Articles (peer reviewed)

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Consumer Data as Consideration

Personal data has become a kind of new currency for the digital world in recent years.[1] However, in consumer contracts – including situations of "paying with one's own personal data" – agreements on consumer data are usually not dealt with under subtitles like "consideration" or "payment". To the opposite, many services, kinds of digital content and sometimes even tangible goods traded in the digital world are supplied "for free". This formula "for free" mainly refers to the fact that the contract does not provide for a monetary consideration, whereas the fact that the supplier is provided with personal data of the other party and that the other party's consent to deal with the personal data is widely ignored in the descriptions given in (insofar misleading) advertisements and contract terms.

This ignorance in the description meets with the state of today's contract law in Europe. So far, neither the European legislator nor the Member States decided on how to organise the exchange of performances including personal data and the consent of the consumer or any other affected person (ie the data subject). Whilst in the political sphere many voices are sceptical versus the "for free"-formula, European contract law has not even attempted to develop a very basic set of rules for contracts under which personal data is the object of a performance or even the counter performance, ie the consideration – neither on the European nor on the national level.[2] Consequently, the large comparative projects, which lead to the Principles of European Contract Law and the Draft Common Frame of Reference, did not include any rule on obligations referring to personal data as an object.[3]

With this article, we try to demonstrate sketchily that there is a need to develop general rules on personal data as an object of contractual obligations and as consideration. When arguing on consumer data as consideration one has to start with the fact of commercialisation of personal data in the digital world. While commercialisation has brought about new risks for consumers as to their personal data, we will argue that the law should tackle these risks by establishing two layers of consumer protection, ie data protection rules and particular contract law rules in parallel.[4] The points raised thereby would obviously be worth to be developed in a deep level comparative analysis, which does not exist so far; however, this would go beyond the scope of the sketch presented here, meant to provide for the questions of further comparative research. Moreover, national laws in Europe did not develop well-accepted concepts for the use of data as consideration under a contract so far[5] but concentrate on the human rights aspects of the topic.

I. Some basic considerations

1. Commercialisation of personal data of consumers

When European legal orders started to deal with data protection and the protection of personal data of consumers in particular, legislators and practicing lawyers could not imagine that commercialisation of personal data would become a matter of fact some decades later. European data protection law as first dated in 1995[6] and later on amended for the digital world in 2002[7] did not aim to handle personal data as a kind of commercial object. One could even have argued that the basic idea of a personality right, which today is protected also by the European Charter of Fundamental Rights, would have prevented personal data of becoming an object of commerce at all. Even within the Digital Agenda of the European Commission personal data are mainly mentioned under the aspect of data protection, while personal data as a reward is not dealt with.[8]

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1 See eg World Economic Forum, *Personal Data: The emergence of a New Asset Class* (Geneva 2011); Eggers/Hamill/Ali, 'Data as currency' (2013) 13 Deloitte Review 18 et seq; Taylor, *Data: the new currency* (EuropeanVoice, Brussels 2014); Dahl, 'Daten als Basis der digitalen Wirtschaft und Gesellschaft' (2015) RDV 236. Many blog postings refer to this, eg Zax, 'Is Personal Data the New Currency?' (*MIT Technology Review*, 30 November 2011) <http://www.technologyreview.com/view/426235/is-personal-data-the-new-currency/>. For the theoretical foundations see Stigler, 'The Economics of Information' (1962) 69 Journal of Political Economy 213.

2 The large comparative study by *Loos*, *Hellberger*, *Mak* and others on digital content contracts for consumers (University of Amsterdam, Analysis of the applicable legal frameworks and suggestions for the contours of a model system of consumer protection in relation to digital content contracts [2011]) refers to the point and even provides for a draft article on "gratuitous" transfer of digital content but does not contain any comparative finding as to personal data as performance under a contract. See, however, the German debate on the application of the Consumer Rights Directive 2011/83/EU and their transposition by § 312 BGB on gratuitous dispositions and cases of obligations to consent with data processing: Report of the Legal Committee of the Bundestag on the transposing Act (BT-Drs 17/13951, p 59, 72) and Brönneke/Schmidt, 'Der Anwendungsbereich der Vorschriften über die besonderen Vertriebsformen nach der Umsetzung der Verbraucherrechterichtlinie' (2014) VuR 3 (in favour of an application) and Schirmbacher, in Spindler/Schuster (eds), *Recht der elektronischen Medien* (3rd edn, 2015) § 312 BGB no 30 (against it) – all three do not give reasons.

3 However, Article IV H–1:201 DCFR clearly defines the gratuitousness of a contractual performance as of being "without reward", which excludes contracts with personal data as part of a synallagma.

4 Large parts of this article are based on Langhanke, *Daten als Leistung* (doctoral thesis Bayreuth 2015 – forthcoming).

5 As opposed to the well-developed business models on personal data, see Buhl/Röglinger/Moser/Heidemann, 'Big Data – Ein (ir-)relevanter Modebegriff für Wissenschaft und Praxis?' (2013) 2 Wirtschaftsinformatik & Management (a newer version to appear in Schmidt-Kessel/Langhanke (eds), *Datenschutz als Verbraucherschutz* (Jena 2015) 37-47.

6 See the Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281/31.

7 Directive 2002/58/EC 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 L201/37.

8 See Communication from 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", COM(2015) 192 final. See also the earlier Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Digital Agenda for Europe", COM(2010) 245 final.

However, commercialisation of personal data is a matter of fact today. Trading (in a larger sense) with personal data has become a well-established phenomenon and lawyers should not refuse to deal with this phenomenon only by referring to the personality right of the respective consumers and other data subjects. The commercialisation of personality rights in case of personal data is not as different from other cases of commercialisation of personality rights as in the case of actors, artists or – thinking it to the very end – all other providers in the market who offer objects which belong to their very own personality.

Trading personal data in practice is not restricted to the selling of addresses or other data, but also covers the use of personal data for advertising purposes or for the formation of profiles built on personal data gathered by a business (ie the controller). While trading personal data even in this larger sense is a well-established phenomenon today, the particular idea of "payment" with one's own personal data is a rather new development. Legal orders have started to run into difficulties when qualifying relationships, in which personal data is used as a kind of counter performance, to determine the application of legal rules.[9] And it is quite astonishing that, while in the political sphere and the media, data as consideration has become a common topic, lawyers have so far not developed a general theory on how to deal with personal data as an object of performance, as a kind of counter performance and, therefore, as a kind of "payment".

2. New risks for consumers as to personal data

The new function of personal data based on the commercialisation gives birth to new risks for consumers as well. From a classical perspective data protection law would protect personality rights and privacy in the collection process and the use of personal data; and one could even ask whether this part of the law belongs to consumer protection law or not.[10] The new development has opened up the perspective on personal data, which has a particular economic value. This new perspective interrelates with particular new risks that are not so much related to personal integrity of the consumer but to the protection of his preferences and his patrimony.

The common core of these new risks lies in determining the value of one's own personal data and the market. Supplying the consumer with "gratuitous" internet services with high effort and costs demonstrates that the average consumer today underestimates the value of his personal data, despite the fact that in the political sphere and the media "payment by one's own personal data" is subject to much consideration.

However, with the emergence of new business models the markets are changing more and more. An obvious case of the use of personal data as means for counter-performance is the reduced insurance premiums for the insurant in return for personal data. The most well-known examples for these constellations are certain health insurance contracts offered not only on US-markets, but also by European insurance companies.[11] A second example is the so-called "telematics insurance" under which the insurer offers a reduced premium to such insured persons that consent to the collection and use of the data facilities in the car; such sensor data may also be qualified as personal data of the driver(s) in most cases, at least.[12] For some sets of personal data even standard market prices are discussed within journals and reviews. For example, the data record of the use of a car over a period of three years is estimated of being worth between 1.500 and 2.000 €.[13] The core of the new risks for consumers as to personal data is underestimating this particular value and dealing with personal data and consent without having been promised a valuable counter-performance.

3. Two layers of consumer protection

As a consequence of the combination of "old" and "new" risks as to the consumer's own data, consumer protection takes place at two layers, the layer of data protection and the layer of contract law:

Data protection laws in Europe and elsewhere focus on the protection of personality rights and privacy of consumers and other data subjects.[14] In many aspects, their functioning comes very close to the protection of physical integrity. The European system of data protection by the law starts with a general ban on data processing and enables the parties to dispose of personal data by establishing some exceptions to the general ban. These exceptions include the possibility of consent by the consumer or other data subjects. By contrast, the rules on data protection and privacy do not aim to foster the fairness of bargains that include the consumers' personal data. Obviously, one could develop mechanisms as part of the data protection law as well by concretising the rules of binding consent. However, this would lead to an over-complex structure of consent within the data protection law.[15]

On the other hand, apart from some legal orders, which provide for *obligations de securité*, *Schutzpflichten* and so forth, contract law does not generally protect the integrity of the parties to the contract. Rather, contract law deals with the pre-conditions of fairness of bargains and with their enforcement. Therefore, contract law is the right (and traditional) place to deal with the economic value of consumers' personal data.[16] Contract law organises the exchange of performances and the framework of fair bargains in European law. Rules for consumer protection concerning the (economic) preferences of consumers should be dealt with in the realm of contract law also in cases where personal data

9 However, not much research to that point has been done yet, see for competition law the rare example of Podszun/Franz, 'Was ist ein Markt? – Unentgeltliche Leistungsbeziehungen im Kartellrecht' (2015) NZKart 212 et seq.

10 For European Union Law this question should be treated as decided because of the number 17 of the annex to the Regulation (EC) No 2006/2004 on Consumer Protection Cooperation, OJ L364/1, which explicitly refers to the Directive 2002/58/EC on Privacy and Electronic Communications. However, it was only Directive 2009/136/EC amending the regulatory framework for electronic communication network and services, which added the said number 17 in 2009. See also Buchner, *Informationelle Selbstbestimmung im Privatrecht* (Tübingen 2006) 109 et seq.

11 Cf Lensing, 'Gendiagnostik in der Versicherungswirtschaft: Persönlichkeitsrecht versus unternehmerische Freiheit' (2009) VuR 411; Gaßner/Strömer, 'Mobile Health Applications – haftungsrechtlicher Standard und das Laissez-faire des Gesetzgebers' (2015) VersR 1219.

12 See eg for a German perspective Klimke, 'Telematik-Tarife in der Kfz-Versicherung' (2015) r+s 217; Lüdemann, 'Connected Cars – Das vernetzte Auto nimmt Fahrt auf, der Datenschutz bleibt zurück' (2015) ZD 247; Helmes, 'Verkehrstelematik und Versicherung: Technik – Datenschutz – Versicherungsprodukte' (2015) VersR 1096.

13 Cf Schwartmann/Hentsch, 'Eigentum an Daten – das Urheberrecht als Pate für ein Datenverwertungsrecht' (2015) RDV 221, 229.

14 Schwartmann/Hentsch, 'Eigentum an Daten – das Urheberrecht als Pate für ein Datenverwertungsrecht' (2015) RDV 221, 222 et seq.

15 In the same sense Schwartmann/Hentsch, 'Eigentum an Daten – das Urheberrecht als Pate für ein Datenverwertungsrecht' (2015) RDV 221, 228.

16 This would also exclude intellectual property law (with property rights held by the controller and licences) from being the systematically and politically preferable way to organise the relations between the parties; cf Schwartmann/Hentsch, 'Eigentum an Daten – das Urheberrecht als Pate für ein Datenverwertungsrecht' (2015) RDV 221 and similarly De Franceschi/Lehmann, 'Data as Tradeable Commodity and New Measures for their Protection' (2015) 1 Italian Law Journal 51.

and the economic potential of their use are dealt with in agreements between the parties and the markets.

These two layers of consumer protection should not only be followed by the legislator. Decisive differences in concepts, aims and instruments should also lead European academic writing to follow this two-layer approach also when it comes to dogmatics of European Private Law.[17]

II. Personal data as object of contractual obligations

Using personal data as consideration or counter-performance within a contract pre-supposes that it is possible to agree on personal data as object of contractual obligations at all.

As a first step, one has to admit that the supply of pure personal data by a debtor to a creditor usually will not be sufficient for a performance (1.). Therefore, such pure personal data does not provide for the object for the respective obligation. By contrast, the core of an obligation to provide for personal data is the consent of the data subject.[18] Such consent may only be object of an obligation as far as the creditor of the personal data is not justified by the law itself to deal with the respective data (2.). Vice versa, agreeing on personal data as object of a (contractual) obligation is not precluded by law and data protection law in particular (3.). However, one has to concede that the technique of qualifying such an obligation remains difficult because of the consumer's right to withdraw his consent (4.).

1. Supplying personal data is not sufficient

Only at first sight, one could think of the pure supply of personal data being a sufficient object of a usual contractual obligation to provide personal data. The general ban of processing alien personal data without a legal justification or consent would usually make such an obligation unenforceable or even illegal.

Therefore, a duty to supply pure personal data may form part of a contract, but usually will be of a more ancillary nature. Usually, the creditor of such an obligation would only be justified in processing the data when he is provided with the consent of the data subject. Moreover, the creditor of such an obligation in many cases gets the personal data even before a contract is concluded and consent is given. Therefore, not the supply of the data as such is usually of much interest to the creditor. Rather, he is interested in becoming justified for certain kinds of processing the data. The core of an obligation to provide for personal data is not the delivery of that data, but the consent of the consumer or other data subject, which only brings the creditor in the position to legally use the economic value of the personal data.

2. Consent exceeding authorisations by law as performance

The particular interest of a creditor of personal data is usually directed to get the consent of the data subject to proceed with the data (predominately collected) in a way, which is a significant economic interest to him. However, the factual interest of the creditor would also not cover cases of processing, for which he would be justified by the law even without consent of the data subject. An obligation that would provide the creditor with a legal competence to data processing, to which he is entitled anyway by the law, would frustrate the purpose of the whole obligation. Therefore, a reasonable object of an obligation to provide for personal data has as its core only the data subject's consent to acts of processing, to which the creditor is not authorized anyway by the law.[19]

The restriction of the performance to ways of data processing that are not covered by legal justifications brings about the problem of the scope of obligation of the usual authorisation of contract partners for processing "necessary for the performance of a contract to which the data subject is party" (Article 7 Data Protection Directive 95/46/EC). In our view, this particular and very typical justification for controllers has to be interpreted restrictively.[20] The purpose of that exception is to enable the parties of a contract to perform all obligations under the contract even if this would include data processing as a kind of ancillary activity. By contrast, the exception does not apply where a whole obligation under the contract builds on commercialisation of personal data. The exception, therefore, does not cover obligations, which have personal data and consent as their very object. The restrictive purpose of all the exceptions named explicitly in Article 7 of the Directive 95/46/EC prevents a significant broader meaning.

For the same reason an obligation to provide personal data would not make consent superfluous by the more general exception of processing "necessary for the purposes of the legitimate interests persuade by the controller or by the third party or parties to whom the data are disclosed" (also Article 7 of the Directive 95/46/EC). Here again, the exception does not cover the case of making the personal data the very object of the contractual obligation, but only aims to enable a controller to pursue legitimate interests by allowing an ancillary processing of personal data of other contract parties.

Therefore, making personal data the object of a contractual obligation does not provide the creditor with a legal justification for the processing. Consent by the creditor in these cases remains the necessary prerequisite for the possibility to perform such an obligation.

3. Legality of the object personal data

The commercialisation of personal data is a factum. Neither the primary law of the European Union and Article 8 of the Charter of Fundamental Rights in particular nor the secondary law and here in particular the Directive 95/46/EC do generally prevent the data subject from concluding a contract obliging himself to provide for his personal data for the creditor. In particular, such an obligation to transfer (additional) personal data and to consent (additionally) to the processing with that personal data does not as such infringe public policy or good morals. This *inter alia* follows from the general exception that the controller is justified by an unambiguous consent by the consumer or other data subject. Personal data is disposable for the data subject and may therefore be the object of a contractual obligation to dispose.

On the other hand, primary and secondary data protection law of the European Union also limits the parties' autonomy. The consumer or other data subject is not able to oblige himself to provide for personal data to an unlimited extend. An obligation to establish a better position for the creditor as

17 For a dogmatical explanation for Austrian, Swiss and German law see Langhanke, *Daten als Leistung* (Note 4) chapter 4.

18 In this respect, obligations under consideration here differ from the classical situations, in which consent of a party to interfere with its rights (eg in case of medical treatment) is an act of co-operation rather than one of the characteristic performances under the contract. Solutions for those cases of co-operation do not suit for the obligations under consideration here.

19 Langhanke, *Daten als Leistung* (Note 4) chapter 3 part B.

20 Langhanke, *Daten als Leistung* (Note 4) chapter 3 part A. For a (probably) somewhat broader view, see Determann, *Field Guide to Data Privacy Law* (2nd ed, Cheltenham 2015) 100.

to the authorisation of data processing then legally possible under the applicable data protection law should be unenforceable, at least if not void or voidable. This follows from the very high value given to data protection by the Charter of Fundamental Rights and its Article 8, which attaches much importance to the parties' autonomy on the one side and on its limits on the other.

In particular, Article 8 of the Charter of Fundamental Rights and the basic principles of secondary data protection law of the European Union prevent the data subject from validly promising to waive his right to withdraw from consent.[21] This strong position of the right to withdraw is a particular implementation of the general principle of a right "to be forgotten" under European Union law.[22] Consequently, the right to withdraw restricts the possibility to consent in data processing always and everywhere within the internal market. This right is not disposable for the data subject. The very purpose of this non-disposable right to withdraw furthermore requires that the data subject is not even able to promise a waiver of that right to withdraw; the right to withdraw belongs to the common European *ordre public*.[23] Therefore, the principle causes any promise to waive the right to withdraw being contra public policy of the European Union. The data subject is therefore legally unable to promise any restriction to the right to withdraw from the consent.

4. Dogmatical qualification of such obligation

Accepting an obligation, which the debtor is able to frustrate at any time by a simple declaration, seems to be somewhat odd. The non-disposable right to withdraw from the consent raises a severe dogmatical problem, because the legal capacity to frustrate an obligation – like a potestative condition subsequent – contradicts the binding nature of an obligation and thereby its basic idea. 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"[24].

This particular characteristic of the precarious consent as an object of an obligation to provide for personal data asks for doctrinal solutions mirroring the fact that the obligation right from the beginning includes the possibility of legally remaining unfulfilled.[25] Therefore, one may qualify such an obligation as generally unenforceable, which would also probably exclude all kinds of damages for non-performance. However, such a solution would leave the creditor of the obligation without protection even in cases where the data subject has never declared withdrawal. The alternative would be construing the obligation as including the possibility of a "justified breach" right from the very beginning of its existence. This would keep the obligation being enforceable on the one hand, but excluding the effects of the breach of contract in case of disruption by withdrawal on the other hand. However, one could argue that such a construction would conflict with the very nature of an obligation as such.

Probably most legal orders – at least those thinking dogmatically – will find a solution in one way or another and answer the question whether it would be possible to base a claim for damages on the non-performance of an obligation to consent with data processing. The only decisive aspect of structure is the fact that the right to withdraw may not be overcome through the backdoor by providing the creditor with a claim for damages covering the whole performance interest in the consent to process the personal data of the debtor. Moreover, it would be politically unfavourable from the perspective of an Internal Market, if diverging national concepts would start to develop in this field.

III. Personal data may constitute counter-performance

Payment with one's own data presupposes the possibility not only to oblige oneself to supply data and consent in processing, but also to interconnect the data obligation with other obligations of the contract. This need is entirely independent from the basic approach how such link is dogmatically explained whether by a construction of concurrent conditions or by the topos of synallagma, which is the prevailing view on the continent today.

1. Possibility to link an obligation for personal data to obligations of the other party

On the contract law level there is no general impediment, which would prevent building a kind of synallagma in the contract where one party promises to provide for personal data. Whereas, the dogmatical difficulties in building such synallagma with unenforceable obligations should not be underestimated, the unenforceability of an obligation – if this view will prevail in the future – would not prevent contract law from analysing the contractual situation as a *quid pro quo*-situation in the sense of a synallagma. The dogmatical difficulties and the practical consequences here still need to be solved and developed, but they are solvable from the perspective of contract law. However, such a solution should again be developed on the EU level, to prevent a defibration of the legal development in Europe.

2. Impediments from data protection law? – the role of linkage prohibitions

One could argue that an obligation to provide for personal data conflicts with the freedom of consent of the data subject. As seen above this argument should not be followed because the obligation to provide personal data and consent to processing is restricted in one way or the other (unenforceable or excuse of breach) and would not lead to a waiver of the data subject's right to withdraw from its consent at any time.

However, some particular aspects of the general principle of consent may conflict with the possibility to link an obligation to provide personal data and consent with other obligations to a synallagma-like construction. Data protection law has always been sceptical versus attempts to link consent with other performances. For the Internal Market, this scepticism coincides with general ideas of linkage prohibitions in competition law. These linkage prohibitions in competition law

21 But see Buchner, *Informationelle Selbstbestimmung* (note 10) 272 et seq arguing to the contrary for some cases.

22 Cf the famous Google-Judgement by the CJEU, Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* [2014] ECLI:EU:C:2014:317. Cf the case note by Schmidt-Kessel/Gläser/Langhanke/Herden, 'Recht auf Vergessen und piercing the corporate veil' (2014) GPR 192 et seq.

23 For the same reason, an intellectual property right in favour of the controller (cf Schwartmann/Hentsch, 'Eigentum an Daten – das Urheberrecht als Pate für ein Datenverwertungsrecht' (2015) RDV 221, which do not clearly determine the right holder) would contravene the European public policy and would be in conflict with Article 8 of the Charter of Fundamental Rights. Personal data do not belong to the commons.

24 See Schulze, *Die Naturalobligation* (Tübingen 2008) (with a comparative part on the concept of natural obligation on p 211-238) and Jones/Schlechtriem, *International Encyclopedia of Comparative Law*, vol VII, § 15 no 30–57.

25 See on the several variants to construe the obligation Langhanke, *Daten als Leistung* (Note 4) chapter 3 part B II.

forbid monopolists to ask for consent where no alternative source of supply is on the market. Data protection regulation in many European states has broadened these linkage prohibitions to cases of consent in data processing by the data subject.[26] Several national rules refer to situations of restricted competition by market structures, which come, at least, near to a monopolistic situation.[27] Therefore, linkage prohibitions in the data protection laws of the Member States usually have a rather limited scope of application, which mainly presupposes an imbalanced market with a kind of monopolistic structure.

Moreover, the usual structure of linkage prohibitions would allow a dependency between providing personal data against some other kind of performance where the creditor of the personal data offers alternatively a construction where the debtor would not provide personal data but money instead. Linkage prohibitions do therefore only impede certain situations of the conclusion of the contract, but they do not impede a synallagmatic structure of a contract involving as part of the synallagma an obligation to provide personal data. Finally, the particular linkage prohibition in data protection law aims to prohibit situations of pressure to ancillary consent to data processing rather than "payment with data" agreements.[28] Therefore, the existence of some linkage prohibitions in the data protection laws of some Member States does not generally prevent synallagmatic structures involving the provision of personal data.

IV. Consequences of withdrawal of consent

The weakest point of the qualification of a promise to provide for personal data as an obligation in its strict sense is the right of the data subject to withdraw consent. Every concept of personal data becoming an object of a contractual obligation has to present an answer for the consequences of such a withdrawal and the relationship between the withdrawal and the contractual rights and obligations.

1. Withdrawal is no breach

As mentioned earlier the consumer or other data subject must be free to withdraw consent at any time. Therefore, as aforementioned, a waiver of such right to withdraw is ineffective because it infringes mandatory law. Moreover, the consumer may not promise such a waiver; such a promise would be contra public policy of the EU.

Moreover, under an obligation to provide personal data withdrawal may not be qualified as breach of contract. Therefore, withdrawal does not provide the other party with a claim for damages. This main consequence of the strong mandatory nature of the right to withdraw from consent is independent from the nature of the obligation discussed above.

When thinking of developing a basic concept of consumer data as consideration a bit further one has to discuss, at least, two possible exceptions to this exclusion of damages in case of withdrawal. First, the strong effects of the mandatory nature of the right to withdraw do not protect the consumer or other data subject from a – contractual or extra-contractual – liability for fraud where the consumer deludes the business or other data controller as to his intention concerning the continuity of the consent to process with the personal data. A second exception could be the situation of a mistimed withdrawal. This refers to the general need under a contract with an obligation to provide personal data to provide for a kind of transitional period. Such a transitional period would aim to give the business or other data controller the opportunity to set an end on his data processing activities and to prevent him from being liable for processing in the meantime of that transitional period.

2. Termination of the contract

In a synallagmatic relationship, withdrawal of consent to process with personal data of the consumer or other data subject may not leave the contract unaffected – such withdrawal will often frustrate the purpose of the contract or its future enforcement. However, withdrawal by the consumer should not be analysed as ending the contract *per se* or *ipso iure*. Namely, it is neither self-evident that the intention to withdraw includes the intention to end the contract. Nor is the withdrawal necessarily connected with a frustration of the whole synallagmatic contractual relationship.

However, in many cases the other party (business or other data controller) would have a right to terminate the contract unilaterally. Such a right to terminate would and should depend on inter alia the amount of data obtained and used in the past by the business, the treatment of other clients, and the position of the other party in the market (eg, is he a monopolist?).

This core set of rules still needs to be developed. However, typical general clauses on fundamental breach or fundamental disruption of a contract would usually help to find a sufficient solution in practice.

V. Conclusions

The commercialisation of personal data has become a fact in recent years. Because of such commercialisation of personal data, the legal rules on personal data of consumers have been subject to a significant shift of paradigm. These rules are no longer completely or at least predominantly directed to the protection of the personal integrity of the consumer. Rather, the protection of the proprietary interests and economic preferences of consumers in their personal data emerged as a second purpose of protective mechanisms in the context. However, the rules on data protection do not suit to solve questions of fairness and enforcement of bargains including one party's personal data. Hence, such fairness and enforcement of bargains including one party's personal data should be dealt with under the auspices of contract law. The basic structure of contract law dealing with personal data obligations is as follows:

1. Performance in case of personal data is characterised as the consumer's consent exceeding the legal authorisations provided for by the law in favour of the business. The duty to supply pure data is of a more ancillary nature and not a necessary element, when the provision of personal data constitutes an obligation under a contract. Such a contract with personal data as object of performance is not covered by usual "performance of contract exceptions" of data protection laws, which would *ex lege* authorise the data processing under data protection law rules.

2. A contractual obligation to consent to processing with the consumer's personal data is valid as far as it does not oblige the consumer to wave the right of withdrawal from consent.

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26 Cf Buchner, *Informationelle Selbstbestimmung* (note 10) 264 et seq.

27 See Schwartmann/Hentsch, 'Eigentum an Daten – das Urheberrecht als Pate für ein Datenverwertungsrecht' (2015) RDV 221, 228.

28 In this sense Langhanke, *Daten als Leistung* (Note 4) chapter 3 part B IV.

Such an obligation to consent to processing with the consumer's personal data is neither enforceable in kind nor by way of damages.

3. The law does not prohibit an agreement providing for personal data as a counter-performance. The technical difficulties in building the synallagma with unenforceable obligations are solvable. A performance promised in exchange for consent to process with personal data is therefore not gratuitous. There *is* a valuable consideration, which leads to a synallagmatic contract. Withdrawal of consent by the consumer does not end the contract *ipso iure*, but may provide the business with a right to terminate under certain circumstances. ■

Maria Cecilia Paglietti*

Exporting and Re-importing Substantive and Judicial Models in the EU Credit Market (the EAPO)

1. Introduction: integration as a moving process

According to the traditional view, integration is a moving process, which, respecting the value of plurality, is founded on a search for suitable models based on the principle of effectiveness[1].

Today, we are witnessing a deep transformation of the integration process: by exporting and importing substantial and judicial models, new institutions are being introduced which go beyond interdependence and stem from a combination of theory and practice. This phenomenon involves both substantive law institutions and new procedures.

Within this context, the adoption of Regulation (EU) 655/2014, known as EAPO (establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters)[2] provides procedural as well as substantive and administrative rules, and is attributable to the European tendency to harmonise common procedural rules[3]. Given that the concept of harmonisation is highly controversial[4], and that comparative studies show the existence of different types of harmonisation[5], the Regulation (EU) 655/2014 can be viewed not only as an instance of the trend towards the europeanization of civil procedure[6], but also of the broader and more political impacting transition from minimum harmonisation to maximum harmonisation[7]. The adoption of this changed political perspective, which justifies, in terms of legislative technique, the use of the Regulation instead of the Directive[8], involves abandoning the idea of individual legal frameworks as autonomous and self-sufficient systems, and adopting within the European Union a new intent to achieve common objectives aiming at full harmonization[9] which, far from being a mere technical option, responds to a clear choice of legal policy[10] (as well as to legislative[11] and jurisprudential prescriptions[12]), on the assumption of a shift in focus from social issues to domestic market issues[13]. These changes in methodology and perspective help to situate the development of new, unprecedented European procedures (such as the EAPO) within the context of the emergence of a new European legal culture[14] which, given that law (both substantive and procedural) is an inherently cultural phenomenon[15], is the result of the reconciliation of the civil law and the common law families[16].

An aspect that is particularly important to both theoretical and practical jurisprudence is the emergence of problems on decision enforcement issues, in particular with regard to the effectiveness of the judicial system[17]. From this point of view, this problem has taken two main evolutionary trajectories: at the procedural level, the incorporation of the right to the

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1 Mauro Cappelletti, Monica Seccombe, Joseph H. Weiler (eds), *Integration Through Law* (de Gruyter 1986), who emphasise the shift from the political to the legal level.

2 Regulation (EU) no 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters [2014] OJ L 189/59.

3 Marcel Storme, 'Procedural Law and The Reform of Justice: from Regional to Universal Harmonisation' (2001) 6 Unif L R 763 ff.; on the specific purposes of harmonization cf. Konstantinos D. Kerameus, 'International Perspectives on Civil Justice' in Ian Richard Scott (ed), *International Perspectives on Civil Justice: Essays in Honour of Sir Jack I. H. Jacob* (Carswell Legal Pubns 1990) 47 ff.

4 ALI/UNIDROIT Principles of Transnational Civil Procedure, as adopted by the American Law Institute and UNIDROIT in 2004. These Principles were published, accompanied by Rules and short commentaries, *ALI/UNIDROIT Principles of Transnational Civil Procedure* (CUP 2006).

5 Patrick Glenn, 'Harmony of Laws in the Americas' (2003) 34 U Miami Inter-Am L Rev 223 ff.

6 Michael Dougan, *National Remedies Before the Court of Justice. Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 4-14; Eva Storskrubb, *Civil Procedure and EU Law. A Policy Area Unrecovered* (OUP 2008).

7 Matthias E. Storme, 'Harmonization of Civil Procedure and the Interaction with the Substantive Private Law' in Xandra E. Kramer, Cornelis H. van Rhee (eds), *Civil Litigation in a Globalising World* (Springer 2012) 143 ff.

8 Indeed, the Regulation ensures legal certainty and better meets the requirements of clarity and uniformity in all member States (cf. Commission 'Proposal for Council Regulation (EC) on Jurisdiction and the Recognition and enforcement of Judgment in Civil and Commercial Matters' COM (1999) 348 final, 4).

9 Stephen Weatherill, 'Why Object to Harmonization of Private Law by the EC?' (2004) 5 ERPL 633 ff.

10 Commission, 'Consumer Policy Strategy, 2002-2006', (communication) COM (2002) 208 def., 7 May 2002.

11 See Art. 4 Directive 2005/29/EC of the European Parliament and of the Council, 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149/22.

12 Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-217, para 41; Case C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH* [2010] ECR I–10909, para 30.

13 Vanessa Mak, 'Review of the Consumer Acquis – Torwards Maximum Harmonisation?' (2009) 17 ERPL 55 ff.

14 Martin W. Hesselink, *The New European Legal Culture* (Kluwer 2001).

15 Mirjan R. Damaška, *The Faces of Justice and State Authority* (Yale UP 1986) 19-27; 73-80; 98-101 ff.; Angelo Dondi, 'Crise récente de la justice civile et évolution des réglementations procédurales selon différentes cultures du procès' [2006] Revue Recherche .Juridique 2351 ff.

16 John H, Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law' in John H. Merryman (ed), *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* (Kluwer 1999) 17 ff.; and (1981) 17 Stan J Int'l L 357, 372; Janet Walker, Oscar G. Chase, 'Common Law and Civil Law and the Future of Categories. An introduction' in Janet Walker, Oscar G. Chase (eds), *Civil Law, Common Law and the Future of Categories*, (Lexisnexis 2012), III ff.

17 Konstantinos D. Kerameus, 'Enforcement Proceedings' *International Encyclopedia Comparative Law* vol 14, Chap. 10.