) and CC, art 51(2).
79 De Franceschi (n 9), 1391–1394.
80 Directive 2005/29/EC, arts 6(1)(d) and 7(1); CC, arts 21(1)(d) and 22(1).

website or app, and to remain in it, as found by the AGCM, TAR and Consiglio di Stato.[81]

Part of the legal scholars also believe that if an unfair commercial practice is found to exist, consumers are entitled to compensation for the resulting pecuniary loss and may also file a class action.[82]

The dangerous impact that considering the exchange of services and personal data as an onerous contract could have is, hence, evident. Nevertheless, the path taken by Italian legal scholars and case law seems to be moving in this direction, thus making it difficult to reconcile the already existing consumer discipline with these contracts and leaving major interpretative and applicative doubts unresolved.

5. Coordination problems with GDPR: nature, freedom and withdrawal of consent and conformity requirements

The problem of coordination between the DCD and other legislation does not only concern consumer law, but also and above all data protection law. And, in particular, the GDPR, which the European legislator merely referred to, although some issues would have deserved clarification.

First of all, it is not specified what are the conditions of lawfulness on which the processing under the contract in question can be based, however this can be deduced from the DCD. Indeed, as mentioned before, the DCD applies where the trader supplies digital content or service and the consumer provides personal data, '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'.[83] The last two exceptions evidently refer to the hypotheses provided for in letters b) and c) of art 6(1) GDPR, ie where the processing of personal data is necessary for the performance of a contract to which the data subject is party or for compliance with a legal obligation to which the controller is subject. Thus, the only legal basis that seems to be able to justify such processing is consent[84]. But it is unclear whether consent coincides with contractual consent, whether it is compatible with data protection law, and what happens if consent is withdrawn.

81 AGCM, Decision 27432, 29 November 2018, para 70; twin judgments TAR Lazio, 10 January 2020, No 260 and TAR Lazio, 10 January 2020, No 261, para 13; twin judgments Consiglio di Stato, 29 March 2021, No 2630 and Consiglio di Stato, 29 March 2021, No 2631, respectively, paras 11 and paras 10.

82 De Franceschi (n 9), 1402–1403.

83 DCD, art 3(1) and CC, art 135-*octies*(4).

84 GDPR, art 6(1)(a).

The first problem relates to the nature of the consent to the processing of personal data – which is closely related to the issue of the qualification of personal data discussed above –: Italian legal theory is divided between those who attribute to it a contractual nature and those who qualify it as a legal act, comparable to a justification or an authorisation.[85] According to the former, consent constitutes the expression of will with regard to the circulation of personal data.[86] According to one part of the latter, the processing of personal data is *per se* unlawful and the consent of the data subject excludes unlawfulness;[87] according to the other part, on the contrary, the processing is *per se* lawful and the consent intervenes just to remove a limitation that the law places on the power of the data controller.[88]

In the aforementioned judgment, the Corte di Cassazione stated that it is 'to be excluded that the consent considered by this provision [ie, art 23 of the Italian Privacy Code[89]] is simply the same consent in general required for contractual purposes':[90] part of the scholars has, therefore, deemed it necessary to have a double consent, one for the conclusion of the contract and one for the processing of personal data.[91] However, a large part of the scholars remains convinced of the opposite theory, due in part to the judgments of the TAR and the Consiglio di Stato, which, by recognising the contractual nature of personal data or, at least, of their provision, lead to reconstructing consent in contractual terms. The debate, therefore, still remains open.

In any case, even assuming that consent for contracts involving the exchange of personal data is unique, such consent should comply with the GDPR, according to which "'consent" of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'.[92] It is precisely the requirement of freedom of consent that could create problems in relation to the

85 Parenzo (n 49), 1374.

86 Ricciuto (n 34), 56.

87 Ilaria Amelia Caggiano, 'Il consenso al trattamento dei dati personali nel nuovo Regolamento europeo. Analisi giuridica e studi comportamentali' [2018] Osservatorio del diritto civile e commerciale 67, 84 ss.

88 Bravo (n 52), 42 ss.

89 Now repealed, according to which: '1. The processing of personal data by private individuals or public economic entities is only permissible with the express consent of the person concerned. 2. Consent may relate to the entire processing or to one or more of its operations. 3. Consent shall only be validly given if it is freely and specifically expressed with reference to a clearly identified processing operation, if it is documented in writing, and if the information referred to in Article 13 has been provided to the data subject. 4. Consent shall be given in writing when the processing relates to sensitive data'.

90 Corte di Cassazione, 2 July 2018, No 17278, para 2.4.

91 Bravo (n 52), 40 ss.

92 GDPR, art 4(11).

contracts under consideration, in respect of which the GDPR provides additional guidance, stating that 'when assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract'.[93]

It is, therefore, not forbidden to make the performance of a contract conditional on the provision of consent to the processing of data, although this circumstance must be taken into *utmost* account. This article has been interpreted by the European Data Protection Authorities, with reference precisely to those situations of '"tying" the provision of a contract or a service to a request for consent to process personal data that are not necessary for the performance of that contract or service'.[94] And, although the article is not construed in an absolute manner, they argued that 'there might be very limited space for cases where this conditionality would not render the consent invalid'.[95]

More specifically, to make this assessment, according, first, to the Article 29 Working Party and, then, to the European Data Protection Board (EDPB), consideration must be given to the fact that 'the element "free" implies real choice and control for data subjects':[96] the *reality* of the choice depends on the possibility for the data subject to access the service even without giving consent and, thus, presupposes that the provider offers two versions of the same service, one conditional on consent and the other one not. Moreover, 'both services need to be genuinely equivalent'.[97]

In any case, they exclude the freedom of consent 'if a controller argues that a choice exists between its service that includes consenting to the use of personal data for additional purposes on the one hand, and an equivalent service offered by a different controller on the other hand':[98] in such a scenario, freedom of choice would depend on other market participants and on subjective judgements of equivalence, while obliging data controllers to monitor the market to ensure the continued validity of consent in case a competitor changes its service.

Accepting this interpretation would end up considering the consent as invalid and, therefore, the processing provided for the large and growing number of

93 ibid art 7(4).

94 Article 29 Working Party Guidelines on consent under Regulation 2016/679 [2017] 17/EN WP259 (Article 29 WP Guidelines Consent), 8; EDPB Guidelines on consent under Regulation 2016/679 [2020] 05/2020 (EDPB Guidelines Consent), para 26.

95 Article 29 WP Guidelines Consent, 9; EDPB Guidelines Consent, para 35.

96 Article 29 WP Guidelines Consent, 5; EDPB Guidelines Consent, para 13.

97 Article 29 WP Guidelines Consent, 9; EDPB Guidelines Consent, para 37.

98 Article 29 WP Guidelines Consent, 9–10; EDPB Guidelines Consent, para 38.

tying contracts as unlawful. However, both Italian case law and academia deviate from this view.

When it comes to case law, it suffices to cite the administrative judgments on unfair commercial practices: while recognising profiles of unlawfulness within *tying* operations, their validity was indirectly recognised. In addition, the Corte di Cassazione, in the aforementioned judgment, also showed a favorable view, stating that, when assessing whether consent is freely given, 'conditioning cannot always and in any case be taken for granted and should instead be deemed to exist the more the service offered by the provider of the Internet site is at once non-fungible and indispensable for the data subject',[99] where 'non-fungible' refers to the possibility of access to similar services and 'indispensable' to the importance of the service for the user.

As for the academia, it was first noted that the validity of consent is to be assessed at the time it is given, so it is irrelevant that the service provided by another market participant changes, also because the data subject could withdraw it in any case. Moreover, there is no reason to consider the requirement of equivalence between different services as subjective, adopting an objective notion of equivalence linked to their characteristics. Thus, consent given against an alternative, provided by the same or other operators, is considered free, in line with the Corte di Cassazione's ruling.[100]

However, it has been pointed out that, if a service is fungible, it is, as such, also renounceable, but the same cannot be said for a non-fungible service. The Facebook example is emblematic: the service offered by Facebook is probably non-fungible, as there are no real equivalents on the market, but it cannot be called essential and indispensable. It seems, however, preferable to reserve the qualification of renounceable only for the most futile cases and to consider that non-fungible services are also indispensable.[101]

The distinctiveness of consent to data processing lies not only in the specific validity requirement mentioned above, but also in the provision for its revocability: on the one hand, the right to withdraw consent presents significant coordination problems with Directive 2011/83/EU in relation to the exceptions to the right of withdrawal from a distance contract, and, on the other hand, it raises several doubts in relation to restitution obligations or reimbursements.

In the first place, under the GDPR, the data subject shall have the right to withdraw his or her consent at any time: this in unwaivable right.[102] But, at the same time, the Directive 2011/83/EU and the CC provides that the right of withdrawal for distance contracts – which, as noted above, includes the contracts under consideration – is excluded with respect to contracts for the supply

99 Corte di Cassazione, 2 July 2018, No 17278, para 2.5.
100 Thobani (n 70), 142.
101 ibid 143.
102 GDPR, art 7(3).

of digital content which is not supplied on a tangible medium, if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal.[103] This was intended to prevent the consumer from abusing the right of withdrawal by exercising it and demanding the return of the service received, after obtaining and storing the digital content. However, this exception to the right of withdrawal from a distance contract will not be applicable if the counter-performance consists of personal data, since such a waiver would be incompatible with the GDPR: this inapplicability is likely to create unequal treatment between payment by means of a sum of money and payment by means of personal data.[104]

In the second place, where the right of withdrawal is exercised, the right to regulate its consequences is left, as mentioned above, to the Member States. Which poses, first of all, coordination problems between States, in a context where digital content or service providers operate globally, without geographic boundaries. The major problem, however, concern the qualification of the contracts under consideration – which, as has been amply exposed, is far from being resolved –, so that the rules relating to that particular type of contract can be applied. But in any event, even if the contracts under consideration were recognised as belonging to a certain type, that type would certainly not have provisions that take account of their peculiarities, constituting a *unicum* in the contracts expressly regulated today. And, furthermore, should the termination of the contract result, according to the law of a Member State, in the full restitution of the services performed and, therefore, in the restitution of the personal data as well, it is difficult to imagine how this could be achieved. Indeed, by the time the data subject withdraws consent to processing, the person who received them, the trader, will already have made a financial profit and, as a consequence of their further disposal, will also, usually, have already lost track of them. In this regard, it has also been pointed out that monetary compensation in such a case may be difficult to quantify.[105]

Finally, another coordination issue between the GDPR and the DCD concerns the conformity requirements of the latter. In this respect, in fact, there is a discrepancy between the recitals – where it is provided that 'facts leading to a lack of compliance with requirements provided for by Regulation (EU) 2016/679, including core principles such as the requirements for data minimisation, data protection by design and data protection by default, may, depending on the circumstances of the case, also be considered to constitute a lack of conformity of the digital content or digital service with subjective or objective requirements for conformity provided for in this Directive'[106] – and the articles

103 Directive 2011/83/EU, art 16(m) and CC, art 59(1)(o).
104 De Franceschi (n 9) 1408.
105 ibid 1407.
106 DCD, recital n 48.

of the DCD – where there is no reference to compliance of the content or service with the GDPR.

Despite this, it is argued that GDPR compliance requirements are included in the objective requirements for conformity of art 8 DCD, according to which the digital content or digital service shall 'be fit for the purposes for which digital content or digital services of the same type would normally be used, taking into account, where applicable, any existing Union and national law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct' and shall 'possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which the consumer may reasonably expect, given the nature of the digital content or digital service'.[107]

The reference to average quality standards, in fact, can only refer also to those imposed by the GDPR, given the oft-mentioned provision of the prevalence of the data protection law over the DCD,[108] as well as the provision according to which in the event of termination of the contract the trader shall comply with the obligations applicable under the GDPR:[109] it would be contradictory not to give the consumer contractual remedies when the GDPR rules are violated.[110]

However, this is an issue that, like the previous ones, would have deserved a clarifying intervention by the legislator and not a generic reference to the GDPR.

6. Findings

An attempt has been made, here, to reconstruct (part of) the debate created around the figure of contracts for the exchange of digital content or services and personal data. Debate still characterized by great ferment and difference of views, not reconciled and, indeed, further distanced by the DCD.

The purpose of this paper, in fact, was to retrace the critical issues generated by having recognised these contracts in a European legislative text, without claiming to find a solution, but in order to show how having expressly differentiated them from contracts in which a price is paid in money has created more problems than it has solved.

Above all, because, although there is no express qualification of personal data and of the contracts under which they are put into circulation, it is now undisputed that three levels of protection apply to them: consumer protection,

107 DCD, art 8(1)(a) and (b) and CC, art 135-*decies*(5)(a) and (b).
108 DCD, art 3(8); CC, art 135-*novies*(6).
109 DCD, art 16(2) and CC, art 135-*noviesdecies*(3).
110 Camardi (n 14) 513–520.

personal data protection and contractual protection. And each of these sets of provisions is not only unsuitable for these contracts, but it is not even clear how it applies. With the risk, moreover, that each level continues to be regulated independently of the others and, above all, without provisions appropriate to the contracts under consideration: bringing forward all three levels separately would create insurmountable coordination problems.

While it is true that an express recognition of this contractual scheme in European legislation is an important achievement, it is also true that the legislator has not fully achieved the objectives it set with the first recitals of the DCD: 'consumers should benefit from harmonised rights for the supply of digital content and digital services that provide a high level of protection. They should have clear mandatory rights when they receive or access digital content or digital services from anywhere in the Union. Having such rights should increase their confidence in acquiring digital content or digital services. It should also contribute to reducing the detriment consumers currently suffer, since there would be a set of clear rights that will enable them to address problems they face with digital content or digital services'.[111]

Yet, it cannot yet be said to exist a 'a set of clear rights' enabling consumers to address problems they encounter with digital content or digital services obtained in exchange for their personal data. Some significant examples have been given so far.

We can only hope that the legislator will again intervene on the issue, removing the 'the major obstacles to the development of cross-border e-commerce in the Union [...]. Ensuring better access for consumers to digital content and digital services, and making it easier for businesses to supply digital content and digital services, can contribute to boosting the Union's digital economy and stimulating overall growth'.[112]

111 DCD, recital n 8.
112 ibid recital n 1.