

Why personal data must not become a commodity

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The data economy is often portrayed as a new market in which personal data are "the price". Whoever pays no money for a free service pays with data. Within the GDPR framework that picture is misleading. The General Data Protection Regulation does not treat personal data as freely tradeable goods that a data subject can definitively exchange for a service. EDPB Opinion 08/2024 illustrates this within its specific scope: consent-or-pay models used by large online platforms for behavioural advertising.

"Data as the price": a seductive but flawed model

Companies sometimes describe their offering as a reciprocal exchange: use our free service and pay with your attention and your data. The vocabulary is that of the market: supply, demand, exchange, value. It sounds fair. But it does not square with what the GDPR expects of consent, nor with what the EU legislature intended when Article 8 of the Charter was drafted as a self-standing fundamental right alongside Article 7 (private life) and Article 17 (property).

In earlier contributions to this knowledge base I have argued that personal data are not property under the GDPR (Bijvoets, 2026a) and that data portability concerns control, not possession (Bijvoets, 2026b). Here comes the third step: personal data cannot function as a commodity either, because the legal instruments with which the GDPR works (consent, withdrawal, free formation of the will) sit poorly with the characteristics of a market.

EDPB Opinion 08/2024: "consent or pay" as a legal problem

In April 2024 the European Data Protection Board, at the request of the Dutch, Norwegian and Hamburg supervisory authorities (under Article 64(2) GDPR), adopted an opinion on so-called "consent or pay" models used by large online platforms (EDPB, 2024a). Its conclusions pull no punches:

- 1 Where large online platforms offer only a binary choice, consenting to processing for behavioural advertising or paying a fee, the consent will in most cases fail to meet the "freely given" criterion of Article 4(11) GDPR.
- 1 The EDPB emphasises that the existence of an "equivalent alternative" for which no fee is charged can be a weighty factor in assessing whether consent is freely given.
- 1 Where the alternative is a paid one, it may, depending on the circumstances, be necessary according to the opinion to offer a further alternative without behavioural advertising, for instance with contextual advertising, for consent to qualify as freely given. The opinion stresses that this is a case-by-case assessment, not a fixed rule.

The reasoning was summarised by EDPB Chair Anu Talus: controllers should take care that the fundamental right to data protection is not transformed into a feature that individuals have to pay to enjoy (EDPB, 2024b). Although fundamental rights may have economic implications and may be limited within Article 52 of the Charter, access to protection must not in practice become dependent on payment.

A tension within EU law: data as counter-performance

On another front, EU law does acknowledge that personal data are deployed economically. Directive (EU) 2019/770 on contracts for the supply of digital content expressly addresses the situation in which a consumer pays no money but provides personal data in exchange for digital content or services. The Directive brings those situations within its scope of protection (Article 3(1)), though not without limits: cases in which the trader processes the personal data exclusively to supply the service or to comply with legal requirements fall outside it. EU law thereby recognises that personal data can play an economic role in contractual relationships, without facilitating that role without restriction.

There is thus genuine tension between the two regimes. Directive 2019/770 extends consumer protection to data-processing services. The GDPR, and within its limited context EDPB Opinion 08/2024, require the processing still to rest on an appropriate legal basis and any consent relied upon to be genuinely "freely given". Tracking and behavioural advertising may also engage the ePrivacy framework; the correct basis therefore cannot be determined apart from the technology and the specific purpose. Both regimes operate side by side: personal data can be contractually relevant, but GDPR protection continues to apply in full. Where exactly the line runs is ultimately a weighing exercise for the legislature, supervisory authorities and courts. The four reasons below make that weighing concrete.

Four legal reasons why commodification does not work

To begin with, consent can always be withdrawn (Article 7(3) GDPR). Withdrawal is not retroactive: processing lawfully based on consent before withdrawal does not become unlawful after the event. From withdrawal onwards, the controller may no longer continue on that consent. Processing may continue only if a genuinely independent legal basis exists for the further processing and all other GDPR requirements are met; consent cannot simply be relabelled after withdrawal. This continuing revocability sits uneasily with the idea of a definitive purchase price.

Consent must moreover be freely given (Article 4(11) GDPR). A binary choice, consent or stay out, can put voluntariness under pressure, especially where there is an imbalance of power or a lack of genuine alternatives. The Court of Justice touched on that question in *Meta Platforms v Bundeskartellamt*, albeit primarily in the context of competition law and its interplay with the GDPR (CJEU 4 July 2023, C-252/21, ECLI:EU:C:2023:537). EDPB Opinion 08/2024 explicitly extends the reasoning to consent-or-pay models.

The object of protection is, furthermore, the human being, not the data. Recital 4 GDPR and Article 1(2) GDPR establish that the processing of personal data must be designed "to serve mankind". A market model that turns the human being himself into the source of tradeable wares sits poorly with that, although recital 4 contains no prohibition of economic exploitation as such.

Finally, commodification touches on dignity and autonomy. Article 8 of the Charter places data protection on a par with Article 7 (private life), both rooted in human dignity (Article 1 of the Charter). The Charter's concept of dignity thereby puts pressure on a purely proprietary approach: a subject of law is hard to conceive of as merchandise.

What, then, is permitted?

The GDPR does not prohibit personal data from having economic value. Online services run largely on behavioural advertising; e-commerce requires customer data; CRM systems collect contact data. The boundary lies not at commerce, but at contracting protection away. A service provider may process personal data only where each purpose has a valid legal basis and, where relevant, the ePrivacy rules are also met. Consent will often be central to personalised behavioural advertising, but the assessment remains purpose-, technology- and context-specific. The provider may never say: you have "paid" with your data, so GDPR protection lapses. For large online platforms using binary consent-or-pay models, EDPB Opinion 08/2024 expressly rejects that idea.

The difference lies in the nature of the relationship. A commodity changes owner; thereafter the original owner has no further say. Personal data under the GDPR remain connected to the data subject; even after processing he retains the rights of access (Article 15), rectification (Article 16), erasure (Article 17) and withdrawal of consent (Article 7(3)). Unlike with a sold thing, a continuing legal relationship remains in place.

What is at risk under commodification?

The objections to a commodification model are not only doctrinal; they can also be sketched practically. The following three risks are not established law, but follow from the scheme of the GDPR framework and current practice.

The first is **lock-in**: whoever has once handed over data becomes entangled with the service provider; withdrawal becomes socially or technically unattractive. The second is **stratification of fundamental rights**: in a consent-or-pay world, citizens with money can buy what they wish to keep private, while citizens without money must pay with their data. That runs counter to the idea of fundamental rights as equal and inalienable entitlements. The third is **monetisation of inferred data**, think of "data wallets" or personal data brokers, in which data subjects are expected to trade their profiles. The Article 29 Working Party counts provided and observed data within the right to data portability, but places inferred and generated data, such as profiles and scores, outside it (WP242 rev.01; Bijvoets, 2026b). Even the most mobility-oriented GDPR right therefore does not cover profiles; a trade in profiles would accordingly find little purchase in current law.

Conclusion

The GDPR contains no property regime for personal data (Bijvoets, 2026a); it regulates processing through rights and obligations, not through transferable proprietary rights. Along the same lines, personal data are difficult to reconcile with a commodity approach: the framework remains one of fundamental rights, not of property law. EDPB Opinion 08/2024 confirms that point for large online platforms using consent-or-pay for behavioural advertising; it is not a general ruling on every paid privacy option or every commercial processing operation. Personal data are protected because the human being is protected, not because the object is valuable.

For practice this means that whoever builds personal data into his business model is not a merchant. He operates within a continuing legal relationship as controller or processor (Article 4(7) and (8) GDPR), in which the rights of data subjects remain central. That is a fundamentally different picture from the one the market metaphor suggests. And that is just as well.

References

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- 1 CJEU 4 July 2023, C-252/21, [ECLI:EU:C:2023:537](#) (Meta Platforms v Bundeskartellamt).
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- 1 [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 (General Data Protection Regulation), OJ 2016 L 119/1, in particular Article 1(2), Article 4(7), (8) and (11), Article 7(3), Articles 15-17 and recital 4.

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