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Opening up personal data protection: A conceptual controversy
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1. Introduction

The European right to the protection of personal data is becoming increasingly visible. The Charter of Fundamental Rights of the European Union (EU) (hereafter, ‘the Charter’), solemnly proclaimed in 2000 by the European Parliament, the Council and the European Commission, innovatively¹ listed among its fundamental rights and principles a provision overtly and unambiguously titled ‘(p)rotection of personal data’.² In December 2009, the Lisbon Treaty accorded the Charter legally binding force, equal to the EU Treaties. In addition, it formally incorporated into the Treaty on the Functioning of the European Union (TFEU) an explicit reference to the ‘the right to the protection of personal data’,³ followed by a mandate to the European Parliament and the Council to lay down rules on the protection of individuals with regard to the processing of personal data.⁴ In January 2012, the European Commission placed the new right at the very centre of its legislative package for the future of EU personal data protection law, announcing a move away from the traditional framing of EU data protection under the right to privacy. Similarly, the EU Court of Justice is now increasingly often alluding to the new right in its judgements.⁵

This increased visibility of the EU right to personal data protection has rendered perceptible the existence of divergent, and even conflicting, understandings of its nature – in particular, of its content. And this is occurring precisely when the determination of such content has become particularly relevant, as the now binding Charter explicitly restricts any possible limitation on the exercise of the fundamental rights it enumerates to the respect of ‘the essence of those rights’.⁶ So, what is the essence of the right to the protection of personal data?

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¹ Innovatively at the level of EU law, which had previously never recognised the existence of such a right (even if some EU Member States had previously enshrined similar or closely related rights).

² Charter, art 8.

³ Charter, art 16(1).

⁴ Charter, art 16(2).

⁵ Since its original acknowledgment in 2008 of the fact the Charter expressly proclaims the right to protection of personal data (Case C-275/06 *Promusicae* (Judgment of the Court (Grand Chamber) of 29 January 2008), para 64).

⁶ Charter, art 52(1). The notion was taken from German constitutional doctrine (Roza Pati, ‘Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective’ (2012) 23 *Berkeley Journal of International Law* 223, 270).

This contribution reviews and discusses the divergent interpretations of the nature of personal data protection. First, it introduces them as oscillating between two plausible readings of Article 8 of the Charter, which it describes as the *prohibitive* and *permissive* conceptualisations of personal data protection. Second, it traces their lineages in the history of data protection law, to underline that both are at least partially rooted in some particular national approaches. Third, it analyses existing conceptualisations in the literature. And finally, it investigates the ongoing construal of the EU fundamental right to the protection of personal data by the EU Court of Justice, comparing it with the standpoint adopted by the European Court of Human Rights, and hinting that the approach espoused by the former actually departs from the most common conceptualisations of personal data protection as a legal notion.

2. Two conceptualisations embodied in two contrasted readings

Existing understandings of the European right to the protection of personal data typically oscillate between two poles. A first approach envisages the right as representing, in substance, an overall prohibition of the processing of personal data – thus, as what could be labelled a *prohibitive* notion. A second approach conceives of the right as constituting instead, in essence, a series of rules applying to the processing of personal data, regulating and limiting such processing but not forbidding it – or as a *permissive* (or regulatory) notion. These two contrasting perspectives both correspond to possible readings of the Charter.

Article 8 of the Charter, titled ‘Protection of personal data’, establishes:

- “1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.”

For those who conceive of the right as prohibitive, it is to be regarded as being described by Article 8(1) of the Charter.⁷ In this sense, the sentence ‘(e)veryone has the right to the protection of personal data concerning him or her’ would mean that everyone is entitled to have their personal data safeguarded, sheltered, shielded. According to this view, the right’s core could be portrayed as *proscriptive*, to the extent that it basically withholds and principally prohibits the processing of personal data.

Thinking of Article 8(1) of the Charter as the right’s description indirectly leads to contemplate Articles 8(2) and 8(3) as detailing possible interferences with it: the processing of personal data then becomes permissible as a limitation to the general principle that data must remain un-processed, insofar as the conditions established in Article 8(2) and 8(3), which amount to a total of six, are respected. In other terms, personal data shall not be processed, but they can exceptionally be processed if fairly, for a specified purpose, based on consent or another legitimate basis provided by law, as long as individuals have the right to access and rectify them, and if independent supervision is in place.

⁷ In its 2012 legislative package on personal data protection, the European Commission sometimes refers to Art 8(1) of the Charter as establishing the right (see for instance: European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)’ COM(2012) 11 final 17.

In sum, from this standpoint, Article 8 of the Charter has a binary structure: whereas Article 8(1) asserts that personal data *cannot* be processed, Articles 8(2) and 8(3) provide for derogations and thus reduce the scope of this prohibition by detailing when data can be legitimately processed. This opposition can be described with the formula:

$$\text{Art. 8 Charter} = \text{Art. 8(1) Charter} - (\text{Art. 8(2) Charter} + \text{Art. 8(3) Charter})$$

This binary arrangement echoes the formal configuration of Article 8 of the European Convention on Human Rights (ECHR), which enshrines the right to respect for private life. Article 8(1) of the ECHR asserts that ‘(e)veryone has the right to respect for his private and family life, his home and his correspondence’, whereas Article 8(2) of the ECHR specifies the requirements of lawful interferences with or permissible restrictions of the right.⁸ Since 1995, EU data protection law has been formally linked to this provision. The Data Protection Directive⁹ refers to it,¹⁰ and the EU Court of Justice has repeatedly emphasised and exacerbated this connection.¹¹ For those who (still) envision personal data protection as an element of the right to respect for private life, to consider the Charter’s Article 8 as having also a binary structure appears to be consistent *more geometrico*.

In contrast, the Charter’s Article 8 can also be read not as a binary, but as a unitary provision. From this perspective, the core content of the right to the protection of personal data is precisely described by the conditions allowing for the processing of personal data. The requirements of Article 8(2) and 8(3) would not outline demands applicable to interferences with the right, but those of the very right itself, which is thus expressed and substantiated through them. This *permissive* or regulatory/enabling conception assumes that personal data in principle may and will be processed, but asserts that such processing should be fair, for a specified purpose, be always based on consent or another legitimate basis provided by law, that individuals must have the right to access the data and rectify them, and that independent supervision must be in place. In short:

$$\text{Art. 8 Charter} = \text{Art. 8(1) Charter} + \text{Art. 8(2) Charter} + \text{Art. 8(3) Charter}$$

This understanding could also be designated as *affirmative*, in the sense that it characterizes the nucleus of personal data protection by the presence of a series of features. The substantial components of the fundamental right to the protection of personal data would be the six elements mentioned in Articles 8(2) and 8(3): the principle of fair processing, the principle of purpose specification, the requirement of legitimate basis, the right of access, the right of rectification and the requirement of independent supervision. In this light, any restriction of any of these core constituents would need to comply with the requirements applicable to

⁸ ECHR, art 8(2): “*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*”.

⁹ Directive 95/46/EC of the European Parliament and 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 (Data Protection Directive) [1995] OJ L281/31.

¹⁰ Data Protection Directive, art. 1(1) (mentioning the right to privacy, which following Recital 10 is to be interpreted as referring to Art. 8 of the ECHR).

¹¹ Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk* [2003] ECR 2003 I-04989.

limitations of the EU fundamental rights, which are specified in the Charter's horizontal provisions, and concretely in Article 52.¹² In this sense:

EU right to personal data protection = Art. 8 Charter – Art. 52 Charter

Both conceptualisations, the *prohibitive* and the *permissive*, rely on the taking into account of the requirements mentioned in Articles 8(2) and 8(3) of the Charter, but differently. For the former, the right's essence is a (mere) prohibition, coupled with highly specific conditions for interferences with such prohibition. For the latter, its central component are the detailed requirements in themselves. Both understandings engage a series of substantive requirements applicable to the processing of personal data, be it as conditions for lawful limitations, or as prerequisites of respect of the right.

2. Notes for a genealogy of oscillating understandings

The described conceptualisations have intertwined lineages in the history of personal data protection law. As a matter of fact, roots of fluctuating understandings of the content of personal data protection can be traced back to the very origins of the notion. A few examples will help illustrate this.

One of the earliest manifestations of European personal data protection law in Europe was the adoption in 1970 of the *Hessische Datenschutzgesetz*, or Data Protection Act of Hesse.¹³ The Act was established by the German Land of Hesse after the setting up of automated data processing facilities.¹⁴ It was this Act that made headway for the use in German law of the word *Datenschutz* to refer to the regulation of the usage of information stored in files. The term, translated as 'data protection' in English and with similar calques in other European languages, eventually integrated international law, EU law and the national legal orders of all European countries.

The Hesse Data Protection Act defined *Datenschutz* as the obligation for records, data and the results attained by their processing to be obtained, transmitted and stored in such a way that they could not be consulted, altered, extracted or destroyed by an unauthorized person.¹⁵ The Act was based on the perceived need to establish by default the confidentiality of data.¹⁶ Even if, in practice, the reality of such confidentiality was strongly undermined by permissible exceptions,¹⁷ conceptually the Act equated nascent 'data protection' with the safeguarding of data through prohibitive measures. It did contain provisions on the rights of individuals concerned by the information stored, who were entitled notably to demand the rectification of incorrect data,¹⁸ but data processing (and the requirements applicable to it) was conceived of as the exception, not the rule. The rule was that data should not be processed.

The rights of the individuals concerned by data processing were being granted greater significance at the time in other countries, and, most notably, in the United States (US).¹⁹

¹² art 52 of the Charter is applicable also when its art 8 is taken as having a binary structure, but in that case limitations to the right to the protection of personal data appear as primarily described by art 8(2) and 8(3) of the Charter.

¹³ Hessische Datenschutzgesetz vom 7. Oktober 1970.

¹⁴ Hessian Act on data processing centres of Land and Communes, of 16 December 1969.

¹⁵ Hesse Data Protection Act, section 2.

¹⁶ Herbert Burkert, 'Privacy - Data Protection: A German/European Perspective', in *Proc. 2nd Symposium of the Max Planck Project Group on the Law of Common Goods and the Computer Science and Telecommunications Board of the National Research Council* (1999) 45.

¹⁷ *ibid.*

¹⁸ Hesse Data Protection Act, section 4.

¹⁹ Vittorio Frosini, 'La Convenzione europea sulla protezione dei dati' (1984) 24(1) *Rivista di diritto europeo* 3, 7.

There, the regulation of automated data processing was being apprehended through the notion of 'privacy', reconceptualised in terms of "control" over personal information. According to the popular and influential definition of Alan F. Westin, privacy was 'the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'.²⁰ This perception, which stressed the idea of control, supported the need for a positive, affirmative set of prerogatives to accompany any processing of data related to individuals.²¹

In this context, in the US was developed the doctrine of so-called 'fair information practices', which, as its name suggests, is concerned with the exercise of information/data processing: it stipulates what must be done when information is processed, as opposed to prescribing any necessity to refrain from processing. This doctrine was formally incorporated in US law under the 'privacy' tag in the 1974 Privacy Act.

The drafters of the Hesse Data Protection Act were already aware of such developments,²² which soon permeated all international debates in the field. In German law, nonetheless, 'data protection' continued to be envisaged as being primarily proscriptive for many years. In 1977 was enacted Germany's first Federal Data Protection Law, under the heading Law on Protection Against the Misuse of Personal Data in Data Processing, or *Bundesdatenschutzgesetz* (Federal Data Protection Act).²³ The Act's basic principle was eventually described as establishing that, in general, the processing of personal data is forbidden.²⁴ Despite (or because of) this basic principle, the Act established broad exceptions: the processing of data was to be considered legitimate when authorized by law, but also when based on the consent of the individual.²⁵

The construal of 'data protection' as devoted to the shielding of personal data was also inscribed around that time in other European legal orders. In 1978, Austria adopted a Federal Act on the Protection of Personal Data including a Section on the 'Fundamental right to data protection' with constitutional value.²⁶ Its Article 1 established that everyone shall have the right of secrecy for the personal data concerning them, especially with regard to their private and family life, insofar they have an interest deserving such protection.²⁷ Here, 'data protection' was identified with data secrecy, and entangled with the respect for private life.

In 1978, France adopted its own rules on automated data processing. The object of the *loi informatique et libertés* was not data (which might be processed, or be left unprocessed), but the processing of data. It thus assumed that such processing was to take place, and described the conditions under which it should take place. As an exception to the general rule, it asserted that it was forbidden to process some categories of data: those related to racial or ethnic origins; political, philosophical, or religious orientation; trade union affiliation of

²⁰ Alan F. Westin, *Privacy and Freedom* (first published 1967, Atheneum 1970) 7.

²¹ The construal of privacy as informational privacy based on the notion of control was also famously developed by Miller: Arthur R Miller, *The Assault on Privacy* (Mentor 1972).

²² The US were regarded as the prevailing information source by its drafters (Spiros Simitis, 'Privacy: An endless debate?' (2010) 98(6) *California Law Review* 1989, 1995).

²³ Gesetz zum Schutz vor Mißbrauch personenbezogener Daten bei der Datenverarbeitung (Law on protection against the misuse of personal data in data processing) (*Bundesdatenschutzgesetz* - BDSG) (Federal Data Protection Act) of 27 January 1977, *Bundesgesetzblatt* (BGBl) 1 201.

²⁴ As noted in Section 3, described as comprehending the ratio legis, the philosophy of the Act. (J. Lee Riccardi, 'The German Federal Data Protection Act of 1977: Protecting the Right to Privacy?' VI *Boston College International & Comparative Law Review* 243, 248).

²⁵ Jesús María Prieto Gutiérrez, 'La Directiva 95/46/CE como criterio unificador' (1998) 23-26 *Informática y derecho* (Revista Iberoamericana de Derecho Informático) 1091, 1140.

²⁶ Austrian 1978 Federal Act, section 1.

²⁷ Austrian 1978 Federal Act, art 1 of section 1.

people, or are related to health or sex life.²⁸ This provision was later to inspire the emergence of the category of specially protected ‘sensitive data’.²⁹

A major redefinition of the essence of regulations on personal data processing emerged in Germany from the judiciary. In 1983, the German Federal Constitutional Court³⁰ put forward a new legal notion named *Recht auf informationelle Selbstbestimmung*, or right to informational self-determination.³¹ Considering that individuals can be limited in their development and affected in their dignity if deprived of freedom, and arguing that they would not act freely ignoring which data about them are processed,³² the Constitutional Court construed the notion by stressing the need to take into account the rights of the individual during all processing stages.³³ It described among the right’s main elements the premise that the use of personal data must respect a strict limitation of purpose³⁴ and that uses incompatible with the original collection’s purpose are to be forbidden.³⁵ Limitations to the right were deemed possible, but only if provided by law and justified in the light of the pursuit of general interests.³⁶

All these developments were certainly not hermetically sealed. They undoubtedly influenced each other. Interactions between countries active in the regulation of data processing were a reality since the very beginning of the 1970s, and they became increasingly institutionalised by the end of the decade as different international fora started to get involved.

In 1985 entered into force Council of Europe’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, also known as Convention 108, constituting the first major international instrument on the subject with legally binding force. The Convention incorporated the ‘data protection’ terminology while redefining its meaning. It designated ‘data protection’ as corresponding to the respect of rights and fundamental freedoms, in particular the right to privacy,³⁷ and concretised it in rules profoundly indebted to the ‘fair information practices’ doctrine. Thus, it inscribed in international law, and indirectly in the national legal orders of the many countries party to the Convention, the idea that ‘data protection’ serves privacy, and contributed to the understanding of this idiom has carried a permissive dimension. In 1995, the Data Protection Directive imported into EU law, directly from Convention 108, the formula according to which ‘data protection’ serves privacy.³⁸

3. The inscription of personal data protection in the EU Charter

²⁸ Art. 8 of loi 1978.

²⁹ Denmark also adopted influential provisions on an equivalent category of data in 1978 (Jon Bing, ‘Personal data system’ - A comparative perspective on a basic concept in privacy legislation’ in Jon Bing and Knut S. Selmer (eds), *A Decade of Computers and Law* (Universitetsforlaget 1980) 79).

³⁰ In the *Volkszählungsurteil*, Urteil des BVerfG v. 15.12.1983 zum VZG 83 (BVerfGE 65, 1).

³¹ The Federal Constitutional Court founded the existence of a right to informational self-determination in Articles 2(1) and 1(1) of the Basic Law, describing it as one of its concrete manifestations (Gerrit Hornung and Christoph Schnabel, ‘Data protection in Germany I: The population census decision and the right to informational self-determination’ (2009) 25 Computer Law & Security Report 84, 86).

³² Mónica Arenas Ramiro, *El derecho fundamental a la protección de datos personales en Europa* (Tirant Lo Blanch 2006) 396.

³³ Viktor Mayer-Schönberger, ‘Generational Development of Data Protection in Europe’ in Philip E. Agre and Marc Rotenberg (eds), *Technology and Privacy: The New Landscape* (MIT Press 1997) 229.

³⁴ Arenas Ramiro (n 32) 401.

³⁵ *ibid* 402.

³⁶ *ibid* 399.

³⁷ Convention 108, art 1.

³⁸ art 1(1) of Directive 95/46/EC.

The Charter heralded two major changes in EU law: it included a provision referring not to ‘data protection’, but to ‘personal data protection’,³⁹ and it presented this right to ‘personal data protection’ as a distinct right, separate from the right to privacy.⁴⁰ Whereas Article 7 of the Charter echoed Article 8 of the ECHR by likewise establishing a right to respect for private life, the Charter’s Article 8 enshrined a new right to personal data protection. Officially, this provision was grounded in existing EU primary and secondary law (in particular, the Data Protection Directive), Article 8 of the ECHR and Convention 108. None of these sources, however, ever mentioned any right to the protection of personal data, or advanced ‘data protection’ in an autonomous fashion.

Actually, and contrary to what the official Charter’s *Explanations* might suggest, early appearances of what would later become its Article 8 had surfaced in tentative listings of EU fundamental rights connected not to privacy, but to the right to access documents. In the 1990s, for instance, the European Parliament had supported the idea of recognising a fundamental right of ‘access to information’ that would grant everyone the right to access and rectify administrative documents and ‘other data concerning them’.⁴¹ This could be used as an argument justifying the reading of Article 8 of the Charter as having among its core constituents precisely a right to access and rectification of personal data.

Another ground that seemingly warrants the construal of Article 8 of the EU Charter as indivisible is that its current wording originally appeared as a single paragraph.⁴² It was only at a final stage that the Presidium guiding the drafting process decided to divide its content into three separate paragraphs, admittedly to improve its readability.⁴³ Taking this into account, it is easier to argue that the second and third paragraphs were probably not conceived originally as elements to be opposed to the first paragraph, but merely complementing its content.

Similarly, it is generally acknowledged that the Charter’s structure is the following: firstly it enumerates rights and principles (in its first 50 articles), and secondly it, lists general provisions on its interpretation and application, which include, in Article 52, provisions on the scope and interpretation of rights and principles, and on their limitations. As evidence of this design, the Charter’s Article 7 on the right to respect from private life, which echoes Article 8 of the ECHR, reproduced only its first paragraph – whereas its second paragraph, describing lawful interferences, was regarded as subsumed in the Charter’s Article 52. Supporting this conception, early versions of the Charter’s *Explanations* explicitly pointed out that the right to

³⁹ Following a suggestion by a representative of the Swedish Government (CHARTE 4332/00, CONVENT 35, p. 447). The difference between these two notions is more perceptible in some European languages other than English, as in English ‘data protection’ is sometimes understood as an elliptical form of referring to ‘the protection of personal data’ (cf. in German, in which the Charter marked a shift from *Datenschutz* to *Schutz personenbezogener Daten*, or in Swedish, for which it represented a move from the terms commonly used to refer to the Data Protection Directive, *dataskydd*, to *Skydd av personuppgifter*).

⁴⁰ Despite discussions on the opportunity of this approach. See for instance: CHARTE 4332/00, CONVENT 35, p. 288.

⁴¹ European Parliament (1994), "Resolution on the Constitution of the European Union of 10 February 1994 (A3-0064/94)", *Official Journal of the European Communities*, C 61, p. 167. See Art. 15.

⁴² Presidency Note, *Subject: Draft Charter of Fundamental Rights of the European Union – Complete text of the Charter proposed by the Praesidium*, CHARTE 4422/00, CONVENT 45 (OR. Fr), Brussels, 28 July 2000, p. 4. By then, the English translation of the provision of the right to respect for private life had also been amended: “Article 7. Respect for private and family life: Everyone has the right to respect for his private and family life, his home and the confidentiality of his communications” (idem).

⁴³ Norbert Bernsdorff, ‘Kapitel II, Freiheiten: Artikel 6 bis 19’ in Jürgen Meyer J (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos Verlagsgesellschaft 2003) 159.

the protection of personal data could be limited under the Charter's horizontal or transversal provisions on the limitations of rights.⁴⁴

Despite these facts, it has been claimed that the Charter's Article 8 would account for an anomaly of its architecture, and that it does describe specific conditions of lawful limitations to the right through its second and third paragraphs.⁴⁵ According to this view, Articles 8(2) and 8(3) of the Charter would describe *specific* lawful limitations, as opposed to the *general* lawful limitations addressed in Article 52.

4. Theoretical (re)arrangements

In the literature, the affirmation of the very existence of a European right to the protection of personal data is still relatively rare. When its existence is recognised, it is often discussed in conjunction with privacy – be it to assert the continuities or discontinuities between them.

Before 2000, it was relatively common to declare that the right to privacy (understood here as synonymous to the right to respect for private life)⁴⁶ had evolved through the years, and had gradually come to include the protection of personal data, regarded as a sort of informational dimension of privacy, concerned with positive control on the use of information. This conceptual modernisation of privacy was directly inspired by the changing case law of the European Court of Justice of Human Rights, which has been progressively incorporating elements of data protection (as established in Convention 108) in its construal of the content of Article 8 of the ECHR. In the literature, privacy's modernisation commonly occurred at the expenses of (inescapably outdated, narrow and primarily negative) old privacy.⁴⁷ The new privacy was for instance described as offensive, which suggested that it was originally strictly defensive.⁴⁸ Only exceptionally it has been attempted to contend that contemporary privacy had to be regarded as a positive and broad notion not because it had moved in that direction, but because it has always been as such.⁴⁹

Lately it is more and more usual to depict the right to privacy and the right to the protection of personal data as separate notions,⁵⁰ the latter often regarded as a spin-off of the former, or

⁴⁴ Presidency Note, *Subject: Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4422/00 CONVENT 45, CHARTE 4423/00, CONVENT 46* (OR. Fr.), 31 July 2000. The Charter's *Explanations* have been renegotiated over the years, and were modified before the Lisbon Treaty established their hermeneutic value (Art. 6(1) of the Treaty on European Union (TEU)). In their current version, the allusion to the Charter's general provisions as relevant for determining the limitations of the right to the protection of personal data is missing (*Explanations relating to the Charter of Fundamental Rights* ", *Official Journal of the European Union*, 14.12.2007(C 303), p. 20).

⁴⁵ See, notably: Birte Siemen, *Datenschutz als europäisches Grundrecht* (Duncker & Humblot 2006) 283. Another example of this type of anomaly could be said to be found in art. 17 Charter.

⁴⁶ The use of both as synonymous in EU law was formally validated by the Data Protection Directive, which took such meaning of 'privacy' from Convention 108.

⁴⁷ See, for instance: Antonio Enrique Pérez Luño, *Derechos humanos, estado de derecho y constitución* (10a edición, Tecnos 2010) 336. This trend persists in non-European literature, where the explicit consideration of 'informational privacy' as an element of privacy is used to mark the (historical) shift of privacy from "secrecy" to "control" (Schulhofer, Stephen J. (2012), *More essential than ever: The Fourth-Amendment in the Twenty-First Century*, Oxford, Oxford University Press, p. 8).

⁴⁸ Yves Poullet, 'Pour une troisième génération de réglementation de protection des données' in María Verónica Pérez Asinari and Pablo Palazzi (eds.), *Défis du droit à la protection de la vie privée: perspectives du droit européen et nord-américain / Challenges of Privacy and Data Protection Law: Perspectives of European and North American Law* (Bruylant 2008) 37.

⁴⁹ See, in this sense: Serge Gutwirth, *Privacy and the information age* (Rowman & Littlefield Publishers 2002); Westin (n 20).

⁵⁰ See, for instance: Peter Hustinx, 'Data Protection in the European Union' (2005) P&I 62.

even, perhaps more graphically, an unwanted child.⁵¹ Constructing a picture of two distinct entities, sometimes the parentage between both is emphasised: the existence of a new right is sometimes accepted⁵² only together with the idea that this does not imply that the new right is fundamentally novel. For some scholars, the construal of the right to the protection of personal data can only be approached as profoundly indebted to a traditional conception of privacy (understood as a prohibition of interference with private life), and it carries in its genes the idea of prohibition (applied, in this case, to the processing of personal data). This understanding echoes what has been described as a prohibitive notion, and sustains the envisioning of rules detailing how data can be processed as being related to the lawful limitations to the right to the personal data protection.⁵³

Others, however, have preferred to put forward a conception of the new right as essentially divergent from privacy. An exemplar case of such a characterisation by contrast is the categorization of privacy and (personal) data protection in terms of *opacity v. transparency* tools. From this standpoint, the major attribute of privacy would be that it aims to protect individuals by saturating their opacity in front of power, drawing normative limits,⁵⁴ whereas the key feature of data protection would be that its aim is to reinforce the transparency of power's exercise by organising and regulating the ways a processing must be carried out in order to remain lawful.⁵⁵ Privacy and data protection would thus by default serve divergent rationales, even if they can be punctually coincidental.⁵⁶ Data protection as such would not aim at protecting against data processing, but only from some unlawful data processing practices.⁵⁷ This view appears to fit what has been named as a *permissive* notion, in the same way as other depictions of data protection as offering positive and dynamic protection (at variance with the negative and static protection of privacy).⁵⁸

Even when addressed from the perspective of its relation with privacy, divergent approaches of the conceptualisation of the right to the protection of personal data do, thus, surface. Each has varying effects on the conceptualisation of privacy, which as a consequence is sometimes represented as an expanding concept, or, on the contrary, as a surpassed or trumped notion. What all these standpoints share is a common concern with the necessity to locate the construal of personal data protection in the requirements applicable to the processing of personal data; these can be regarded as an element transforming privacy from the inside, as a necessary counterpoint to a right upholding that personal data shall not be processed, or as the nucleus of a right primarily concerned with such processing.

⁵¹ Marek Safjan, 'The right to privacy and personal data protection in the Information Society', in Council of Europe, *Proceedings of the European Conference on Data Protection on Council of Europe Convention 108 for the protection of individuals with regard to automatic processing of personal data: present and future, 19 November, Warsaw (2001)* 27.

⁵² With reticence. See: Peter Blume, 'Lindqvist Revisited – Issues Concerning EU Data Protection Law' in Henning Koch and others (eds), *Europe: the New Legal Realism : Essays in Honor of Hjalte Rasmussen* (DJØF Publishing 2010) 85. See also: Peter Blume, *Protection of informational privacy* (DJØF Publishing 2002).

⁵³ Blume, Peter, Lindqvist Revisited - Issues concerning EU data protection law, pp. 81-95, in *Europe : the new legal realism : essays in honor of Hjalte Rasmussen / [ed. by] Henning Koch ... [et al.]*, Copenhagen : DJØF Publishing, 2010, p. 86.

⁵⁴ De Hert, Paul and Serge Gutwirth 'Privacy, data protection and law enforcement. Opacity of the individual and transparency of power' in Claes E, Duff A. & Gutwirth S. (eds.), *Privacy and the criminal law* (Intersentia, 2009) and Serge Gutwirth, 'Biometrics between opacity and transparency' (2007) 43 *Annali dell'Istituto Superiore di Sanità* 61, 61.

⁵⁵ *ibid*, 62.

⁵⁶ *ibid*, 63.

⁵⁷ Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer 2009) 3.

⁵⁸ Stefano Rodotà, 'Data Protection as a Fundamental Right' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer 2009).

5. Fabricating personal data protection as a EU legal concept

In February 2000, Advocate-General Siegbert Alber observed that “*there would be no need for data protection if there were a general prohibition of information disclosure*”,⁵⁹ and that, as a consequence, there is a ground to argue that to subject information to data protection does not solely amount to preventing its disclosure. He was considering the interpretation of a reference to the obligation for Member States to ensure protection of the data collected in some databases, present in a EC Regulation dating from 1992. He eventually concluded that the wording of the provision at stake⁶⁰ was not sufficiently clear as to give a definite answer on its meaning.⁶¹ In the same vein, the EU Court of Justice refrained from giving any concrete orientation as to what ‘data protection’ did mean.

Since 2000, the Luxembourg-based EU Court of Justice has been increasingly confronted with the interpretation of EU data protection law and the EU fundamental right to personal data protection. Until now, however, it has never tackled directly the question of the essence of the right to personal data protection. In its case law, the EU Court of Justice has customarily connected the respect of the essence of all fundamental rights to the idea of proportionality: any interference with a right which is disproportionate (in view of the objective pursued) is to be regarded as impairing the right’s very substance.⁶² This approach regards the notion of the essence of rights as intrinsically connected to a certain conception of the principle of proportionality.⁶³

The EU Court of Justice’s case law on fundamental rights has also been traditionally marked by its habit of refer for guidance and inspiration to the ECHR, and to the case law therefore of Strasbourg’s European Court of Human Rights, which is its principal interpretative authority. The entry into force of the Lisbon Treaty has reinforced the significance of the ECHR and of the case law of the Strasbourg Court for EU law, announcing the future accession of EU to the ECHR. The Charter itself establishes notably that, insofar it contains rights corresponding to rights guaranteed by the ECHR, their meaning and scope shall be the same.⁶⁴

The case law of the European Court of Human Rights is, however, not directly applicable to the interpretation of Article 8 of the Charter, as in the ECHR there is no corresponding provision exclusively dealing with personal data protection. The Strasbourg Court has been addressing issues related to the processing of information about individuals through the lens of Article 8 of the ECHR on the right to respect for private life and, over the years, it has been incorporating elements of data protection as developed by Convention 108 into its construction of this right. Taking the wording of Article 8 of the ECHR as a starting point, it has had recourse to ideas that originated in data protection law both to broaden the scope of Article 8(1) ECHR, and to refine its assessment on the possible lawfulness of interferences as per Article 8(2) ECHR.

⁵⁹ Case C-369/98 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Trevor Robert Fisher and Penny Fisher*, Opinion of AG Alber, para 41.

⁶⁰ Council Regulation (EEC) No 3508/92 of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes [1992] OJ L 355/1, art 9. It establishes: “*The Member States shall take the measures necessary to ensure protection of the data collected*”.

⁶¹ Opinion of AG Alber (n 59), para 41.

⁶² Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] 2003 I-05659, para 9.

⁶³ cf Christoph Engel, ‘The European Charter of Fundamental Rights: A Changed Political Opportunity Structure and its Dogmatic Consequences’ (2001) 7 Eur. L. J. 151.

⁶⁴ Charter, art. 52(3).

As a result, according to the case law of the European Court of Human Rights, there *can* (in some circumstances) be an interference with the right to respect for private life whenever there is processing of any information relating to an identifiable individual.⁶⁵ But not only. There *can* also be an interference when there is an impairment of one of the ‘core principles of data protection’, such as, for instance, the requirement that data must not be stored longer than strictly necessary,⁶⁶ when restricting full access to information kept about an individual,⁶⁷ or when data is used in an unforeseen manner.⁶⁸ All these interferences, in order to be considered lawful, must comply with the general requirements contained in Article 8(2) of the ECHR: they need to be (a) in accordance with the law, (b) pursue one of the specific aims described therein; and (c) be necessary in a democratic society, a condition to be understood as including the requirement that measures need to be proportionate to the aim they pursue.⁶⁹ Therefore, it can be argued that the Strasbourg Court’s perspective corresponds to a *permissive* notion of personal data protection, in the sense that it regards it as typified by a series of substantial principles and formal rules applying to personal data processing.

The European Court of Human Rights has never ruled or implied that there might exist a human right to personal data protection as such. The EU Court of Justice’s starting point, on the contrary, is nowadays the existence of a fundamental right to the protection of personal data, as enshrined in the Charter. Their perspectives are therefore to some degree antithetical: Strasbourg’s case law has been built on the unspecific wording of Article 8 of the ECHR on the right to respect for private life, progressively augmented and strengthened by the embracing of specific ideas imported from data protection law (concretely, from Convention 108), whereas the Luxembourg Court is now confronted with the interpretation of a provision which already details precise principles of personal data protection (Article 8(2) and Article 8(3) of the Charter, the content of which partially proceeds from Convention 108). Hence, the EU Court’s insistence on referring back to Strasbourg’s case law on Article 8 of the ECHR becomes problematic, as instead of directing it towards the idiosyncrasy of personal data protection, it leads it through a complex roundabout to an indirect assimilation of data protection under the right to respect for private life, at best, and to an ill defined series of displaced criteria, most often.

In practice, what is happening is that the EU Court of Justice is seemingly construing the right to the protection of personal data as a proscriptive notion, except that it only espouses part of this approach. The Court habitually equates any processing of personal data with a limitation of the right, implying that the right’s core content is substantiated in Article 8(1) of the Charter, to be read, therefore, as proclaiming that personal data shall in principle be left unprocessed.⁷⁰ If this was so, conceptually it would be logical to refer to the requirements substantiated in Article 8(2) and 8(3) to determine the possible lawfulness of any limitation. But the EU Court of Justice tends instead to assess the lawfulness of limitations by engaging in a tortuous reading of Article 8 of the Charter in conjunction with the Charter’s Article 7 and 52(1), as well as Article 8 of the ECHR.⁷¹

⁶⁵ *Leander v Sweden* (1987) Series A no 116, para 48; *Kopp v. Switzerland* (1998) Reports 1998-II, para 53; *Amann v Switzerland* (2000) Reports 2000-II, paras 69 and 80; *Rotaru v Romania* (2000) Reports 2000-V, para 46.

⁶⁶ *S and Marper v the United Kingdom* Reports (2008), para 107.

⁶⁷ *Segerstedt-Wiberg and others v Sweden* (2006) Reports 2006-VII, paras 93 and 99.

⁶⁸ *Peck v the United Kingdom* (2003) Reports 2003-I, paras 60 and 63.

⁶⁹ *Segerstedt-Wiberg and others v Sweden* (n 67), para 102. On lawful interferences: see: *inter alia*, the *Gillow v. the United Kingdom* (1986) Series A no 109, para 55).

⁷⁰ See, for instance: Case C-543/09 *Deutsche Telekom AG v Bundesrepublik Deutschland* (Judgment of the Court (Third Chamber) of 5 May 2011), para 49.

⁷¹ An illustrative example is the judgement for Joined Cases C-92/09 and C-93/09, where the EU Court of Justice stated that ‘the limitations which may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8 of the’ ECHR (Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke and Eifert* [2010] ECR-I-0000, para 52). In her Opinion for

In this network of provisions, the EU Court has set up as its read thread the idea of proportionality. The word ‘proportionality’ is mentioned in the requirements for rights limitations of Article 52(1) of the Charter ((s)ubject to the principle of *proportionality*...⁷²), as already noted. It is not expressly referred to in Article 8(2) ECHR, but, as noted, the condition of being necessary in a democratic society includes the need for measures to be *proportionate* to the aim pursued.⁷³ It is true that proportionality is also not overtly alluded to in Article 8(2) of the Charter; nonetheless, since 2003 the Luxembourg Court has maintained that the Data Protection Directive imposed a ‘requirement of *proportionality*’⁷⁴ by establishing both that data processed ‘must be adequate, relevant and not excessive’ in relation for the purpose for which they are processed,⁷⁵ and that data can be processed when ‘necessary’ to comply with a legal obligation⁷⁶ or to perform a public interest task or in the exercise of official authority.⁷⁷ Following this line of thinking, the Court appears to consider such ‘requirement of proportionality’ subsumed under the references in Article 8(2) of the Charter to the principle of fair processing and legitimate basis.

It is highly debatable whether all these different proportionality issues can be compared, or freely amalgamated.⁷⁸ The words in the different provisions and related case law might sometimes coincide, but this does not entail that they can be regarded as having the same meaning. The nature and strictness of the applicable proportionality tests might also not be necessarily equivalent. Until now, the EU Court of Justice has mostly focused on a formal approach to proportionality, and centred in various occasions its reasoning on whether there had existed the possibility for a carrying out a balancing exercise, or whether it had been foreseen. Faced with measures entailing the systematic processing of personal data in the name of copyright enforcement, the EU Court has disputed the possible compliance with the requirement that a fair balance be struck between applicable fundamental rights.⁷⁹ On the contrary, the Court has accepted measures potentially involving the processing of personal data as lawful when national courts had been enabled to accept or refuse the processing by weighing conflicting interests at stake.⁸⁰

Be it as it may, the crucial problem here is that the EU Court of Justice appears to be too easily inclined to judge the lawfulness of limitations with the right to the protection of personal data on the basis of mere proportionality tests, in place of taking due account to the

the Cases, Advocate General Sharpston had proclaimed that she took to be synonymous the expressions ‘in accordance with the law’, ‘laid down by law’ and ‘provided by law’, to be found respectively in art 8(2) ECHR, art 8(2) and 52(1) of the Charter (Joined C-92/09 and C-93/09 *Volker and Markus Schecke and Eifert*, Opinion of AG Sharpston, para 93) (cf. with the case law of the European Court of Human Rights, stressing that the requirement of ‘in accordance with the law’ within art 8(2) goes beyond the existence of a legal basis in domestic law; see, for instance, Judgment of the Court in *Amann v Switzerland* of 16 February 2000, para 55).

⁷² Emphasis added.

⁷³ *Gillow* (n 69), para 55.

⁷⁴ *Rundfunk* (n 11), para 91 (emphasis added).

⁷⁵ Data Protection Directive, art 6(1)(c).

⁷⁶ Data Protection Directive, art 7(c).

⁷⁷ Data Protection Directive, art 7(d).

⁷⁸ In EU law, the principle of proportionality has a specific meaning: it is one of its general principles, and as such limits EU competences (together with the principle of subsidiarity (TEU, art 5(4)): It requires that acts adopted by EU institutions do not exceed the limits of what is appropriate and necessary to attain the legitimate objectives pursued.

⁷⁹ Case 70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (Judgment of the Court (Third Chamber) of 24 November 2011), para 53.

⁸⁰ The Court has argued that legislation enabling national courts seized of applications for orders to disclose personal data in the name of copyright enforcement to weight conflicting interests is to be regarded as likely, in principle, to ensure a fair balance between applicable EU fundamental rights. *Bonnier*, Case C-461/10, para 59 and 60.

substantial requirements listed in Article 8(2) and Article 8(3) of the Charter – which would be the only option fully consistent with a conceptual understanding of personal data protection as substantially *prohibitive* (and thus as enshrined in Article 8(1) of the Charter). Once it decides that personal data processing has taken place, it regards this as a limitation to the EU fundamental right to personal data protection; afterwards, instead of considering whether the processing complied with the concrete criteria of Articles 8(2) and Article 8(3), it basically merely examines whether the processing follows a weighing of interests.

With its repeated allusions to Strasbourg's case law on lawful interferences, the EU Court seems to be following it *à la lettre*, but as a matter of fact it distorts it by applying such case law to a right substantially dissimilar. And its trend to focus on the existence of a balancing act further deviates the Court from considering any possibly applicable substantive criteria.

This general approach is however (fortunately) not consistently followed by the EU Court of Justice. The Court has occasionally appeared to envisage some elements mentioned in Article 8(2) and 8(3) of the Charter as essential components of the EU fundamental right to the protection of personal data. In October 2012, it stressed that control by an independent data protection authority is a requirement derived for EU primary law.⁸¹ There is thus still room for an enhanced judicial construction of the EU right, more congruous with its historical development, be it as proscriptive or as permissive notion – and, at least, not as a flawed embodiment of the former.

6. Concluding remarks

In this contribution we have explored the conceptualisations of the right to personal data protection by focusing on existing oscillations in the understanding of this legal concept. The issue of determining what might be the essence of the right to the protection of personal seems particularly timely not only because of its increasing prominence in EU law, but also because its recognition is also being considered in other legal systems. The possibility to include a reference to such a right is notably being discussed in the context of the current review of Convention 108.⁸²

The right as currently being construed by the EU Court of Justice relies on some elements of the *proscriptive* approach, but fails to fully uphold such approach. An illusion of equivalence with the case law of the European Court of Human Rights conceals the fact that, in reality, the two Courts are addressing the issue from divergent understandings of the substantial components of the rights involved. Now that the Luxembourg Court appears to be fully ready to embrace the existence of a right to the protection of personal data, it should perhaps start to address more straightforwardly the determination of its content, and the crucial identification of the exact relation between such core content and the requirements of Articles 8(2) and 8(3) of the Charter.

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⁸¹ Case C-614/10 *European Commission v Austria*, para 36 (cf. Case C-518/07 *Commission v Germany* [2010] ECR I-1885).

⁸² Consultative Committee on the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) (2012), *Final document on the modernisation of Convention 108*, T-PD (2012)04Mos, 15 June 2012, Strasbourg, p. 9.

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