Tilburg University

Contract and consumer law

Mak, Vanessa

Published in:
Research handbook in data science and law

Publication date:
2018

Document Version
Other version

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):
Mak, V. (2018). Contract and consumer law. In V. Mak, E. Tjong Tjin Tai, & A. Berlee (Eds.), *Research handbook in data science and law* (pp. 17-38). Edward Elgar.

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TILBURG PRIVATE LAW WORKING PAPER
SERIES

No. 07/2018

“Contract and Consumer Law”

Vanessa Mak
Professor of Private Law
Vanessa.Mak@tilburguniversity.edu

FACULTY OF LAW

Contract and consumer law

Vanessa Mak¹

1. Introduction

Data has been called the new oil of society, in a metaphor that draws a parallel with that other commodity that in the days of the industrial revolution spawned a lucrative and fast-growing industry.² One legal institution that could also be compared to oil, though in a different way, is contract. Contract can be regarded as the oil or grease that makes the wheels of society run smoothly. It lays down an ordering mechanism that determines which agreements—sales transactions, loans, commitments to provide a service—can be enforced and under what conditions.³

However, rather than improving the function of contract as an oil of societal interaction, data appears to be upsetting the established order. To give an example: data-driven technologies are being used to learn about consumer preferences and to tailor production and advertising to these preferences.⁴ Very little of what happens in this ‘black box’ of data is transparent to consumers. Whilst contract laws around the world in the last decades have been infused with transparency obligations for traders, aiming to give consumers a stronger legal position in relation to (economically stronger) businesses,⁵ the use of data in the consumer market threatens to diminish that protection. Another question for contract law is whether, now that data research enables traders to learn about the individual preferences of consumers, the general ‘consumer’ category in contract laws still works for defining areas in which weaker contracting parties require legal protection.⁶ As a third example, a more specific problem for contract law is whether transactions in which a consumer ‘pays’ by providing personal data in exchange for receiving a service—e.g. access to a wifi network at the airport—should be treated similarly to contracts in which a price is paid in money. Should consumers have similar rights and remedies in contract law if the service does not function properly?⁷

This chapter aims to give an overview of the contractual issues that have arisen in relation to the use of data. Since the use of data has far-reaching consequences for

¹ Professor of Private Law, Tilburg University.

² ‘The world’s most valuable resource is no longer oil, but data’, *The Economist*, 6 May 2017.

³ JM Smits, *Contract Law. A Comparative Introduction* (2nd edn, Edward Elgar 2017) 3-5; and see H Collins, *The Law of Contract* (4th edn, CUP 2008) x, who regards contract law as intertwined with morality, social and economic policy, and therefore as having a regulating function.

⁴ V Mayer-Schönberger and K Cukier, *Big Data* (Eamon Dolan/Houghton Mifflin Harcourt 2013) 104-105.

⁵ For the development of this idea in European private law, see E Hondius, ‘The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis’ (2004) 27 *Journal of Consumer Policy* 245.

⁶ See for an explorative study pre-contractual information duties: from behavioural insights to big data’ in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 221.

⁷ This question has become prominent in Europe due to the proposal of the European Commission for a Directive on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final, which proposes that when a consumer actively supplies personal data or other data this can constitute a counter-performance in contract. See Art 3(1) of the proposed Digital Content Directive.

consumer markets, the chapter focuses on issues that have arisen in those markets and the regulatory responses that have emerged, or are emerging, in consumer law.⁸ The opening part (section II), however, presents a general introduction to the ways in which the existing elements of contract law such as the rules on formation, content, defects of consent and remedies are touched by the rise of the data economy.⁹ It considers in particular what effects the use of data has on the autonomy of contracting parties, and on the balance of contractual fairness. The next parts (sections III, IV and V) examine three more specific issues for consumer contract law, namely transparency, payment with data, and the question whether the 'consumer' concept needs adjusting. Those issues will be considered in the light of existing regulation, primarily in Europe, as laid down in the form of information duties for traders, unfair terms control, and unfair commercial practices regulation.¹⁰ The focus of this chapter will be mainly on the EU, with occasional references to the US, seeing that Europe has developed a fairly coherent regime of harmonised consumer contract law that in many aspects already applies to data-related contracts. An analysis of this framework can provide a useful basis for further debate and comparison with other jurisdictions in the world. Issues that are for now unregulated will also be highlighted, where relevant with reference to proposed rules that may or may not become law in the near future.¹¹ Section VI concludes, drawing together some of the lines set out in the previous sections, and providing an outlook for future research on data and contract law.

2. Data and contract law

Even if examples of data processing in private law relationships abound, as the issues highlighted in the introduction make clear, it is not immediately obvious that contract law should apply to these cases. At a fundamental level, there may be a problem of fit, i.e. the suitability of contract law to deal with cases in which data protection laws have already sought to balance the economic and fundamental rights of individuals. There may also be a problem of fit on a more specific level, namely where the existing rules of contract law are unable to accommodate transactions involving data. I will elaborate on both points, considering first the fundamental question why contract law should be concerned

⁸ In business-to-business relationships some contractual issues have arisen that might also warrant further research or possibly regulatory action; see e.g. discussions on the terms and conditions of cloud storage. See S Bradshaw, C Millard and I Walden, 'Contracts for Clouds: Comparison and Analysis of the Terms and Conditions of Cloud Computing Services' (2011) 19 *International Journal of Law and Information Technology* 187, which examines in particular terms concerning the location of data placed into the cloud and the legal foundations of cloud contracts; W Kuan Hon, C Millard and I Walden, 'Negotiating Cloud Contracts: Looking at Clouds from Both Sides Now' (2012) 16 *Stanford Technology Law Review* 81, which presents an empirical study of contract negotiations in relation to cloud contracting and suggests that standards and certification might enhance legal certainty and compliance for small and medium-sized enterprises.

⁹ For an analysis of the rise of the 'data economy' and the economic, societal and legal challenges that it poses, see 'Data is giving rise to a new economy', *The Economist*, 6 May 2017. The European Union has made 'building a European data economy' one of the goals of its Digital Single Market strategy; see European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building a European Data Economy', COM(2017) 9 final.

¹⁰ In Europe, relevant legislation includes Directive 2011/83/EU on consumer rights [2011] OJ L304/64 (Consumer Rights Directive); Directive 93/13/EEC on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Terms Directive); and Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22 (Unfair Commercial Practices Directive).

¹¹ Such as the proposed Digital Content Directive, see n 7.

with data, and then the more specific question how—or, in which respects—it should be concerned with data.

2.1 *Why should contract law be concerned with data...*

Contract law, as part of private law, is concerned with the economic ordering of society.¹² All rules of contract law therefore deal with transactions that represent economic value, either in the form of a performance being exchanged for a counter-performance (a synallagmatic contract), or in the form of a one-sided performance (e.g. a donation).¹³ Data is of value too, yet the application of contract law to transactions involving data is not automatic. Two points are problematic.

First, even though it is clear that data has economic value for the companies that use it to calibrate their production and marketing towards consumer preferences,¹⁴ it is hard to attach specific value to the data of *individual* consumers. Their data is in itself not of significant value to a company. It only becomes valuable once it is combined with the data of hundreds or thousands of other customers. Big data analysis enables companies to deduct preferences from this large pool of consumer data. Nevertheless, even if it is impossible to attach specific value to the data provided by an individual consumer, one might say that it is at least clear *that* the consumer's data is of value to the company. Therefore, contract law might be extended to contracts in which a counter-performance to obtain a good or service exists of 'payment' with data.¹⁵ After all, why should Google be allowed to make money on my data, while I receive nothing?¹⁶

Second, the application of contract law to a particular category of data, namely: personal data, is problematic. Personal data, i.e. data that is related to an identified or identifiable natural person,¹⁷ is subject to data protection regulation in many jurisdictions. That means that strict rules apply concerning the processing of such data, with the aim of safeguarding privacy. Rather than being concerned with economic ordering, as contract law is, data protection regulation is considered part of fundamental rights protection.¹⁸

Yet, in practice personal data can be part of contracts for goods or services in several ways. It might be that data are necessary for the proper functioning of a good or service. For example, for 'location services' on a mobile phone app to work it is necessary for the supplier of the app to have access to the customer's GPS

¹² Cf Micklitz, who calls it economic law. See K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation. Liber Amicorum for Hans Micklitz* (Springer 2014).

¹³ Donations, or gifts, are considered contracts in some, but not in all legal systems. In English law, for example, promises for donation are void for lack of consideration, unless they are laid down in a deed; whereas in German law gifts are treated as a form of contract, albeit with certain formalities. See for a comparative perspective H Beale cs (eds), *Cases, Materials and Text on Contract Law. Ius Commune Casebooks for the Common Law of Europe* (2nd edn, Hart 2010) 60, 89; Smits (n 3) 72, 104.

¹⁴ See e.g. 'How Companies Learn Your Secrets', *New York Times*, 16 February 2012.

¹⁵ On which topic, see further section V.

¹⁶ The YouTube video 'Data to Money: How Much does Google Owe You?' makes some suggestions as to how payments to individual users of Google (or other companies) could be organised. See <<https://www.youtube.com/watch?v=W8kA-EZReA0>>.

¹⁷ This is the definition laid down in Art 4(1) of the General Data Protection Regulation (GDPR) which will become applicable from 25 May 2018. See Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1.

¹⁸ In Europe, see e.g. Artt 7 and 8 of the EU Charter of Fundamental Rights, Art 16 of the Treaty on the Functioning of the European Union (TFEU), and Art 8 of the European Convention on Human Rights (ECHR).

location.¹⁹ It may also be that personal data are requested by a supplier in exchange for a service, such as the example that was earlier given of wifi services at an airport. In that case, the data are not necessary for the proper functioning of the service, but may constitute a counter-performance or 'payment' by the customer. Thirdly, data may be produced or generated by the user of a digital service. Examples of this category can be posts on social media, including texts, photos and videos, that can be traced to an identified or identifiable user. When data is part of a contractual transaction, the question arises whether contractual rights and remedies can be applied to that transaction. Only the first category is unproblematic here, as data protection laws generally allow processing when personal data is necessary for the performance of a contract.²⁰ For the other two categories—personal data as counter-performance and personal data produced or generated by the user of a digital service—no easy answer exists. Some lawyers are vehemently opposed to the application of contractual regimes to personal data, on the basis that it would be unethical for data subjects to be able to trade their data in an economic transaction.²¹ At the same time, the alternative view holds that personal data should be integrated into the framework of contract law, as it is an economic reality that it is used as a counter-performance in exchange for obtaining (mostly) a service. Contract law, which is concerned with economic transactions, would be the appropriate place to deal with 'payment' with data.²² The same argument that was put forward in relation to the difficulty of establishing the value of individual data applies here: if Google earns money through advertising deals based on the analysis of personal data,²³ why should the user of its search engine not have contractual rights and remedies if the service does not function properly?²⁴

2.2 ...and how?

If it is established that contract law should concern itself with data, the implications of that choice will need to be run through. How can issues concerning data be dealt with within the doctrinal systems of existing contract laws? Generally speaking, all contract law systems in the world will have to consider issues arising in relation to the following, archetypical aspects of contract law.

General principles of contract law. Contract laws around the world recognise autonomy and fairness as general principles underlying the specific rules of

¹⁹ See for this example recital 14 of the proposed Digital Content Directive (n 7).

²⁰ For Europe see GDPR (n 17), Art 6(1)(b).

²¹ See G Buttarelli, the European Data Protection Supervisor (EDPS), 'Address to Socialists and Democrats Group workshop on the Proposed Digital Content Directive at the European Parliament', 12 January 2017, p 3, who compares the market for data to the market for live human organs. The speech is available at: <https://edps.europa.eu/sites/edp/files/publication/17-01-12_digital_content_directive_sd_en.pdf>.

²² To this effect, C Langhanke and M Schmidt-Kessel, 'Consumer Data as Consideration' (2015) 4 Journal of European Consumer and Market Law 218, 219.

²³ The assumption here is that the data that a user enters into Google's search field can be traced back to him or her, and is hence data relating to an identifiable natural person.

²⁴ An additional question is whether a user of Google's search engine has a contract with Google, and when it would be concluded. This question is not settled by case law. Presumably, an argument could be made that there is a contract between Google and the user, which is concluded when the user starts a search on the website, and thereby accepts Google's offer for providing a web-searching service. See E Mik, 'Contracts Governing the Use of Websites' [2016] Singapore Journal of Legal Studies 70, 71. Even if no contractual relationship can be established, in the EU certain information duties may rest on a provider on the basis of the E-Commerce Directive. See Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market [2000] OJ L178/1, Art 5.

contract law.²⁵ Autonomy is generally defined as the fundamental right of individuals to shape their own future through voluntary actions, and in private law translates into the freedom to decide with whom and on which terms to contract.²⁶ In the data economy, new questions arise as to how autonomy should be perceived, for example to what extent individuals should be free to transfer their personal data in exchange for goods or services.²⁷ In that context, the fundamental right to privacy is also a relevant benchmark,²⁸ though it is not a principle of contract law.

Formation: from oral, to written to digital. The ‘datafication’ of the consumer market goes hand in hand with digitalisation. One area in which this is apparent, in particular when taking a historical perspective, is the formation of contract. The recognition of a contract as a legal figure that represents a binding agreement between two or more parties goes back to Roman times. Initially an oral agreement between two parties, established through the proclamation of a *stipulatio* in the presence of witnesses,²⁹ it became practice for contracts to be laid down in writing.³⁰ Until this day, although contracts may validly be concluded orally,³¹ they are often laid down in writing. Since the rise of e-commerce, ‘in writing’ also can mean that the contract is recorded in digital form and confirmed by an electronic signature.³² In consumer contracts, EU law furthermore requires that general terms and conditions are made available to the consumer in a way that allows her to store and reproduce them.³³

Content and transparency. With regard to contracting in the data economy, however, more important than requirements about form are transparency requirements. Is it clear to the other party on which terms one wishes to enter into a contract, and if so, are those terms clear and intelligible? Moreover, are they valid, and if they diverge from default rules of contract law, do they do so within the boundaries of what the law allows? For business transactions, it is generally

²⁵ Other principles of contract law, such as a trust principle (Vertrauen in German, vertrouwen in Dutch law), the principle that agreements are binding (*pacta sunt servanda*), legal certainty, or a principle of consensualism, are recognised by various legal systems. This chapter focuses on autonomy and fairness as the primary principles that are impacted by the data economy, which are moreover the principles shared by virtually all contract laws in the world.

²⁶ WH van Boom and A Ogus, ‘Introducing, Defining and Balancing “Autonomy v Paternalism”’ (2010) 3 *Erasmus Law Review* 1.

²⁷ See e.g. E Kosta, *Consent in European Data Protection Law* (Brill 2013) 138, who advocates a rights-based approach to the use of personal data, in which the consent of the data subject is examined in the light of autonomy. This can mean that data protection law should restrict the possibilities for data subjects to dispose of or trade their personal data on the market for information. See further below, part IV.

²⁸ Compare N Helberger, ‘Big data en het consumentenrecht’ in: PH Blok (ed), *Big data en het recht* (Sdu 2017) 151, who uses autonomy, fairness and privacy as benchmarks for her evaluation.

²⁹ Albeit that the concept of a reciprocal or synallagmatic contract was established later than the earliest form of a binding promise, the *stipulatio*. See R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 68-69; B Nicholas, *An Introduction to Roman Law* (OUP 1962) 161-163.

³⁰ Zimmermann (n 29) 71; Nicholas (n 29) 194ff. See for a comparative overview of current European contract laws J Gordley, *The Enforceability of Promises in European Contract Law* (CUP 2001) 2.

³¹ This rule is not codified in German or French law, but it is in Dutch law. Art 3:37 of the Dutch Civil Code stipulates that ‘unless provided otherwise, declarations, including communications, can be made in any form and can be inferred from conduct.’ See Smits (n 3) 101.

³² For an overview of formal requirements per country, see G Spindler and F Börner (eds), *E-Commerce Law in Europe and the USA* (Springer 2002). See also I Walden and J Hörner, *E-Commerce Law and Practice in Europe* (Woodhead Publishing 2001), in particular Section 2. In Europe, rules concerning electronic signatures are laid down in Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market [2014] OJ L257/73.

³³ Directive 2000/31 (n 24), Art 10(3).

presumed that parties are by themselves able to investigate the terms of the contract and to negotiate the bargain that the other party is willing to make. The transparency required from the offeror ranges from systems that only require honesty in relation to statements, such as English law, to systems that require the disclosure of essential information about the terms and subject-matter of the contract, such as German and French law.³⁴ The transparency required in business-to-consumer contracts, by contrast, across the board is of a higher standard. Consumer protection rules in Europe require that the trader discloses detailed information about, *inter alia*, the price of the goods or services offered, the product characteristics, and the conditions under which terms may be changed.³⁵

Conformity and remedies. The rules on the performance of contracts, and the remedies that are available when a party does not live up to a contractual promise, will have to be reassessed in the data economy. Debates on contracts for the supply of 'digital content' have been held at several stages in the development of rules of consumer contract law in Europe, but have so far not led to legislation at the EU level. Early proposals for legislation, in the Consumer Rights Directive and the proposed Common European Sales Law (CESL), were either more modest or (in case of the CESL) rejected during the legislative process between the European Parliament, the Council and the Commission.³⁶ A new attempt has been made with the 2015 proposal for a Digital Content Directive, which was presented in tandem with a directive on online and distance sales contracts.³⁷ The proposal aims to introduce rules on conformity and available remedies for non-conformity of digital content. The term 'digital content' includes data which is produced and supplied in digital form, *i.e.* in bytes, such as audio, video, apps, games and software, as well as services that allow the creation, processing or storage of data in digital form (cloud services) or the sharing of data (social media).³⁸ For this type of content, the Directive proposes conformity rules and remedies that are tailored to the nature of digital content, in particular its non-physical character.³⁹ One difficulty is to demarcate the boundary between digital and physical goods, in

³⁴ J Cartwright, 'Defects of Consent in Contract Law' in AS Hartkamp cs, *Towards a European Civil Code* (4th edn, Kluwer Law International 2010) 537, 542.

³⁵ See further para III.

³⁶ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, recital 17; Consumer Rights Directive (n 10), recital 19 and *i.a.* Artt 2(11) and 9(2)(c). The only national jurisdiction in the EU that has introduced specific rules on digital content is the United Kingdom in the UK Consumer Rights Act 2015, chapter 3.

³⁷ Proposed Digital Content Directive (n 7) and proposal of the European Commission for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM(2015) 635 final.

³⁸ See proposed Digital Content Directive, Art 2(1). Amendments proposed by the Presidency after the first reading of the proposed Directive by the Parliament and the Council introduce a distinction between 'digital content' and 'digital services'. See Council of the European Union, Interinstitutional File 2015/0287 (COD), Art 1.

³⁹ This chapter focuses on aspects of contracting in the data economy that are thought to influence contract law in more fundamental ways. For an in-depth analysis of the suitability of various remedies, including repair, replacement, termination and damages, see *e.g.* MBM Loos cs, 'Digital content contracts for consumers. Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts, final report: Comparative analysis, Law & Economics analysis, assessment and development of recommendations for possible future rules on digital content contracts. With an executive summary of the main points', study performed for the European Commission (2011), available at: <ec.europa.eu/justice/consumer-marketing/files/legal_report_final_30_august_2011.pdf>.

particular in relation to the Internet of Things,⁴⁰ and further research will need to focus on the question how the two can be distinguished. Another question is which conformity requirements should apply, which can be problematic as legal standards for the quality of data are lacking in existing laws.⁴¹

In sum, the rise of the data economy does not seem to upset the doctrinal structures of contract laws at a fundamental level. However, it does raise questions as to how existing doctrines can respond to the emergence of data-driven technologies, and the use of data as a means of 'payment' in contract law. This brings us to a number of specific issues that have come up in relation to consumer contracts in the data economy: transparency, payment with data, and the shifting meaning of the 'consumer' benchmark. To some extent, existing regulation may be able to provide adequate answers to the question which rights consumers can enforce against traders or suppliers. Overall, however, a re-evaluation of consumer contract law is needed to determine whether new or revised regulation is required for contracting in the data economy. I will examine this question first for transparency.

3. Transparency

Consumer contract law, globally, embraces the idea that consumer should be provided with information that puts them on a (more) equal footing with traders. Information can serve to diminish the asymmetry between consumers and businesses in terms of knowing the quality of products and services, whether the price is fair, and whether the terms and conditions of purchase are otherwise fair and reasonable towards the consumer.⁴² The balance between autonomy and fairness in contract law is so restored. Especially in European law, this idea of transparency is reflected in numerous information requirements for traders in consumer contracts. The most generally applicable rules on this are laid down in the Consumer Rights Directive,⁴³ whilst rules for specific contracts can be found in the Consumer Credit Directive, the Mortgage Credit Directive and the Package Travel Directive.⁴⁴ These Directives require the trader to disclose information about the characteristics of a good or service, the price, the address details of the trader, as well as other terms of the contract.⁴⁵

In the data economy, the question how transparency towards consumers can be guaranteed demands renewed scrutiny. The complexity of data-driven technologies means that it is not always clear to consumers how the services provided by the trader operate (e.g. with algorithm-based services, such as Google,

⁴⁰ The 'Thing' in Internet of Things can be defined as 'any physical entity capable of connectivity that directly interfaces the physical world, such as embedded devices, sensors and actuators'; see G Noto La Diega and I Walden, 'Contracting for the "Internet of Things": Looking into the Nest' (2016) 7 *European Journal of Law and Technology*, available at: <<http://ejlt.org/article/view/450/658>>.

⁴¹ For an analysis based on German law, but of wider impact, see T Hoeren, 'Big Data and the Legal Framework for Data Quality' (2017) 25 *International Journal of Law and Information Technology* 26.

⁴² I Ramsay, *Consumer Law and Policy* (3rd edn, Hart 2012) 49ff.

⁴³ Directive 2011/83/EU (n 10).

⁴⁴ Directive 2008/48/EC on credit agreements for consumers [2008] OJ L133/66 (Consumer Credit Directive); Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property [2014] OJ L60/34 (Mortgage Credit Directive); Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] OJ L326/1 (Package Travel Directive).

⁴⁵ For distance and off-premises contracts, which will likely include the majority of (online) contracts involving data, see the requirements laid down in Directive 2011/83/EU (n 10), Art 6. See also for e-commerce contracts Directive 2000/31/EC (n 24), Art 5 and Art 10.

or listings on Airbnb). This could be seen as intransparency with regard to the characteristics and quality of a service.⁴⁶ Further, the way in which a price is calculated, or whether the consumer pays a 'price' if she pays with data,⁴⁷ is not always clear. Third, thorny questions arise when the 'data' at the heart of a transaction are personal data. Can, and should, contract law interfere with data protection regimes?⁴⁸

The simple answer is that contractual agreements on the use of personal data cannot go beyond the boundaries laid down in data protection rules. In Europe,⁴⁹ the relevant framework for data protection follows from the GDPR. The Regulation determines that personal data may only lawfully be processed if consent has been given by the data subject (or in this case: the consumer) to the processing of his or her personal data for one or more specific purposes, or if processing is necessary *inter alia* for performance of the contract, compliance with a legal obligation, or for the purposes of the legitimate interests pursued by the controller of the data.⁵⁰ While it may be debated what amounts to 'consent' or what falls within the scope of 'legitimate interests', the provision establishes that situations in which these conditions are not complied with will constitute unlawful processing of personal data. In contract law, that could mean that significant limitations are placed on the use of data as payment. The processing of data for commercial purposes is unlikely in itself to constitute a 'legitimate' interest, and whether the consumer has given consent for the processing of her personal data can be doubtful. In consumer contracts, such consent would mostly be obtained through the consumer's agreement with a set of general terms and conditions, in which a term is included on data processing. Although the agreement with standard terms binds the consumer in contract law, and the GDPR also recognises it as a form of consent,⁵¹ the literature is critical on whether agreement with standard terms amounts to consent in data protection law. Studies have shown that most consumers do not actually read terms and conditions before agreeing to them, in particular in online contracts where the consumer is required to click an agree-button before downloading a product.⁵² In

⁴⁶ The question whether to attach transparency requirements to algorithmic listings is under consideration in the European Law Institute's project 'Draft Model Rules on Online Intermediary Platforms'. For more information, see the project website at: <www.europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/platforms/>.

⁴⁷ On which in more detail para IV below, which focuses on transactional fairness rather than transparency.

⁴⁸ This question was already highlighted above, para II.1.

⁴⁹ The US regimes, by comparison, are less stringent in their prohibitions on the use and processing of personal data. For a comparison, see e.g. F Böhm, 'A Comparison between US and EU Data Protection Legislation for Law Enforcement', study for the LIBE committee of the European Parliament, September 2015, available at: <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536459/IPOL_STU%282015%29536459_EN.pdf>.

⁵⁰ Art 6(1) GDPR, which specifies also that the last condition 'shall not apply to processing carried out by public authorities in the performance of their tasks.'

⁵¹ According to recital 32 of the 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, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website, choosing technical settings for information society services or another statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data.' More specific rules to this effect are laid down in Art 4(11), 7 and (for children) 8.

⁵² See e.g. B Custers *cs*, 'Informed Consent in Social Media Use. The Gap between User Expectations and EU Personal Data Protection Law' (2013) 10 *Journal of Law and Technology* 435; R Böhme and S Köpsell, 'Trained

all cases where an online opt-in is required, therefore, high acceptance rates are found, which is problematic as the acceptance of terms (even if unread) may give suppliers the affirmation that they are entitled to disclose and process data more widely.⁵³ Still, workable alternatives to the current informed consent construction in data protection law will need further research.⁵⁴

Existing legislation may nonetheless go some way towards protecting consumers through contract (and tort) law. In Europe, a safety net against the unlicensed use of consumers' personal data is provided by the transparency requirements found in Directive 2005/29/EC on unfair commercial practices and Directive 93/13/EEC on unfair contract terms. These Directives can provide some relief to consumers when the contract terms were not transparent in relation to the trader's use of (personal) data, albeit that their remit is restricted by certain conditions. If a trader fails to disclose, or fails to disclose in a clear, intelligible and timely manner, that personal data provided by the consumer will be processed and used for commercial activities of the trader, this could amount to an unfair omission under the Unfair Commercial Practices Directive. The Directive's stipulation that such an omission is actionable if it fails to identify 'the commercial intent of the commercial practice' could arguably be extended to data, since data have commercial value for the trader.⁵⁵ Still, for a successful action on the basis of the Directive the consumer will also have to prove that the misleading omission caused her to make a transactional decision—i.e. that she concluded a contract—that she would otherwise not have made.⁵⁶ Further, the available remedies are not harmonised by the Directive. It will therefore depend on the rules applicable in the consumer's country of residence what remedies she has. In some cases she may be able to rescind or avoid the contract and to reclaim the price, whilst sometimes damages may be claimed.⁵⁷ Damages can be a problematic remedy, however, since it will often be difficult to establish what loss the consumer has suffered as a result of the misleading practice.⁵⁸

Directive 93/13/EEC on unfair terms might be of use in relation to general terms and conditions that infringe data protection regulation. Terms that allow the

to Accept? A Field Experiment on Consent Dialogs' in Proceedings of the SIGCHI Conference on Human Factors in Computing Systems (2010) 2403; A Acquisti, 'Nudging Privacy: The Behavioral Economics of Personal Information' (2009) 7 Security & Privacy Economics 82.

⁵³ DJ Solove, 'Introduction: Privacy Self-Management and the Consent Dilemma' (2013) 126 Harvard Law Review 1880, 1899.

⁵⁴ It has been suggested that a system based on fair transactions, combined with a consent requirement in cases where the risks for the data subject of allowing processing are high, could perform better than the current model; see BW Schermer, B Custers and S van der Hof, 'The Crisis of Consent' (2014) 16 Ethics and Information Technology 171.

⁵⁵ In support of this argument, European Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices', SWD(2016) 163 final, 27, with reference to Art 7(2) and No 22 of Annex I to the UCPD.

⁵⁶ Directive 2005/29/EC (n 10), Art 7(2). An alternative ground for action would be where the trader claims to deliver a 'free' service, yet requires the consumer to provide personal data in exchange. See M Loos and JA Luzak, 'Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 Journal of Consumer Policy 63, 67.

⁵⁷ Rescission or avoidance are possible in Belgium and the Netherlands. For an overview of available remedies, see the country reports on unfair commercial practices published in the Journal of European Consumer and Market Law, issues 5 and 6 of 2015, and issue 2 of 2016.

⁵⁸ The comparison in tort will be with the transaction that the consumer would otherwise have made. Presuming that consumers often have made up their minds about wishing to buy a certain product or service, they would likely have chosen an alternative to the trader's offer, and not have gotten a cheaper deal. Damages are then nil.

trader to process data beyond what the GDPR regime stipulates as legitimate use could potentially be set aside,⁵⁹ whereas contracts in which the consumer ‘pays’ for a good or service by providing personal data to the trader could be subject to the Directive too.⁶⁰ Some caution is however required when drawing this conclusion, as Directive 93/13/EEC appears to have been drafted only with the economic interests of consumers in mind, and to have been applied only in that vein. Cases like *Kásler*, *RWE Vertrieb*, and *Invitel* emphasise that the consumer has the right to know on what terms she agrees to enter into a contract. The consumer’s knowledge extends to her being aware of the *economic* consequences that signing up to the terms of the contract will have for her.⁶¹ While the ‘constitutionalisation’ of contract law appears to be winning ground in Europe,⁶² it is not settled that the protection of a fundamental right always translates into contractual protection. Hence, whether contracts in which the consumer ‘pays’ with personal data should be treated the same as contracts for money is an open question. On this point, see further para IV.

Even if transparency requirements are imposed on traders in contracts concerning data-driven technologies, whether through existing rules or new regulation, there is a deeper question to consider. The information paradigm in consumer contract law works from the assumption that information duties for traders can remedy the information asymmetry between traders and consumers in the market. Yet, most legal systems recognise that information alone is not sufficient to protect consumers, for example because people’s ability to process information is limited.⁶³ In contract law, therefore, often rules are found that may restrict party autonomy with an eye to the protection of weaker contracting parties, such as consumers, and ensure that contracts are fair or reasonable. These rules vary from general rules of fairness or equity to specific, mandatory rules of consumer protection.⁶⁴ The next section discusses how the monitoring of contractual fairness is challenged by the growing practice of consumer ‘payment’ with data.

4. Payment with Data

If a consumer provides a counter-performance in contract by providing her personal data, e.g. in exchange for access to a wifi service or an app, does that transaction not infringe data protection rules that aim to ensure privacy and the legitimate use of personal data? This question was already touched upon in the previous section on transparency. The answer, at least for now, appears to be that data protection rules leave limited space for the legitimate provision of personal

⁵⁹ Such terms would infringe a legal duty—the protection of personal data—and would be considered unfair on that ground in most legal systems in Europe. The same might be the case if terms and conditions diverge to the detriment of the consumer from default rules of law that are not mandatory; compare the substantive unfairness test of CJEU, Case C-415/11 Mohamed Aziz v Catalunyacaixa, ECLI:EU:C:2013:164, para 68.

⁶⁰ Cf Loos and Luzak (n 56) 67.

⁶¹ CJEU, Case C-26/13 *Kásler*, ECLI:EU:C:2014:282, para 74.

⁶² H-W Micklitz and N Reich, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive’ (2014) 51 Common Market Law Review 771.

⁶³ This insight has been informed in recent decades by the growing body of empirical studies on consumer behaviour. For an analysis of the impact of behavioural economics on European consumer law, see the collection of essays in A Alemanno and A-L Sibony, *Nudge and the Law. A European Perspective* (Hart 2015).

⁶⁴ Such as the rules laid down in the Unfair Terms Directive and the Unfair Commercial Practices Directive.

data in a contractual situation.⁶⁵ Another question is whether payment with data *should* not be possible in contract. Furthermore, if payment with data was integrated into contract law, there is a question what this means for the substantive fairness of contracts. Does a consumer pay a fair price if she pays with her personal data, in relation to the service or goods that she receives? And: does the trader have greater liberty to set the terms of the contract because the consumer does not pay a price for the goods or service delivered?

These are more difficult questions to answer. Considering the question whether payment with data should be possible in contract law, there are reasons to think that it should be. Besides the argument from economics that personal data have economic value for traders and that the consumer should therefore have monetary rights vis-à-vis the trader, another argument in favour of this position could be that it enhances the autonomy of consumers. The possibility to manage and use one's personal data may be regarded as part of the ability to give shape to one's future, and in that sense it could fit seamlessly with the freedom of contract.⁶⁶ Nevertheless, while a contract lawyer may agree with this reading, a data protection lawyer might well look at autonomy from a different perspective. It could also be argued that individuals have the best chances for self-development when data protection laws ensure that their personal data are protected and cannot be easily used by, or traded to others.⁶⁷

These two viewpoints are unreconciled in current laws. The recent proposal for a European Directive on digital content contracts has suggested that the provision of personal data by a consumer in exchange for a service should be considered a counter-performance in contract, similar to payment in money.⁶⁸ That provision, if it is adopted, would attach contractual rights to the consumer's provision of personal data as payment.⁶⁹ From a fundamental rights perspective however doubts have been raised in relation to the desirability of introducing this possibility.⁷⁰ One concern is that the introduction of a contractual regime for contracts in which consumers provide personal data as part of their performance would cut across the carefully balanced data protection regime laid down in the GDPR. To verify whether that anxiety is justified, it would first have to be assessed whether the rules of the proposed Directive respect the boundaries set by the

⁶⁵ Above, p 8.

⁶⁶ See above, p 4. A plea in favour of enhancing data protection through contract law is made also by N Helberger, F Zuiderveen Borgesius and A Reyna, 'The Perfect Match? A Closer Look at the Relationship Between EU Consumer Law and Data Protection Law' (2017) 54 Common Market Law Review 1427. See also B Lubomirov, 'Persoonsgegevens betalen de rekening' [2018] Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR), forthcoming.

⁶⁷ Compare Kosta (n 27) 140 and A Rouvroy and Y Pouillet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the importance of privacy for democracy' in S Gutwirth cs (eds), *Reinventing Data Protection?* (Springer 2009) 50.

⁶⁸ Art 3(1) of the proposed Digital Content Directive (n 7).

⁶⁹ It applies also where 'any other data' is provided as a counter-performance, see Art 3(1). In consumer contracts, however, it is likely that all data generated by the consumer falls within the scope of 'personal data' as defined in Art 4(1) of the GDPR.

⁷⁰ A negative opinion has been expressed by the European Data Protection Supervisor (EDPS), Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, 14 March 2017, available at: <https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf>.

GDPR,⁷¹ a point at which doubt has been cast.⁷² Further, even if the contract regime of the proposed Directive does not respect the boundaries of data protection law, the question is whether there is sufficient ground for adopting a divergent regime in contract law. The solution could perhaps be found somewhere in the middle, if the contract law regime were to build in safeguards for the legitimate use of personal data. A starting point can be a reappraisal of the rules on consent.⁷³ Consent can in this context be seen as a default rule, which can be limited by law in cases where the legislator deems it undesirable for personal data to be traded on the market, or in other words, to be ‘monetised’.⁷⁴

If the possibility for ‘payment’ with data does become part of European contract law, a subsequent question is how the national contract laws of the EU member states will implement such a rule into their systems. This is a doctrinal question. It raises some challenges since the classification of these types of contracts can be difficult – are they sales contracts, or can they be considered contracts for barter or exchange, or services contracts? In many legal systems it will first of all, for contracts which can be construed as sales, be difficult to reconcile the concept of ‘payment with data’ with rules of sales law. Most national contract laws hold as a rule that a counter-performance or a payment in sales contracts can only be made with money. Examples are the rule laid down in Article 7:1 of the Dutch Civil Code, which states that ‘sale is the agreement under which one of the parties engages himself to deliver a thing and the other party to pay a price in money in return’, and the rule in § 433(2) of the German Civil Code that says that ‘[t]he buyer is bound pay the seller the agreed price’. The obvious solution would be to change the wording of the law so that it extends also to contracts in which the counter-performance consists of payment with (personal) data. Another option could be to interpret ‘price’ and ‘money’ in a broad sense so that they include anything of value.⁷⁵ That solution could be constructed along the lines of consideration in contract law, which might be a way to circumvent the strict rules of consent of data protection law.⁷⁶ A third option would be to bring contracts in which a consumer pays with data under a different category of contracts. They might be construed as services contracts—in which case similar restrictions apply as with sales—or, or as contracts for barter or exchange. The latter option might solve some problems in legal systems that apply the rules of sales law (mostly) equally to barter and exchange. Nonetheless, that is not the same for all legal systems and, for example, harmonisation of rules across the EU could pose challenges. It should also be borne in mind that the rights of consumers may be more limited than they are in sales contracts.⁷⁷ Further, it may be seen as stretching the limits of barter agreements to bring services-for-data contracts under this category, as barter

⁷¹ Art 3(8) of the proposed Directive stipulates that the Directive is ‘without prejudice to the protection of individuals with regard to the processing of personal data.’

⁷² See the opinion of the EDPS (n 70).

⁷³ On consent, see above, p 8.

⁷⁴ Compare N Purtova, *Property Rights in Personal Data: a European Perspective* (BOXPress 2011) 257.

⁷⁵ This could however be problematic, since it is virtually impossible to determine the value of individual data. Personal data becomes valuable to traders only once the data of large groups of consumers are combined so that an analysis can be made of the aggregated data.

⁷⁶ Langhanke and Schmidt-Kessel (n 22).

⁷⁷ E.g. in England and Scotland. Most legal systems apply the rules of sales law also to barter agreements. See for a comparative overview of European systems the commentary on Art 1:103 in EH Hondius cs (eds), *Principles of European Law – Sales (PEL S)* (Sellier 2008) 127-128.

agreements usually concern the exchange of goods.⁷⁸ The alternative, to treat these contracts as services, is also not ideal as the rules on services contracts, unlike sales contracts, are largely unharmonised in Europe. That means that there is likely to be a lack of legal certainty in this area in the near future, which may hinder the cross-border supply of digital content.⁷⁹ Further research could explore the possibilities for harmonisation.

Besides the question how to doctrinally integrate contracts in which a consumer provides personal data as a counter-performance, a further question is whether the expectations of consumers in terms of conformity and fairness should be adapted to this particular type of contract. The proposed EU Digital Content Directive is not entirely clear on this. It aims to apply the same rules to these contracts as to contracts in which the consumer pays a price in money. For conformity, this means that legal criteria for quality, fitness for purpose and other requirements are applied that are connected to the reasonable expectations that a consumer may have from the digital content.⁸⁰ At the same time, the proposed Directive contains the proviso in relation to the conformity c.q. fitness for purpose of the digital content that, barring contractual stipulation, this shall be assessed taking into account 'whether the digital content is supplied in exchange for a price or other counter-performance than money'.⁸¹ That condition suggests that the legitimate expectations of the consumer may be considered lower in contracts where no price in money is paid.⁸² If that were indeed the intention of the European legislator, that test for conformity may be criticised for not attaching sufficient weight to the value of (personal) data.⁸³

The questions whether contract law should be concerned with data and if so, how, are prominent in cases concerning 'payment' with data. As this section has highlighted, further research will have to tackle the questions if and how contract law can be dovetailed with data protection regulation in order to construct a framework within which consumers can use their personal data in ways that enhance their autonomy, and that fit within contract law's notions of fairness.

5. From Average Consumer to Personalised Contracting?

Finally, a fundamental challenge to consumer contract law is posed by the use of data as a means to personalise transactions. With traders learning the personal preferences of each consumer through their purchases, online searches, likes on social media, and other activities that are registered as data and available for analysis by the trader, it has become possible to target advertising or even specific offers to individual consumers. Online stores like Amazon, but also brick-and-

⁷⁸ *ibid.*

⁷⁹ The rules on digital content contracts can potentially be implemented into the legal systems of the EU member states as a *sui generis* regime. See V Mak, 'The New Proposal for Harmonised Rules on Certain Aspects Concerning Contracts for the Supply of Digital Content', briefing paper for the European Parliament, February 2016, available at: <http://www.epgencms.europarl.europa.eu/cmsdata/upload/a6bdaf0a-d4cf-4c30-a7e8-31f33c72c0a8/pe_536.494_en.pdf>.

⁸⁰ This is a usual approach for conformity in sale of goods contracts. See e.g. the Explanatory Notes to the UK Consumer Rights Act 2015, no. 178; H Beale (ed), *Chitty on Contracts* (vol II, Sweet & Maxwell 2015) 1262.

⁸¹ Proposed Digital Content Directive (n 7), Art 6(2)(a).

⁸² Loos cs (n 39) 177 ff.

⁸³ See V Mak (n 79) 18. The UK Consumer Rights Act 2015 applies largely similar conditions for conformity of digital content as for physical goods. That might be justified on the ground that the Act only covers contracts in which a price in money has been paid in exchange for digital content; see Artt 33, 34 and 35.

mortar stores like supermarkets,⁸⁴ provide consumers with personalised recommendations and discount offers. This practice may be the harbinger of a shift from standardisation to personalisation in consumer law.⁸⁵ The question is whether regulation should be responsive to this change, and if so, how. I will focus my discussion on the potential implications for contract law.

The primary consequences in contract law of the personalisation of consumer contracts would relate to the assessment of transparency, as discussed in part III. The benchmark used for assessing whether information given to consumers through advertising or terms of the contract was fair, or whether standard terms of the contract were fair, are the 'presumed expectations of the average consumer who is reasonably well-informed and reasonably observant and circumspect'.⁸⁶ This 'average consumer' is perceived as a consumer who is able to process information concerning the product or service that she purchases. In general, it is considered to be efficient to work with a broadly defined category of 'consumers'. While there can be a large variety of consumers, the defining characteristic of all of them is that they generally have a weaker bargaining position than traders or suppliers.⁸⁷ Tailoring rules of consumer protection to a consumer who is broadly defined as a natural person not acting in the course of a business or profession, and combined with the also general notion of an 'average consumer', means that the majority of consumers will be included, and therefore protected, through consumer law.

Exceptions exist in some cases. Besides the general category of 'average consumers', a category of 'vulnerable' consumers is recognised in the Unfair Commercial Practices Directive who are vulnerable because of their mental or physical infirmity, age or credulity.⁸⁸ The idea of working with a specific target group, such as vulnerable consumers, has been deemed to improve legal certainty. Since the targeted group is more clearly defined, it is easier for the legislator and the courts to determine what level of protection fits with these types of consumers—and to ensure that it is neither too high nor too low.

It has been suggested that a similar approach can be applied to cases in which the trader has personalised information about a consumer. According to Rott: 'spricht auch nichts dagegen, dann, wenn der Unternehmer mit kommerzieller Kommunikation auf den einzelnen Verbraucher zielt, die "Zielgruppe" auf eben diesen einzelnen Verbraucher zu beschränken.'⁸⁹ In other words, the target group may be limited to one person, whose preferences are known to the trader. That idea could well be operationalised in the online market, in which many traders will have data stored on the previous purchases or searches of a consumer on their website.

⁸⁴ As an aside: the distinction between online and physical stores is becoming less pronounced as they venture into each other's territory. Amazon has recently opened its first physical stores, whilst many supermarkets operate websites through which customers can order goods for home delivery.

⁸⁵ On this topic see in this volume also Busch and De Franceschi, Chapter 17. See earlier C Busch, 'The Future of Pre-Contractual Information Duties: from Behavioural Insights to Big Data' in: C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 221.

⁸⁶ CJEU, Case C-210/96 Gut Springenheide GmbH [1998] ECR I-4657, para 31; CJEU Kásler (n 61), para 74.

⁸⁷ See Hondius (n 5).

⁸⁸ Unfair Commercial Practices Directive (n 10), Art 5(3).

⁸⁹ P Rott, 'Der "Durchschnittsverbraucher" – ein Auslaufmodell angesichts personalisierten Marketings?' [2015] *Verbraucher und Recht* 163.

Whether that approach is desirable is another question. Counter-arguments can be that such an approach would infringe upon the privacy of the consumer, or that it is still inefficient to work with individual approaches for each consumer.⁹⁰ Furthermore, the relation between the personalised assessment of unfair commercial practices and unfair terms would have to be calibrated with existing individual approaches in contract law, i.e. the application of rules on defects of consent such as mistake, misrepresentation, duress. It would therefore also raise new, doctrinal challenges for contract law.

6. Concluding Remarks

What does the future look like for contracting in the data economy, in particular for consumers? Drawing together the lines set out in this chapter, it becomes clear that the challenges for contract law are at least threefold: ethical, economic, and doctrinal.

The ethical challenge is whether contract law should interfere with the carefully reached balance between data subjects and data users' rights in data protection regulation, such as in Europe the new GDPR. While that question has been addressed in the literature, for example in relation to the 'monetisation' of data, the proposed EU Directive on digital content contracts brings that discussion into the realm of actual, current regulatory debates. The Directive, if it is adopted, could bring about a landmark change for the nature of (consumer) contracts in Europe, and could potentially be an example for other jurisdictions as to how contractual rights can be attached to contracts in which a consumer pays with data, rather than with money. Due to the significant impact that such a development would have on contracting—in particular by introducing contractual rights for consumers that might be a basis for liability of suppliers—the debate on this issue is likely to be hard-fought. The issue will therefore in all likelihood remain at the forefront of future research in this area of 'data science and law'.

The economic question is how contract law can integrate (personal) data as an object of value in contract law. While it can be established that data has value for companies, and that contract law would therefore seem an adequate medium for dealing with data transactions, it is problematic that the value of individual data cannot be established. If contract law does integrate data into its system, further research will have to consider the question how the valuation of data can take place. While that might seem difficult, it should be remembered that contract law in many instances already works with estimations of value rather than actual numbers (e.g. in the assessment of damages, where quantification can be hard).

Finally, doctrinal challenges exist in determining how contract law can accommodate new technologies and new forms of contracting in the data economy. For contracts concerning data-driven technologies, the existing transparency requirements and rules on the assessment of contractual fairness may have to be re-evaluated. In Europe, this would mean a review of the rules laid down in the Unfair Terms Directive and the Unfair Commercial Practices Directive. For contracts in which data is used as a form of 'payment', or a counter-performance, questions arise as to whether such contracts should be treated differently from consumer sales contracts or not, and what consequences this

⁹⁰ V Mak, 'De "gemiddelde consument": van fictie naar feit?' [2017] *Ars Aequi* 592, 598-599.

would have for consumer expectations. As a third example, the personalisation of contracts made possible by data-driven technologies may require a reassessment of the benchmarks used for testing unfairness. It may also require an analysis of how these approaches would fit with existing, personalised assessments in contract law, such as the assessment made in relation to defects of consent. Nevertheless, one might say that the doctrinal challenges for contract law are less significant than the other, more fundamental challenges. As some say in the Netherlands, we may be looking at nothing more than 'old wine in new bags'.