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## Personal Data “Trading” Under Polish Contract Law

### I. Introduction

The aim of this paper is to elaborate on the changing perception of personal data in the light of the traditional contractual relationship. Nowadays, the character of personal data has changed. The opinion that personal data may be treated as remuneration is frequently expressed.<sup>1</sup> However, in the Polish literature this problem is not subject of wide discussion and no papers related to personal data as the object of an obligation have been published so far.<sup>2</sup> Meanwhile, it can be seen that personal data became the object of enterprise’s interest on a massive scale. Exchanging goods and services for personal data has become a fact; however, the legal qualification of providing personal data in the context of obligation has raised adequate reservations. I will discuss these problems in a prism of examples describing possible ways to use the personal data that are taking place in Polish trade relations. The issue to be examined is how and under what circumstances enterprises and traders demand supply of personal data, and what they offer in return. It should be noted that this is not an exhaustive list, and the need to provide consumer’s personal data to businesses is getting more frequent and gaining new forms.

Another related issue which should be considered in the first place is the question whether there are provisions of Polish or European law that directly apply to personal data as an element of contractual relationship. Especially, provisions of data protection legislation are going to be examined. Mentioned regulations will be analysed paying special attention to implications of considering personal data in the context of obligation. Afterwards an attempt will be made to classify personal data into the framework of the Polish Civil Code.<sup>3</sup> Therefore, the above mentioned processing situations will be analysed through the prism of provisions of the PCC pertaining to contractual obligations. The question that arises is whether personal data are among the designata of the term “payment”. What consumer behaviour should be treated as a counter-performance (if at all supply of personal data could be considered as counter-performance)? Another question that arises is whether behaviour consisting of supply of personal data can be matched to classical mechanisms of the functioning of contract law institutions in Poland.

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<sup>1</sup> *W. D. Eggers/R. Hamill/A. Ali*, Data as currency, Deloitte Review 2013, No. 13, p. 21; *F. Zoll*, Personal Data as Remuneration in the Proposal for a Directive on Supply of Digital Content, in: *R. Schulze/D. Staudenmayer/S. Lohsse*, Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps, 2017, p. 179; see also *C. Langhanke/M. Schmidt-Kessel*, Consumer Data as Consideration, Journal of European Consumer and Market Law 2015, No. 6, p. 219.

<sup>2</sup> See *P. Fajgielski*, Odwołalność zgody na przetwarzanie danych osobowych – znaczenie dla praktyki gospodarczej, in: *A. Mednis*, Prywatność a ekonomia. Ochrona danych osobowych w obrocie gospodarczym, Warsaw 2013, p. 68–70; the author focuses on issues arising from the withdrawal of consent in the light of economic practise; see also *J. Barta/P. Fajgielski/R. Markiewicz*, Ochrona danych osobowych. Komentarz Lex, Warsaw 2015, p. 404; these authors only mention that consent of data subject may be part of the contract.

<sup>3</sup> The Civil Code of 23 April 1964 (Dz. U. 1964 nr 16 poz. 93), hereinafter referred to as PCC.

## II. The qualification of personal data supply in the light of contract law

At the outset it should be noted that contractual disposal of personal data is controversial due to its legal nature. Said controversies stem from a variety of reasons. Firstly, as has already been indicated above, current legislation does not refer to personal data as an element of contractual relationship. Secondly, scholars hold the view that in the frame of article 23 PCC disposing of goods appearing in this article is irreconcilable with their legal nature.<sup>4</sup> And among the mentioned goods (freedom, dignity, freedom of conscience, surname or pseudonym, image, secrecy of correspondence, inviolability of home, and scientific, artistic, inventor's and rationalizing activity), the Polish legislator expressis verbis included personal data, in particular, surname, pseudonym or image. Thirdly, in the background of such transactions, the exchange of products and services for personal data should not be considered as free of charge. However, the qualification of this kind of contract (if at all possible) is not an effortless task, and the assessment of the value of this kind of goods is even more challenging. Another issue is the problem of economic and informal inequality at the negotiation stage of such contract. A stronger entity has the ability to enforce contract terms; it might also manifest itself in the fact that inequality results from the lack of alternatives<sup>5</sup> (see example of Google or Facebook). Fifthly, the consequences of withdrawal of consent in the light of contracts should be examined, especially the effect of withdrawal on contractual relationship. Precisely, it has to be determined whether a withdrawal of consent may constitute a breach of a contract and what the fate of the contract shall be after such withdrawal.

## III. Relevant provisions

### 1. Loophole in regulation

Currently there is no legislation directly related to personal data in the frame of contractual obligation neither on Polish nor on European level. Neither the Polish Data Protection Act<sup>6</sup> nor the PCC treat personal data as a potential subject of a contract. It is a similar situation when it comes to the Principles of European Contract Law or the Draft Common Frame of Reference.<sup>7</sup> Despite its long preparation period, it seems that the General Data Protection Regulation<sup>8</sup> does not perceive personal data from this point of view either. As far as acts that are not directly related to data protection are concerned,

<sup>4</sup> K. Michałowska, Umowne zadysponowanie informacjami ze sfery prywatności, in: J. Haberko/ A. Olejniczak/ A. Pyrzyńska/D. Sokołowska, Współczesne problemy prawa zobowiązań, Warsaw 2015, p. 475.

<sup>5</sup> Ł. Goździaszek, Wybrane dobre praktyki w zakresie usług elektronicznych, Warsaw 2016, p. 112.

<sup>6</sup> Personal Data Protection Act of 29 August 1997 (Dz. U. 1997 nr 133 poz. 883), hereinafter referred to as PDPA.; within the scope of its regulation, this act implements Directive 95/46/EC of the European Parliament and the Council 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 L 281, 23.11.1995, p. 31, as amended; Dziennik Urzędowy UE Polskie wydanie specjalne [Official Journal of the European Union – Polish Special Edition], Chapter 13, vol. 15, p. 355, as amended).

<sup>7</sup> C. Langhanke/M. Schmidt-Kessel, fn. 1. p. 219.

<sup>8</sup> Regulation (EU) 2016/679 of the European Parliament and 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), hereinafter referred to as GDPR.

Directive 2011/83/EU<sup>9</sup> must be examined. According to this act, repayment is minimum content – the *essentialia negotii* – in both sales and service contracts. But in the case of contracts regarding the supply of digital content the requirement of repayment is not provided.<sup>10</sup> So it seems that the EU legislator took into consideration the specific nature of a contract, functioning in a digital environment. Payment is not a prerequisite for the contract to be included in the scope of the directive.

## 2. Proposal for a “Directive on the Supply of Digital Content”

Certainly, one of the most relevant legislative proposals for the discussed context is the European Commission’s proposal for a “Directive on the Supply of Digital Content”.<sup>11</sup> The provision of personal data is treated as a mutual consideration for services consisting of supplying of digital content by article 3 (1) of this proposed directive. According to mentioned provision, the proposed directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid, or the consumer actively provides counter-performance other than money in the form of personal data or any other data. Thus, the proposal does not recognize this type of contract as a non-paid contract, but also does not consider personal data as a price in its literal sense.<sup>12</sup> We can draw a conclusion that, in the light of this forthcoming act, the supply of personal data might be considered as a counter-performance. However, it should be kept in mind that currently it is merely a proposal, and adequate doubts are being reported.<sup>13</sup> For instance, there are no remedies for the controller to terminate a contract.

## 3. Withdrawal of consent in accordance with PDPA and GDPR

The consequences of a withdrawal of consent in the light of contracts might turn out to be destructive for the entire view of personal data being an object of contractual disposal. The right to withdraw a given consent is an element of a system based on the legal framework, which fully guarantees data protection of European citizens. Although the Data Protection Directive<sup>14</sup> does not provide for a remedy in this regard (possibility of withdrawal of consent), the PDPA was amended in this direction. In consequence, since 29 September 2010 according to Polish law the consent may be withdrawn at any time.<sup>15</sup> Furthermore article 7 (3) GDPR provide that the data subject shall have the right to with-

<sup>9</sup> Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council.

<sup>10</sup> B. Kaczmarek-Templin, in: T. Skoczny/D. Karczewska/M. Namysłowska, *Ustawa o prawach konsumenta*, Warsaw 2015, p. 101.

<sup>11</sup> European Commission Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content, Brussels, 9.12.2015, COM(2015) 634 final, 2015/0287 (COD), hereinafter referred to as PDCD.

<sup>12</sup> See F. Zoll, fn. 1, p. 181.

<sup>13</sup> *Ibid.*, p. 185–186.

<sup>14</sup> Directive 95/46/EC of the European Parliament and the Council 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, Official Journal L 281, 23/11/1995 P. 0031 – 0050, hereinafter referred to as DPD.

<sup>15</sup> See article 7 (5) point 5; See also J. Barta/P. Fajgielski/R. Markiewicz, fn. 2, p. 344–345.

draw his or her consent at any time. The natural conclusion is, since both the PDPA and GDPR provide for the possibility of withdrawal of consent, the admissibility and effectiveness of such disposals must be called into question.<sup>16</sup> Therefore, the contractual exclusion or modification of article 7 (3) GDPR and 7 (1) point 5 PDPA in fine may be a cause of doubts as well, as to the imperative character of this provisions.<sup>17</sup>

#### IV. Admissibility of data processing

##### 1. Legitimizing premises

Processing of personal data may take place under certain conditions. A list of premises that legitimize processing of data is expressed in article 23 (1) of the PDPA. The processing of data is permitted only when at least one of the following circumstances occurs: firstly, a person whom the data concern has given his or her consent, save with respect to the removal of data concerning this person; secondly, when processing is necessary for the exercise of a right or discharge of a duty arising under a provision of law; thirdly, the processing is allowed when it is necessary for the performance of a contract if the person whom the data concern is a party to the contract, or it is indispensable for the performance, prior to entering into a contract, of acts upon the demand of the person whom the data concern; fourthly, when it is essential to the execution of certain tasks which are laid down in the law and carried out in public interest. The last condition is related to the processing if it is indispensable for the fulfilment of legitimate purposes of the data controllers or data recipients and the processing does not infringe the rights and freedoms of the person whom the data concern.

The above catalogue was implemented<sup>18</sup> by the DPD. In the GDPR the EU legislator decided to interpose a similar basis for processing. Therefore, it seems that the remarks made by legal scholars and guidelines made by EU institutions in relation to the DPD also apply to the GDPR.<sup>19</sup> When it comes to a legal qualification of the abovementioned premises it is agreed among Polish legal scholarship and in jurisprudence of Polish courts that their character is autonomous, independent and equal.<sup>20</sup> Data processing on the basis of more than one premise does not have any legal bearing – if one of the premises ceases to be satisfied, processing may still remain legal on the base of the others. This means that, in some cases, the withdrawal of the consent would not entail the absence of the basis to data processing. From the point of view of entrepreneurs in such cases it is unnecessary to attain a consent.

<sup>16</sup> *F. Zoll*, fn. 1, p. 183.

<sup>17</sup> *J. Byrski*, *Odwolanie zgody na przetwarzanie danych osobowych. Wybrane zagadnienia*, *Monitor Prawniczy* 2011, No. 3, p. 1014–1016; see also *C. Langhanke/M. Schmidt-Kessel*, fn. 1. p. 219; see also *F. Zoll*, fn. 1, p. 187.

<sup>18</sup> Subject to the condition that in the DPD there is an additional premise: member states shall provide that personal data may be processed only if processing is necessary in order to protect the vital interests of the data subject.

<sup>19</sup> *A. Dmochowska*, *Zasady dotyczące przetwarzania danych*, in: *A. Dmochowska/M. Zadrożny*, *Unijna reforma ochrony danych osobowych. Analiza zmian*, Warsaw 2016, p. 18–19.

<sup>20</sup> See, e. g., *J. Barta/P. Fajgielski/R. Markiewicz*, fn. 2, p. 404.

## 2. Consent of data subject most valuable for controllers

It should be noted that the premise of the consent counts most for entrepreneurs. This fact results from several reasons. For instance, the consent might be useful for the processing of data for marketing purposes when the condition set out in article 23 (1) point 5 PDPA<sup>21</sup> is not an option. Secondly, an entrepreneur will need the consent when he needs to forward personal data to third parties. The next reason is to extend the scope of data processing. Fourthly, the aim of entrepreneurs is the enhancement of data processing purposes.<sup>22</sup> The last reason is of paramount importance with a view of an extension of the data type in the frame of a clear division of sensitive and ordinary personal data.<sup>23</sup>

In the light of the above and taking into account that the subject of the present analysis is the qualification of the supply of personal data as part of a contract, the premises which article 23 (1) point 2–5 PDPA provide for, are not relevant for further deliberations. Only the premise of consent is of key significance. Only in cases, when there is no legitimisation to processing personal data or there is a need to extend the scope or purposes of data processing, the consent of a data subject would be important and valuable for the entrepreneur. Furthermore, in all other cases (article 23 (1) point 2–5 PDPA) the possibility of withdrawal of consent will be substantially limited.

## V. Process of personal data supply

At this point, the term of data supply needs to be clarified. This process can be described by being a chain of events which lead to a state of affairs in which the controller is coming in to possession of information about a data subject with the intention of processing such data. Though, there are many such situations, there is a need to narrow down the scope of these deliberations to the case in which the abovementioned process is a result of a contract. As it was mentioned in introduction, I am going to describe two variants of relation, whereby personal data might be an object of contractual obligation between a controller and a data subject – in the case under consideration – between a creditor and a debtor. The first type consists in an exchange of products or a possibility of using a service, for which the consumer is obliged to pay a price, and additionally to supply personal data (hereinafter referred to as Variant A). Alternatively, the aforementioned goods are made available by the controller gratuitously, but subject to the condition that the data subject supplies his or her personal data (a model that is becoming more and more frequent recently) – hereinafter referred to as Variant B. A commonly occurring example of services offered by entrepreneurs in exchange for consumer's personal data are email accounts, file hosting services, file editing services etc. This includes services and applications whose main purpose is to profile users. These applications and services by using various methods in conjunction with analysis form a user profile that contains personal

<sup>21</sup> According to article 23 (4) PDPA the legitimate purpose referred to in paragraph 1, subparagraph 5 shall include, in particular, direct marketing of the data controller's own products or services and also enforcement of claims arising from an economic activity conducted.

<sup>22</sup> P. Fajgielski, fn. 2, p. 64.

<sup>23</sup> The PDPA distinguishes between personal data and sensitive personal data. Article 27 PDPA refers to sensitive data. The legal nature of the premises that article 27 PDPA provides for is different from the premises mentioned in article 23. In the light of article 27 the consent is also a condition which legitimizes data processing. By way of digression the general rule of processing such data is a general ban for processing. See decision of Supreme Administrative Court 11 April 2003, II SA 412/02. Also the processing of the data shall be allowed where the person whom the data concern gives his or her consent in writing, unless such data are to be removed.

information such as name, surname, person type, identification number and address, but also information about inclinations, beliefs, visited places or a social relationships, etc.<sup>24</sup>

A slightly different scheme consists in situations when the controller offers temporary access to a service without charge, but after an expiration of certain period of time, the consumer is obliged to pay, if he or she wants to continue using the service. Another situation is when in exchange of personal information, the data subject will take advantage, for example, in the form of some kind reduction of price of the product or service, or some additional option in digital service will be unblocked. An exchange for personal data may also occur when the controller offers a possibility to participate in a contest, subject to the condition that the data subject will supply his or her data.

All these situations which are contained in Variant B share a similar characteristic. That common feature is that for all these services or products in the case of absence of personal data supply, the debtor would be obliged to pay or provide some other type of consideration.

The question is how this process proceeds from the debtor's point of view. In the first place, a person who wants to make use of a service or obtain a product is obliged to enter data into a system, or in paper form. Then, the data subject is obliged to give his or her consent for data processing. The last obligation of the data subject is to tolerate data processing and not to withdraw the consent. From the side of the controller, in Variant B obviously, the entrepreneur will gain an advantage as long as the debtor will not withdraw his or her consent; otherwise the controller would not be interested in continuing the contractual relationship. From debtor's point of view, if he or she wants to gain advantage from the abovementioned services and products, the essential element of this potential obligation is constituted by two omissions: the first one is allowing data processing; the second omission relies on the continuance in the consent, i. e., in other words, not to withdraw the consent.

## VI. The consent of a data subject as an act of law in the light of the PCC

### 1. Relation between the PCC and data protection provisions

The legal status of the consent remains debatable in Poland.<sup>25</sup> This dispute is based on the question whether the consent might be treated as an act in law. This issue might not be as relevant as it seems, not to mention that in the case of Variant B such notion should not be questioned, since personal data can be perceived as some kind of remuneration. In the light of the PCC, the legal nature of the consent is particularly relevant in the context of the requirement of the consent of a statutory representative of the data subject limited in his or her capacity. Some scholars argue that restrictions arising from article 17 PCC are too strict.<sup>26</sup> The point is that without the consent of a statutory representative of an underage data subject, the conclusion of a contract or disposition of a right would be impossible. It is true that this approach might raise a practical problem especially in the context of the digital world. According to the GDPR in relation to the offer of information society services directly to a child, the processing of personal data of a child shall be lawful where the child is at least 16 years old.<sup>27</sup> However, in the light of the PCC in

<sup>24</sup> *Ł. Goździaszek*, fn. 5, p. 100–102.

<sup>25</sup> *S. Hoc/T. Szewc*, *Ochrona danych osobowych i informacji niejawnych*. Warsaw 2014, p. 31–32. It seems that this dispute in the context of this paper is not relevant.

<sup>26</sup> See *J. Barta/P. Fajgielski/R. Markiewicz*, fn. 2, p. 342.

<sup>27</sup> See article 8 (1) GDPR.

the case of concluding a contract by the data subject limited in his or her capacity without specific provision the contract remains null and void. It seems that considering consent as kind of an authorizing act is solving the problem, because in this notion there is neither an obligation nor a disposition of a right.<sup>28</sup> Nevertheless, this notion is not broadly accepted among scholars. So it seems that there is a need of providing a special provision in this respect.

There is another factor to mention in the light of the qualification of the consent of a data subject. According to article 29 Data Protection Working Party:

consent is also a notion used in other fields of law, particularly contract law [...]. There is no contradiction, but an overlap, between the scope of civil law and the scope of the Directive: the Directive does not address the general conditions of the validity of consent in a civil law context, but it does not exclude them. This means, for instance, that to assess the validity of a contract in the context of Article 7 (b) of the Directive, civil law requirements will have to be taken into account. In addition to the application of the general conditions for the validity of consent under civil law, the consent required in Article 7 (a) must also be interpreted taking into account Article 2 (h) of the Directive.<sup>29</sup>

It seems that the provisions of the PCC referring to defects in the declaration of intent might be applicable only when it comes to article 82 and 83 (1) PCC because of the effects of these provisions. (An act in law which is inconsistent with statutory law or is designed to circumvent statutory law shall be null and void). However, rules regarding *inter alia* error and threat, that articles 84, 85, 86, 87 PCC provide for, cannot be applied because of their weaker effect. According to the aforementioned provisions the evasion of the legal effects of a declaration of intent made to another person under the influence of an error or threat shall be effected by a declaration presented to that person in writing. The right to avoidance of legal effects expire after a specified time.<sup>30</sup> Meanwhile, the consent of the data subject in the light of the aforementioned cases should be treated as null and void under the law, as well in each and every one of those situations.<sup>31</sup>

In summary, the consent of a data subject should be considered as an act in law in the light of the PCC provisions, at least as regards Variant B. Secondly, the PCC provisions in the case of consent given by the data subject should be supplementarily applicable. Therefore, the consequences of a qualification of the consent as an act in law causes the necessity to refer to provisions of title IV of PCC regarding acts in law, subject to modification which provisions of the PDPA and the GDPR provides for, especially above-mentioned conditions that are applicable to a child's consent in relation to information society services or effects of defects in the declaration of intent.

## 2. Free consent means voluntary decision

The conditions in which a decision is being made have a direct impact on that decision. It should be considered whether the view of personal data supply being part of the contract is not against the obligatory elements of the consent.

Among the features of the valid consent scholars enumerate voluntariness. A reading of the PDPA and GDPR provisions confirms this interpretation. Under article 4 (11)

<sup>28</sup> *S. Hoc/T. Szewc*, fn. 25, p. 31.

<sup>29</sup> Opinion 15/2011 on the definition of consent of Article 29 Data Protection Working Party Adopted on 13 July 2011 01197/11/EN WP187, [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf), p. 6.

<sup>30</sup> See article 88 (1) and 88 (2) PCC.

<sup>31</sup> *J. Barta/P. Fajgielski/R. Markiewicz*, fn. 2, p. 405.

GDPR consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject. “Freely given” condition is provided also in the DPD.<sup>32</sup> According to the aforementioned opinion the consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation, coercion or significant negative consequences if he or she does not consent.<sup>33</sup> On the basis of the PDPA, commentators state that the consent may be considered as voluntary only if its expression or refusal has no influence on other entitlements of the data subject.<sup>34</sup>

The aforementioned observations should conform to Variants A and B. In the case of Variant A the conclusion of a contract cannot be determined by giving consent for processing. In such situation, the debtor is obliged to pay the price, and in the case of imposition of another duty, the consent should be presumed not to be freely given.<sup>35</sup> The situation changes when we analyse Variant B. First of all, the statement that this kind of contract should not be determined by giving data subject consent for processing is unjustified. Basically in Variant B we are facing counter-performance in the form of giving a consent and tolerating data processing, and such situation is inherently conscious and voluntary. The data subject’s decision is made on the condition that in exchange for supply of data he or she will receive a product or service. Therefore, in such cases there is a foregone conclusion that the data subject is aware of the consequences of his or her action.

It seems that *de lege lata* this notion in the light of the PDPA and the DPD is acceptable. This was also confirmed in the literature.<sup>36</sup> However, the entry into force of the GDPR provisions may change the abovementioned approach. Apart from the provision on the definition of consent, the regulation clarifies what is meant by freely given consent. Due to article 7 (4) GDPR when assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract. We can already draw certain conclusions which may be the reason why in both variants the consent would not be considered as freely given. The essential aspect of cases in the light of Variant B is that the performance of a contract is dependent on the consent.

### 3. Model form of contract

According to article 60 PCC the intention of a person performing an act in law may be expressed by any behaviour of that person which manifests that intention sufficiently, including the fact of revealing this intention in electronic form. That provision cannot be applicable in the case of the consent on a basis of PDPA provisions; because of the wording of article 7 point 5 PDPA the consent shall not be presumed or implied from a declaration of intent with different contents.<sup>37</sup> Despite the fact that the DPD does not

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<sup>32</sup> See article 2 lit. h DPD.

<sup>33</sup> Opinion 15/2011, fn. 29., p. 12.

<sup>34</sup> *A. Mednis*, Cechy zgody na przetwarzanie danych osobowych w opinii Grupy Roboczej Art. 29 dyrektywy 95/46 Nr 15/2011 (WP 187), appendix to *Monitor Prawniczy*, No., 7, 2012, p. 25.

<sup>35</sup> *P. Fajgielski*, fn. 2, p. 69.

<sup>36</sup> *Ibid.*

<sup>37</sup> Some representatives of data protection law scholarship rises that impementation might be too restrictive: See, e.g., *M. Krzysztofek*, *Zmiana przepisów o zgodzie na przetwarzanie danych osobowych*, PPH 2011, No. 4, p. 58.

provide for such restrictions, according to the GDPR the data subject's consent is given in the context of a written declaration which also concerns other matters; the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language,<sup>38</sup> therefore the consent must be provided separately.<sup>39</sup> In the light of the aforementioned provisions, Polish case law referring to conditions for valid consent remains eligible. Signing the contract cannot be unequivocal to granting a consent,<sup>40</sup> and also all aspects of the consent must be clear for the data subject at the time of granting. In connection with this, the consequence of such approach is that article 384 (2) PCC would not be applicable.<sup>41</sup>

## VII. Disposal of personal data

### 1. Personal data in the light of article 23 PCC

Since the assumption that personal data might be a form of remuneration has been made, the essence of the matter of this exchange has to be considered. Qualification of personal data supply in the frame of an obligation must be preceded by the examination of the possibility of disposal of personal data. The issue at stake is the commercialisation of personal data. The process of commercialisation of personal data should be treated as a commercialisation of other personal rights.<sup>42</sup> Therefore, in my opinion the analysis made in Polish private law theory in the context of monetizing personal rights would be appropriate in the context of this paper.

The nature of personal goods in Polish private law is based on a pluralistic model.<sup>43</sup> This means that there are many kinds of personal goods and respective personal rights that are assigned to every one of these goods by the legal system.<sup>44</sup> A catalogue of the goods is contained in article 23 PCC. As was mentioned before, surname, pseudonym or image are explicitly named among these goods; thus they are indisputably subject to protection guaranteed by Polish private law. It is also clear that the abovementioned list is not conclusive, and that the number of personal goods is increasing with the passage of time. The actual catalogue is determined by a lot of factors including social context; therefore it has very dynamic nature. The type of goods that can be considered as an object of private law protection is determined by the level of technological and civilizational development and economic and social relations.<sup>45</sup> In the context of the fast development of the digital world, it seems that this notion guarantees proper protection. For sure personal data must be perceived in the light of the right to privacy. The right to

<sup>38</sup> See article 7 (2) GDPR.

<sup>39</sup> *F. Zoll*, fn. 1, p. 181.

<sup>40</sup> Decision of 27 July 2005 of the Regional Court, Warsaw — Court for the Protection of Competition and Consumers, XVII AMC 60/04, *Monitor Sądowy Gospodarczy* 2007, No. 29, 1780.

<sup>41</sup> That notion was confirmed by Polish Supreme Administrative Court in 4 April 2003., II SA 2135/02., *Monitor Prawniczy* 2003, No. 10, p. 435; *J. Barta/P. Fajgielski/R. Markiewicz*, fn. 2, p. 344.

<sup>42</sup> *C. Langhanke/M. Schmidt-Kessel*, fn. 1, p. 220.

<sup>43</sup> This notion was confirmed by the Polish Supreme Court on 9 May 1958, (case IV CR 630/57), LEX No. 1632581.

<sup>44</sup> *S. Dmowski/S. Rudnicki*, *Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna*, Warsaw 2003, p. 97; See also *K. Michałowska*, fn. 4, p. 476.

<sup>45</sup> Resolution of the Polish Supreme Court 16 July 1993, OSNC 1994/1/2, I PZP 28/93.

privacy which belongs to a category of non-transferable personal rights<sup>46</sup> must be distinguished from collecting benefits from goods, which are protected by private law. However, from the perspective of this analysis it should be noted that between the protection of the right to privacy in the aspect of constitutional and private law, and the protection of personal data under the PDPA, there is a kind of overlap; nevertheless in practice these systems are independent.<sup>47</sup> Therefore, there might be a situation when illegal data processing would not be considered as a breach of rights to privacy.

## 2. Close connection between personal data and data subject

The right to protection of personal life and the right to protection of data should be distinguished from personal goods themselves, and the goods in turn need to be distinguished from their material counterpart. In the case of such a good like “image”, its material counterpart might be a photograph,<sup>48</sup> in case of personal data the material counterpart might be a photograph as well, or digital information pertaining to a particular person.

Therefore, the question arises whether personal data might be considered as a personal good. In principle, the answer is affirmative, but the determination whether a personal good constituted by personal data was violated has to be conducted on the basis of objective criteria, by recourse to evaluations and opinions shared in a given community. Certainly, some of personal data has to be treated as a personal good and protected accordingly, because it is so named in article 23 PCC.

In the context of this paper the nature of personal data as such should be ascertained. It may be helpful to refer to the methods of determining the legal nature of personal goods. Case law and legal theory stress the non-financial character of personal goods; however, this does not mean that they lack any financial aspect.

Hence, it has to be noted that personal goods may be commercialized, and giving payable consent for their exploitation is allowed.<sup>49</sup> On the other hand, it is argued, that such exploitation of personal goods does not shatter their non-financial nature.<sup>50</sup> No one denies that, for instance, a person entitled to an image can profit from this object. And in the case of personal information we are dealing with a similar situation. It is difficult to assess whether a given legal good has a commercial nature or not, and the assessment seems impossible without recourse to the social context.<sup>51</sup> It is important to point out that personal data take on different forms, and that their catalogue is expanding. As an example, geo-location services or the creation of an individual user profile through services such as Google, Facebook and Snapchat can be provided. Assessment must be made in concreto.

<sup>46</sup> *G. Szpor*, Pojęcie informacji a zakres ochrony danych, in: *P. Fajgielski*, Ochrona danych osobowych w Polsce z perspektywy dziesięciolecia, Lublin 2008, p. 8.

<sup>47</sup> *W. J. Katner*, in: *M. Saffjan*, Prawo cywilne część ogólna System Prawa Prywatnego Tom I, Warsaw 2012, p. 1265.

<sup>48</sup> *P. Poglódek*, Majątkowa ochrona dóbr osobistych w Kodeksie cywilnym – cz. I, Monitor Prawniczy 2004, No 13, p. 1.

<sup>49</sup> *K. Michałowska*, fn. 4, p. 478.

<sup>50</sup> *P. Księżak*, in: *P. Księżak/M. Pyziak-Szafnicka*, Kodeks cywilny. Komentarz. Część ogólna, Warsaw 2014, p. 274.

<sup>51</sup> *A. Wojciechowska*, Czy autorskie dobra osobiste są dobrami osobistymi prawa cywilnego?, Kwartalnik Prawa Prywatnego, No. 3, 1994, p. 375; See also *P. Sut*, Problem twórczej wykładni przepisów o ochronie dóbr osobistych, Państwo i prawo, No. 9, 1997, p. 31.

Personal data are a “twine” of messages that are interrelated, integrated, and personalized collection of information about the individual.<sup>52</sup> It is a widely held view among scholars that because personal goods are connected to a particular person, they cannot be transferred to another person in such a manner that the latter could freely dispose of these goods. The same could probably be said when it comes to personal data. In the case of personal data, it also corresponds to the right of the individual to decide about the purposes of processing these data, and the right to supervise their correctness. Even when personal data has become a particular kind of commodity, because of their inseparable bond with a particular person, they cannot be an object of autonomous trade, since when such trade is conducted, the processing is, at any time, dependent upon the consent of data subject.<sup>53</sup>

### 3. The right to data protection

In the case of personal data, added economic value is created by a permit for data processing – thus, in a sense, by waiving of protection afforded by the PDPA. Here, again, the norm derived from article 7 (3) GDPR and 7 (1) point 5 PDPA in fine has to be mentioned. It is not possible to waive this right even if the individual fully accepts the consequences of such a situation. Both the EU and the Polish legislator decided that this freedom must be limited, and that the individual’s ability to decide about the fate of his or her personal data must give way to the general policy of data protection throughout the European Union.<sup>54</sup>

Relying on the analyses made with regard to the effectiveness of the disposal of personal goods, which are applicable to personal data as well, it must be concluded that, while under Polish law the effectiveness of the disposal of personal data is untenable, the payable authorization of another person to performing the rights to the data is feasible, provided that condition sine qua non of an agreement is the consent of the data subject, and the provisions concerning the revocation of consent are respected.

The key element is therefore the right of the subject to protect his or her data. The basic question is also whether this right can be disposed of. In my opinion, until there is no statutory provision which allows for the disposition of this right, there is no such possibility, as is referring to personal rights, for instance in the case of image.<sup>55</sup> Furthermore, the right to data protection should be distinguished from the personal right because of a clear provision of the possibility to withdraw a given consent at any time.

This is the situation we are facing as far as personal copyrights are concerned. It appears that they are protected by civil law in a similar way as personal data. There is a provision governing the exercise of the financial right of an author by others entities, and a provision relating to perform personal rights of an author after his or her death as well.<sup>56</sup> Consequently, in the absence of such analogous provisions, in the case of person-

<sup>52</sup> *K. Chalubińska-Jentkiewicz/ M. Karpiuk*, Prawo nowych technologii. Wybrane zagadnienia., Warsaw 2015, p. 343.

<sup>53</sup> See also: *K. Michałowska*, fn. 4, p. 484.

<sup>54</sup> *C. Langhanke/M. Schmidt-Kessel*, fn. 1. p. 222.

<sup>55</sup> See article 81 Law on Copyright and Related Rights of 4 February 1994 r. (Dz. U. tłum. gb Nr 24, poz. 83). Under this provision the dissemination of an image shall require the permission of the person presented in it. Unless there is a clear reservation, such permission shall not be required if such person has received the agreed price for posing.

<sup>56</sup> Nevertheless, the protection and the nature of the copyright are based on articles 17 and 79 Law on Copyright and Related Rights, similarly in the case of personal rights of the heirs of the author – Article 78 Law on Copyright and Related Rights.

al data the disposition or inheritance is impossible. Likewise, this right must be considered to have non-financial nature and, consequently, it is non-transferable and cannot be inherited.<sup>57</sup>

In conclusion, the right might be non-transferable, but the economic benefits of the information that comes from the processing of personal data can be measurable. The possibility of processing of goods in the form of personal data causes an increase in the assets of the entity that is processing the data. Therefore, the possibility of economic exploitation of personal data should not be impugned. Supply of personal data on the basis of a given consent should be treated as acquiescence for processing data, which in the case of the absence of consent would be qualified as an infringement of a rights based on data protection acts. In personal data protection theory there the opinion that, if the right to personal data protection is considered in the prism of private law, we are dealing with an intangible property.<sup>58</sup> In the light of what was mentioned above, it seems that it is right assertion. In the case of the right to personal data protection it should be considered as a non-financial right, which is very strongly connected to the data subject. Therefore, it is not tradable and non-heritable; however, it has a financial aspect in the form of the possibility of collecting benefits from the toleration of data processing by other entities, subject to condition that the data subject will have permanent impact on data processing in the form of the possibility to withdraw the given consent at any time.

## VIII. Personal data in the context of obligation

### 1. The legal nature of the right to withdrawal of consent

Even though we have recently been witnessing a situation in which personal data is being used in a profitable way for the entity that processes personal data, and the data subject also benefits from such an exchange, this fact does not mean that such exchange corresponds with the principles developed by the contract law theory, and that the provisions of the PCC relating to mutual contracts are appropriate to regulate such a relationship.

Since we accept that in the case of data ‘trading’ there is some kind of exchange, we have to consider whether the PCC provisions referring to mutual contracts are applicable. This will also allow to examine whether there are any mechanisms that in result of which, the parties will be able to enforce the consideration of other party. In the case of both mentioned variants, the possibility to withdraw a given consent needs to be analysed in a prism of the relevant provisions of the PCC, which regulate the effects of the non-performance of obligations. These provisions are contained in articles 487–497 PCC. According to article 487 (2) PCC, a contract is mutual if both parties are obliged in such a manner that the performance by one of them is to correspond to that by the other. The Polish jurisprudence and case-law mention the usefulness of subjective or objective criteria in the process of the reconstruction of a mutual agreement.<sup>59</sup>

The equivalence is analysed from the perspective of the parties; therefore, it is a subjective perception. This is not an obligatory feature. The exchange of considerations occurs because each party sees the usefulness of the provision of the other party – do ut

<sup>57</sup> P. Książak, in: P. Książak/M. Pyziak-Szafnicka, Kodeks cywilny. Komentarz. Część ogólna, Warsaw 2014, p. 274.

<sup>58</sup> J. Barta/P. Fajgielski/R. Markiewicz, fn. 2, p. 264.

<sup>59</sup> Ł. Węgrzynowski, Ekwiwalentność świadczeń w umowie wzajemnej, Warsaw 2011, p. 288.

des.<sup>60</sup> It follows that the considerations of the parties are conjugated in such a way that the invalidity of one of the obligations or failure to perform or improper performance of one of the consideration affects the validity or content of the mutual contract.<sup>61</sup> In other words, no consideration can exist without the other. This notion was apparently approved by Polish Supreme Court.<sup>62</sup> If the parties give the contract a mutual nature, they are free to formulate the obligation resulting therefrom only if their provisions do not undermine the principle of equivalence of the consideration.<sup>63</sup> In addition to fulfilling the requirement of article 487 (2) PCC to apply provisions referring to mutual contracts, it seems that there is a need to examine whether there is a synallagmatic attachment between the considerations.<sup>64</sup> Jurisprudence emphasises that there are various types of synallagma. This notion allows a distinction between: genetic, conditioning and functional synallagma. Genetic synallagma is referring to search for the source of obligation. Only an effective formation of a contract determines its legal existence. It is also important to consider the correlation between particular obligations, which is an emanation of conditioning synallagma.<sup>65</sup> The willingness to receive mutual benefit should be the purpose of the contractual relationship. The analysis of a purpose of the contract is connected with the functional synallagma. If the purpose is impossible to accomplish, the obligation does not exist, no matter what the reason of this impossibility was (for instance – the impossibility of performance – see 387 (1) PCC). The functional aspect of this concept implies an interconnection between claims of parties; it also emphasizes the most important aim of concluding a mutual contract, which is actual performance of the consideration.<sup>66</sup> Not only the promise of performance is satisfying for the creditor, but it would also be the actual realisation of an obligation.<sup>67</sup>

The question arises whether in the case of both variants there is such functional and conditioning connection between these potential considerations. It seems therefore that the purpose of such a relationship is that in exchange for the possibility of using the service or delivery product, the controller will be authorised to process personal data of the data subject. One could see that the controller would be inclined to give an opportunity of using a service or deliver a product as long as the data subject continues not to withdraw his/her consent. And in the majority of cases this will happen; however, there will be situations when controllers will immediately use personal data. Therefore, in such situations it will no longer be necessary for him to have a given consent; furthermore withdrawal of consent does not have retroactive effects. It seems that the qualification of supply of personal data as consideration, which is being a part of mutual contract should be preceded by an analysis of processing purposes and amount of assets which the controller has obtained in concreto. However, this often turns out to be impossible.

<sup>60</sup> Z. Radwański/A. Olejniczak, *Zobowiązania – część ogólna*, Warsaw 2014, p. 124.

<sup>61</sup> M. Kondek, in: K. Osajda, *Kodeks cywilny. Komentarz*, Warsaw 2017, p. 1140.

<sup>62</sup> According to the Polish Supreme Court feature of mutual agreements, within the meaning of article 487 § 2 PCC this is to ensure that the provision of one party is in the economic sense equivalent to the other party. Each party commits itself because it will be satisfying for the other party. The mutual agreement is a *causalis* one. The reason why one of the parties is obliged is to guarantee the obligation of the other party to fulfil its obligation (*causa obligandi*); see judgement of Polish Supreme Court on 2 April 2004, III CK 537/02, Legalis.

<sup>63</sup> Judgement of the Polish Supreme Court of 23 June 2005, II CK 739/04.

<sup>64</sup> F. Zoll, in: A. Olejniczak, *Prawo zobowiązań – część ogólna. System prawa Prywatnego*. Tom VI, Warsaw 2014, p. 1055.

<sup>65</sup> S. Grobel, *Synallagma i jego rodzaje.*, *Studia Juridica Silesiana*, 1991 No. 16, p. 15–18.

<sup>66</sup> Ł. Węgrzynowski, fn. 59, p. 122-123.

<sup>67</sup> S. Grobel, fn. 65, p. 19.

Regardless of what was mentioned above since we consider that in variant B, a service or product was provided only in exchange for personal data, or for this reason there has been some kind of reduction of the price, we have to assume that the aim of processing personal data is that the controller will be able to compensate for the incurred costs by providing the service or product. For obvious reasons, it is likely that the data subject will benefit from using the service or obtaining a product. However, this might not be enough in the context of a synallagma. In the light of this notion, Polish private law theory emphasises that the qualification of a contract as a mutual one must be related to mechanisms that, as a result, enable the parties to enforce the consideration of the other party. It seems that in the light of supply of personal data such assurance of enforcement would mean that the data subject would lose the possibility of withdrawal of a given consent, or such behaviour should be considered as the non-performance or improper performance of the obligation.

In the light of the PPC, the norms which articles 471, 491 and 492 provide for are particularly relevant. The question arises whether it is justified to consider the possibility of withdrawing a given consent as the non-performance or improper performance of the obligation. The answer is most likely to be negative. The basic argument is that this notion might be contradictory to the GDPR provisions referring to conditions on consent. The view in which the performance of the right to withdrawal of a given consent is associated with any detriment for the data subject might be considered as contradictory to the requirement of a ‘freely given’ consent (see chapter VI. 2).<sup>68</sup> It is also caused by the fact that the application of these rules would be contrary to the ratio of the PDPA, as public rules which play an important role in the protection of both individual and public interests. Moreover, it would be against public policy of the EU and inconsistent with the nature of these provisions as mandatory rules.<sup>69</sup> The right to withdrawal of consent drawn from of fundamental right drawn from the GDPR and the PDPA, which are mandatory rules, and a contractual provision cannot have the result of depriving the data subject of protection afforded to him by such peremptory rules.<sup>70</sup> Therefore, the right to withdrawal of consent should be considered as a non-financial right, strongly connected to the data subject. Therefore, this right is not tradable. In my opinion there is currently very limited scope for party autonomy in data protection matters. The data subject should have the right to have his or her personal data erased and no longer processed where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with the GDPR. In order to ensure that consent is freely given, such consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller. Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent is not necessary for such performance. Also consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.<sup>71</sup> The aforementioned restrictions related to ‘freely given’ consent, and the possibility of its with-

<sup>68</sup> According to recital 42 of GDPR the consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment.

<sup>69</sup> See C. Langhanke/M. Schmidt-Kessel, fn. 1, p. 222.

<sup>70</sup> See also F. Zoll, fn. 1, p. 187–188.; C. Langhanke/M. Schmidt-Kessel, fn. 1, p. 220–221.

<sup>71</sup> See recital 42, 43 and 65 of GDPR.

drawal at any time might be causing that data supply might not be considered as counter-performance.

## 2. Contractual penalty

According to PCC it may be stipulated in the contract that the redress of the damage resulting from the non-performance or an improper performance of a non-pecuniary obligation shall take place by the payment of a specified amount. This provision refers to a contractual penalty. From the aforementioned deliberations (chapter VIII. 1. and VI. 2.) it seems obvious that article 483 PCC referring to a contractual penalty cannot be applicable. Therefore, it is not possible to stipulate a contractual penalty in the case of consent withdrawal considering Variant A or a fortiori Variant B.

## 3. Condition

In Polish data protection theory it is clear that consent might be given under the condition and for a definite period of time.<sup>72</sup> The question then arises as to how the condition may be applicable to controller's consideration. It seems that a perfect solution for the controller (creditor) would be a contractual stipulation referring to the withdrawal of a given consent. In the light of article 89 PCC the commencement or the cessation of the effects of act in law may be made dependent upon a future and uncertain event (condition). In the frame of PCC provisions referring to the condition we are dealing with a distinction between resolutive and susceptible condition is made.

The basic feature of a resolutive condition is that the effects of the legal action stops when a future and uncertain event happens. One would argue that in the case of the subject matter of this analysis, a withdrawal of consent might be considered as a future and uncertain event. The mechanism of functioning of the termination condition apparently manifests itself when such stipulation is added to contracts where the parties are obliged to provide continuous obligations.<sup>73</sup> The fulfilment of the condition has no retroactive effect unless otherwise stipulated (*ex nunc effect*).<sup>74</sup> It would appear that the foregoing notion might be useful in the case of contracts where supply data is treated as a consideration; however it might be undermined by judicial practice and theory. Said controversies stem from two reasons. The first reason is a consequence of another distinction between conditions made in private law scholarship. 1. Dependent on the will of the party, 2. Independent from the will of the party, 3. Dependent on the will of others. This kind of condition should be considered as potestative condition (*conditiones potestativae*).<sup>75</sup> It means that the effect of a legal action depends on the specific behaviour of one of the parties. If the effect entirely depends on the will of one of the parties this kind of condition should be considered as clear potestative condition (German: Willensbedingungen).<sup>76</sup> Polish scholars emphasise that conditioning legal effects only on the will of one of the parties is in contradiction with the essence of the contractual relationship.

<sup>72</sup> At this point it should be said that consent might be given for specified period of time.

<sup>73</sup> Z. Radwanski, in: Z. Radwański, *Prawo cywilne – część ogólna. System prawa prywatnego. Tom II*, Warsaw 2008, p. 261–263.

<sup>74</sup> See article 90 PCC.

<sup>75</sup> German: so-called *Potestativbedingung*.

<sup>76</sup> Z. Radwanski, *fn.* 72, p. 264.

This notion was confirmed by the Polish Supreme Court.<sup>77</sup> However, another interpretation might also be considered (see e. g. “sale for try-out”).<sup>78</sup> The main reason why such condition is not an option is that such stipulation should be considered as a circumvention of law because of being contradictory to the right to withdrawal of consent, which the provisions of the PDPA and the GDPR provide for. Furthermore, in accordance with the PCC if a condition which contradicts statutory law or the principles of community life is resolute, it shall be considered as not having been made at all.<sup>79</sup>

#### 4. Impossibility of performance

The difficulties associated with the qualification of personal data supply cause the necessity to analyse this possible relationship in a prism of the impossibility of performance. It should be considered whether this kind of consideration is legally possible in the light of article 387 (1) PCC. This article provides for a general rule that a contract for an impossible performance is null and void. Jurisprudence distinguishes between the actual and legal impossibility of performance. The effect of the impossibility of performance is the nullity of the contract, which implies the obligation to fulfil it.<sup>80</sup> Legal impossibility occurs when the consideration is possible in a physical sense, but in the light of legal norms it is not possible to perform.<sup>81</sup> The possibility to withdraw a given consent at any time arises from the PDPA and the GDPR, and contractual stipulation that deprives the data subject of its right is unacceptable. Therefore, if assuming that the data subject undertakes himself/herself not to withdraw consent, this kind of consideration should be treated as a consideration which is impossible to perform. It seems that there is a need to search for the other core on which this kind of relationship is based on, so that the data subject has a right to withdrawal of a given consent at any time.

### IX. Attempt to proper qualification

#### 1. Awareness of withdrawal of consent

Still the question remains whether the character of personal data, in particular the possibility of withdrawal of consent, makes it impossible to classify the supply of personal data as a consideration in the light of the PCC and the GDPR. As it was mentioned before, the consequences of withdrawal of a given consent in the light of contracts might turn out to be destructive for the entire view of personal data being an object of contractual disposal. This could be additionally caused by a number of aforementioned reasons (as indicated in chapter VIII. 1.).

<sup>77</sup> P. Sobolewski, in: K. Osajda, *Kodeks cywilny. Komentarz*, Warszawa 2017, p. 690–691. This author is pointing to large numbers of examples of judicature; see, Judgement of the Polish Supreme Court of 11 November 2002, I CKN 1044/00, *Legalis*; Judgement of Polish Supreme Court of 10 April 2003, III CKN 1335/00, *Legalis*; Judgement of the Polish Supreme Court of 11 August 2011, I CSK 605/10; Judgement of Appeal Court in Cracow of 19 May 2015, I ACa 120/15, *Legalis*)

<sup>78</sup> There are voices that this notion might be too radical: see, A. Wolter/J. Ignatowicz/K. Stefaniuk, *Prawo cywilne*, 1998, p. 324; it should be mentioned that “sale for try-out” which article 592 PCC provides for, should be considered as such potestative condition: See Z. Radwanski, *fn.* 72, p. 265.

<sup>79</sup> See article 94 PCC.

<sup>80</sup> B. Lackoroński in: K. Osajda, *Kodeks cywilny. Komentarz*, Warszawa 2017, p. 285.

<sup>81</sup> Several legal scholars hold different opinions: Cf. P. Machnikowski, in: E. Łętowska, *Prawo zobowiązań – część ogólna. System prawa Prywatnego*. Tom V, Warsaw 2013, p. 556.

In the relationship which is related to exchanging of personal data for services and products we might deal with some kind of mutual contract, but *de lege lata* it is impossible to enforce an obligation not to withdraw a given consent. This will mean that the obligation must rely on the other core. The controller will benefit from processing until the consent is not withdrawn. The controller being aware of the rights drawn from the PDPA and the GDPR for the data subject decides to provide services or deliver the products bearing the risk of withdrawal of a given consent. Awareness of the possibility of withdrawal of consent from the beginning is the core of this contract. This kind of contract might remain a mutual one because of the assumption that the purpose of this exchange is that the controller will receive the possibility of processing data for an undefined period of time and will benefit until the data subject withdraws his or her consent.

The scope of personal data should be determined by the controller. Also it seems that the controller should be able to demand supply of missing data or data updating. The formula “*do ut des*” is intact. However, the issue of provisions referring to effects of the non-performance of obligations being not applicable remains unresolved. It may seem that such configuration of a contract is highly unsatisfying for the controller, who incurred a cost of production of a product or providing a service. However, the benefits of data processing are huge, in particular in the digital environment; therefore the controller too may compensate this cost until the data subject withdraws his or her consent.

## 2. Distinction between periodical, single and continuous consideration

When discussing personal data supply as a consideration, recourse has to be made to the classification of considerations proposed in the Polish private law doctrine. The essential criterion classifying that division is a time factor. The effect of a single consideration could be reached by single operation, for instance, a one-off payment or delivery of the work. The time factor does not determine the size of the consideration.<sup>82</sup> In case of periodical consideration the performance consists of constantly giving a certain amount of money or other items at regular intervals.<sup>83</sup>

It seems that the most suitable type of consideration for an act of supply of personal data in the light of contractual relationship would be a continuous consideration. Among the characteristic features of a continuous consideration scholars hold that there must be some kind of constant behaviour. Furthermore, the key element of such type of considerations would be the aspect of time, specifically when the contract is concluded for an indefinite period. In the light of supply of personal data these two aspects (constant behaviour and indefinite period) relate to the fact that the data subject (the debtor) will tolerate the data processing as long as he or she will not withdraw his or her consent. Perhaps he or she would not exercise this right at all.

It is also said that continuous considerations usually occur when the act of the debtor relies on an omission.<sup>84</sup> This notion may fit to the data subject behaviour. The obligation of a data subject might rely on two omissions: 1. tolerating of the data processing; 2. continuance in the consent until he or she decides to exercise the right to withdrawal of a given consent.<sup>85</sup> As it was mentioned in chapter VIII. 1., the obligation of the data subject cannot be based on banning the possibility to withdraw a given consent. Conse-

<sup>82</sup> A. Pырzyńska/T. Dybowski, in: E. Łętowska, *Prawo zobowiązań – część ogólna*. System prawa Prywatnego, Warsaw 2013, p. 213

<sup>83</sup> *Ibid.* p. 215.

<sup>84</sup> *Ibid.* p. 216.

<sup>85</sup> See also F. Zoll, *fn.* 1, p. 183.

quently, in the light of a continuous consideration, the data subject's behaviour would rely on the two (1., 2.) aforementioned omissions.

However, this is doctrinal division (periodical, single and continuous) and is more applicable to typical obligations because it is hard to indicate clear criterion of differentiation between abovementioned types of considerations. The exact qualification of consideration including supply personal data in prism of this division might not be possible, especially considering the fact that transferring data is a new type of consideration, which does not fit into classical forms of contract law. In such situations the qualification of the consideration should be made in light of the content of the statements of will and the nature of the other party's performance.<sup>86</sup>

### 3. Right to renounce or terminate the contract

It should be noted that in some cases considerations of parties would have a different character. According to the Polish civil law doctrine, obligations in which at least one of the considerations has a continuous character should be treated as continuous obligations. Therefore, contracts in which the object of performance is personal data or precisely personal data supply, should be treated as long-term contracts.<sup>87</sup> So it seems that articles 384(1) and 365(1) PCC might apply.<sup>88</sup> According to the second mentioned article, unlimited contracts shall expire after a notice that has been given by the debtor or creditor. It seems that in situation of variant B in most of cases, the time limit of contract has not been set out. This interpretation is consistent with the view that the controller wants the contract to last as long as is possible so that he would be able to process the data as long as it is possible. Therefore, such contracts might be treated as continuous obligations, with unlimited character, so article 365(1) PCC would be applicable.<sup>89</sup>

As a general rule, the right to prospectively terminate a contract rather than to renounce the contract is more applicable to contracts including continuous or periodical obligations.<sup>90</sup> It corresponds with the legal feature of withdrawal of consent, which also has effects only for the future (*ex nunc*). The withdrawal of consent does not affect the lawfulness of processing based on consent before its withdrawal.

<sup>86</sup> A. Pырzyńska/T. Dybowski, fn. 82, p. 213.

<sup>87</sup> See also F. Zoll, fn. 1, p. 183.

<sup>88</sup> A. Pырzyńska/T. Dybowski, fn. 82, p. 221.

<sup>89</sup> Provisions of the contract aiming to exclude the applicability of this article are void due to the article's mandatory character.

<sup>90</sup> K. Pasko, *Odstąpienie od umowy z powodu naruszenia zobowiązania w wypadku umów o charakterze ciągłym*, Przegląd Sądowy 2016, p. 74–73.

## X. Final remarks

The deliberations made in chapter IX. 3. are only an attempt to match behaviour consisting of supply of personal data to contractual rules arising from the PCC. But it does not change the fact that this approach might be not sufficient to consider ‘trading’ with personal data as counter-performance. Having accepted the indisputable, unmodifiable and mandatory understanding of provisions of the PDPA and the GDPR referring to withdrawal of consent, in principle, we have to conclude that the rules referring to potestative condition and effects of non-performance of obligation or contractual penalty which the PCC provides for are not applicable. An approach according to which these rules have a mandatory nature was underlined by both Polish and foreign scholars. The aforementioned requirements (mentioned in chapter VIII. 1. in fine) in the case of both variants (A and B) cause a situation where concluding contractual relationships is highly questionable.

Therefore: 1) The right to data protection is non-tradable and non-heritable; however, it has financial aspect in the form of the possibility of collecting benefits from the toleration of data processing by other entities, subject to condition that the data subject will have permanent impact on the data processing in form of, inter alia, possibility to withdraw consent at any time. 2) It is not possible to contractually waive such right. 3) Personal data should not be considered as a price or money. 4) However, the possibility of economical exploitation of personal data should not be impugned. 5) The qualification of supply of personal data as a consideration in a mutual contract – if it is possible at all – in the light of data protection acts causes the impossibility to apply the PCC provisions referring to effects of non-performance of obligation. 6) The withdrawal of a given consent could not be qualified as breach of contract. 7) The data subject (the debtor) cannot be obliged to redress the damage resulting from the non-performance or improper performance of the obligation because of performing the right that article 7 (3) GDPR and 7 (5) PDPA provide for.<sup>91</sup> 8. Supply of a personal data as a performance made by the data subject limited in his or her capacity, *de lege lata* might be invalid.

There are no definite conclusions here, since the qualification of supply of personal data as a consideration is based on the tensions between contract law and data protection acts. Precisely, this is because European law system guarantees the undeniable option to withdraw consent. Thus, the entire view of personal data as an object of a contractual relationship is called into question. Change of perception of personal data and permission to ‘trading’ with such data, should be preceded by an adaption of contract rules that will take into account the nature of such relations, and above all, the nature of data protection acts. It seems that this would require the accurate evaluation of value of personal data and a profound analysis of ways and purposes of processing of data in potential contractual relationship. However, legal acquiescence of ‘trading’ personal data may cause grave danger for European citizens in the future which cannot be seen currently.

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<sup>91</sup> C. Langhanke/M. Schmidt-Kessel, fn. 1, p. 222; See also in case of legal nature of 7(5) PDPA provisions: J. Barta/P. Fajgielski/R. Markiewicz, fn. 2, p. 264.