

The Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services – Potential for Improvement

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Abstract

Consumers increasingly "pay" for digital content and services with data. Resulting agreements involving data counter-performance ("DCP") foster growth and vibrancy in the digital single market.

Potentially impacting this trend, however, is the new Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services ("DCD"), which encompasses most digital content or -service contracts wherein the consumer pays with data.

Ostensibly designed to foster digital single market growth and better protect consumer interests, the DCD may in fact slow the proliferation of DCP agreements. In particular, DCD-imposed hurdles for traders may – together with the legislation's unclear contours of scope – lead traders to inefficiently allocate resources. This could in turn render less attractive DCP-based agreements from the trader perspective.

Potential modifications to the DCD could serve to reduce such inefficiencies. In particular, textual refinement of the DCD's scope section offers a relatively measured and realistic path to that end. Such refinement would involve for instance clarification of the definition of a "trader," the limits of "goods with digital elements," and the boundaries of what constitute acceptable grounds for the processing of personal data.