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REGULATING DATA PROVISION CONTRACTS – FILLING THE GAPS OR OVERLAPPING THE EU RULES ON THE CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT?

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ABSTRACT

In 2022, UNCITRAL Working Group IV was mandated to develop the Rules on data provision contracts as an answer to the needs of rapidly growing data market. It was expressly noted then, that the Working Group IV should be mindful of similar legislative initiatives. In October of 2023, the working version of the Rules was distributed. Among the other provisions, the Rules define a data provision contract as a contract under which one party provides data to other party. Given definition shows a great resemblance with the contracts on the supply of digital content regulated by 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. This paper analyzes and compares some of the key provisions of the aforementioned legal instruments. Special focus is attached to the scopes of application of both instruments and exclusions from their application, legal nature and general characteristics of both data provision contracts and contracts for the supply of digital content, obligations of the contractual parties. The main objective is to establish clear boundaries regarding the objects and scopes of application of both legal instruments in order to determine their potential overlaps. Finally, the paper investigates the reach and the meaning of personal data provision as a sui generis reimbursement in the context of both instruments.

Key words: *contract law, data provision, digital content supply, consumer protection, UNCITRAL, DCSD.*

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1. INTRODUCTION

Pythagoras, the Greek philosopher and mathematician who is widely known for his theory of the functional significance of numbers, didn't consider ones and zeroes as numbers. Little could he assume that some 2600 years after his time, those ones and zeroes will constitute the "data", the cornerstone for the "new age" commodities, assets and indeed tradeable values.[1] His only mistake was that he lived and passed in a material (and perhaps spiritual) world of ancients, without being able to taste the digital dimension that we whiteness today, which is built properly upon ones and zeroes…

Ever since the emergence of electronic technologies and communications in the last decade of the 20th century, the transformation from material (tangible) to digital means in every aspect of social and business activities has been facing the progress and exponential growth. Recently, the COVID-19 pandemic has accelerated digitalization processes, as more and more people have continued, to the extent possible, with their activities through online channels – for example, for working, studying, communicating, selling and buying, or entertainment.[2]

In the EU alone, the value of the data market, defined as the marketplace where digital data are exchanged as products or services, reached 82 billion Euros in 2023, with an increase of 11.1% on the previous year from approximately 74 billion Euros in 2022. Moreover, it is estimated that it will reach 118 billion Euros by 2030 in a modest scenario, while an optimistic scenario would estimate that, considering further potential advancement in digital innovation and transformation, the value of the data market in EU could reach 141 billion Euros.[3] The global amount of digital information in 2012 was calculated to be 2.7 trillion gigabytes. By 2016, the amount of data created that year alone amounted to 16.1 trillion gigabytes, and it has been projected to increase to 163 trillion gigabytes by 2025.[4]

In such global environment, given the rapidly growing importance of data in international trade, in 2022, UNCITRAL mandated their Working Group

[1] For a „data" as „digital assets" see Toygar, A. et al.: A New Asset Type: Digital Assets, *Journal of International Technology and Information Management*, 22(4) 2013, pp. 113-115.

[2] UNCTAD: *Digital Economy Report 2021*, New York, 2021, p. 3; Zdraveva, N.: Digital Content Contracts and Consumer Protection: Status Quo and Ways Further, *EU and Comparative Law Issues and Challenges Series*, (5) 2021, p. 399.

[3] European Commission: *European Data Market Study 2021–2023*, Luxembourg, 2024, pp. 11-13.

[4] World Trade Organization: *World Trade Report 2018 - The future of world trade: How digital technologies are transforming global commerce*, Geneva, 2018, p. 28.

IV (Electronic Commerce) (hereinafter: WG.IV) to engage in developing the Rules on data provision contracts.[5] Though the potential form of the final output wasn't indicated at the time, it was explicitly noted that the WG.IV should consider and be mindful of similar legislative initiatives,[6] among the others with the provisions of 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.[7]

Before any further discussion on the issue, it should be noted that UNCITRAL Rules for data provision contracts are still in the preparatory phase, and thus this paper will rely on the provisions of their current version.[8] It is not certain if or when they will be adopted as well as will the current provisions of URDPC remain as they are or change, and if so, to what extent.

To get to the point, the data, as currently formulated in the URDPC, is a representation of information in electronic form, while the data provision contract is defined as a contract under which one party provides data to other party.[9] On the other hand, DCSD defines digital content as data which are produced and supplied in digital form.[10] Resemblances between terms "data" and "digital content" are quite clear. In fact, quoted definitions are indicating that term "data" is somewhat broader, and as such includes the digital content among the other types of data. The aforementioned leads to the conclusion that URDPC and DCSD could be regulating the very similar if not partially the same contractual relationship.

This paper analyzes and compares some of the key provisions of URDPC and DCSD. Special focus is attached to the scopes of application of both instruments and exclusions from their application, legal nature and general characteristics of both data provision contracts and contracts for the supply of digital content, obligations of the contractual parties. The main objective is to estab-

5 UNCITRAL: *Report of the United Nations Commission on International Trade Law Fifty-fifth session (27 June–15 July 2022) A/77/17*, New York, 2020, para. 163.

6 *Ibid*., para. 162. and 164.

7 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 (Text with EEA relevance.) OJ L 136, 22.5.2019, pp. 1-27, (hereinafter: DCSD).

8 See UNCITRAL: *Default rules for data provision contracts (first revision), Note by the Secretariat A/CN.9/WG.IV/WP.183*, Vienna, 2023. That version of the Rules with comments was prepared for the sixty-sixth session of the UNCITRAL that took place in Vienna, 16-20 October 2023. For the purpose of this paper plain rules (without commentaries) are hereinafter referred to as: URDPC.

9 Art. 1-2. URDPC.

10 Art. 2. DCSD.

lish clear boundaries regarding the objects and scopes of application of both legal instruments in order to determine their potential overlaps. Finally, the paper investigates the reach and the meaning of personal data provision as a sui generis reimbursement in the context of both instruments. The paper does not unnecessarily address the issues concerning provision of digital services under DCSD, data rights and the uprising issue of legal nature of data in comparative legal systems.

2. GENERAL REMARKS ON URDPC & DCSD SCOPES OF APPLICATION

In general, URDPC should apply to contracts for the provision of data under which one party (the "data provider") provides data to another party (the "data recipient").[11] It is *prima facie* evident that URDPC applies to extremely wide range of contracts where one party provides data to another party.

The above quoted provision implies that URDPC applies exclusively to contractual obligations consisting of data provision. Therefore, the obligation to provide data arising from other grounds than contract, e.g. compensation for damages or unjust enrichment, wouldn't fall under the scope of URDPC. In that regard, quite interesting question could arise, whether URDPC could apply to data provided during the precontractual activities such as negotiations.

The contractual obligation of data recipient isn't mentioned in the definition of contract. Such an expression in URDPC leads to a conclusion that performance that forms the obligation of data recipient does not make *essentiala negotii* of the contract at current stage of URDPC. Thus, the contract itself could be unilateral where only data provider overtakes the obligation (*e.g.* donation of data)[12], or synallagmatic where data recipient overtakes the performance of counter-obligation towards data provider. The potential performance that forms counter-obligation of data recipient could consist of various deeds, such as monetary compensation, delivery of goods, transfer of rights, performance of a service and even of provision of data.[13] The contract as such exhibits the wide range of parties' autonomy. Data provision contracts may also cover certain "data pooling" arrangements, under which the parties provide data to a

[11] Art. 2. URDPC.

[12] UNCITRAL, *op. cit.* (ref. 8), para 17. As mentioned, so far WG.IV hasn't considered any rules on the price for provided data.

[13] *Ibid*. The concept of data provision contracts is consistent with contracts under which the parties provide data to each other (e.g. a two-way data sharing arrangement) and which each party would act as a "data provider" and "data recipient".

shared "data pool".[14] Further, since data pools are partnerships in their essence, it seems that there would be no obstacles to "invest" data as a share contribution into a company or partnership based on a data provision contract, provided that such share contributions are allowed by national laws governing companies and partnerships.

URDPC scope of application is determined *ratione materiae* – by the nature of data provision contracts. Parties to the contract, designated as the data provider and the data receiver, are not determined in any further manner. However, one of the exclusions to the application of URDPC refers to laws governing consumers protection. Specifically, it is stated that nothing in URDPC should affect the application to data provision contracts of any law related to data privacy and protection, the protection of consumers, trade secrets or intellectual property.[15] Such an expression does not disqualify URDPC application to consumer contracts *in toto* but rather only to those aspects of consumer contracts that are regulated by consumer protection laws, *inter alia*, those which are the product of DCSD implementation. It is worth a mention that WG.IV still considers if the aforementioned expression of exclusion is sufficient to address the issue of consumer contracts or whether an express exclusion of consumer contracts *in toto* should be included.[16] Bearing that in mind, it is quite certain that URDPC should apply to civil and commercial contracts.

On the other hand, DCSD applies to (1) contracts where the trader supplies or undertakes to supply digital content… to the consumer and the consumer pays or undertakes to pay a price, (2) contracts where the trader supplies or undertakes to supply digital content… to the consumer, and the consumer provides or undertakes to provide personal data to the trader…, and (3) contracts where the digital content… is developed in accordance with the consumer's specifications.[17]

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[14] *Ibid*., para. 18. See also American Law Institute & European Law Institute: *Principles for a Data Economy: Data Transactions and Data Rights*, 2023, pp. 84-89. Data pools are therein defined as relations under which separate parties, which are called the "data partners," agree to share data in a way that there is not a "supplier" and a "recipient" but that each of the parties is, at the same time, both supplier and recipient with regard to data shared in a data pool. As such data pools are *de facto* partnerships.

[15] Art. 2. para. 4. URDPC.

[16] UNCITRAL, *op. cit*. (ref. 7), para 24. See also UNCITRAL: Report of Working Group IV (Electronic Commerce) on the work of its sixty-fifth session (New York, 10–14 April 2023) A/CN.9/1132, Vienna, 2023, para. 24. It is very likely that future work on URDPC will focus on business-to-business transactions, and exclude from the scope contracts with consumers.

[17] Art. 3. DCSD. See also Carvalho, J. M.: Sale of Goods and Supply of Digital Content and Digital Services - Overview of Directives 2019/770 and 2019/771, *Journal of European Consumer and Market Law*, 8(5), 2019, pp. 196-198; Sein, K., Spindler G.: The new Directive on

As such, in its essence, DCSD covers only four contractual schemes, considering the conflicting interests of the contractual parties: (1) supply of digital content *vs*. payment,[18] (2) supply of digital content *vs*. data provision, (3) development of digital content *vs*. payment, and (4) development of digital content *vs*. data provision. *Vice versa*, considering the conflicting interests of the contractual parties, URDPC could potentially apply to the endless contractual schemes which could be reduced to: (1) data provision *vs*. anything or (2) data provision *vs*. nothing. Therefore, without considering whether the contract is commercial, civil or consumers, it is quite obvious that the scope of URDPC is much broader than the scope of DCSD. The main reason for that, is the indeterminacy of the "data recipient's" performance which could *de facto* consist of anything that is legally permitted and objectively possible.

Besides being determined *ratione materiae* through the objective of the contract, the scope of application of DCSD is also determined *ratione personae*.[19] The designation of contractual parties here is not determined by their contractual performance (e.g. digital content supplier and digital content purchaser), but by their general contractual status – trader and consumer.[20] That fact alone limits the DCSD scope of application exclusively to consumer contracts while civil and commercial contracts are left out of its scope.

However, even though DCSD is an instrument of maximum harmonization when it comes to consumer protection, and thus Member States may not restrict its scope, they are, on the other hand free to extend its scope to dual pur-

Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1, *European Review of Contract Law*, 15(3) 2019, pp. 257-279; Zdraveva, N., *op. cit*. (ref. 2), pp. 402-403.

[18] *Cf*. DCSD Recital para. 23. and Art. 2. ad 7. DCSD. The notion of payment under DCSD isn't strictly limited to classical monetary obligations where the performance consists of paying a sum of money. Digital representations of value such as electronic vouchers or e-coupons or virtual currencies are also considered as a method of payment within the meaning of DCSD. Also see Beale, H.: Digital Content Directive and Rules for Contracts on Continuous Supply, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(2) 2021, pp. 96-97.; Wiśniewska, K., Palka, P.: The impact of the Digital Content Directive on online platforms' Terms of Service, *Yearbook of European Law*, 42 2023, pp. 392–393; Zdraveva, N., *op. cit*. (ref. 2), p. 403.

[19] Carvalho, J., *loc. cit*. (ref. 17).

[20] Art 2. ad DCSD. For the purposes of DCSD, a consumer is considered a natural person who, is acting for purposes which are outside that person's trade, business, craft, or profession. Trader on the other hand is any natural or legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft, or profession.

pose contracts and in general to contracts that are not necessarily considered as consumer contracts.[21]

In that sense, if we assume that the digital content is in fact the form of data, the URDPC would possibly apply to all contractual schemes regulated by the DCSD, provided that the contract is of civil or commercial nature. Furthermore, unless WG.IV decides to exclude all consumer contracts from its scope, URDPC would also apply to contractual schemes of a certain consumer contracts that are not expressly governed by DCSD *e.g.* personal data provision *vs* delivery of goods.[22]

Now that is pretty certain that URDPC does not interfere with the DCSD scope of application, whether it will exclude from its scope all consumer contracts or not, the question that arises is: what are the boundaries that separate the URDPC and DCSD scopes of application? In order to discover them, it is necessary to determine the meaning of the terms "data" and "digital content" within the framework of URDPC and DCSD.

3. THE CONCEPTUAL FRAMEWORK: "DATA" AND "DIGITAL CONTENT"

The scientific literature abounds with various definitions of the data, some of which are complementary while others are contradictory.[23] That circumstance makes it practically impossible to adopt a universally accepted theoretical definition of the data. UNCITRAL WG.IV itself dealt with the concept and notion of data while defining the data message[24] and electronic record[25] within

[21] Carvalho, J., *op. cit.* (ref. 17), pp. 194-196.

[22] Even though such a contractual scheme is currently unlikely to occur in practice, especially in consumer-trader relation, it should be considered that DCSD alone introduced the data provision as a *sui generis* form of contractual reimbursement. Therefore, considering the growing importance of a data value now days within the context of contractual autonomy principle it is not impossible to imagine that data provision could become common form of contractual reimbursement in near future.

[23] See for example UNCTAD, *op. cit.* (ref. 2.), p. 52.

[24] *Cf.* Art. 2. UNCITRAL Model Law on Electronic Commerce, Art. 2. UNCITRAL Model Law on Electronic Signatures, Art. 1. UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services and Art. 4. UN Convention on the Use of Electronic Communications in International Contracts. The data message is therein defined more or less as information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

[25] Art. 2. UNCITRAL Model Law on Electronic Transferable Records defines electronic record as information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together

the framework of its previous legal instruments from the field of electronic commerce. Regardless of the fact that none of the previous UNCITRAL legal instruments defines the data itself, the notions of the data message and electronic record served as a solid base from which the definition of the data could be extracted.

The other base for crafting the notion of data was found in a broad definition formulated by ISO, which defines data as a reinterpretable representation of information in a formalized manner, suitable for communication, interpretation or processing. Even though the given ISO definition does not limit the notion of data to electronic form or machine-readable format, it was acknowledged that machine-readability and thus suitability for automated processing is the key point that gives data its value in the digital economy. For this particular reason, it was decided to adopt the working definition of data as a representation of information in electronic form exclusively.[26] Therefore, for the purposes of URDPC, the data is currently defined as a representation of information in electronic form.[27]

Attribution of electronic form rather than digital form in the definition of data, is preserved to keep URDPC consistent to the terminology used in existing UNCITRAL instruments. Also, and what is probably more important, during WG.IV sessions, it was acknowledged that the term "electronic" is an umbrella term that encompasses not only data in digital form, but also data used in high-speed analogue computing and quantum computing, which might not be digital (i.e. information represented by a string of "zeros" and "ones").[28] Therefore, the principle of technology neutrality in the definition of data is preserved, even though it is somewhat reduced to the electronic means only.[29]

The URDPC notion of the data outlines the concept of data adopted in ALI/ELI Principles for a data economy, and thus the explanations regarding the notion of data therein and its scope of application are *mutatis mutandis* appli-

so as to become part of the record, whether generated contemporaneously or not. See also Šafranko, Z.: The Notion of Electronic Transferable Records, *INTEREULAWEAST* 3(2), 2016, pp. 8-10.

[26] UNCITRAL, *Taxonomy of legal issues related to the digital economy*, Vienna, 2023, p. 22.

[27] Art. 2. URDPC.

[28] UNCITRAL, *op. cit.* (ref. 16.), para. 20-21.

[29] Essentially, the principle of technological neutrality requires such a nomotechnical expressions in regulations, which is neutral and under which all existing and potentially future technologies can be subsumed. In this sense, limiting data to electronic means actually ignores the technology of classical presentation of information on a paper medium.

cable to the URDPC notion of data.[30] The definition of the data is very broad and as such covers all kinds of data. However, the ALI/ELI Principles are covering only data issues that have a primary focus on records of large quantities of information, and not the cases in which, the focus is on the medium itself, or any other aspect of data. It is explained that the distinction between a primary focus on records of large quantities of information is particularly relevant when it comes to digital phenomena that are not primarily considered as data even though, technically speaking, they have the same or a very similar nature, such as functional *e.g.* computer program, or representative data *e.g.* cryptocurrencies.[31] The examples of such data that are primarily focused on information would be the data on consumer preferences, market statistics, raw data extracted from the sensors etc. The value of such data is not in the data itself, but in the possibilities that can be achieved by collecting, processing, altering, transmitting or even destroying such data.

Digital content, on the other hand, as defined in DCSD, means data which are produced and supplied in digital form.[32] Indeed, the digital content as such is covered by URDPC notion of data. In theory, the digital content is conceptualized as a bit-based object distributed through electronic channels.[33] In this sense, the term digital content includes computer programs, applications, video files, audio files, music files, digital games, e-books and other e-publications.[34] Since the given examples do not create an exhaustive list, but rather a guideline for understanding the notion of the digital content, it is important to consider the very nature that designates the digital content.

Considering the aforementioned, one of the key characteristics of the digital content (for the purposes of this paper), may be summed to the fact that the value of the data comprising the digital content is contextual rather than intrinsic.[35] In that sense, we can assume that the fundamental motivation for acquiring digital content as such, does not lie in the information itself, from which it is built, but rather in its functionality. The data of which the digital content is built, is therefore commonly used for entertainment, learning and

[30] See American Law Institute & European Law Institute, *op. cit.* (ref. 14.), p. 21. According to the Principle 3., data means information recorded in any machine-readable format suitable for automated processing, stored in any medium or as it is being transmitted.

[31] *Ibid.*, pp. 16-21.

[32] Art 2. DCSD.

[33] Rowley, J.: Understanding digital content marketing, *Journal of Marketing Management* 24(5-6) 2008, p. 521.

[34] *Ibid.*, p. 522. See also DCSD Recital, para. 19.

[35] Rowley, J., *op. cit.* (ref. 33.), p. 524.

creativity rather than processing. Therefore, the digital content is primarily type of functional data.

It is obvious that the broad notion of data itself as accepted both in ALI/ELI Principles and URDPC also covers the notion of the digital content as crafted for the purposes of DCSD. That leads to a conclusion that all the digital content is data, while all the data isn't necessarily the digital content. Therefore, solely regarding the objects of contractual performances, there may be some overlapping between URDPC and DCSD. However, to investigate potential overlapping of the regulatory frameworks of two instruments, exclusions to the application of URDPC should be observed.

4. EXCLUSIONS

Current provisions of the URDPC foresees exclusion of its application regarding certain types of data and contracts in which preponderant part of the obligations of the data provider consists in the supply of digital services. Also, URDPC does not tend to interfere with any laws governing data privacy and protection, the protection of consumers, trade secrets or intellectual property.[36]

4.1. EXCLUDED TYPES OF DATA

URDPC expressly provides that contracts for the provision of data comprising (1) software, (2) electronic transferable records, and (3) the result of electronic identification or the result deriving from the use of a trust service, are excluded from the scope of its application.[37] From the nomotechnical point of view, the provision on excluded types of data, which enumerates certain types of data are excluded, doesn't seem to be the happiest solution. Namely, enumeration as such that specifies particular types of data implies that the list of excluded data is closed, and that all other types of data are included.

The software, as defined by ISO, is all or a part of the programs, procedures, rules, and associated documentation of an information processing system. The WG.IV reasoning to exclude the software from the scope of application of URDPC is based on the fact that the contracts for the supply of software are already an established type of contract in many jurisdictions, and URDPC is not intended to displace the legal regimes that apply to such contracts.[38]

[36] Art. 2. para. 2-4. URDPC.

[37] Art. 2. para. 2. URDPC.

[38] UNCITRAL, *op. cit.* (ref. 8.), para. 20.

Since the software is considered as a set of data, as well as a digital content, DCSD generally applies to the consumer contracts on supply of software. Nevertheless, free and open-source software is *inter alia* excluded from its application.[39] That exclusion is reasonable within the context of DCSD as it only applies to synallagmatic contracts where both parties undertake the obligation. As free and open software is often provided without any price to be paid, this would have excluded software such as Linux operation system, Mozilla Firefox web browser or Wikipedia from the scope, as they usually do not require payment or provision of personal data.[40]

In the context of the stated position of the DCSD regarding its application to software, it is worth mentioning that URDPC excludes from its application all kinds of software regardless if it is provided for free or for some kind of reimbursement is given as a counter-performance. Since URDPC expressly excludes only software *argumentum a contrario* it appears that it would apply to contracts providing other types of digital content covered by DCSD, *e.g.* audio or video files.

The other type of data that is excluded from URDPC refers to electronic transferable records. Electronic transferable record is an electronic record, issued individually, to which the right to claim the delivery of the goods or to claim the payment attaches in such a manner, that right indicated in the electronic record cannot be claimed without the demonstration of control over the electronic record, nor it can be transferred to other person without the simultaneous transfer of control over the electronic record to that person.[41] As such, the electronic transferable record is representative data, hence, the data that incorporates the right to claim certain performance from its issuer. The exclusion was made since URDPC is not intended to apply to dealings in electronic records that are governed by special substantive law regimes, such as electronic transferable records within the meaning of the UNCITRAL Model Law on Electronic Transferable Records.[42]

It seems that the similar reasoning was crucial for exclusion from the scope of URDPC of contracts on providing data that is a result of electronic identification or a result deriving from the use of a trust service - to avoid potential overlapping with the provisions of UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services.

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39 Art. 3. para. 5. (f) DCSD.

40 Sein, K. *et al*., *op. cit*. (ref. 17.), p. 268.

41 Šafranko, Z., *op. cit*. (ref. 25.), p. 27.

42 UNCITRAL, *op. cit*. (ref. 8.), para. 21.

4.2. EXCLUSION OF THE CONTRACTS ON PROVIDING DIGITAL SERVICES WHOLLY OR PREPONDERANTLY

Unlike DCSD which applies to certain contracts on supply of both digital content and digital services, URDPC only applies contracts on provision of data. The contracts on provision of digital services are therefore left out of the URDCP scope. Within the framework of DCSD, digital service means: (1) a service that allows the consumer to create, process, store or access data in digital form; or (2) 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.[43] Generally, digital services are those which allow the creation, processing, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media.[44]

Since the supply of digital services in most cases implies the exchange of data, it is important to draw a clear line between the concepts of digital services supply on one hand, and the concept of digital content supply or provision of data on the other. The borderlines here are quite foggy, and perhaps it is the best to leave the digital environment for a moment, and seek for the answers in traditional contractual relations. In that sense, there is a logical analogy between the contracts on digital content supply or data provision and sale of goods contracts. In both cases, the performance of a contractual obligation is contained in single deed of delivery, supply or provision. *Vice versa*, when it comes to digital services supply, the contract is comparable to various traditional contracts *e.g.* service contracts, deposit contract, lease contract etc., where the performance of a contractual obligation is contained in continuous doing over certain period of time. In that manner, digital content or data are mainly subjects to one-time purchases, while digital services are commonly subjecting to subscriptions. Therefore, digital content, and perhaps data, is typically static and are meant to be consumed or used by the user, while digital services are dynamic and involve providing continuous utility or function.

Since URDPC does not apply to contracts on provision of digital services, it also won't apply to mixed contracts in which the preponderant part of the obligations of the data provider consists in the supply of services with respect to the data.[45] URDPC does not include the principal rules on the method and criteria by which preponderant part of the obligations of the data provider will be determined. It seems that that task is left to court and arbitration practice.

[43] Art. 2. ad. (2) DCSD.

[44] DCSD Recital, para. 19.

[45] Art. 2. para. 3. URDPC.

4.3. INTERFERENCE WITH LAWS ON DATA PRIVACY AND PROTECTION, CONSUMERS PROTECTION, INTELLECTUAL PROPERTY ETC.

When it comes to data provision contracts, the data that is provided could consist of personal or confidential information. Protecting data privacy and security is paramount in cyberspace, where vast amounts of personal and sensitive information are exchanged, stored, and processed on digital platforms.[46] The disposition with and processing of such a data could be restricted by special laws. One of most notable laws in that sense, in the EU, is 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).[47] Among other regulations, GDPR provides that data traders need to have a legal basis for commercial exchange of personal data, such as a consent or in the absence of consent, processing of personal data is lawful only in the situations of necessity enumerated by GDPR.[48] In that respect, nothing in URDPC should affect the application to data provision contracts of any law related to data privacy and protection.[49] That provision, as acknowledged, aims to avoid the impracticality of limiting URDPC application to the provision of data that does not comprise personal data, while ensuring that protective and regulatory measures regarding personal data continue to apply with full force.[50]

URDPC has the same attitude when it comes to potential interfering with the laws governing intellectual property rights. In literature, it is argued for instance, that most of the digital content is in fact copyright protected,[51] and the examples like digital photos, videos or music, certainly confirm that point of

[46] Babikian, J., Navigating Legal Frontiers: Exploring Emerging Issues in Cyber Law, *Revista Espanola de Documentacion Cientifica*, 17(2) 2023, p. 100.

[47] 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) (Text with EEA *relevance),* OJ L 119, 4.5.2016, pp. 1–88., hereinafter: GDPR).

[48] Art. 6. GDPR. Also see Custers, B., Malgieri, G.: Priceless data: Why the EU fundamental right to data protection is at odds with trade in personal data, *Computer Law & Security Review*, 45 2022, pp. 7-9.

[49] Art. 2. para 4. URDPC.

[50] UNCITRAL, op. cit. (ref. 8.), para. 25.

[51] For the connection of DCSD and copyrights see Gliha, D.: The Digital Content Directive's Implications on the exercise of Copyright and Market Competition, *INTEREULAWEAST*, 10(1) 2023, pp. 27-30.

view. In the same manner, the data that is subject to the data provision contract could also be the subject to intellectual property rights, such as copyrights, trademarks or patents. Hence, where the data that is subject to intellectual property rights is involved, URDPC avoids to regulate the measures that the parties are to take to comply with the requirements of the laws governing intellectual property.

Lastly, URDPC does not tend to interfere with any laws governing consumer protection. That provision clearly keeps URDPC application out of the DCSD domain. However, since DCSD regulates limited number of contractual schemes, some of the unregulated contractual schemes between traders and consumers could fall under the URDPC scope of application.[52] To avoid any interference with the consumer contracts, WG.IV is currently considering the option to exclude all consumer contracts from its scope.

5. PROVIDING AND SUPPLYING: THE SYNONYMS OR SOMETHING COMPLETELY DIFFERENT

The data and the digital content as a subject of the parties' performances under the contracts governed by URDPC and DCSP have been discussed and compared. It remains here to observe and interpret the very nature of the contractual parties' performances. Namely, while URDPC uses the phrase "provision of data", DCSD uses the phrase "supply of digital content" to describe the contractual obligation. Since there is quite a resemblance between provision and supply in the given context, the question arises whether the mentioned terms are used as synonyms, or do they have a different meaning? It is *prima facie* obvious that both terms are used as a functional equivalent to the term "delivery" when it comes to tangible commodities.

URDPC expressly states that it understands two different modes of performance under the notion of data provision: (1) delivering the data to an information system designated by the data recipient and (2) making the data available to the data recipient or to a person designated by data recipient in an information system under the control of the data provider.[53] It seems that the focus in performance here is not in transferring the control over data, which would be a functional equivalent to transferring possession over tangible goods, but rather in enabling the data receiver to use the data.

[52] See *supra ad*. 2.

[53] Art. 5. para. 1. URDPC.

DCSD on the other hand, defines the concept of "supply" through the performance of a trader whereas, the trader shall have complied with the obligation to supply when the digital content or any means suitable for accessing or downloading the digital content is made available or accessible to the consumer, or to a physical or virtual facility chosen by the consumer for that purpose.[54]

It seems that both URDPC and DCSD when designating the concepts of providing and supplying are putting stress on making data or digital content available to the recipient for use in accordance with its usual or contracted purpose. Given the aforementioned, there doesn't seem to be any relevant difference in the content of providing and supplying.

6. SPECIAL REMARKS ON PROVIDING PERSONAL DATA AS A REIMBURSEMENT FOR A SUPPLY OF DIGITAL CONTENT

Definitely, one of the biggest innovations brought by DCSD lies in the option to pay the supply of the digital content with personal data instead with money.[55] So far, the data was mainly observed as a type of commodity in electronic environment, however DCSD gave the data a completely new function in digital market, making the data *sui generis* currency. This issue has been broadly discussed in literature, from a different perspective regarding various issues.[56] However, for the purposes of this paper, the data as a currency will be observed strictly from the perspective of URDPC scope of application.

DCSD, *inter alia*, applies to the contracts 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. There are two exceptions to the given rule, in which cases the provision of personal data won't be considered as payment: (1) if the personal data are exclusively processed by the trader for the purpose of supplying the digital content or digital service, or (2) if it is used for allowing the trader to comply with legal requirements to which the trader is subject. If a trader processes those data for any other purpose, the provided data will be considered as a sui generis reimbursement for the supplied digital content or service.

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[54] Art. 5. para. 2. DCSD.

[55] Alves, M de A.: Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services & the EU Data Protection Legal Framework: Are Worlds Colliding?, *UNIO – EU Law Journal*, 5(2) 2019, p. 35.

[56] *Ibid*., pp. 36-40. See also Bedir, C.: Contract Law in the Age of Big Data, *European Review of Contract Law* 16(3), 2020, pp. 353-356; Custers, B., Malgieri, G., *op. cit*. (ref. 47.), pp. 2-3.

Now, if one changes the perspective and observes the given contractual scheme from the URDPC corner, the conclusion is reached that both trader and consumer are simultaneously acting as data providers and data receivers whereby the trader's performance consists of supplying the consumer with a digital content as a data which is focused on functionality, while the consumers performance consists of providing the trader with their personal data, which is solely focused on information. Now, if there were any doubts that URDPC includes the digital content in its notion of the data, there certainly should be no such doubts regarding personal data. Personal data, whose value lies exclusively in the information, should definitely be covered by the URDPC notion of data.

The given perspective raises multiple issues, *e.g.* if a trader is liable for the conformity of supplied digital content with a contract under the DCSD provisions, could consumer, as a data provider, be liable for conformity of provided personal data under the URDPC provisions?[57]

7. CONCLUSION

This paper has examined possible collisions between URDPC and DCSD scopes of applications, based on a starting premise that contractual obligations consisting in data provision and supply of digital content may be overlapping. The issue was analyzed and compared in multiple layers: (1) the legal nature of a contracts, (2) the obligations of contractual parties, (3) the nature of contractual parties' performances and (4) the subjects of their performances.

Regarding the legal nature of the contract DCSD applies only to consumer contracts where trader undertakes the obligation to supply consumer with a digital content while the consumer in return undertakes the obligation to pay the price or to provide the trader with their personal data. In that respect, DCSD will not apply to commercial or civil contracts. This statement, however, is not absolutely certain since Member States are free to extend the DCSD scope to civil and commercial contracts and to determine how they will treat dual purpose contracts. On the other hand, URDCP does not generally determine its scope of application based on *ratione personae* criteria. True, it also doesn't interfere with the issues that are governed by consumer protection laws, such as DCSD *inter alia*, however it could apply to some contracts between traders and consumers, especially those providing the data provision as a type of reimbursement.

[57] *Cf.* Art. 7. URDPC and Art. 7-10. DCSD.

When it comes to obligations of contractual parties, the scope of URDPC is *prima facie* much broader since it practically includes all permitted and possible contractual schemes, given that at least one of the contractual parties is obliged to provide data to other party. Other than that, the data receivers' obligation could consist in anything, so the contract itself could be free, synallagmatic or *sui generis* partnership. *Vice versa*, DCSD scope of application is practically restricted to four contractual schemes. Bearing in mind such a wide scope of URDPC, it could practically interfere with some issues covered by DCSD.

Furthermore, considering the nature of contractual parties' performances, one could conclude that there are not any essential differences between providing and supplying. Both deeds are practically functional equivalents to delivery (if the subject of the contract was a tangible goods), and both are primarily intended to enable the use of data or digital content to the obligation's creditor.

Lastly, considering the subjects of parties' performances, the broad notion of data, as it is currently formulated by URDPC, *prima facie* covers the notion of digital content. If UNCITRAL really intends to focus on data as pieces of information rather than functionality of the data, it should expressly state that in the definition of data or in the exclusions to its scope of application. The precise exclusion of software as a type of digital content from its scope doesn't help at all. On the contrary, it leads to assumption that the digital content other than software falls under its scope of application. The problem on this level also appears when it comes to providing personal data as a *sui generis* reimbursement provided by DCSD, which is definitely considered as data whose primal value consists in its processability.

Having in mind all the aforementioned, it seems that WG.IV is currently diving in muddy waters. It will take an exceptional effort to clear all the potential overlaps and restrict URDPC scope of application to the areas intact by DCSD. While other issues could be resolved by reducing the notion of data or expanding the exclusions by using more generic terms such as functional and representative data rather than software or electronic transferable records, it remains to be seen how the issue of personal data provision as a reimbursement will be treated. Now, was the Pythagoras' ignorance of the ones and zeroes true nature, his backwardness or his blessing?

LITERATURE

1. Alves, M de A.: Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services & the EU Data Protection Legal Framework: Are Worlds Colliding?, *UNIO – EU Law Journal*, 5(2) 2019, pp. 34-42.
   – DOI: https://doi.org/10.21814/unio.5.2.2290
2. American Law Institute & European Law Institute: *Principles for a Data Economy: Data Transactions and Data Rights*, 2023, [https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ALI-ELI_Principles_for_a_Data_Economy.pdf], 06/05/2024.
3. Babikian, J., Navigating Legal Frontiers: Exploring Emerging Issues in Cyber Law, *Revista Espanola de Documentacion Cientifica*, 17(2) 2023, pp. 95-109.
4. Beale, H.: Digital Content Directive and Rules for Contracts on Continuous Supply, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 12(2) 2021, pp. 96-110.
5. Bedir, C.: Contract Law in the Age of Big Data, *European Review of Contract Law*, 16(3) 2020, pp. 347-365.
   – DOI: https://doi.org/10.1515/ercl-2020-0020
6. Carvalho, J. M.: Sale of Goods and Supply of Digital Content and Digital Services - Overview of Directives 2019/770 and 2019/771, *Journal of European Consumer and Market Law*, 8(5) 2019, pp. 194-201.
7. Custers, B., Malgieri, G.: Priceless data: Why the EU fundamental right to data protection is at odds with trade in personal data, *Computer Law & Security Review*, 45 2022, pp. 1-11.
   – DOI: https://doi.org/10.1016/j.clsr.2022.105683
8. 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 (Text with EEA relevance.) OJ L 136, 22.5.2019, pp. 1-27.
9. European Commission: *European Data Market Study 2021–2023*, Luxembourg, 2024.
   – DOI: https://doi.org/10.2759/632809
10. Gliha, D.: The Digital Content Directive's Implications on the exercise of Copyright and Market Competition, *InterEULawEast: Journal for the international and european law, economics and market integrations*, 10(1) 2023, pp. 21-44.
    – DOI: https://doi.org/10.22598/iele.2023.10.1.2.
11. 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) (Text with EEA relevance), OJ L 119, 4.5.2016

12. Rowley, J.: Understanding digital content marketing, *Journal of Marketing Management* 24(5-6) 2008, pp. 517-540.
– DOI: https://doi.org/10.1362/026725708X325977

13. Šafranko, Z.: The Notion of Electronic Transferable Records, *InterEULawEast: Journal for the international and european law, economics and market integrations,* 3(2) 2016, pp. 1-31.

14. Sein, K., Spindler G.: The new Directive on Contracts for the Supply of Digital Content and Digital Services – Scope of Application and Trader's Obligation to Supply – Part 1, *European Review of Contract Law*, 15(3) 2019, pp. 257-279.
– DOI: https://doi.org/10.1515/ercl-2019-0016

15. Toygar, A., Taipe Rohm, C. E., Zhu, J.: A New Asset Type: Digital Assets, *Journal of International Technology and Information Management* 22(4) 2013, pp. 113-119.
– DOI: https://doi.org/10.58729/1941-6679.1024

16. UNCITRAL Model Law on Electronic Commerce, 1996.

17. UNCITRAL Model Law on Electronic Signatures, 2001.

18. UNCITRAL Model Law on Electronic Transferable Records, 2017.

19. UNCITRAL Model Law on the Use and Cross-border Recognition of Identity Management and Trust Services, 2022.

20. UNCITRAL, *Taxonomy of legal issues related to the digital economy*, Vienna, 2023.

21. UNCITRAL: *Default rules for data provision contracts (first revision), Note by the Secretariat (A/CN.9/WG.IV/WP.183)*, Vienna, 2023.

22. UNCITRAL: *Report of the United Nations Commission on International Trade Law Fifty-fifth session (27 June–15 July 2022) (A/77/17)*, New York, 2022.

23. UNCITRAL: *Report of Working Group IV (Electronic Commerce) on the work of its sixty-fifth session (New York, 10–14 April 2023) (A/CN.9/1132)*, Vienna, 2023.

24. UNCTAD: *Digital Economy Report 2021*, New York, 2021.

25. United Nations Convention on the Use of Electronic Communications in International Contracts, New York, 2005.

26. Wiśniewska, K., Palka, P.: The impact of the Digital Content Directive on online platforms' Terms of Service, *Yearbook of European Law*, 42 2023., pp. 388-406.
– DOI: https://doi.org/10.1093/yel/yead004

27. World Trade Organization: *World Trade Report 2018 - The future of world trade: How digital technologies are transforming global commerce*, Geneva, 2018.

28. Zdraveva, N.: Digital Content Contracts and Consumer Protection: Status Quo and Ways Further, *EU and Comparative Law Issues and Challenges Series*, 5 2021, pp. 398-421.

– DOI: https://doi.org/10.25234/eclic/18313