

# The Processing of Personal Data in Contracts for the Supply of Digital Content and Services

PhD. student **Sorana BRISC**<sup>1</sup>

## **Abstract**

*This paper highlights the impact of personal data processing in contracts for the supply of digital content and services. The primary aim of this study is to clarify the role played by the consent given by the data subject to the processing of personal data within the framework of these new-wave digital contracts. In particular, our focus lies on discerning the consequences of the withdrawal of consent on the contract itself. This subject requires a multidisciplinary approach. By using the historical, theoretical and descriptive method of scientific inquiry, we hope to provide a more precise understanding of the complex regulatory framework governing electronic commerce. The paper commences by explaining the socio-economic and regulatory context in which the processing of personal data influences contract law. In the first section of the paper, we underline the distinction between two manifestations of will: the contractual consent, understood as a prerequisite for the validity of a contract, and the GDPR consent, representing an agreement to the processing of personal data. Subsequently, we emphasize the role of GDPR consent in synallagmatic contracts for the supply of digital content and services whereas the third section deals with the effects of GDPR consent withdrawal on the digital contract. Following our research, we concluded that there is a symbiotic relationship between the two legal forms of consent, despite their different nature. It is certain that the extensive processing of data, often referred to as 'Big Data', which has been prevalent for at least a decade, claims the need to protect the consumer of digital content and services beyond the non-patrimonial nature of the fundamental rights regulated by Regulation (EU) 2016/679.*

**Keywords:** *supply of digital content, supply of digital services, Directive (EU) 2019/770, Regulation (EU) 2016/679, consent, processing of personal data.*

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<sup>1</sup> Sorana Brisc - Doctoral School of Law, Faculty of Law, Babeş-Bolyai University of Cluj, Romania, sorana.suciu@gmail.com.

## 1. Introductory remarks

The economical context in which consent given to the processing of personal data influences contract law already has a history of at least a decade. The emergence of new disruptive technologies enhanced by data production has given rise to contractual figures never seen in the past. We are referring to the contracts for the supply of digital content and services that nowadays benefit from a unified normative act at the European Union level: Directive (EU) 2019/770<sup>2</sup>, further referred to as ‘DCD’.

The DCD governs two primary obligations of the supplier of digital content and services: the obligation to supply and the conformity obligation<sup>3</sup>. However, no definition of the term ‘supply’ is provided<sup>4</sup>. No less true is that the DCD’s source of inspiration is the abandoned Proposal for a European Regulation on a Common European Sales Law [CESL]<sup>5</sup>. CESL was intended to establish the legislative framework for sale contracts while also regulating the contracts for the supply of digital content<sup>6</sup>.

The inclusion of the contract for the supply of digital content within a regulatory instrument that aimed to create a common sales law proves the European interest in regulating the supplying of digital content in alignment with the consumer’s sales law. The choice of the European legislator is unsurprising, given that the civil law is structured in a way that places the synallagmatic sales contract at its core<sup>7</sup>.

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<sup>2</sup> Directive (EU) 2019/770 Of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 136 of 22 May 2019, pp. 1–27. Romania transposed the DCD by O.U.G. no. 141/2021, M. Of. Number 1248 of 30 December 2021.

<sup>3</sup> Alongside the DCD, the European legislator adopted the corresponding regulatory instrument regulating the sale of goods, including goods with embedded software. Directive (UE) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136 of 22<sup>nd</sup> of May 2019. Romania transposed the Directive by O.U.G. no. 140/2021, M. Of. Number 1245 of 30 December 2021.

<sup>4</sup> In the draft stage of the regulatory act, it was discussed about defining the act of supply as granting access to digital content or making digital content available, but it was abandoned because by defining the act of supply, future performances could fall outside its scope of application. See the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, 9 December 2015, COM (2015) 634 final.

<sup>5</sup> See Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11<sup>th</sup> of October 2011, COM (2011) 635 final.

<sup>6</sup> Andrej Savin, *Harmonising Private Law in Cyberspace: The New Directives in the Digital Single Market Context*, Copenhagen Business School Law Research Paper Series no. 19–35/2019. The document is available online at the address: <https://ssrn.com/abstract=3474289>, date of last access: 1<sup>st</sup> of Mars 2024. For the same conclusion, see Sorana Suciuc, *Reflecții asupra contractului digital*, Revista Română de Drept Privat No. 2/2022, p. 393.

<sup>7</sup> François Terré, Philippe Simler, Yves Lequette, François Chénéde, *Droit civil. Les obligations*, 13<sup>e</sup> édition, Dalloz, Paris, 2022, p. 38. However, the synallagmatic nature of the sale emerged later, under the influence of canonists. In this regard, see Philippe Malaurie, Laurent Aynès, Pierre Yves

But currently, economic reality sheds light on contract models that increasingly diverge from traditional sales contract. This pertains to the transfer of digital assets, such as digital financial instruments or computer programs, where the conventional sale, primary involving the transfer of ownership, is incompatible with the virtual nature of these new digital assets<sup>8</sup>. However, sales law, tied to the physical aspect of the goods, continues to serve as the main framework for all other contracts.

Thus, the contract for the supply of digital content and services addressed by the DCD (further referred to as the *digital contract*)<sup>9</sup> is not a sale of digital content, but rather an unnamed contract<sup>10</sup>. The act of qualifying for the type of binding legal agreement falls within the scope of the national law, which determines it in accordance with otherwise flexible private law rules.

However, this mission is challenging. At the European Union level, the legislation concerning the new technologies is fragmented among regulatory acts with varying degrees of force and applicability. We take as an example the General Data Protection Regulation [GDPR]<sup>11</sup>, the Directive on intellectual rights upon computer programs [Software Directive]<sup>12</sup>, the Directive on the Supply of Digital Content and Services [DCD], the European Data Regulation [Data Act]<sup>13</sup>, and more recently, proposals such as the Regulation on Horizontal Cybersecurity

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Gautier, *Droit des Contrats Spéciaux*, LGDJ, 11<sup>e</sup> édition, Paris, 2020, p. 56.

<sup>8</sup> Regarding the incompatibility of the right of ownership (in its traditional sense) with digital values, see Andreas Rahmatian, *Debts, Money, Intellectual Property, Data and the Concept of Dematerialised Property*, in *Journal of Intellectual Property, Information Technology, and Electronic Commerce Law* no. 11/2020, p. 186 and following. See also Johan David Michels, Christopher Millard, *Mind the Gap: The Status of Digital Files Under Property Law*, Legal Studies Research Paper no. 317/2019, the document is available online at the address: <https://ssrn.com/abstract=3387400>, date of last access: 1<sup>st</sup> of Mars 2024.

<sup>9</sup> For more details regarding the notion of ‘digital content’ and that of ‘digital services], see Ionuț Florin Popa, *Furnizarea și conformitatea conținutului digital sau serviciului digital*, in *Revista Română de Drept privat* nr. 1/2022, pp. 229–271; Sorana Suci, *Conformitatea conținutului digital. Noi instrumente legislative europene*, in *Revista Română de Drept Privat* nr. 1/2021, pp. 704–728.

<sup>10</sup> Reiner Schulze, Dirk Staudenmayer, *EU Digital Law. Article-by-Article Commentary*, Hart Publishing-C.H. Beck-Nomos, Oxford-New York-Baden-Baden-München, 2020, p. 100; The same idea in Sorana Suci, *op. cit.* (*Conformitatea conținutului digital. Noi instrumente legislative europene*), pp. 721–722.

<sup>11</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), JO L 119 of 4<sup>th</sup> of May 2016, pp. 1–88, further referred to as ‘GDPR’.

<sup>12</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111 of 5<sup>th</sup> of May 2009, p. 16–22 (The Software Directive).

<sup>13</sup> Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), JO L of 22<sup>nd</sup> of December 2023.

Requirements for Products with Digital Elements [EU Cyber Resilience Act]<sup>14</sup> and the Regulation on Artificial Intelligence [EU Artificial Intelligence Act]<sup>15</sup>. All of these directly impact the digital contract. The challenge lies precisely in the patchwork application of the law in the realm of the supply of digital content and services.

Among the numerous facets of the digitalization of contract law, equally captivating, we focus on one in particular: the effects of personal data processing upon the digital contract.

The subject holds particular interest because the DCD expressly recognizes that the digital content and services are supplied in exchange for the processing of personal data [art. 3 para. (1) 2<sup>nd</sup> provision DCD]. While the contract for supply of digital content may not be considered a sales contract, it nonetheless adheres to its structure, essentially functioning as a synallagmatic contract. In this case, the price is not necessarily the payment of money but rather the supplier's ability to process the personal data of the consumer.

Although DCD provides that it shall be without prejudice to GDPR [art. 3 para. (8) Seco<sup>nd</sup> provision DCD], the contractual effects of the data subject's consent remain unclear. As we will see in the following sections, the will of the consumer plays a dual role: firstly, the *contractual consent*, necessary for the validity of the contractual agreement, and secondly, the *GDPR consent*, necessary to authorize the processing of personal data [section I].

We pose a predictable question: what role does the *GDPR-consent* play in the digital contract? [Section II]. Having formulated a potential answer, we are equally interested in what happens to the digital contract when the *GDPR consent* is withdrawn under the terms of art. 7 para. (3) of the Regulation, particularly when personal data serves as the sole consideration for the supply for digital content or service [section III].

We address the given hypotheses by trying to coherently apply civil and European law principles, aiming to elucidate the complex e-commerce legislation. However, despite the flexibility of private law, we assert that the digital market requires to enhance consumer protection mechanisms that should extend beyond the non-patrimonial-oriented protection provided by the GDPR Regulation<sup>16</sup>.

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<sup>14</sup> Proposals for a Regulation of the European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020, of 15<sup>th</sup> of September 2022, COM (2022) 454 final.

<sup>15</sup> Proposals for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act), of 21<sup>st</sup> of April 2021, COM (2021) 206 final.

<sup>16</sup> The need to protect the consumer through two layers, one of personal data protection and the other of contractual obligations, was illustrated in Carmen Langhanke, Martin Schmidt-Kessel, *Consumer Data as Consideration*, in Journal of European Consumer and Market Law no. 6/2015, p. 218 and following.

## 2. Data subject's consent: between authorization of personal data processing and *ad validitatem* condition

1. *Contractual-consent*. The consent of the parties lies at the heart of the contract, defined as a meeting of the minds [1,166 Civil Code] or as a mutual assent<sup>17</sup>. The meeting of the minds is recognized as the central point of the contract in comparative law<sup>18</sup>, in European codifications without legal force<sup>19</sup> and in positive European law<sup>20</sup>.

The internal will, crucial in forming the contract, consists of a fusion of consent and contractual cause. In this framework, the absence of either component results in a lack of an agreement. Thus, the serious, free, and informed consent generates obligations and leads to the primary effect: the binding force of the contract [art. 1,270 para. (1) C. civ.]. This implies that neither party can unilaterally withdraw his or her consent, as embodied in the principle of contractual symmetry [art. 1,270 para. (2) C. civ.] or in the principle of irrevocability of the unilateral legal act. Civil law recognizes this as a fundamental condition for the validity of a contract; thus we refer to it as *contractual consent*.

2. *GDPR consent*: On the other hand, the consent granted by the data subject for the processing of personal data [art. 6 para. (1) lit. a) and art. 7 GDPR] differs from what we qualified as contractual consent.

In private law, beyond its primary definition as codified information<sup>21</sup>, the concept of 'data'<sup>22</sup> is used to denote a good or commodity that serves as the subject of legally binding relationships<sup>23</sup>. Indeed, data has been characterized as alienable and appropriable intangible assets<sup>24</sup>. The possession of data involves

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<sup>17</sup> See Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Drept civil. Obligațiile*, 2<sup>nd</sup> ed., Universul Juridic, Bucharest, 2020, pp. 31-32.

<sup>18</sup> See Reiner Schulze, Fryderyk Zoll, *European Contract Law. Second Edition*, C. H. Beck-Hart-Nomos, Baden-Baden, 2018, pp. 25-29.

<sup>19</sup> Art. II. -1:101 DCFR. See Reiner Schulze, Fryderyk Zoll, *op. cit.*, p. 40.

<sup>20</sup> The contract as a concordant agreement of wills is illustrated by the Court of Justice of the European Union in the case of Rudolf Gabriel C-96/00, ECLI:EU:C:2002:436, para. 49. See Reiner Schulze, Fryderyk Zoll, *op. cit.*, p. 26. Also see Sorana Suci, *op. cit. (Reflecții asupra contractului digital)*, p. 392.

<sup>21</sup> About data understood as encoded information, see Sorana Suci, *op. cit. (Reflecții asupra contractului digital)*, p. 396 and following.

<sup>22</sup> Recently, the notion of 'data' received its first definition in European Private Law. According to art. 2 (1) of Regulation (EU) 2023/2854 [Data Act], they represent, 'any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording'.

<sup>23</sup> Herbert Zech, *Data as a tradeable commodity* in Alberto de Franceschi (ed.), *European Contract Law and the Digital Single Market*, Intersentia, Cambridge-Antwerp-Portland, 2016, p. 53.

<sup>24</sup> From a technical perspective, 'Big Data' refers to databases, meaning collections of information processed in such a way that the result becomes a 'product' or a 'commodity' with economic value. See Alberto de Franceschi, Michael Lehmann, *Data as Tradeable Commodity and New Measures for their Protection*, in Italian Law Journal no. 1/2016, Vol. 1. The document is available online at the address: [https://www.theitalianlawjournal.it/data/uploads/pdf/1\\_2014/data-as-tradeable.pdf](https://www.theitalianlawjournal.it/data/uploads/pdf/1_2014/data-as-tradeable.pdf).

access to information (*usus*), the utilization involves processing (*fructus*), and disposal implies the right to erase them (*abusus*)<sup>25</sup>. The economic value of data processing stems from its utility; thus, we distinguish between raw data and the information it carries. In the context, the purpose of data use is to process raw data in order to extract economically exploitable information.

Personal data constitute a special category of data, since their protection was given the status of a fundamental right [as outlined in art. 8 para. (1) of the Charter of Fundamental Rights of the European Union and art. 16 of the Treaty on the Functioning of the European Union (TFEU)]<sup>26</sup>. Indeed, precisely this need for non-patrimonial protection urged the adoption of the GDPR. Given that the non-monetary aspect of personal data is the sole focus of this regulatory instrument, the consent of the data subject plays a central role in the processing of their personal data<sup>27</sup>.

Thus, consent holds the power to legitimize data processing, a significant force which stems from the broad language of art. 6 para. (1) a) GDPR<sup>28</sup>, which grants individuals the authority to allow the usage of their data, ‘for any specific purpose’<sup>29</sup>. The person’s ability to dispose of their own personal data derives from the subjective and discretionary nature of the right to data protection, derivative of the non-patrimonial personality rights. As an expression of the personality right, approving the processing of personal data has a protective function, the act of authorization being essentially revocable [art. 7 para. (3) GDPR]<sup>30</sup>. However, since consent for data processing constitutes a unilateral and independent legal

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<sup>25</sup> Herbert Zech, *op. cit.*, p. 56.

<sup>26</sup> It has been argued that this protection is rather allocated to the individual, and not to personal data. In reality, the person is the one protected against violations through the exploitation of personal data. See Herbert Zech, *op. cit.*, p. 66.

<sup>27</sup> Art. 4 points 11 GDPR: ‘“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’.

<sup>28</sup> Art. 6 para. (1) a) GDPR: ‘Processing shall be lawful only if and to the extent that at least one of the following applies a) the data subject has given consent to the processing of his or her personal data for one or more specific purpose.’

<sup>29</sup> However, data processing must remain within the limits imposed by public order and good morals. In this regard, art. 5 para. (1) (b) GDPR stipulates the requirement that the purpose of the processing must be specific, explicit, and legitimate, while recital [39] establishes that ‘Any processing of personal data should be lawful and fair’.

<sup>30</sup> This non-patrimonial right is found in domestic law provisions such as art. 58 Civil Code referring to the respect owed to the human being and its inherent rights. Debates regarding the legal nature of personal data and correlative rights are numerous, ranging from their qualification as derivatives of the non-patrimonial right of personality to their qualification as proprietary rights, similar to intellectual property rights. See Martin Schmidt-Kessel, *The Processing of Personal Data. Consent for the Processing of Personal Data and its Relationship to Contract*, in Alberto De Franceschi, Reiner Schulze, ‘Digital Revolution – New Challenges for Law’, C. H. Beck-Nomos, München, 2019, p. 79. For the same idea, see Herbert Zech, *op. cit.*, p. 66.

act, it must adhere to the general conditions for the validity of a legal act: capacity, consent, object, and cause<sup>31</sup>.

In the context of digital contracts, we witness the transgression of the person's right to dispose of their own personal data from the plan of non-patrimonial rights that enjoy protection to that of patrimonial rights<sup>32</sup>. This transition introduces uncertainties concerning the role of the data subject's consent in the performance of contractual obligations.

3. *The distinction*: The confusion between *contractual consent* and *GDPR consent* arises from the external manifestation of will because both declarations of the consumer (the actual data subject) occur simultaneously and through the same means. In electronic contracts, the formation of the contract typically occurs through actions such as ticking boxes just by clicking them<sup>33</sup>. However, the GDPR, in art. 7 para. (2), stipulates that the consent for the processing of personal data must be given in a written form and separated from other potential aspects for which the data subject is required to give consent.

From the perspective of the internal will, it is certain that the two serve different purposes: while GDPR consent legitimizes data processing, contractual consent legally binds the data subject<sup>34</sup>. Thus, GDPR-consent alone does not establish the agreement that caused the processing of personal data.

Due to the separation of these two, the consumer, being both a data subject and a contractual party, should not face any contractual consequences when GDPR consent is absent, invalid or withdrawn. It has even been argued that the consent for personal data processing, unlike contractual consent, binds the consumer through a natural obligation derived from the right to dispose of their personal data as there is no enforcement of this obligation<sup>35</sup>.

However, despite its optional and non-patrimonial nature, GDPR consent is meant to fulfil the legal requirements for data processing without which the provider cannot process personal data. As we will explore, although they serve different functions, these two forms of consent are in a symbiotic relationship, hence the absence or withdrawal of the consent to process personal data significantly impacts the fate of the contract.

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<sup>31</sup> In the sense that the data processing agreement is just apparently a unilateral legal act, see Lucian Bercea, *Standardul 'consumatorului mediu' și consimțământul pentru prelucrarea datelor cu caracter personal*, in *Revista Română de Drept Privat* No. 1/2018, p. 41.

<sup>32</sup> See Rolf H. Weber, *Data Protection in the Termination of Contract*, in Reiner Schulze, Dirk Staudenmayer, Sebastian Lohsse (eds.), 'Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps. Münster Colloquia on EU Law and the Digital Economy II,' Nomos-Hart Publishing, Baden-Baden, 2017, p. 194.

<sup>33</sup> Known as '*click-wrap contracts*'. See Rodrigo Momberg, *Standard Terms and Transparency in Online Contracts*, in Alberto De Franceschi (ed.), 'European Contract Law and the Digital Single Market. The Implications of the Digital Revolution,' Intersentia, Cambridge-Antwerp-Portland, 2017, pp. 189–207.

<sup>34</sup> Martin Schmidt-Kessel, *op. cit.*, p. 77.

<sup>35</sup> In this context, it has been argued that the disposal right upon personal data is 'almost perfect'. See Martin Schmidt-Kessel, *op. cit.*, p. 78.

### 3. The role of the consent given to personal data processing in synallagmatic digital contracts

We therefore admit that the consent for the processing of personal data, as outlined in art. 6 para. (1) a) GDPR, exerts influence on the digital contract. Since GDPR consent is a legal act, distinct from the contract, it follows its own autonomous legal regime, through its own conditions of validity<sup>36</sup>. For example, according to art. 8 para. (1) GDPR, individuals under the age of 16 cannot provide consent for personal data processing; thus, consent must be given by the holder of parental responsibility<sup>37</sup>. Also, GDPR consent is deemed freely given only when the individual is adequately informed in advance on the scope of personal data processing, as prescribed by arts. 12–14GDPR<sup>38</sup>.

As it differs from contractual consent, the absence of GDPR consent should not affect the fate of the contract. Thus, the invalidity of GDPR consent should not impact the validity of the contract. The contract should remain valid and the obligations stemming from its binding nature remain enforceable. Following this logic, the supplier must continue to perform its obligation to supply, even though the consumer has not validly given his consent to the processing of his personal data.

The conclusion may be theoretically correct but pragmatically the separation of the two does not work. Therefore, we must distinguish between two models of personal data processing: essential processing of personal data (1); non-essential processing of personal data (2).

(1) *Essential processing of personal data*. When the processing of personal data is essential for the performance of a contract, the informed consent of the data subject is not required [art. 6 para. (1) b) GDPR]. Therefore, the provider does not need to seek or obtain consent to process personal data.

In the case of a supplier of an e-book, he must collect personal data in order to deliver the e-book, such as the e-mail address of the consumer. Without this information, the provider does not know the party's address and, thus, cannot fulfil its obligation to provide the electronic copy of the book. This exemplifies

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<sup>36</sup> In the sense that the consumer's declaration of consent is based on a contractual mechanism, see Lucian Bercea, *op. cit.*, p. 42.

<sup>37</sup> Art. 8 para. (3) GDPR provides that this rule 'shall not affect the general contract law of Member States such as the rules on the validity, formation or effect of a contract in relation to a child'. It is worth noting that under Romanian civil law, the contract itself will be valid even when consent is given by a minor under 16 years old, having limited capacity to exercise rights, if the act is authorized by the parents or the custodian (tutor) [art. 41 para. (2) C. civ.].

<sup>38</sup> See recital [42] GDPR: 'Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.' See also recital [32] GDPR: 'Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her' and 'when the processing has multiple purposes, consent should be given for all of them'.

the *essential processing of personal data*.

It is sufficient for the data subject to express consent to the formation of the contract to legitimate the personal data processing<sup>39</sup>. The absence of explicit consent for data processing is irrelevant and any refusal to process them does not invalidate the contract. Of course, failure to provide these personal data at the contract formation stage means that the legal agreement will not be established. This is because the digital architecture of the IT systems is designed in such a way that failure to give these personal data prevents the user from pressing the subscription button, which would otherwise signify acceptance of the contractual offer.

(2) *Non-essential processing of personal data*. The reality shows us that, most common, the supplier of digital content and services also processes personal data that is not necessary for the supply of the digital content or digital service.

In the example from point (1), the supplier of the e-book, acting both as a contractual party and a personal data controller, collects personal data from the buyer for purposes beyond the actual performance of the contract. These purposes may include gathering information about the buyer's literary preferences, about the spoken languages, or geographical location. The collection of this information is not necessary for providing the e-book, as it can be delivered without such details. In this case we are dealing with non-essential processing of personal data.

When the supplier processes personal data that is not necessary for the performance of the contract, according to art. 6 para. (1) a) GDPR, the supplier has the obligation to obtain informed consent for the processing of personal data.

Almost without exception, the suppliers of digital content and services reserve their right to process personal data beyond what is strictly necessary. This applies to various services such as online streaming, cloud storage, social platforms, user-generated content services and finally, all applications that offer *software-as-a-service* solutions<sup>40</sup>. In practice, suppliers' contractual terms often condition the supply of digital content and services on the consent to the processing of personal data.

The European Union has accepted data trading as a new business model and acknowledged the inherent patrimonial value of personal data. Art. 3 par (1) 2<sup>nd</sup> provision DCD<sup>41</sup> confirms the empirical reality of contracts where an individual's consent for data processing constitutes the very object of the obligation, or

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<sup>39</sup> This is also the case of supply by downloading of free open-source software, when any data collected and processed is strictly for the purpose of performing the supply (i.e. Adobe Acrobat Reader). Art. 3 para. (1) DCD expressly excludes it from its scope. See also recital [32] DCD.

<sup>40</sup> For example, Google, Facebook, Twitter, YouTube, Spotify, Netflix, and others. They apparently offer free digital services for which the consumer pays by giving their consent for personal data processing for various purposes, ranging from simple service optimizations to personalized advertising, profiling, or transferring data to other entities.

<sup>41</sup> Art. 3 para. (1) DCD: *'This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer*

more precisely, the consideration for digital supply.

Therefore, the European legislator distinguishes between contracts in which personal data processing constitutes the consideration for the supply of digital content or service and those that are supplied free of charge, wherein data processing is strictly necessary for the supply of the digital content or service. The latter are excluded from the scope of DCD<sup>42</sup>.

In fact, the DCD regulates only the onerous contracts, as indicated by art. 3 para. (1) and para. (5) f) DCD, which excludes from its scope the operating systems offered by the supplier under a free open-source license. Therefore, it is unsurprising that the DCD exclusively regulates the supply of digital content or digital services in exchange for money or for the right to process personal data that are not essential for the performance of the contract<sup>43</sup>. In the latter case, data processing effectively serves as the price of the supply of digital content or service, thereby conferring an onerous character upon the contract.

The provisions of the DCD are in line with what was already recognized by the GDPR. Art. 6 para. (1) (b) GDPR exempts from the rule of explicit consent those contracts also exempted by art. 3 par (1) 2<sup>nd</sup> DCD from its scope, namely that in which data processing is strictly necessary for the performance of the contract<sup>44</sup>. In addition, art. 7 para. (4) GDPR also distinguishes between essential and non-essential personal data processing. The differentiation is significant in evaluating the voluntary and informed nature of GDPR consent<sup>45</sup>.

Let us consider an example: an application offering navigation and traffic warning services based on crowdsourcing. Because this service relies on real-time information provided by users, the supplier processes personal data including names, email addresses, device locations, reasons for traffic stops, and commonly travelled routes. Given the digital service's nature, the application could not function without user-provided information that often represents personal data. However, data collection extends beyond contract performance as the supplier reserves the right to process collected data for other purposes such as marketing profiling. These additional processing purposes, exceeding what's strictly

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*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 that data for any other purpose.'*

<sup>42</sup> See also Sorana Suciuc, *op. cit.* (*Conformitatea conținutului digital. Noi instrumente legislative europene*), pp. 724-725.

<sup>43</sup> Fryderyk Zoll, *Personal Data as Remuneration in the Proposal for a Directive on Supply of Digital Content*, in Reiner Schulze, Dirk Staudenmayer, Sebastian Lohsse (eds.), 'Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps. Münster Colloquia on EU Law and the Digital Economy II', Nomos-Hart Publishing, Baden-Baden, 2017, p. 181.

<sup>44</sup> *Ibidem*, p. 183.

<sup>45</sup> Art. 7 para. (4) GDPR: '*When assessing whether consent is freely given, the 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.*'

necessary for contract performance, require express consent for data processing under art. 6 para. (1) a) GDPR.

We can assert that, most of the time, when data processing is not essential to fulfil the contract's function, it constitutes genuine consideration for the digital content or services. In this scenario, the individual's consent for data processing aligns with that expressed in the contractual agreements<sup>46</sup> and is akin to the notion of 'cause' used in civil law legal systems or the notion of 'consideration' used in Anglo-Saxon legal systems<sup>47</sup>.

Therefore, while the general rule is the independence between the consent for personal data processing and the consent for the formation of the contract, they establish a dependency relationship when the digital content or service is supplied in exchange of personal data.

Consequently, the person's consent not only satisfies the legal requirements imposed by the GDPR but also signifies the internal will which is necessary for the conclusion of the contract.

#### **4. Contractual effects of the withdrawal of consent for the processing of personal data**

We explained that, as a rule, contractual consent and GDPR consent are distinct. However, in digital contracts where personal data processing constitutes the supplier's remuneration, the two are interdependent. What happens if the consent for data processing is withdrawn during the performance of the contract?

Art. 7 para. (3) GDPR provides consumers with the optional right to withdraw their consent for the processing of their personal data at any time. In the silence of the European legislator, there could be a potential conflict between the discretionary right to withdraw consent for data processing and the general principle of the binding force of contracts, which is present in most legal systems in Europe<sup>48</sup>. This issue requires further preliminary observations.

The first observation is that the DCD acknowledges its subsidiary nature in relation to the GDPR<sup>49</sup>. This means that the provision outlined in art. 7 para. (3) GDPR takes precedence over any rule within the DCD.

The second observation is that the potential conflict arises primarily in synallagmatic contracts, where the consumer's consent to personal data processing is in exchange for the specific contractual performance. In other situations, as mentioned in Section II, the distinction between the binding consent and data processing consent is clearly defined.

Finally, the third observation is that the mutual and interdependent obligation to process personal data lies, not so much in the provision of the personal

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<sup>46</sup> This idea was also emphasized in Lucian Bercea, *op. cit.*, p. 20.

<sup>47</sup> Reiner Schulze, Dirk Staudenmayer, *op. cit.*, p. 73.

<sup>48</sup> Herbert Zech, *op. cit.*, p. 68.

<sup>49</sup> Recital [37] DCD.

data itself, but rather in the consumer's tolerance of data processing. This aspect qualifies the agreement as one with successive performance, although not from the perspective of the action to supply digital content or services, but rather from that of accepting the data processing in return<sup>50</sup>. Additionally, art. 7 para. (3) GDPR stipulates that data processing conducted during the period of consent validity remains in effect. This underscores the future-only effects of consent withdrawal and the validity of data processing carried out during the contract's active period.

Based on these three observations, different opinions were expressed regarding the effect of consent withdrawal on contracts. Some argue that withdrawal of consent leads to the termination of synallagmatic contracts where data processing serves as consideration, as the interdependent obligation disappears, making the supplier find no interest in performing the digital contract<sup>51</sup>. Others suggest that withdrawal of consent under art. 7 para. (3) GDPR may not necessarily terminate the contract, due to the separation of the two declarations<sup>52</sup>. According to the latter, exerting the optional right to withdraw consent should justify non-performance<sup>53</sup>.

We believe that the discretionary nature of the right to withdraw consent should be interpreted in light of the regulation's primary goal: the protection of personal data. It is essential to consider art. 7 para. (3) GDPR from the perspective of safeguarding personal data, rather than focusing on the contractual position of the consumer. Therefore, when a consumer successfully withdraws his consent in accordance with art. 7 para. (3) to protect their personal data, the Regulation's objective is achieved, irrespective of whether the contractual agreement continues.

The withdrawal of consent for personal data processing under art. 7 para. (3) GDPR constitutes a failure to perform the main obligation of the consumer, that of consenting to his personal data being processed. This failure is significant enough for the supplier to lose interest in performing his own obligation, that of supplying digital content or services. While withdrawal of GDPR consent is an optional right from the perspective of personal data protection, it nonetheless represents a failure to perform an obligation, from the contractual standpoint. This failure should be considered unjustified in civil law terms and therefore justifies the supplier to terminate the contract.

In conclusion, we argue that withdrawing consent for personal data processing gives the supplier the right to terminate the digital contract. As data processing transforms the contract from a one-off contract (*uno ictu*) to a contract with successive performance, withdrawing GDPR-consent leads to *ex nunc* ter-

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<sup>50</sup> Fryderyk Zoll, *op. cit.*, p. 184.

<sup>51</sup> *Ibidem*.

<sup>52</sup> Carmen Langhanke, Martin Schmidt-Kessel, *op. cit.*, p. 222.

<sup>53</sup> Also see Fryderyk Zoll, *op. cit.*, footnote 17, p. 184.

mination of the contract, only by affecting future personal data processing as otherwise is provided by art. 7 para. (3) GDPR.

On the other hand, although this conclusion is natural from the supplier's perspective, the consumer expects the digital service to be supplied even though they express their intention to withdraw consent for the processing of their data. This expectation is precisely determined by the behaviour of the major companies that provide digital services which, for a long time, have not been transparent about the commercial purpose of their virtual platforms. Through their acts, providers have led consumers to believe that the services are supplied free of charge.

*Why is it important?* Over time, the use of personal data in marketing profiling purpose has become increasingly aggressive, to the point where, due to the accuracy of the advertisements displayed on virtual platforms, consumers wonder if they are being tracked by major companies, even in the privacy of their own homes<sup>54</sup>. Meanwhile, consumers have become aware of their subjective rights over personal data, especially after the adoption of the GDPR. On the other hand, social or user-generated content platforms have managed to create dependency. As a result, the consumer is no longer willing to give up digital services, but at the same time they expect their personal data not to be used.

For instance, the behaviour of Meta Platforms Inc., which at the beginning of November 2023 decided to condition the supply of its service, either on agreeing to the processing of data for marketing profiling, or on paying a fee of \$251.88 per year, for the access to the platform without personalized advertisements, has sparked widespread outrage<sup>55</sup>. Meta's decision came in response to the Judgment of the Court of Justice of the European Union in the case of Meta Platforms and others, C-252/21<sup>56</sup>, in which the Court ruled, among other things, that the dominant position in the market is an important factor in determining whether consent has indeed been validly freely given<sup>57</sup>. Indeed, Facebook users, accustomed to the illusion of a free digital service, considered to be abusive the act of conditioning the service on consent to processing personal data.

It is precisely the consumer expectation of having the service supplied free of charge that has led some authors to consider that the supplier would not be entitled to terminate the contract when the consumer withdraws his GDPR

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<sup>54</sup> See for example, <https://www.thesun.co.uk/tech/21005595/facebook-listening-conversation-microphone-truth/>, date of last access: 10<sup>th</sup> of March 2024.

<sup>55</sup> Known as 'pay or okay' method. NOYB [European Center for Digital Tights] accused Meta of abusive behaviour, even formulating a legal action against the operator for this, considering it illegal under the GDPR. See <https://noyb.eu/en/meta-ignores-users-right-easily-withdraw-consent>, date of last access: 10<sup>th</sup> of March 2024. See also, <https://www.dataguidance.com/news/austria-noyb-files-complaint-against-meta-over-pay-or>, date of last access: 10<sup>th</sup> of March 2024.

<sup>56</sup> Case C-252/21 Meta Platforms and others, EU:C:2023:537.

<sup>57</sup> However, ECJ argued that art. 6 par. (1) a) and art. 9 par. (2) a) of the GDPR do not prevent the operator of an online social network, which holds a dominant position in the market, from contractual stipulating that users may consent to the processing of personal data. See Case C-252/21 Meta Platforms and others, EU:C:2023:537, par. 154.

consent, arguing that the unilateral right over the data constitutes an excusable event for non-performance for the consumer<sup>58</sup>.

Certainly, neither the GDPR nor the DCD meet the real expectation of the consumer, which is to access free digital services, as we have concluded that the withdrawal of GDPR consent justifies the supplier's decision to terminate the contract. On the other hand, it is evident that the common expectation for major providers to provide digital services for free is unreasonable.

We believe that the protection provided by art. 7 par. (3) GDPR should be understood in conjunction with the supplier's duty to transparently and coherently inform the consumer regarding the limits of this subjective right over their personal data, especially regarding the purpose and means of processing personal data. Indeed, The Court of Justice of the European Union explained in Case *Meta Platforms and others* that users of digital services must have the freedom to refuse the processing of personal data, even to opt to withdraw consent only for specific data processing purposes, without being obliged to give up to the digital service itself. However, the Court has not recognized a consumer's right to free services<sup>59</sup>. According to the Court, it is sufficient for the supplier to offer the consumer, in case of withdrawal of GDPR consent, an equivalent alternative digital service, that is not accompanied by such processing of personal data, but is provided in exchange for compensation<sup>60</sup>.

If the consumer is unwilling to allow the use of data and also unwilling to pay the price, the supplier's decision to terminate the contract is justified. Ultimately, the market for digital assets and services is governed by the rule of contractual freedom whereas consumer protection norms are intended to maintain balance in the contract between parties and not to inhibit the market of these fabulous new emerging technologies.

## 5. Concluding remarks

When discussing the processing of personal data, interference with contract law is inevitable. However, neither GDPR nor DCD address directly the effects of personal data processing on the digital contract. The connection between the two commence from the consent of the natural person which, in contract law, provides the contract with a binding force, whereas in personal data protection law, authorize the processing of personal data.

While the external manifestation of suggests a similarity between them, consent for personal data processing is distinct from consent as a condition for the validity of a contract. Generally, failure to comply with data protection regulations or withdrawal of consent does not affect the contract's binding force. However, there's a notable exception: the digital contracts where personal data

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<sup>58</sup> *Supra*, footnote 51.

<sup>59</sup> Case C-252/21 *Meta Platforms and others*, EU:C:2023:537, par. 150.

<sup>60</sup> Case C-252/21 *Meta Platforms and others*, EU:C:2023:537, par. 150.

processing constitutes the mere consideration of the contract. In such cases, the agreement for data processing serves as the consideration for the supplier's obligation, making it indispensable for the contract enforceability. Consequently, withdrawing consent for personal data processing, as permitted under art. 7 para. (3) GDPR can implicitly influence the contract for the supply of digital content or services and potentially lead to its termination.

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