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# DATA AS COUNTER-PERFORMANCE: A NEW WAY FORWARD OR A STEP BACK FOR THE FUNDAMENTAL RIGHT OF DATA PROTECTION?

*A data protection analysis of the proposed Directive on certain aspects for the supply of digital content*

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**Keywords:** *Digital Content Directive, data as counter-performance, data protection, fundamental rights, European consumer law*

**Abstract:** *With the proposed Directive on digital content the Commission has tried to give legal reality to the fact that individuals “pay” for otherwise “free” services online with their personal data (“data as counter-performance”). The legislative procedure has revealed severe doubts on the compatibility of this concept with the GDPR and the fundamental rights nature of data protection. This paper aims for reconciliation by considering the Directive as another means of data protection as a fundamental right, and by arguing for the enhanced practical opportunities using European consumer law can offer.*

## 1. Introduction

With the proposal for a Directive on certain aspects for the supply of digital content (“the Proposal”)<sup>1</sup>, the European Commission tries to give legal reality to a perceived fact: namely that individuals “pay” for otherwise “free” services online with their personal data.<sup>2</sup> The ongoing legislative procedure has revealed severe doubts by the co-legislators<sup>3</sup> and the European Data Protection Supervisor (EDPS)<sup>4</sup> on the possibility of expressing this reality in terms that are legally compatible with the General Data Protection Regulation (GDPR)<sup>5</sup> and fundamental rights. Specifically, the EDPS has voiced concerns that the wording of the Proposal (“*counter-performance other than money*”) would undermine the nature of the fundamental rights aspect of data protection and legitimise a business model hostile to data protection principles.<sup>6</sup> To avoid future

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<sup>1</sup> EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and of the Council on certain aspects for the supply of digital content [2015] COM(2015) 634 final.

<sup>2</sup> *Ibid.*, Art. 3 (1); Data is also sometimes called the “oil” of the digital era, see: THE ECONOMIST, Regulating the internet giants: The world’s most valuable resource, 6 May 2017, p. 7 (p.7).

<sup>3</sup> COUNCIL, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) - General approach [2017] 2015/0287 (COD), Annex MAIN ELEMENTS OF THE COMPROMISE PACKAGE, pp. 4f; EUROPEAN PARLIAMENT, Report on the proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content [2017] A8-0375/2017, pp. 90f.

<sup>4</sup> EDPS, Opinion 4/2017 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content [2017] 14 March 2017, p. 3.

<sup>5</sup> Regulation 2016/679/EU 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), OJ L 2016/119, 1.

<sup>6</sup> Opinion 4/2017, *supra* note 4, pp. 7f.

difficulties, it is important that the legislative process manages to sort out the question of whether there is indeed an issue with the fundamental right to data protection and the GDPR at the next legislative stage. This paper aims to suggest a possible reconciliation by considering the Directive as another means of data protection as a fundamental right, and by arguing for the enhanced practical opportunities that using European consumer law can offer.<sup>7</sup>

As methodology, after a short introduction of the Proposal, three main criticisms from a data protection perspective that emerged in the debates are presented (incompatibility with the GDPR; being contrary to the fundamental rights nature of data protection; and legitimizing the business model of free services). Afterwards, Chapter 4 will propose three counter-weighting strategies that could lead to reconciliation of at least some of the mentioned issues. Finally, the conclusions will argue for the advantages of including free services in the Proposal.

## 2. Proposed Directive on certain aspects for the supply of digital content

The Proposal was published in a package together with a Proposal for a Directive on online and other sales of goods<sup>8</sup> in December 2015 to continue the Commission's efforts to fully harmonize rules within the European consumer law<sup>9</sup> and to complete the Digital Single Market as announced in its strategy of May 2015.<sup>10</sup> As a targeted full harmonisation instrument, it is intended to close a perceived gap in European consumer law, which already featured in the failed proposal for a Common European Sales Law ("CESL"), namely the protection of the consumer when acquiring digital content or digital services, also when the counter-performance consists of data.<sup>11</sup> The relatively concise proposal of 55 Recitals and 24 Articles replicates largely the rules of Directive 1999/44/EC<sup>12</sup> and adapts them to the digital environment.<sup>13</sup>

To discuss all aspects included in the Proposal would exceed the limited range of this paper, therefore it will only focus on the attempt of the Commission to include in its scope free services, meaning services that appear to be free, but where in reality the consumer is required to surrender valuable personal information in exchange for using the services.<sup>14</sup> Hence, the Proposal should not only apply to contracts where digital content is bought against money, but also in cases where "*the consumer actively provides counter-performance other than money in the form of personal data or any other data*".<sup>15</sup> This notion<sup>16</sup>, which was already includ-

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<sup>7</sup> This has been advocated by the EDPS in: EDPS, Preliminary Opinion: Privacy and competitiveness in the age of big data – The interplay between data protection, competition law and consumer protection in the Digital Economy [2014] March 2014, p. 38.

<sup>8</sup> EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods [2015] COM(2015) 635 final.

<sup>9</sup> WENDLAND, GEK 2.0? Ein europäischer Rechtsrahmen für den Digitalen Binnenmarkt, GPR 2016, p. 8 (p. 8).

<sup>10</sup> EUROPEAN COMMISSION, Communication of the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe [2015] COM(2015) 192 final, pp. 4f.

<sup>11</sup> EUROPEAN COMMISSION, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [2011] COM(2011) 635 final; WENDLAND, Ein neues europäisches Vertragsrecht für den Online-Handel? Die Richtlinienentwürfe der Kommission zu vertragsrechtlichen Aspekten der Bereitstellung digitaler Inhalte und des Online-Warenhandels, EuZW 2016, p. 126 (pp. 126f).

<sup>12</sup> Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 1999/171, 12.

<sup>13</sup> For an overview over all issues covered in the proposal, see: MAK, The new proposal for harmonised rules on certain aspects concerning contracts for the supply of digital content. In: Website of the European Parliament. [http://www.epgencms.euoparl.europa.eu/cmsdata/upload/a6bdaf0a-d4cf-4c30-a7e8-31f33c72c0a8/pe\\_536.494\\_en.pdf](http://www.epgencms.euoparl.europa.eu/cmsdata/upload/a6bdaf0a-d4cf-4c30-a7e8-31f33c72c0a8/pe_536.494_en.pdf) (accessed on 3 January 2018) 2016, pp. 1-32.

<sup>14</sup> Preliminary Opinion, *supra* note 7, p. 10.

<sup>15</sup> Digital Content Proposal, *supra* note 1, Art. 3 (1).

<sup>16</sup> Some named this the main achievement of the Digital Content Proposal, see: SCHULZE/STAUDENMAYER, Digital Revolution – Challenges for Contract Law. In: Schulze/Staudenmayer (Eds.), Digital Revolution: Challenges for Contract Law in Practice, Nomos, Germany 2016, pp. 19-32 (p. 32).

ed in the CESL<sup>17</sup>, should prevent differing consumer rules for business models<sup>18</sup> and ensure that the consumer is protected whether he or she “paid” with money or “data”.<sup>19</sup> Realizing the overlap and potential conflict with the GDPR, the Commission provides that the application of the Proposal should be in full compliance with the EU data protection framework.<sup>20</sup> The Commission also notes that its proposal respects and will foster the fundamental rights of Articles 16 (freedom to conduct a business), 38 (consumer protection) and 47 (effective remedy) of the Charter of Fundamental Rights of the European Union (“CFREU”)<sup>21</sup>, interestingly without mentioning Articles 7 (privacy) and 8 (data protection) CFREU.<sup>22</sup> Besides these general observations the Proposal does not include specific rules explaining the practical application of “*counter-performance other than money in the form of personal data or any other data*” or its relation to other EU law including fundamental rights. It only mentions the notion when discussing the remedies of price reduction (Article 12 (3) price reduction is not possible if counter-performance was not money) and termination of the contract (Article 13 (2) (b) and (c) obligation for supplier to refrain from the use of data and the right for the consumer to retrieve them in an easily readable format).

### 3. Key areas of criticism and their treatment in the legislative negotiations

The relative vagueness mentioned above of the “*counter-performance*”-notion led to intense discussions in the European Parliament and the Council during their negotiations. These issues can be divided into three key areas of criticism, and shall be further explained below together with proposed solutions.

#### 3.1. Incompatibility with the GDPR

Firstly, it was argued that the Proposal would not respect the balance found within the GDPR regulating the instances when processing of personal data may occur and therefore be incompatible with its objectives. Two main issues arose, namely the restricted applicability of the Proposal only to situations where personal data are actively provided, and the potential changes the Proposal seems to introduce to the grounds of legitimate processing of the GDPR.

The first point of contention was the restriction of the scope of application only to cases where the consumer actively provided personal data.<sup>23</sup> This notion is expanded, though not explained, in the Recitals of the Proposal, and intends to exclude especially automatically generated information collected by a cookie.<sup>24</sup> Such a restriction does not feature in the GDPR.<sup>25</sup> As Beale rightly notes, this rule in the Proposal also provides a perverse incentive to secretly collect data from the consumer, as then it would not apply.<sup>26</sup> It also contradicts the finding of the Article 29 Working party (“WP29”) considering data collected by cookies<sup>27</sup> and specifically IP addresses<sup>28</sup> to be personal data, depending on the circumstances, as it degrades them to a sort of second class personal data, to which not all consumer law safeguards apply.<sup>29</sup> Considering the draft proposal of the

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<sup>17</sup> CESL, *supra* note 11, Rec. 18, Art. 107.

<sup>18</sup> STAUDENMAYER, *Digitale Verträge – Die Richtlinienvorschläge der Europäischen Kommission*, ZEuP 2016, p. 801 (p. 807).

<sup>19</sup> Digital Content Proposal, *supra* note 1, Rec. 13.

<sup>20</sup> *Ibid.*, Rec. 22.

<sup>21</sup> Charter of Fundamental Rights of the European Union, O.J. 2000, C 364/01 and O.J. 2010, C 83/389.

<sup>22</sup> Digital Content Proposal, *supra* note 1, Rec. 55.

<sup>23</sup> *Ibid.*, Art. 3 (1).

<sup>24</sup> *Ibid.*, Rec. 14.

<sup>25</sup> See scope of the GDPR: GDPR, *supra* note 5, Art. 2 (1).

<sup>26</sup> BEALE, *Scope of application and general approach of the new rules for contracts in the digital environment*. In: Website of the European Parliament. [http://www.epgenems.europarl.europa.eu/cmsdata/upload/4a1651c4-0db0-4142-9580-89b47010ae9f/pe\\_536.493\\_print.pdf](http://www.epgenems.europarl.europa.eu/cmsdata/upload/4a1651c4-0db0-4142-9580-89b47010ae9f/pe_536.493_print.pdf) (accessed on 2 January 2018) 2015, p. 13.

<sup>27</sup> WP29, *Opinion 1/2008 on data protection issues related to search engines* [2008] 4 April 2008, p. 9.

<sup>28</sup> WP29, *Opinion 4/2007 on the concept of personal data* [2007] 20 June 2007, pp. 16f.

<sup>29</sup> *Ibid.*, p. 13.

e-Privacy Regulation<sup>30</sup>, where the processing of meta-data of electronic communication data requires consent of the data subject<sup>31</sup>, it could be argued, as the EDPS notes<sup>32</sup>, that to introduce a differentiation between consumers/data subjects that actively provided personal data and such consumers/data subjects whose data are collected without their specific knowledge endangers the coherence of the EU data protection system. During the negotiations both the European Parliament and the Council recognized the problem and proposed differing solutions. The Parliament de facto abandoned any distinction between actively and passively provided personal data.<sup>33</sup> The Council also dropped the term “*actively*”<sup>34</sup>, but kept in Recital 14 the non-application of the Proposal to situations where the supplier only collects metadata.<sup>35</sup>

A second point of debate surrounded the awkward interplay of the legal grounds for data processing of Articles 6 and 9 GDPR with the exception to the scope of application in Article 3 (4) Proposal for “*contracts with a counter-performance other than money*”. Article 3 (4) sets an exception for the applicability of the Proposal for situations, where the processing of data is strictly necessary for the performance of a contract or the meeting of legal requirements if the supplier does not process them in a way incompatible with that purpose. This provision essentially combines in one paragraph the data protection principles of lawful processing and purpose limitation.<sup>36</sup> The difference in wording of the provisions<sup>37</sup> can perhaps be explained by the fact the Proposal was published before the finalisation of the GDPR (December 2015 to May 2016), and was addressed by both Council and Parliament in their amendments. The Council leaves a fragment of the exception in Article 3 (1) General Approach by reducing the exception to “*exclusively processed (...) for supplying the digital content or digital service, or for the supplier to comply with legal requirements (...), and the supplier does not process these data otherwise*”<sup>38</sup> that still raises the question of whether the Proposal provides for a new or different legal ground of processing than the GDPR.<sup>39</sup> The Parliament suggests limiting the exception to data “*exclusively processed by the trader for supplying, maintaining the conformity of or improving the digital content or service or for the trader to comply with legal requirements (...)*”<sup>40</sup>, which seems to hint at the ground “*legitimate interest of the controller*” of Article 6 (1) (f) GDPR, however without the important caveat that this cannot be outweighed by the fundamental rights and freedoms of the data subject.<sup>41</sup> Interestingly, a different solution was found for a similar issue, namely with regard to Article 13 (2) (b) and (c) Proposal, which includes rights seemingly replicating some data subject rights of the

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<sup>30</sup> EUROPEAN COMMISSION, Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) [2017] COM(2017) 10 final, Rec. 17, Art. 4 (3) (c), Art. 6 (2) (c).

<sup>31</sup> See also: EDPS, Opinion 5/2016: Preliminary EDPS Opinion on the review of the ePrivacy Directive (2002/58/EC) [2016] 22 July 2016, p. 13.

<sup>32</sup> Opinion 4/2017, *supra* note 4, p. 12.

<sup>33</sup> Report A8-0375/2017, *supra* note 3, p. 18 (Amendment 21); thereby following the suggestion of the EDPS, see: Opinion 4/2017, *supra* note 4, p. 21.

<sup>34</sup> COUNCIL, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) – General Approach [2017] 2015/0287 (COD), p. 8 (Article 3).

<sup>35</sup> COUNCIL, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) - Recitals [2017] 2015/0287 (COD), p. 12 (Recital 14).

<sup>36</sup> For an explanation of the principle of purpose limitation, see: WP29, Opinion 03/2013 on purpose limitation [2013] 2 April 2013, pp. 21ff; for an explanation of the principle of lawful processing, see: WP29, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC [2014] 9 April 2014, pp. 10ff.

<sup>37</sup> Art. 3 (4) Digital Content Proposal speaks of data “*strictly*” necessary for the performance, while for the GDPR in Art. 6 (1) (b) just “*necessary*” suffices. Similarly, Art. 3 (4) Digital Content Proposal mentions “*meeting legal requirements*”, while Art. 6 (1) (c) talks about “*compliance with a legal obligation*”. Presumably, the concepts are intended to be the same, but the different wording could lead to diverging interpretations.

<sup>38</sup> General Approach, *supra* note 34, p. 8 (Article 3).

<sup>39</sup> See: Opinion 4/2017, *supra* note 4, pp. 14ff.

<sup>40</sup> Report A8-0375/2017, *supra* note 3, p. 54 (Amendment 83).

<sup>41</sup> See: Opinion 06/2014, *supra* note 36, pp. 33ff.

GDPR.<sup>42</sup> In this case, both the Council and the Parliament simply stated that “*in respect of personal data of the consumer, the supplier (trader) shall comply with the obligations applicable under Regulation (EU) 2016/679*”.<sup>43</sup>

### 3.2. Conflict with the fundamental rights nature of data protection

Secondly, the concept of concluding contracts in exchange for personal data was seen as contradicting the fundamental rights nature of data protection by treating personal data as a mere commodity.<sup>44</sup> The fundamental right of data protection is enshrined in Article 8 CFREU and, as Hijmans argues, either serves to give the individual control over their personal data or is a claim that all data processing needs to be based on fairness with special safeguards.<sup>45</sup> Both rationales could be impaired if personal data are treated as a mere economic asset. A data subject might not be in control of his or personal data in situations where consent would not be an acceptable legal ground because of a clear imbalance between data subject and controller in economic terms.<sup>46</sup> Additionally, the complexities involved in attaching numerical economic value to personal data from the perspective of the data subject<sup>47</sup> could impair control exercised by the data subject. Treating personal data as an economic asset might also undermine the whole concept of fair data processing, as it makes it seemingly easy to contract personal data away, leading to more data processing and less protection overall.<sup>48</sup> Moreover, it has been argued that the concept of human dignity is at the core of fundamental rights and stands in the way of personal information being treated as a mere economic asset.<sup>49</sup> Finally, a concrete issue can arise in data processing based on the consent of the data subject. In such situations Article 8 CFREU and especially Article 7 (3) of the GDPR gives the right to the data subject to withdraw consent at any moment. This can prove tricky in a contractual relationship, where the contract would oblige the data subject to continue supplying personal data even though consent was withdrawn.<sup>50</sup>

Interestingly, neither the Council nor the Parliament introduced fundamental changes to address these issues in their amendments. Both now include Articles 7 and 8 CFREU in the rights to be respected and observed by the Proposal<sup>51</sup>, but do not touch upon the potential fundamental rights issues explained above.

### 3.3. Legitimation of the business model of free services

A last data protection issue was especially debated in the European Parliament, and revolves around the fact that including contracts that treat personal data as payment for services in a EU legal instrument might provide legitimation for a business model (free services) that is highly problematic from a data protection angle.<sup>52</sup> “Free services” in which a data subject provides extensive access to seemingly free applications are an

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<sup>42</sup> For example: GDPR, *supra* note 5, Arts. 17 and 20.

<sup>43</sup> General Approach, *supra* note 34, p. 31 (Article 13a); Report A8-0375/2017, *supra* note 3, p. 76 (Amendment 110).

<sup>44</sup> This is especially emphasised in the Opinion of the EDPS, which compares the market for personal data to the market for human organs, see: Opinion 4/2017, *supra* note 4, p. 7.

<sup>45</sup> HIJMANS, *The European Union as Guardian of Internet Privacy: The story of Art 16 TFEU*, Springer, Switzerland 2016, pp. 54f.

<sup>46</sup> See the situation mentioned in: GDPR, *supra* note 5, Rec. 43; PURTOVA, *The illusion of personal data as no one’s property*, Law, Innovation and Technology 2015, p. 83 (p. 87).

<sup>47</sup> See: HELBERGER, *Profiling and Targeting Consumers in the Internet of Things – A New Challenge for Consumer Law*. In: Schulze/Staudenmayer (Eds.), *Digital Revolution: Challenges for Contract Law in Practice*, Nomos, Germany 2016, pp. 135-161 (p. 150); See also: OECD, *Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value [2013]* OECD Digital Economy Papers No. 220, p. 17.

<sup>48</sup> COHEN, *Examined Lives: Informational Privacy and the Subject as Object*, Stanford Law Review 2000, p. 1373 (p. 1391).

<sup>49</sup> EDPS, *Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data [2016]* 23 September 2016, p. 7.

<sup>50</sup> LANGHANKE/SCHMIDT-KESSEL, *Consumer Data as Consideration*, EuCML 2015, p. 218 (p. 221).

<sup>51</sup> Recitals, *supra* note 35, p. 40 (Recital 55); Report A8-0375/2017, *supra* note 3, p. 47 (Amendment 65).

<sup>52</sup> DIX, *Daten als Bezahlung*, ZEuP 2017, p. 1 (p. 4).

economic reality<sup>53</sup>, and put data subjects under wide-spread commercial surveillance they might not be aware of (“*see-through consumer*”).<sup>54</sup> EU data protection law and especially the GDPR are intended to rein in free services by strictly applying the principles of purpose limitation (GDPR introduces clearer rules on further compatible processing)<sup>55</sup> and lawful processing (e.g. by highlighting that consent cannot be used as a legal basis “*if the provision of a service is conditional on consent to processing of personal data that is not strictly necessary for the performance of that contract*”).<sup>56</sup> These important restrictions seem to be overturned by the Proposal, as it includes no rules on the matter.<sup>57</sup>

While the Council does not tackle this issue in its position, the European Parliament provides at least the option for the national laws of the Member States to decide whether such contracts should be allowed or not and what conditions need to be fulfilled for the validity of contracts against personal data.<sup>58</sup> Even more interestingly, both Parliament and Council drop the term chosen by the Commission (“*counter-performance other than money, i.e. by giving access to personal data or any other data*”) and replace it with “*under the condition that personal data is provided by the consumer or collected by the trader or a third party in the interest of the trade*”<sup>59</sup> or “*provide or undertake to provide personal data*”.<sup>60</sup> Hereby, they are both not following the alternatives suggested by the EDPS,<sup>61</sup> but also avoid an express acceptance of personal data as a counter-performance in a contract.

#### 4. Arguments for reconciliation

After this short outline of the main areas of critique from a data protection perspective, this last section aims to propose some possible reconciliatory approaches that could be applied to overcome the difficulties.

##### 4.1. Proposal could be applied in parallel to the GDPR

A part to the solution for the issues raised regarding the perceived issues of compatibility of the Proposal with the GDPR could lay in considering the status of their relationship to each other, with the GDPR being the prevalent one for data protection purposes. Such an interpretation would already be possible under the originally proposed text, as Article 3 (7) Proposal provides that in case of a conflict with another EU legal instrument, the other Union act should take precedence.<sup>62</sup> This Article has not been amended much by either Council or Parliament.<sup>63</sup> It is also nothing new at least for European consumer law, where for example the wide scope of application of Directive 93/13/EEC on unfair terms in consumer contracts (“Unfair Terms Directive”) arguably leads to it being applied also to data protection issues.<sup>64</sup> This would also align with the different scopes of applications of both instruments: The GDPR has a wide scope of application, applying to

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<sup>53</sup> See: Preliminary Opinion, *supra* note 7, p. 6; Opinion 8/2016, *supra* note 49, p. 6.

<sup>54</sup> BILLEN, The Challenges of Digitisation for Consumers. In: Schulze/Staudenmayer (Eds.), Digital Revolution: Challenges for Contract Law in Practice, Nomos, Germany 2016, pp. 11-17 (p. 15).

<sup>55</sup> GDPR, *supra* note 5, Rec. 50 and Art. 6 (4).

<sup>56</sup> *Ibid.*, Art. 7 (4).

<sup>57</sup> See: Opinion 4/2017, *supra* note 4, p. 17.

<sup>58</sup> Report A8-0375/2017, *supra* note 3, p. 17 (Amendment 20).

<sup>59</sup> *Ibid.*, p. 53 (Amendment 80).

<sup>60</sup> General Approach, *supra* note 34, p. 8 (Article 3).

<sup>61</sup> Opinion 4/2017, *supra* note 4, pp. 10f.

<sup>62</sup> This could be seen as proclaiming subsidiarity for the Digital Content Proposal with all other Union acts, as noted by: SCHMIDT-KESSEL/ERLER/GRIMM/KRAMME, Die Richtlinienentwürfe der Kommission zu Digitalen Inhalten und Online-Handel – Teil 1, GPR 2016, p. 2 (p. 6); It is even more clearly expressed in an amendment by the Council, see: General Approach, *supra* note 34, p. 13 (Article 3).

<sup>63</sup> General Approach, *supra* note 34, p. 12 (Article 3); Report A8-0375/2017, *supra* note 3, p. 56 (Amendment 89).

<sup>64</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 1993/95, 29, Art. 3; HELBERGER, *supra* note 47, pp. 145ff; HELBERGER/ZUIDERVEEN BORGESIUS/REYNA, The Perfect Match? A Closer Look at the Relationship between EU Consumer and Data Protection Law, CMLR 2017, p. 1427 (pp. 1449ff).

all fully or partly automated data processing with a few exceptions.<sup>65</sup> Its rules will probably apply in all situations covered by the Proposal, since even in contracts for the supply of digital content against a monetary price, personal data will most likely be exchanged as well (e.g. a purchase of an e-book could include processing of name, address, e-mail, credit card information etc.).<sup>66</sup> Whether such personal data processing is in accordance with European data protection law will be solely determined by the GDPR.<sup>67</sup> It is only in the specific situation, where personal data serve as a sort of “currency”, that the Proposal will *also* apply. This is the case, where a consumer receives digital content or a digital service (as the Council and Parliament rename it)<sup>68</sup> exclusively by providing personal data (free services). For such situations both the GDPR and the Proposal could apply. The Proposal would offer contractual remedies for the consumer if the digital content or digital service is not in conformity with what was agreed upon (subjective requirements) or can usually be expected (objective requirements).<sup>69</sup> As remedies, the consumer can foremost request repair or replacement, a remedy not available under current and future data protection law. The GDPR offers data subjects a list of rights they can rely upon as an addition or alternative, such as the right of access, right to rectification, and, if processing was based on consent, the right to withdraw consent.

Admittedly, this approach would not solve all the issues raised in the debate about compatibility with the GDPR. Firstly, the application of the Proposal only to situation where the consumer “actively” provided personal data in exchange for a digital content or digital service, would remain an issue. As already noted, this would incentivize covert collection and run counter to the suggestions made in the draft proposal of the e-Privacy Regulation regarding meta-data and cookies.<sup>70</sup> For a better alignment, the amendment of the European Parliament should be followed that completely abandons this differentiation.<sup>71</sup> Regarding the issue of the exception from the scope of application in Article 3 (4) Proposal, a clear parallel application of the two instruments could help insofar as the question of whether processing is lawful should be for the GDPR alone to solve. Thus, the questions of whether data are necessary for the performance of a contract, to fulfil legal obligations, or in the legitimate interest of the controller (principle of lawful processing) should be answered within the GDPR as a preliminary question.<sup>72</sup> As contract law is a competence of the Member States<sup>73</sup>, the validity of a contract that does not comply with the GDPR but that is necessary for the application of the Proposal will essentially depend on their respective national law.<sup>74</sup> As Helberger argues, clauses contradicting data protection (therefore *inter alia* also the GDPR) could be interpreted as being against “good faith” under Article 3(1) of the Unfair Terms Directive and hence not apply.<sup>75</sup> To achieve this result, the final Proposal should include a provision similar to the one introduced by the Council and the Parliament to avoid a similar conflict with the data subject rights of the GDPR.<sup>76</sup>

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<sup>65</sup> ENNÖCKL, Artikel 2 Sachlicher Anwendungsbereich. In: Sydow (Ed.), Europäische Datenschutzgrundverordnung – Handkommentar, Nomos/Manz/Dike, Deutschland 2017, pp. 239-246 (pp. 240 ff).

<sup>66</sup> See as example for smart objects: HELBERGER, *supra* note 47, p. 136.

<sup>67</sup> See: HELBERGER/ZUIDERVEEN BORGESIU/REYNA, *supra* note 64, p. 1462.

<sup>68</sup> Both Council and Parliament limit the definition of “digital content”, which according to the original proposal also encompassed services, to the one used in the Consumer Rights Directive 2011/83/EU in Article 2 (11), and introduce a separate “digital service” definition. These changes do not affect the original scope, but express the scope more clearly. See: General Approach, *supra* note 34, p. 4 (Article 2); Report A8-0375/2017, *supra* note 3, p. 49 (Amendment 69).

<sup>69</sup> Digital Content Proposal, *supra* note 1, Art. 6.

<sup>70</sup> Proposal for a Regulation on Privacy and Electronic Communications, *supra* note 30, Rec. 17, Art. 4 (3) (c), Art. 6 (2) (c).

<sup>71</sup> Report A8-0375/2017, *supra* note 3, p. 18 (Amendment 21).

<sup>72</sup> As also the EDPS notes, see: Opinion 4/2017, *supra* note 4, p. 13.

<sup>73</sup> Digital Content Proposal, *supra* note 1, Rec. 10.

<sup>74</sup> Comparably to the provision in the Unfair Terms Directive, see: Unfair Terms Directive, *supra* note 64, Art. 6 (1).

<sup>75</sup> See: HELBERGER, *supra* note 47, p. 148.

<sup>76</sup> General Approach, *supra* note 34, p. 31 (Article 13a); Report A8-0375/2017, *supra* note 3, p. 76 (Amendment 110).



## 4.2. Obligation for the EU legislator to protect personal data

With Article 16 (2) Treaty on the Functioning of the European Union (“TFEU”)<sup>77</sup>, the EU received a clear mandate and legal base to issue rules for the protection of personal data.<sup>78</sup> As the right to data protection is also guaranteed under Article 8 CFREU as a fundamental right, the EU legislator is moreover required by Articles 2 and 3(1) Treaty on European Union (“TEU”)<sup>79</sup> to promote data protection in its external and internal policies.<sup>80</sup> As the EDPS rightly states, the GDPR was adopted to regulate the use of personal data based on Article 16 TFEU and further implement Article 8 CFREU.<sup>81</sup> However, there is no rule that a fundamental right cannot be protected in more than one instrument at EU level. For example, a high level of consumer protection (required by Article 38 CFREU) is implemented by several EU consumer law instruments, such as the Unfair Terms Directive already mentioned, as well as the Consumer Rights Directive<sup>82</sup>, Directive 1999/44/EC<sup>83</sup> and others.<sup>84</sup> Article 8 CFREU itself is not only specified by the GDPR but also by the e-Privacy Directive<sup>85</sup> (soon to be replaced by the proposed e-Privacy Regulation).<sup>86</sup> The EU legislator has therefore all the opportunities provided by the Treaties to fulfil the obligation to protect personal data. The opportunities for consumer law to protect personal data have already been recognised by the EDPS<sup>87</sup> and several authors.<sup>88</sup> Applying them to the issues raised in the debate especially by the EDPS could lead to the following reconciliatory considerations.

The arguments that accepting that personal data can be exchanged against digital content and services undermines the control of the data subject, the system of fair data processing, and human dignity, all have at their core a rejection of the idea that personal data can be an economic asset. However, as Langhanke/Schmidt-Kessel rightly observes, commercialisation is a reality nowadays and one should not deny this by focusing only on the fundamental right of data protection.<sup>89</sup> The enjoyment of property is recognised as a fundamental right for the EU<sup>90</sup>, and property is an economic asset. Fundamental rights protection and the status of personal data as an economic asset therefore seem to at least not exclude each other per se.

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<sup>77</sup> Treaty on the Functioning of the European Union, OJ C 2012/26, 47, Art. 16 (2) TFEU: „*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the **protection of individuals with regard to the processing of personal data** by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.*“ (emphasis added).

<sup>78</sup> HIJMANS, *supra* note 45, p. 4.

<sup>79</sup> Treaty on European Union, OJ C 2012/326, 13.

<sup>80</sup> HIJMANS, *supra* note 45, p. 20.

<sup>81</sup> Opinion 4/2017, *supra* note 4, p. 8.

<sup>82</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/11/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 2011/304, 64.

<sup>83</sup> Directive 1994/44/EC *supra* note 12.

<sup>84</sup> A good overview of the consumer law instruments in the EU can be found in the recent Fitness Check of the European Commission, see: EUROPEAN COMMISSION, Commission Staff Working Document - Report of the Fitness Check on Directive 2005/29/EC (...); Council Directive 93/13/EEC (...); Directive 98/6/EC (...); Directive 1999/44/EC (...); Directive 2009/22/EC (...); Directive 2006/114/EC (...) [2017] SWD(2017) 209 final.

<sup>85</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 2002/201, 47, Rec. 2.

<sup>86</sup> Proposal for a Regulation on Privacy and Electronic Communications, *supra* note 30, Rec. 4.

<sup>87</sup> Preliminary Opinion, *supra* note 7, p. 33; supplemented by: Opinion 8/2016, *supra* note 49, pp. 8ff.

<sup>88</sup> HELBERGER, *supra* note 47; HELBERGER/ZUIDERVEEN BORGESIU/REYNA, *supra* note 64; more critically, but seeing some value: GONZÁLEZ FUSTER, How uninformed is the Average Data Subject? A Quest for Benchmarks in EU Personal Data Protection, *Iniciativa Digital Politècnica* 2014, p. 92 (p. 102).

<sup>89</sup> LANGHANKE/SCHMIDT-KESSEL, *supra* note 50, p. 219.

<sup>90</sup> CFREU, *supra* note 22, Art. 17.

Therefore, legally accepting personal data as an economic asset for the purposes of a consumer law instrument, should not per se undermine its fundamental rights status. Of course, ideally the EU legislator would explicitly accept that the Proposal will also play a role in protecting personal data by adding Article 16 TFEU as a legal basis for it.<sup>91</sup> Alternatively, one could argue that this task is supplementary to the facilitation of the internal market (Article 114 TFEU), and therefore Article 114 TFEU should be an acceptable legal basis.<sup>92</sup>

Regarding the more concrete issue of the data subjects losing their effective right to withdraw consent by contracting away their personal information, Langhanke/Schmidt-Kessel again provide a convincing answer. For them, a contract of personal data in exchange for digital content or a digital service should be more accurately termed a contract where the trader obtains the consent of the data subject to legally use the economic value of the personal information.<sup>93</sup> Fundamental rights law prevents the data subject from waiving their right to withdraw consent, as this would violate *ordre public*, hence, any contractual obligation to provide consent entered into by the consumer is a weak one, since the consumer has the right to frustrate it at any time. The possibility that the contractual relationship is easily ended, would generally qualify it as not enforceable.<sup>94</sup> This does not prevent it from being part of a contract though, especially for the purposes of consumer law. To cite Langhanke/Schmidt-Kessel “*However such a weak obligation, where the position of the creditor always remains a precarious one, is a well-known phenomenon in European contract law, mainly in cases of long-term contracts or within the category of “natural obligations”*”.<sup>95</sup> With the withdrawal of consent at all times thus preserved, this argument seems to also not contradict the acceptance of personal data as a “*counter-performance*” by the Proposal.

#### 4.3. Pragmatic approach to a new business model

The last point of criticism mentioned earlier concerned the hesitations of legitimising a business model monetizing personal data. This critique is best summarized in the words of the EDPS “*There might well be a market for personal data, just like there is, tragically, a market for live human organs, but that does not mean that we should give that market the blessing of legislation.*”<sup>96</sup> However, following this analysis and accepting that personal data can be an economic asset without undermining its fundamental rights nature also implies the legitimacy of the business model. The GDPR also indirectly recognizes the legitimacy of exchanging data for services by expanding the territorial scope in Article 3 GDPR, which as Recital 23 explains also covers the offering of “*good and services (...) irrespective of whether connected to a payment*”. While this in no way provides an express legitimisation of the business model of free services, it can be interpreted as a pragmatic approach to ensure such business models are covered within the GDPR.

Pragmatically accepting the reality of the free services business model, would also not come without its rewards. Especially the Parliament showed in their amendments that embracing the reality of personal data as an economic asset could lead to interesting developments. Firstly, they propose that conformity with the contract supplying digital content or digital services under the Proposal presupposes that the requirements of the GDPR are observed. Content or services violating the GDPR would therefore trigger the remedies for non-conformity with the contract under the Proposal.<sup>97</sup> This has also been proposed by several authors, either just for the principles of privacy-by-design and privacy-by-default of the GDPR, or for data protection prin-

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<sup>91</sup> This was proposed in the draft of the e-Privacy Regulation, see: Proposal for a Regulation on Privacy and Electronic Communications, *supra* note 30, Explanatory Memorandum, pp. 3f.

<sup>92</sup> The choice of legal basis for a European Union act was recently again outlined in: CJEU 26 July 2017, *Opinion 1/15*, paras. 76ff.

<sup>93</sup> LANGHANKE/SCHMIDT-KESSEL, *supra* note 50, p. 220.

<sup>94</sup> *Ibid.*, p. 221.

<sup>95</sup> *Ibid.*, p. 221.

<sup>96</sup> Opinion 4/2017, *supra* note 4, p. 7.

<sup>97</sup> Report A8-0375/2017, *supra* note 3, p. 63 (Amendment 99).

ciples like data minimisation in general.<sup>98</sup> In the end, if adopted, it could mean more of the alignment already partly possible by using the Unfair Terms Directive<sup>99</sup> and lead to comprehensive ground rules for the digital economy.<sup>100</sup> Secondly, the Parliament has proposed an amendment to the Unfair Terms Directive in the Proposal, listing as an unfair term, such contractual clauses that are circumventing the GDPR<sup>101</sup>, further reconciling the Unfair Terms Directive with the GDPR within the Proposal. Finally, the Proposal does not apply to situations “*where the consumer is exposed to advertisements exclusively in order to gain access to digital content*”.<sup>102</sup> This has remained in the Council’s and the Parliament’s versions of the Proposal, but the Parliament at least foresees in its amendments to the review clause in Article 22 that application on the supply of digital content and digital services, where the consumer is exposed to advertisements exclusively to gain access, should be examined in five years.<sup>103</sup> An inclusion of this business model could further strengthen the position of the data subject/consumer.

In the end, as a result of all this alignment of consumer and data protection law in the Proposal, the data subject/consumer could perhaps choose better whether to give up his or her data depending on the concrete issues in a situation and which remedies might offer the best relief. For example, in a situation where the digital content received is not functioning and was also based on data processing incompatible with the GDPR, the consumer/data subject could insist on it being brought in conformity (if national law accepts the contract as valid), which would entail that also the GDPR be observed, assuming that the amendments of the European Parliament are eventually adopted. This line of reasoning could prove especially useful in the hand of consumer organisations, who under Article 80 of the GDPR can now represent data subjects in their claims.

## 5. Concluding remarks

The Proposal is a bold step and should be given a chance to see whether it succeeds in its aims. However, the data protection issues raised during the negotiations need to be further addressed and sorted out before the finalisation of the proposal. Open issues include problems with the compatibility with the GDPR, especially the introduction of a differentiation between actively and passively provided personal data, and the unhappy mingling of different data protection principles in the scope of the Proposal. As for the more basic concerns regarding the weakening of the fundamental rights protection of personal data and the legitimisation of the business model of free services, this paper has attempted to show that there are at least some valid counter-arguments to these criticisms. These concerns should be taken serious in the next legislative stage though and addressed with concrete provisions. In the end, the Proposal could be an opportunity to also promote data protection with the means of consumer law, and to further the cooperation and alignment between European data protection and consumer law, which could lead to more remedies being available for individuals to assert their fundamental rights of data protection.<sup>104</sup>

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<sup>98</sup> See WENDEHORST, Sale of goods and supply of digital content – two worlds apart?. In: Website of the European Parliament. [http://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN\\_final.pdf](http://www.europarl.europa.eu/cmsdata/98774/pe%20556%20928%20EN_final.pdf) (accessed 3 January 2018) pp. 14f; SPINDLER, Contracts For the Supply of Digital Content – Scope of application and basic approach – Proposal of the Commission for a Directive on contracts for the supply of digital content, ERCL 2016, p. 183 (pp. 194f).

<sup>99</sup> See: HELBERGER, *supra* note 58, pp. 147ff.

<sup>100</sup> See: HELBERGER/ZUIDERVEEN BORGESIU/REYNA, *supra* note 67, p. 1459.

<sup>101</sup> Report A8-0375/2017, *supra* note 3, p. 86 (Amendment 121).

<sup>102</sup> Digital Content Proposal, *supra* note 1, Rec. 14; Art. 3 (4).

<sup>103</sup> Report A8-0375/2017, *supra* note 3, p. 88 (Amendment 125).

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