1. Two decades of Article 8 CFR: A critical exploration of the fundamental right to personal data protection in EU law

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1. INTRODUCTION

Since its enshrinement in Article 8 of the Charter of Fundamental Rights of the European Union (CFR), the right to personal data protection has given rise to intense scholarly discussion, aiming to define its nature, and role vis-à-vis the right to privacy. The European legal tradition on fundamental rights has long safeguarded a broad right to privacy, which evolved to also afford protection to individuals against unlawful processing of their personal data. Data protection was nevertheless somewhat surprisingly elevated to a distinct right within the legal order of the European Union (EU). The increased attention to the regulation of data protection was previously reflected in several national and international developments, such as the constitutionalisation of data protection amongst several EU Member States, the adoption of the Convention on the protection of individuals with regard to automatic processing of personal data by the Council of Europe (CoE), and the regulation of personal data processing by EU secondary law. These developments, nonetheless, do not fully explain the reasons why the establishment of the right to data protection in a separate provision within the CFR was deemed imperative. Two decades later, the nature and scope of the right to data protection are still elusive.

From the scholarly point of view, the enshrinement of the right to personal data protection has prompted numerous discussions, which are herein presented in a systematised manner. The first fundamental topic of debate revolves around the question to what extent the right to personal data protection compromises an independent right or should be interpreted and enforced solely or primarily in relation to the right to privacy. The degree of influence by national constitutional traditions, namely the German legal concept of informational self-determination, forms a substantial part of this debate. A second dilemma posed by academics, concerns the nature of the right to data protection as

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1. Charter of Fundamental Rights of the European Union [2016] OJ C202/01 (CFR). According to Art 8 CFR: ‘(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.’


a prohibitive or permissive right. Understanding its nature may have an impact on identifying what may constitute an interference with the right to data protection and, subsequently, on examining the permissibility of such interferences in accordance with the CFR provisions.

The institutional interpreter of the CFR, that is the Court of Justice of the European Union (CJEU), has yet to endorse a clear standpoint on the above discussions, but rather follows its own distinctive approach. More specifically, in cases that related to the processing of personal data following the adoption of the CFR, the CJEU referred only to the right to privacy and, since 2008, to the right to data protection as a right highly connected to privacy. Until today, despite legislative changes in data protection law, the growing importance of the CFR and the considerable expansion of cases and rulings relating to personal data processing, the CJEU appears to carry out a conflated analysis on interferences to the rights to privacy and to data protection.

The first level of analysis within this chapter is developed on the basis of a review of academic literature on the right to data protection and data protection law, and the examination of the CJEU jurisprudence on issues relating to Article 8 CFR. On a second level, this chapter follows a normative approach by critically examining the various conceptualisations on the basis of their promises and pitfalls, in order to put forward a novel proposition for the interpretation of the fundamental right to personal data protection. The objective of this chapter is therefore threefold. First, it aims to inform a less familiar reader on the history and evolutionary process of the right to personal data protection, highlight open questions and thus contextualise the debates, critiques and potential ways forward. Second, the chapter seeks to guide the reader through the complex landscape of interconnected and opposing scholarly views and disputable jurisprudence on the right to personal data protection. The chapter aspires to provide in this way a clear understanding of the position the right to personal data protection holds in the EU legal order in present day. Third, the chapter takes a normative stand by developing and demonstrating a novel approach to this relatively young fundamental right. The proposition is built on a growingly common appeal for the right’s independence,

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a combination of the examined aspects that seek to achieve it, and an elaboration of elements that have been underdeveloped in literary or jurisprudential discussions.

The chapter is structured as follows: Section 2 provides a historical overview of the core legislative initiatives on a national, international and supranational level in the field of personal data protection, and their interaction. Section 3 discusses the various interpretations accredited to the fundamental right to personal data protection as enshrined in the CFR. The CJEU jurisprudence on what constitutes an interference with the right and the conditions under which interferences may be justifiable are analysed in section 4. Finally, under section 5, our approach to the right to personal data protection is elaborated upon.

2. SHAPING THE RIGHT TO PERSONAL DATA PROTECTION

2.1 National Initiatives

Talks about data protection started in the late 1960s, when the identification of potential risks to privacy and autonomy born by technological developments led to the adoption of various national and eventually international instruments. The technologically augmented surveillance and, in turn, control capabilities on behalf of the public and private sectors, began to disempower the individual. As a response, several European States decided to regulate the processing of personal data. The German federal State (Land) of Hesse was the first to adopt, in 1970, a legal act on governmental records, which also established the term ‘data protection’. Soon after, Sweden was the first to introduce a Data Act on a nation-wide scale in 1973 in order to protect personal information of citizens from undue invasions by both public and private entities. National acts on data protection were thereby not exclusively focused on privacy, but often highlighted the need to safeguard interests and values, commonly left undefined or referring to human rights and interests at large, or occasionally specified as for instance personal integrity or, more scarcely, governmental interests. Numerous States went as far as recognising the fundamental right to data protection as a standalone right within their national Constitutions already in the mid-1970s. Protection of personal data on a constitu-
tional level continues to vary amongst Member States and equally promotes different values including human dignity, personality and privacy.\textsuperscript{12}

The German judicial establishment of ‘informational self-determination’ seems to be the most influential national tradition on the conceptualisations of the CFR right to personal data protection. According to the German Constitutional Court, the right to informational self-determination, based on human dignity and the right to personality, in principle guarantees the power of individuals to determine for themselves the disclosure and use of their data.\textsuperscript{13} Self-determination represents the free development of personality and inter-personal relations as well as the free participation in society. Informational self-determination adapts this concept to the digital environment. Pursuant to the German Constitutional Court, the right to informational self-determination implies a strict limitation of purposes for which processing occurs, and may be restricted by law in pursuit of general interests.\textsuperscript{14} Accordingly, the right is interfered with when personal data are processed beyond the individual’s control and such interference may only be permitted upon specific conditions.\textsuperscript{15} The weight informational self-determination carries in interpreting the right to personal data protection will be more thoroughly discussed in section 3.

\subsection*{2.2 International Sources}


\textsuperscript{12} See also Gloria González Fuster, The Emergence of Personal Data Protection as a Fundamental Right of the EU, vol 16 (Springer International Publishing 2014). Indicatively, the heterogeneity in the establishment of data protection as a standalone fundamental right may be demonstrated through the following four examples: The Portuguese Constitution was the first to provide citizens with rights to information and rectification of data concerning them and processed in State data banks, and, interestingly, with the prohibition of automated processing of data relating to ‘a person’s political convictions, religious beliefs or private life’ (Portuguese Constitution [1976], Art 35). The Spanish Constitution included a four-part provision relating to the honouring of private life and one’s own image, the inviolability of the home, the secrecy of communications and a limit to computer use (Spanish Constitution [1978], Art 180. Its interpretation due to its confusing structure and formulation remains irresolute. The Austrian fundamental right to data protection is strictly linked to the right to respect for private and family life (Austrian Federal Act of 18 October 1978). Finally, the Greek Constitution grants individuals a seemingly prohibitive right to protection of their personal data against unlawful collection, processing and use, especially by automated means. It further points to a national supervisory authority that should guarantee this protection (Greek Constitution [1986], Art 9A). See also Lynskey’s chapter on Art 8 CFR in the context of a broader research on the application of the CFR within 16 Member States Orla Lynskey, ‘Article 8: The Right to Data Protection’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020).

\textsuperscript{13} Volkszählungsurteil [1983] 65 BVerfGE 1.

\textsuperscript{14} Volkszählungsurteil [1983] 65 BVerfGE 1.

within the law, academia and jurisprudence. The right to privacy has been broadly interpreted by the European Court of Human Rights (ECtHR) in such a way so as to also encompass the protection of individuals when processing of their personal data is involved.\(^{16}\) In particular, the ECtHR recognises the processing of information relating to private life as comprising an interference with the right to privacy under Article 8 ECHR.\(^{17}\) Over the past three decades, the ECtHR has ruled on numerous cases that concern a great variety of data categories, held by law enforcement and other governmental authorities, and the impact new technologies may have on personal data protection.\(^{18}\) This body of case-law is significant, as the interpretation of the CFR must be informed by the ECHR and its judicial interpretation, and the application of CFR must grant a level of protection at least equivalent to the one afforded by the ECHR, as interpreted by the ECtHR.\(^{19}\)

In the meantime, the legislative initiatives on a national scale, in combination with the need to harmonise and promote the free flow of personal data within Europe, acted as driving forces for the adoption of Convention 108 by the CoE in 1981.\(^{20}\) It was then that ‘data protection’ was internationally recognised as a term, and directly linked to human rights on a European level.\(^{21}\) Still, data protection was often portrayed as a means to safeguard privacy and individuals’ private information in the increasingly digitised world rather than a right in its own.\(^{22}\) This aim is reflected in Convention 108, which seeks to ensure the respect of individuals’ funda-


\(^{17}\) See, e.g., landmark rulings Leander v Sweden App no 9248/81 (ECtHR, 26 March 1987); Niemietz v Germany App no 13710/88 (ECtHR, 16 December 1992); Amann v Switzerland App no 27798/95 (ECtHR, 16 February 2000).


\(^{19}\) CFR, Art 52(3) foresees that, as long as the CFR rights correspond to ECHR rights, the level of protection afforded by the latter should be considered as a minimum threshold. Therefore, the CFR right to data protection, insofar as it has been included in the interpretation of Art 8 ECHR, should at least meet that threshold, while its protection may be extended further on a CFR level.

\(^{20}\) Gloria González Fuster, The Emergence of Personal Data Protection as a Fundamental Right of the EU, vol 16 (Springer International Publishing 2014). Similarly, data protection principles on an international level had also been established by the Organisation for Economic Co-operation and Development (OECD) in 1980, which have been highly influential. The OECD Guidelines refer to privacy protection in relation to personal data and potential violations of fundamental rights at large by unlawful personal data processing. They further seek to enhance national harmonisation of privacy protection laws in order to fend off potential obstacles to free flows of personal data. The definitions and principles of the OECD Guidelines are very similarly formulated as Convention 108 and EU secondary law. OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data [1980]. Updated in 2013.

\(^{21}\) Gloria González Fuster, The Emergence of Personal Data Protection as a Fundamental Right of the EU, vol 16 (Springer International Publishing 2014).

\(^{22}\) See e.g., Paul De Hert and Serge Gutwirth, ‘Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power’ in Erik Claes, Anthony Duff and Serge Gutwirth (eds), Privacy and the Criminal Law (Intersentia 2006); Gloria González Fuster, The Emergence of Personal Data Protection as a Fundamental Right of the EU, vol 16 (Springer International Publishing 2014); Lorenzo Dalla Corte, ‘A Right to a Rule: On the Substance and Essence of the Fundamental Right to Personal Data Protection’ in Dara Hallinan and others (eds), Data Protection and Privacy: Data Protection and Democracy (Hart Publishing 2020).
mental rights, in particular the right to privacy, as regards the automated processing of their personal data. In its modernised version of 2018, the purpose remains virtually identical. Data protection within the CoE framework is presented in this way as inextricably linked to privacy. Although during the drafting of Convention 108, there was a formal recommendation to incorporate data protection in the ECHR as a separate right, it did not fall through.

2.3 European Union

2.3.1 The legal instruments

The first EU (at the time Community) legislation on data protection, the Data Protection Directive (DPD), which was initiated by the European Commission (at the time Commission of the European Communities), was adopted in 1995 and remained in force for more than 20 years. As stipulated in the DPD, its objective was to enhance the free flow of personal data and to safeguard ‘fundamental rights and freedoms of natural persons, and in particular their right to privacy in relation to the processing of personal data’. It is, indeed, to be expected that data protection in that context was prompted by the need to serve economic interests and the EU market integration. In addition, the principles and rights established in the DPD, for instance fairness, purpose limitation, accuracy and security of data, reflect considerations of inter alia autonomy, control, and democracy. Influences by the legal traditions of the ECHR and Convention 108, which couple data protection to privacy, are equally evident.

Currently, the EU reform package that repealed the DPD comprises its famous successor, the General Data Protection Regulation (GDPR), and its less famous sibling, Directive (EU)
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2016/680 (DPLED), on the processing of personal data within the context of criminal justice.\(^{32}\) The aim of the GDPR, no longer echoing the DPD, is the regulation of free movement of personal data and the ‘protection of fundamental rights and freedoms of persons, in particular their right to the protection of personal data’.\(^{33}\) Similarly, the Preambles of the most recent EU legislation on data protection now start by pointing out the establishment of personal data protection as a fundamental right under the CFR.\(^{34}\)

The political choice to elevate personal data protection as a fundamental right within the CFR was not necessarily an obvious one. The Explanations relating to the CFR (Explanations to the CFR), and its Article 8 in particular, provide little information as regards the rationale behind the introduction of a separate fundamental right on data protection for the first time on a supranational or international level.\(^{35}\) As stipulated, the sources on which the right is based include Article 286 EC, the DPD, the right to privacy under Article 8 ECHR, and Convention 108. Besides the influential international and secondary law sources previously discussed, Article 286 EC constitutes the first primary law provision ‘on the protection of individuals with regard to the processing of personal data and the free movement of such data’ by EU institutions and bodies, as included in the at the time in force EC Treaty.\(^{36}\) These references within the Explanations to the CFR relate primarily to the right to privacy, the free flow of personal data and the protection of individuals’ fundamental rights, in particular privacy, as regards the processing of their personal data. They do not provide an actual explanation as to the reasons why the establishment of the right to data protection in a separate provision within the CFR was deemed imperative.\(^{37}\) Ironically, they seem to demonstrate how data protection is strictly linked to privacy.

Certainly, substantive overlaps between privacy and data protection, insofar as they both relate to personal information of individuals, are evident, and have been abundantly docu-


\(^{33}\) GDPR, Art 1.

\(^{34}\) GDPR, Rec (1); DPLED, Rec (1); Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L295/39, Rec (1).

\(^{35}\) Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02 (Explanations to the Charter); TEU, Art 6.


\(^{37}\) According to Lynskey, credit should be given to influential data protection supporters within the expert group and Convention entrusted with drafting the CFR: Orla Lynskey, ‘Article 8: The Right to Data Protection’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020).
Nevertheless, the two rights may also be seen as different and broader than one another. The right to respect for private and family life encompasses the protection of aspects of one’s private sphere that are irrelevant with data processing, while the right to personal data protection concerns all information on an identified or identifiable individual, whether that relates to one’s private life or not. The relationship between privacy and data protection and how it has affected the position of the latter as a standalone right are further discussed under sections 3 and 4.

Beyond the bounds of the Explanations to the CFR, Dalla Corte further notes that the inclusion of data protection in the CFR was also motivated by the rapid progress of pervasive technology and processing capabilities, and the consequent growing societal importance of personal data protection. On a global scale, the constant production of and increasing reliance on personal data for the roll out of new technologies continue to act as driving forces for data protection regulation gaining momentum.

2.3.2 The hierarchical circle
In principle, the hierarchy of EU norms requires that the lower legal source (secondary law) be read in light of the higher legal source (primary law). In the case of Article 8 CFR, however, there are certain peculiarities that prompt us to question whether it may or should be interpreted in light of secondary law. As mentioned, the Explanations to the CFR set out the sources

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of the CFR rights, which may be considered as binding in the interpretation of said rights.\textsuperscript{42} In this case, a piece of secondary legislation is found amongst the sources. The enshrinement of the fundamental right to personal data protection followed the regulation of data protection in secondary law, and its articulation drew to a large extent from the DPD provisions. While discussions on how the EU data protection secondary law is affected and interpreted in light of the fundamental right to data protection have taken place,\textsuperscript{43} an analysis of the reverse is scarcer.\textsuperscript{44}

The first question concerns the potential leeway for Article 8 CFR to be interpreted in light of the DPD/GDPR provisions. Formulating a definitive answer entails a comprehensive examination of the hierarchy of norms and the interpretation of the CFR rights under EU and constitutional law.\textsuperscript{45} Jurisprudential precedent, however, has shown a certain flexibility through which the CJEU approaches the relationship between primary and secondary law.\textsuperscript{46}

In that vein, and for the purpose of this chapter, we consider the implications of an affirmative response. It is then enquired to what extent the notions between the separate elements of Article 8 CFR and EU secondary law\textsuperscript{47} mirror each other, and to what extent the conditions


\textsuperscript{43} See for instance Gloria González Fuster, ‘Curtailing a Right in Flux: Restrictions of the Right to Personal Data Protection’ in Artemi Rallo Lombarte and Rosario García Mahamut (eds), Hacia un nuevo derecho europeo de protección de datos (2015); Damian Clifford and Jef Ausloos, ‘Data Protection and the Role of Fairness’ (2018) 37 Yearbook of European Law 130.

\textsuperscript{44} See however Tzanou’s thesis for Art 8 CFR to have an autonomous content, independent from secondary legislation: Maria Tzanou, The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance (Hart Publishing 2017).

\textsuperscript{45} The political and constitutional implications of this exercise further depend on whether the effect of secondary law impedes or promotes primary law, whether the division between judiciary and legislative powers is disrupted, and whether the outcome is at odds with EU competences or national constitutional traditions. For a more in-depth exploration of the topic see Jacques Ziller, ‘Hierarchy of Norms: Hierarchy of Sources and General Principles In European Union Law’ in Ulrich Becker and others (eds), Verfassung und Verwaltung in Europa: Festschrift für Jürgen Schwarze zum 70. Geburtstag (Nomos 2014); Elise Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’ (2014) 51 Common Market Law Review 219; Phil Syrpis, ‘The Relationship Between Primary and Secondary Law in the EU’ (2015) 52 Common Market Law Review 461.

\textsuperscript{46} For example, in the Kücükdeveci ruling, the Court of Justice of the European Union (CJEU) stated that secondary law ‘gives expression’ to primary law. Case C-555/07 Seda Kücükdeveci v Swedex GmbH & Co. KG [2010] ECLI:EU:C:2010:21, para 21. The same phrasing was recently repeated in the La Quadrature du Net ruling in relation to the e-Privacy Directive and the ‘rights enshrined in Articles 7 and 8 of the Charter’. Joined Cases C-511/18, C-512/18 and C-520/18 La Quadrature du Net and Others v Premier ministre and Others [2020] ECLI:EU:C:2020:791, para 109. According to Muir, these types of legislation, wherein she includes data protection legislation, seek to reinforce fundamental rights and may potentially result in the expansion of protection beyond the strict boundaries of the CFR: Elise Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’ (2014) 51 Common Market Law Review 219. Even more so, there have been cases, such as the Laval and Rüffert rulings, where secondary law had a significant effect on or even priority over primary law. Case C-341/05 Laval [2007] EU:C:2007:809, para 81; Case C-346/06 Rüffert v. Land Niedersachsen [2008] EU:C:2008:189, para 18. See also Loïc Azoulai, ‘The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization’ (2008), 45 Common Market Law Review, Issue 5.

\textsuperscript{47} See inter alia GDPR, Arts 3–7 and 23; DPLED, Arts 4–5 and 15–16.
for permissible interferences with Article 8 CFR are informed by the conditions foreseen by secondary law for the restriction of the principles and rights established therein.

On the one hand, insofar as the notions introduced by Article 8(1) and (3) CFR are concerned, they may, by all accounts, be perceived as echoing secondary law. More specifically, the notion of personal data in Article 8(1) CFR is understood in the same fashion as the long-established definition and broad interpretation of ‘personal data’ through the aforementioned international sources and the DPD. Article 8(3) CFR points to control by independent authorities, that is the national supervisory authorities established by virtue of the GDPR and the transposition of the DPLED.

On the other hand, Article 8(2) CFR seemingly refers to the principles of fairness, lawfulness and purpose specification or limitation, as well as the data subject rights to access and to rectification. The fact that only certain principles and rights out of the ones established in EU secondary law are included in the CFR provision raises questions regarding their interpretation. It is not clear whether they are identical to or bound by the secondary law rights and principles interpretation or whether they can take an autonomous interpretation. The CJEU held in Google Spain that ‘Article 8(2) and (3) is implemented inter alia by Articles 6, 7, 12, 14 and 28 of [DPD]’.

The influence of secondary law on the principles and rights stipulated in Article 8(2) CFR is important in determining their breadth. For example, the scope of the purpose limitation and fairness principles under Article 8(2), whereby personal data must be ‘processed fairly for specified purposes’, is ambiguous. First, it is not clear whether this articulation of purpose reflects the secondary law purpose limitation principle in its entirety, entailing both purpose specification and compatible use principles, or only the purpose specification principle therein. Interpreting ‘processed fairly for specified purposes’ as also encompassing the assessment of incompatible uses (the compatible use principle), requires the consideration of an additional palladium for the determination of permissible interferences with the right to data protection. In this respect, it would seem counterintuitive should secondary law provide for a broader...
level of protection than primary law. While both views have been argued, the Court has not yet explicitly referred to this issue. Second, fairness in the context of secondary law may be understood both as fair balancing amongst the interests of the data subject and the data controller permeating the data protection legal instruments, and as an operational and procedural tool. It is similarly not (yet) clear whether fair processing in Article 8(2) CFR is meant to embody the substantive or the procedural aspect or both.

The Explanations to the CFR further point to secondary law as containing ‘conditions and limitations’ for the exercise of the right to the protection of personal data. It should be pointed out that, in the abovementioned Google Spain ruling, the CJEU does not include the respective DPD provision on restrictions to principles and rights (Article 13) amongst the provisions by which Article 8(2) and (3) CFR is implemented. Even if it did, however, through a closer examination of the equivalent GDPR and DPLED provisions that replaced the DPD, it becomes obvious that secondary law explicitly points back to primary law, the CFR, for the assessment of the foreseen restriction test, creating a sort of loop. More specifically, the successor of Article 13 DPD in the GDPR (Article 23) requires that the conditions of respecting the essence and of necessity and proportionality as established in the CFR are met. Similarly, Recital (46) DPLED calls attention to the CFR conditions for rights’ limitations (Article 52(1) CFR), with which restrictions of data subject’s rights much comply. In other words, the primary and secondary law instruments point to one another for guidance in assessing the conditions for limitations, following a rather circular approach which makes it difficult to discern the starting point of assessment.


59 Advocate General Kokott though has endorsed the interpretation that Art 8(2) enshrines the purpose limitation principle, read in light of the DPD. Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU [2008] ECR I-00271, Opinion of AG Kokott, para 53. See also discussion below under section 4.2 A confusing and conflated balancing exercise.

60 Damian Clifford and JefAusloos, ‘Data Protection and the Role of Fairness’ (2018) 37 Yearbook of European Law 130. As also noted by Bygrave, ‘at a very general level, the notion of fairness undoubtedly means that, in striving to achieve their data-processing goals, data controllers must take account of the interests and reasonable expectations of data subjects; controllers cannot ride roughshod over the latter’: Lee Bygrave, Data Protection Law: Approaching Its Rationale, Logic and Limits (Springer Netherlands 2002).

61 Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González [2014] ECLI:EU:C:2014:317.

62 CFR, Art 52(1).
The CJEU generally uses a secondary law parlance when discussing Article 8 CFR in relation to its permissible limitations and its essence, as will be examined in section 4. The approach endorsed by the CJEU on Article 8 CFR as implementable by secondary law provisions has been criticised for downgrading the fundamental right to data protection to the level of secondary law, thus limiting its content and afforded protective value. The EDPS, in the Background Paper on assessing the necessity of measures that limit the fundamental right to data protection, seemed to confirm that the right to data protection and the secondary data protection concepts may not be equated. Surprisingly, this clarification was eventually deleted in the final text.

Interpreting Article 8 CFR wholly and restrictively through the lens of secondary law appears fundamentally opposed to the prevalence of EU primary law over EU secondary law. Of course, the contextualisation of the right to data protection may not be utterly independent from secondary law, since the core notion of personal data is defined by the latter. Secondary law could help reinforce the fundamental right to personal data protection, for instance in an enriched interpretation of the principles enshrined in Article 8(2) CFR. By contrast, the fundamental right to personal data protection should not be caged by secondary law. Our proposition on the interpretation of Article 8 CFR, including in relation to the rights and principles within secondary data protection law, is further elaborated upon under section 5.

3. THE MANY CONCEPTUALISATIONS OF THE RIGHT TO DATA PROTECTION

3.1 Introduction: The Academic Bone of Contention

In lack of a clear explanation as to why the right to data protection was articulated as a fundamental right in the CFR, in divergence to the ECHR structure, it seems reasonable that a veil of confusion and controversy shrouds it. Such bewilderment is mirrored in academic discussions seeking to define the new right. Based on different conceptualisation theories relating to the purpose and role of the right to data protection, academics argue against or in favour of its distinction from the right to privacy, while its nature as a prohibitive or permissive right is similarly disputed. Ironically, the same argument, concerning for example the right’s ties to preceding notions, is often used to support divergent opinions.

More specifically, a first scholarly debate concerns the influence of the right to informational self-determination, as developed within the German legal order discussed above, on the

63 Gloria González Fuster, ‘Curtailing a Right in Flux: Restrictions of the Right to Personal Data Protection’ in Artemi Rallo Lombarte and Rosario García Mahamut (eds), Hacia un nuevo derecho europeo de protección de datos (2015).


65 See also Maria Tzanou, The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance (Hart Publishing 2017).
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CFR right to data protection. Academics dispute over the extent to which Article 8 CFR should be interpreted only, primarily, or not at all, in light of its link to informational self-determination. Informational self-determination is further used to support both the separation of the right to data protection from the right to privacy and the opposing view.

A second topic of debate in academic literature revolves around the nature of, and according limits to, the right to personal data protection. Several scholars present the right to data protection as being subject to a conceptual dilemma. They argue that there are two opposing understandings of the nature of the right to data protection, which correspond to different ways to assess permissible interferences with the right, namely the prohibitive versus permissive conceptualisations. Accordingly, the right is perceived as either prohibiting or allowing data processing, depending on its function vis-à-vis privacy and informational self-determination, and by consequence, as consisting of either Article 8(1) CFR or Article 8 CFR in its entirety. However, this dilemma is in fact representative of a false dichotomy, as the two opposing views are actually multiple entangled views based on both commonly shared and opposing arguments, as explained in more detail below.

Before delving into the various approaches promoted by different scholars, it is worth drawing the reader’s attention to a terminological equivocation. The two conceptualisations are often referred to as the positive or negative approach to the nature of the right to data protection. Some authors adopt the traditional terminological division of negative (as prohibition

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69 Paul De Hert and Serge Gutwirth, ‘Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power’ in Erik Claes, Anthony Duff and Serge Gutwirth (eds), Privacy
of interference with the right) and positive (as duty to safeguard the right), inspired by human rights law and the distinction between negative and positive obligations of the State.\textsuperscript{70} In this case, however, the division characterises the nature of the right itself, rather than the deriving implementing obligations, rendering the simultaneous presence of both negative and positive attributes impossible.\textsuperscript{71} In other words, the right to personal data protection in principle either forbids or allows data processing but it cannot do both. By contrast, other authors follow a different understanding of this dichotomy. They consider the right to personal data protection to be positive when it is prohibitive and thus representative of a freedom that grants this prerogative of prohibition, and negative when it is permissive and thus reflecting of a freedom that permits personal data processing.\textsuperscript{72} For clarity purposes, throughout this chapter we refer to the two approaches as \textit{prohibitive}, according to which data processing is in principle prohibited and the right should not be interfered with unless under specific conditions, or \textit{permissive}, according to which data processing is in principle allowed and the right is safeguarded through regulations adopted and enforced by the state.


\textsuperscript{71} On the contrary, negative and positive obligations deriving from a fundamental right, e.g., the right to privacy under Art 8 ECHR, are not mutually exclusive. Jean-François Akandji-Kombe, ‘Positive Obligations under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights’ (2007) Council of Europe Human rights handbooks, No. 7, 18. Positive obligations may actually be considered as exceptional or additional to the negative obligations: Laurens Lavrysen, \textit{Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights} (Intersentia 2016). The concern has also been raised that the distinction might be difficult to make. Additionally, it should be noted that the application of the positive obligations doctrine in the context of EU law presents several particularities, as for example the receiver of obligations deriving from CFR rights may be not only State authorities but the EU institutions as well: Malu Beijer, \textit{Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations}, vol 79 (Intersentia 2017).

3.2 Right as Prohibitive or Permissive?

This section follows a chronological order to present the aforementioned debates in a manner that allows for a clearer overview of how the academic world has reacted to the elevation of data protection into a separate fundamental right in the EU, and how this dual conceptualisation came to be.

Already before the CFR acquired binding force, De Hert and Gutwirth in 2006 discuss privacy and data protection concepts through their connecting ties with autonomy, democracy and self-determination. They perceive privacy and data protection as tools that serve opacity and transparency, and in that way enable the aforementioned values. According to De Hert and Gutwirth, while privacy is primarily a tool for opacity, data protection mainly promotes transparency. On the one hand, privacy represents predominantly opacity as a negative right that forbids the government and external actors to interfere with humans’ personal sphere; it allows individuals to develop away from the public eye. On the other hand, data protection is essentially permissive and serves transparency. The processing of personal data is in principle allowed and legal, and therefore data protection seeks to regulate the fair and transparent processing of personal data through the data quality principles. They exceptionally foresee prohibitive aspects to data protection, for instance in the case of sensitive data or further processing beyond the specified purposes. De Hert and Gutwirth also argue in favour of two distinct rights as the scope of privacy is broader than the scope of data protection and vice versa. Later on, in 2009, they further advance their claim by stating that ‘putting data protection in the privacy frame hampers the realisation of the societal benefits of data protection rights and therefore puts these rights essentially in conflict with the needs of society’.

According to Rouvroy and Poullet in their 2009 paper, the right to data protection is a derivation of informational self-determination, but may not be distinct from the right to privacy. Their view on data protection can be understood as being the face of privacy in the mirror of the digital self. In their view, as both rights consist of instruments that enable individual autonomy, self-determination and human dignity, privacy and data protection should maintain their instrumental and intertwined nature. Constituting two sides of the same coin, only together can they more efficiently serve these fundamental values. Rouvroy and Poullet rely on informational self-determination as the source of data protection in order to argue against its attaining an independent status, because it ‘risks obscuring the essential relation existing between privacy and data protection and further estrange data protection from the fundamental values of human dignity and individual autonomy, foundational to the concept of privacy in which data protection regimes have their roots’.

González Fuster and Gellert in 2012 argue that individual power and control, as the values data protection seeks to promote, can be strengthened not through a prohibitive right, which...

is represented by privacy, but through a permissive right to data protection.\footnote{Gloria González Fuster and Raphaël Gellert, ‘The Fundamental Right of Data Protection in the European Union: In Search of an Uncharted Right’ (2012) 26 International Review of Law, Computers & Technology 73; Gloria González Fuster and Serge Gutwirth, ‘Opening up Personal Data Protection: A Conceptual Controversy’ (2013) 29 Computer Law & Security Review 531.} In their words, ‘data protection can be coined as a negative freedom, that is, protecting the freedom (and autonomy) of individuals […] by channelling the behaviours of others, as they might infringe upon this [negative] freedom’. Control, they argue, flows through the data subject’s rights. In a co-authored piece from 2013, González Fuster and Gutwirth formally categorised approaches to the right to data protection into the two conceptualisations.\footnote{Gloria González Fuster and Serge Gutwirth, ‘Opening up Personal Data Protection: A Conceptual Controversy’ (2013) 29 Computer Law & Security Review 531.} Accordingly, the prohibitive approach is mainly adopted by proponents of data protection as a right heavily influenced by and strongly connected with privacy, while the permissive approach puts forward a right to data protection that is divergent from privacy by allowing and regulating processing activities through data protection principles and rights.

A year later, Lynskey adopts a teleological approach in order to argue in favour of an independent right to data protection.\footnote{Orla Lynskey, ‘Deconstructing Data Protection: The “Added Value” Of A Right To Data Protection In The EU Legal Order’ (2014) 63 International and Comparative Law Quarterly 569.} She explains how data protection relates to a range of data and data processing activities that is broader than the one traditionally covered by privacy, and should thus be distinct from it. Lynskey relies on the aim of data protection to promote informational self-determination and autonomy, in order to demonstrate how the right to data protection pursues the empowerment of individuals against informational and power asymmetries. To achieve its goals, as Lynskey suggests, data protection should be understood as a positive right. While in her analysis from 2014 she seems to endorse the permissive approach, in her most recent work on the right to personal data protection she refers to this distinction without taking a stand.\footnote{Orla Lynskey, ‘Article 8: The Right to Data Protection’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020).} On the contrary, she posits that, albeit conceptually significant, the distinction between prohibitive and permissive approaches may be inconsequential in practice.\footnote{Orla Lynskey, ‘Deconstructing Data Protection: The “Added Value” Of A Right To Data Protection In The EU Legal Order’ (2014) 63 International and Comparative Law Quarterly 569.} Besides, Lynskey considers the ‘conflated vision of the two rights as misconceived’, while in her opinion, ‘it is time to recognize the merits of a truly independent right to data protection’.

Hustinx distinguishes the right to personal data protection under Article 8 CFR from the German right to informational self-determination, essentially due to the latter’s emphasis on consent as the primary legal basis for processing.\footnote{Peter Hustinx, ‘EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation’ (2013) 24th Session on European Union Law Collected Courses of the European University Institute’s Academy of European Law 52.} Hijmans equally takes a stand against the
interpretation of data protection purely as a means of achieving informational self-determination. With references to Hustinx, he relies on the principles of fairness and purpose limitation under Article 8(2) CFR to demonstrate how data protection is a system of checks and balances which ensures that, when personal data are processed, certain rules are complied with. This academic stream interprets the wording of Article 8 CFR, secondary EU data protection law and the CJEU jurisprudence in favour of a permissive right to data protection, which differs from privacy in that it does not seek to protect against external interferences. Unlike Hustinx however, Hijmans explains that ‘the right to data protection is respected insofar as the conditions of Article 8(2) Charter are fulfilled’. In his view, since Article 8(2) provides for the conditions of personal data processing, Article 52(1) CFR is not applicable.

More recently, Tzanou criticises all aforementioned approaches defining the right to data protection for their reliance on the right to privacy and for the characterisation of the right as positive or negative (permissive or prohibitive). She believes in the independence of the right to data protection, which she conditions on three factors: the content of Article 8 CFR should be considered autonomously from secondary EU law, any balancing between the right and opposing rights or interests should be made separately from balancing exercises relating to the right to privacy and, lastly, the right to data protection should function both positively (as permissively) and negatively (as prohibitively).

As a proponent of an independent fundamental right to data protection, von Grafenstein criticises the above conceptualisations by De Hert and Gutwirth, Rouvroy and Poullet, and Tzanou for not further engaging into the discussion of the means by which the right to data protection may be implemented in order to protect fundamental values such as liberty, individual autonomy and self-determination and fundamental rights such as privacy and equality. In his view, ‘if the right to data protection shall add protection with respect to other fundamental rights, its concept of protection must be clear in comparison to the other fundamental rights’. He therefore attaches importance primarily to the relation between the right to data protection and all other fundamental rights.

Finally, Dalla Corte adopts the conceptualisation by De Hert and Gutwirth and favours the right to data protection as being permissive and a tool for transparency, and aligns with authors who focus on the right’s procedural nature. In his analysis, he points out how, before

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84 Hielke Hijmans, The European Union as Guardian of Internet Privacy, vol 31 (Springer International Publishing 2016). Similarly Kranenborg suggests that Article 52(1) CFR is a surplus to the Article 8(2) and (3) requirements: Herke Kranenborg, ‘Article 8 – Protection of Personal Data’ in Steve Peers and others (eds), The EU Charter of Fundamental Rights (Hart Publishing 2014).


87 Lorenzo Dalla Corte, ‘A Right to a Rule: On the Substance and Essence of the Fundamental Right to Personal Data Protection’ in Dara Hallinan and others (eds), Data Protection and Privacy: Data Protection and Democracy (Hart Publishing 2020) referring to De Hert and Gutwirth, Hijmans,
data protection was ‘(quasi) constitutionalised’ in the CFR, it was first regulated by secondary law, whereby processing of personal data is only exceptionally prohibited (only in the case of special categories of data\(^88\)). He therefore concludes that the most coherent construction of the right to data protection (as a distinct right) is as ‘a right to having a (set of) rule(s) regulating the processing of personal data’.

As an intermittent conclusion, it can already be noted that attempting to understand what the rationale behind the fundamental right to data protection is, what values it seeks to safeguard and the manner in which it can and should be interpreted, proves to be a very complex task. There are different debates that take place in parallel, on different levels, and sometimes reaching diverging conclusions while using the same arguments: whether data protection is derivative of (and promoting) informational self-determination or whether it is distinct from it; subsequently, whether its link with informational self-determination renders data protection bound to privacy or whether it is independent from it; whether data protection is permissive and therefore distinct from privacy, or prohibitive and therefore distinct from privacy; whether it is permissive because or regardless of its influences by informational self-determination.

One criticism voiced against the permissive approach is that it may result in a mere procedural compliance test, due to the prominent role of the principles and rights under Article 8(2) and (3) CFR which resound secondary law. In that vein, it is considered that the permissive approach puts emphasis on secondary law principles, taking the focus away from fundamental values such as autonomy and human dignity.\(^89\) However, scholars have advocated both permissive and prohibitive approaches for affording a stronger protection for individuals, by more effectively promoting informational self-determination and data protection as a distinct right.\(^90\) Informational self-determination as the underlining rationale of the right to data protection is in its turn advanced by supporters of both prohibitive and permissive approach. Informational


\(^{88}\) DPD, Art 8; GDPR, Art 9.

\(^{89}\) Damian Clifford, ‘The Legal Limits to the Monetisation of Online Emotions’ (KU Leuven, Faculty of Law 2019).

Two decades of Article 8 CFR

self-determination has also been invoked to support a right to data protection that does not enjoy an independent status but stays coupled with privacy. Finally, the independence of the right to data protection is argued for by supporters of both conceptualisations. It therefore becomes clear that following one or the other approach is not straightforward. Ultimately, this maze of interpretations, whereby the same claims are employed in support of divergent outcomes, arguably impinges on their persuasiveness.

3.3 Interferences with the Prohibitive or Permissive Right to Data Protection

Besides their theoretical value, the questions raised so far may have a decisive role in establishing when an interference with the fundamental right to personal data protection occurs, and when such interference is permissible. According to Article 52(1) CFR, a limitation on a CFR non-absolute right must be provided for by law, respect the essence of the right, and, subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the EU. Apart from the newly introduced concept of the ‘essence’ of a fundamental right in an international human rights instrument, the structure of Article 52(1) CFR bears great resemblance to the ECHR’s so called three-step test, also stipulated in Article 8(2) ECHR, which establishes the conditions for permissible limitations on the right to privacy.

Following the aforementioned analysis on the two conceptualisations, defining data protection as a prohibitive or permissive right leads to a divergent determination of what constitutes an interference with the right to data protection, and of how the conditions laid down in the CFR on its justifiable interference apply. In this respect, it is helpful to look at the formulas

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92 By contrast Lynskey posits that in practice the distinction may be inconsequential as ‘in both cases the requirements of Art 8(2) and 8(3) need to be met before processing is justified’ (see above section 3.2 Right as prohibitive or permissive?). Orla Lynskey, ‘Article 8: The Right to Data Protection’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020).

93 CFR, Art 52(1).

94 However, several authors note that the CJEU is not fully aligned with the European Court of Human Rights (ECtHR) in how they interpret and apply the three-step structure. See e.g., Xavier Groussot and Gunnar Thor Petursson, ‘The EU Charter of Fundamental Rights Five Years on: The Emergence of a New Constitutional Framework?’ in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing (Hart Publishing 2015); Takis Tridimas, ‘The Principle of Proportionality’ in Robert Schütze and Takis Tridimas (eds), Oxford Principles of European Union Law, The European Union Legal Order, Volume I (Oxford University Press 2017); Janneke Gerards, ‘The Age of Balancing Revisited?’ (2020) 6 European Data Protection Law Review 8; Maja Brkan and Šejla Imamović, ‘Article 52: Twenty-Eight Shades of Interpretation?’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020).

devised by González Fuster and Gutwirth in order to explain how the two diverging conceptualisations become applicable on the CFR provision establishing the right to data protection.96

Data protection as a prohibitive right provides for a general prohibition to the processing of personal data established in Article 8(1) CFR, while the provisions that follow under Article 8(2) and (3) CFR provide the derogations to this prohibition. In this way, the right to data protection may be depicted as:


Following the prohibitive approach, the right to data protection is interfered with from the moment personal data are processed, since by default processing is forbidden. In this case, the manner in which Article 52(1) CFR may apply is ambiguous; a previous version of the Explanations to the Charter stipulated that the right may be limited under the conditions set out in Article 52(1) CFR,98 an explanation that was later removed from the final version.99 Some authors argue that Article 52(1) CFR can be understood as providing the general requirements for the permissible interference with Article 8(1) CFR, while the provisions under Article 8(2) and (3) CFR constitute the specific requirements (lex specialis).100 Accordingly, the specific conditions set in Article 8(2) and (3) CFR take precedence and may only be complemented by Article 52(1) CFR.

On the contrary, understanding data protection as a permissive right means that there is no general prohibition to the processing of personal data. Personal data may and will be processed, insofar as a set of rules, that is fair processing, specified purpose, legal basis, rights of access and rectification and independent oversight, apply. The formula is presented as:

‘Art. 8 Charter = Art. 8(1) Charter + Art. 8(2) Charter + Art. 8(3) Charter’101

An interference with the right to data protection must in that case be assessed in relation to all the elements under Article 8 CFR, and it takes place when one of these elements is affected. Article 52(1) CFR should therefore apply vis-à-vis all the separate elements of Article 8 CFR as a whole. Pursuant to the formula by González Fuster and Gutwirth, the ‘EU right to personal data protection = Art. 8 Charter – Art. 52(1) Charter’.102 However, to assess whether an interference with the right takes place, additional steps would need to be taken beyond the initial establishment that data processing takes place, which would to an extent overlap with

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98 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 (2000).
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In other words, determining the interference itself would already necessitate the examination of its potential arbitrariness. Take for example a measure under examination that is claimed to interfere with the fairness principle under Article 8(2) CFR (as explained above in section 2.3.2). The boundaries between assessing if there is a limitation on the principle of fairness, through the existence of substantive and procedural safeguards in pursuit of a fair balancing between the conflicting interests, and examining the permissibility of the limitation on the basis of its proportionality, in the sense of balancing under Article 52(1) CFR, would be blurred. By contrast, it should be noted that according to the dissenting opinion by Hijmans and Kranenborg, Article 52(1) CFR should not be applicable whatsoever in their permissive conceptualisation. In that case, an assessment of limitations on the Article 8(2) and (3) CFR principles and rights would suffice.

To conclude, the literary discussions analysed so far fail to provide coherent guidance on the interpretation of Article 8 CFR vis-à-vis Article 52(1) CFR. The official interpreter of the CFR, that is the CJEU, has developed its own approach, which is distinct from the scholarly conceptualisations and which we will analyse in the following section.

4. THROUGH THE CJEU PRISM

In its earlier rulings on cases relating to the processing of personal data, the CJEU only referred to the right to privacy. It was in 2008 when data protection made its shy debut within the CJEU judgements, but only as a concept cuffed to privacy. When a couple of years later the CJEU examined the right to personal data protection as stipulated in the CFR, it referred to ‘the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8’ and presented Article 8(1) as comprising the right to data protection, and

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103 According to Tzanou, by contrast, such process would allow the determination ‘with accuracy [of] the actual interference of a certain type of processing with the right […] in order to be able to undertake a robust analysis of the permissibility of such interference on the basis of Article 52(1) [CFR]’. She does not however further explain how, following that approach, determining the type of interference is distinct from determining its permissibility by virtue of the proportionality principle. Moreover, Tzanou claims that perceiving processing as interference is ‘counter-intuitive because it also includes lawful processing’. This argument is not convincing either, given that examining lawfulness is part of the assessment to be performed subsequently under Art 8(2) and Art 52(1) CFR: Maria Tzanou, The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance (Hart Publishing 2017).


106 Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU [2008] ECR I-00271, para 63. See also a year later Case C-553/07 College van burgemeester en wethouders van Rotterdam v M.E.E. Rijkeboer [2009] ECR I-03889.
Article 8(2) as containing conditions for the right’s limitations.\textsuperscript{107} To an extent, this structure conforms with how major European legal instruments adopted before the CFR, i.e., the DPD and the ECHR, refer to data protection predominantly in relation to privacy.\textsuperscript{108} The ECHR tradition has strongly directed the CFR right to personal data protection towards considering it as inherently linked to privacy, and created greater confusion than clarity regarding its structure, nature and scope.

Through its increasingly richer case law until now, the CJEU continues to examine interfering measures with the rights to privacy and to data protection by referring to both rights in conjunction.\textsuperscript{109} The two rights enjoy a separate judicial assessment only as regards what constitutes an interference, and what may adversely affect their essence. When referring to Article 8 CFR, the CJEU maintains the view that an interference takes place when processing of personal data is involved, and considers Article 8(1) CFR as establishing the right to data protection and Article 8(2) and (3) CFR as setting the limitations.\textsuperscript{110} In this way, the Court


\textsuperscript{108} This approach also demonstrates a more reserved approach towards the CFR, which, although enacted in 2000, only acquired its full legal binding force in 2009. Consolidated Version of the Treaty on European Union [2016] OJ C202/01 (TEU), art 6. See also Maja Brkan, ‘The Court of Justice of the EU, Privacy and Data Protection: Judge-Made Law as a Leitmotif in Fundamental Rights Protection’ in Maja Brkan and Evangelia Psychogiopoulou (eds), Courts, Privacy and Data Protection in the Digital Environment (Edward Elgar Publishing 2017). Another reason put forth by Brkan is the lack of a common constitutional tradition on data protection amongst Member States.


\textsuperscript{110} See e.g., Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen [2010] ECR I-11063, paras 60-64; Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González [2014] ECLI:EU:C:2014:317 para 68; Joined Cases C-293/12 and C594/12 Digital Rights Ireland Ltd v Minister
arguably follows a prohibitive approach. However, its analysis on the permissibility of interferences with the right is not strictly faithful to the latter, as explained below. In addition, the CJEU’s understanding of when an interference takes place hints at a degree of influence by the German jurisprudence on informational self-determination, although the concept as such is not present in the CJEU line of reasoning. This section seeks to demonstrate in more detail this jurisprudential conceptualisation of the right to personal data protection as it is developed in the Court’s assessment of when interfering measures are justifiable.

4.1 The Essence of the Right to Personal Data Protection

Pursuant to Article 52(1) CFR, as aforementioned, the first condition for any interference with a non-absolute fundamental right protected under the CFR to be considered as justifiable, is that it respects the right’s essence. The notion of ‘essence’ derives from constitutional legal traditions and is understood to mean the core, ‘the very substance’, of a fundamental right.

There are two approaches to the definition and function of the essence, the relative and the absolute. The former looks at the essence in relative terms, in the sense that the essence may be subject to limitations in accordance to a proportionality assessment. By contrast, according to the latter, the essence is an inviolable core that, if limited, then the right ceases to exist. Therefore, according to the absolute approach, the essence may not be subject to a proportionality test. Despite its prominent presence in the CFR, the essence has been underexplored and underutilised by the CJEU, which only started paying closer attention to the concept as of 2015. On the basis of the scarce relevant CJEU jurisprudence, the textual interpretation of Article 52(1) CFR and a teleological interpretation of the notion of essence, several authors...
advocate in favour of the absolute, exclusionary approach to ‘essence’. While an overarching analysis of the nature, concept and role of the essence of fundamental rights at large goes beyond the scope of this chapter, it is obvious that the two approaches have a divergent impact on the application and interpretation of the fundamental right to data protection.

Further controversy surrounds the definition of the essence of the right to data protection itself, as the CJEU has never discussed what the essence of the right to data protection actually is; on the contrary, the Court has only explored what may not breach said essence. It is through this analysis that a multitude of understandings of the essence of the right to data protection has been inferred by academics. For instance, Clifford and Ausloos consider control to be the essence of the right to data protection, Dalla Corte identifies the essence as the collective will for a system of checks and balances regulating personal data processing, while others like Gellert challenge the idea that the essence can be defined in the first place.

According to the CJEU, the generalised retention of electronic communications metadata and Passenger Name Record (PNR) data for their subsequent transfer to law enforcement authorities (LEAs) does not adversely affect the essence of fundamental rights to data protection, insofar as certain data protection and security principles are in place. More specifically, in the Court’s words, the establishment of organisational and technical measures declaring the

116 For a more in depth analysis see e.g., the dedicated issue of German Law Journal of September 2019. (2019) Issue 6 (Interrogating the Essence of Fundamental Rights) 20 German Law Journal.
117 For an overview of the different understandings by various scholars see Porcedda in her analysis of the essence of the right to data protection: Maria Gracia Porcedda, ‘On the Boundaries - Finding the Essence of the Right to the Protection of Personal Data’ in Ronald Leenes and others (eds), Data Protection and Privacy - The Internet of Bodies, vol 11 (Hart Publishing 2019).
121 That is traffic data and location data that derive from the process of a communication’s transmission and refer to technical, temporal and spatial elements, for instance the where, when and amongst who a conversation took place in accordance with the e-Privacy Directive, Art 2(b) and (c).
122 That is data required by an airline, in order for an airplane ticket to be bought and may include the passenger’s full name, date of birth, address, as well as sensitive information, such as details of any special meal requirements, in accordance with Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132, Art 3(5).
purpose and safeguarding the security, confidentiality, integrity and lawful processing of the
personal data, suffice to respect the essence of the right to data protection.\textsuperscript{123} The CJEU has
further held that the establishment of a national independent supervisory authority consists
of an ‘essential component’ of the protection of personal data.\textsuperscript{124} It is worth pointing out that
in the La Quadrature du Net ruling delivered by the CJEU in October 2020 regarding data
retention practices interfering with the rights to privacy and to data protection, an analysis of
the essence is lacking altogether from the Court’s line of reasoning.\textsuperscript{125}

The daedal approach by the Court as well as the distinction between different types of
personal data\textsuperscript{126} as determinant criterion for the impact on the essence have been heavily crit-
icised.\textsuperscript{127} Interpreting the references to the Article 8(2) and (3) CFR notions within the CJEU
assessment of the essence has been particularly challenging. More specifically, the reference
to an independent supervisory authority as ‘essential component’ raises the question whether it
consists of a reference to secondary law or an interpretation of Article 8(3) CFR, and whether
‘essential component’ is equated with or complementary to the ‘essence’. The answers to both
questions can have an impact on how to interpret Article 8 CFR and on what constitutes its
essence. The CJEU approach further calls into question whether the essence of the right to data
protection is encapsulated in the data quality principles deriving from secondary law. If so,
then the essence remains unaffected when organisational and technical measures respective to
the Article 8(2) CFR elements are in place.

Brkan notes that, despite the confusion born by the questions above, the elements under
Article 8(2) and (3) CFR should not be considered as part of the essence of the right to data
protection.\textsuperscript{128} Otherwise, an interference to any of those elements would result in an irreparable
interference to the essence of the right, a conclusion that seems to go against the wording of

\textsuperscript{123} Joined Cases C-293/12 and C594/12 Digital Rights Ireland Ltd v Minister for Communications,
Marine and Natural Resources and Others and Kärntner Landesregierung and Others [2014] ECLI:EU:
C:2014:238, para 39–40; Joined Cases C-203/15 and C-698/15 Tele2 Sverige AB v Post och Telestyrelsen
and Secretary of State for the Home Department v Tom Watson and Others [2016] ECLI:EU:C:2016:9,
para 101; Opinion 1/15 [2017] ECLI:EU:C:2016:656, paras 133, 149; Case C-207/16 Ministerio Fiscal

\textsuperscript{124} Case C-614/10 European Commission v Republic of Austria [2012] ECLI:EU:C:2012:631, para
37; Case C-362/14 Maximillian Schrems v Data Protection Commissioner [2015] ECLI:EU:C:2015:650
para 41.

\textsuperscript{125} Joined Cases C-511/18, C-512/18 and C-520/18 La Quadrature du Net and Others v Premier

\textsuperscript{126} That is electronic communications metadata, PNR data and content data.
\textsuperscript{127} See for instance Maja Brkan, ‘The Concept of Essence of Fundamental Rights in the EU Legal

\textsuperscript{128} Porcedda translates the CJEU references to data principles into ‘essence unambiguously identi-
ﬁed by the Court’. She employs a methodology of ‘attributes’ to identify the essence of the right: the
attributes represent a limited number of characteristics of a right while the essence is found in the core
of these attributes. In her analysis, purpose limitation, for instance, is one of the many attributes. She
further submits that ‘there may be multiple essence, or core areas’. Nevertheless, it remains unclear how
attributes may be breached and when a breach of an attribute would impermissibly limit the essence of
data protection. Moreover, given the minimal role of Art 8(2) and (3) CFR in the judicial assessment
of permissible interferences with the right to data protection by the CJEU, it seems unconvincing that
these elements consist of the essence of the right to data protection: Maria Gracia Porcedda, ‘On the
Boundaries - Finding the Essence of the Right to the Protection of Personal Data’ in Ronald Leenes and
others (eds), Data Protection and Privacy - The Internet of Bodies, vol 11 (Hart Publishing 2019).
Article 52(1) CFR.\textsuperscript{129} This understanding is also adopted in this chapter, as the components of Article 8(2) and (3) CFR may have a stronger role in the legality and proportionality assessment, rather than the analysis of the essence of the right to data protection. Brkan concludes that an adverse effect on the essence of the right to data protection should be determined on a case-by-case basis, due to its largely factual nature.\textsuperscript{130}

4.2 A Confusing and Conflated Balancing Exercise

If the essence of the right is found not to be compromised, the CJEU moves on to examine the three conditions of legality, finality and proportionality pursuant to Article 52(1) CFR. Examining the presence of a legal basis and of a legitimate aim is rather straightforward, while proportionality lato sensu relates to two aspects, the relation between ends and means and the balancing. In this vein, the proportionality assessment can be subdivided into three parts, including the test of suitability, that is whether the instrument is suitable to achieve the aim, the test of necessity, that is whether there is no less restrictive alternative test, and proportionality stricto sensu, that is whether the instrument provides for a fair balance between the conflicting interests.\textsuperscript{131} Yet, the application of the proportionality principle is not unequivocal; the CJEU case law reveals a more restrictive approach that does not necessarily include the third aspect of fair balancing.\textsuperscript{132} while the theoretical and practical value of the proportionality principle

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{129} Maja Brkan, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core’ (2018) 14 European Constitutional Law Review 332.
\item\textsuperscript{130} Maja Brkan, ‘The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU’s Constitutional Reasoning’ (2019) 20 German Law Journal 864. However, Dawson, Lynskey and Muir question whether pursuant to the absolute approach, the content of the essence of the right needs to be defined altogether, as the essence is breached when the right is extinguished or abolished: Mark Dawson, Orla Lynskey and Elise Muir, ‘What Is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ (2019) 20 German Law Journal 763. Under a more nuanced approach, Tridimas points out that the distinction between essence (without distinguishing between absolute or relevant approaches) and proportionality may be difficult to make as ‘the definition of the core element entails an interpretational process which may itself incorporate an element of unacknowledged balancing’: Takis Tridimas, ‘The Principle of Proportionality’ in Robert Schütze and Takis Tridimas (eds), Oxford Principles of European Union Law, The European Union Legal Order, Volume I (Oxford University Press 2017).
\item\textsuperscript{132} According to Brkan and Imamović, it is debateable whether the proportionality principle stricto sensu can be included within the proportionality principle lato sensu as developed within the CJEU jurisprudence. They further note the equally diverse treatment of proportionality in the strict sense by Advocate Generals. In their contribution to a book on the application of the CFR within 16 Member States, they point out how the understanding of the proportionality principle also differs amongst Member States: Maja Brkan and Šejla Imamović, ‘Article 52: Twenty-Eight Shades of Interpretation?’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020). Similarly, according to Tridimas, the CJEU does not necessarily distinguish between the necessity and proportionality stricto sensu requirements, while the three elements of the proportionality assessment should be seen as a continuum rather than separately: Takis Tridimas, ‘The Principle of Proportionality’ in Robert Schütze and Takis Tridimas (eds), Oxford Principles of
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itself has been questioned. As that as it may, this chapter does not seek to engage into the copious discussions on proportionality at large; rather it examines its hitherto application by the CJEU and its theoretical potentiality, specifically in cases concerning interferences with the right to personal data protection.

As aforementioned, the CJEU more often than not assesses in a joint manner the interferences with the rights to privacy and to personal data protection instead of performing a separate analysis. For instance, its analysis commonly starts with the statement that ‘a fair balance should be sought in particular between that interest and the data subject’s fundamental rights under Articles 7 and 8 of the Charter’, followed by a common line of reasoning under the umbrella of ‘[j]ustification of the interference with the rights guaranteed by Articles 7 and 8 of the Charter’. The CJEU conflates the two rights as much as to state that ‘[s]o far as concerns the right to respect for private life, the protection of that fundamental right requires [...] that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary’. Such phrasing creates the impression that the safeguarding of the right to personal data protection is closely intertwined and interpreted predominantly in light of the right to privacy, a reading that is only in detriment to citizens’ enjoyment of two separate fundamental rights.
In the instances where the CJEU does refer to the right to data protection alone, sporadic mention is made to the separate elements within Article 8 CFR. The CJEU states that the right to data protection is conferred by Article 8(1) CFR, while the provisions under Article 8(2) and (3) CFR are scarcely invoked and only taken into account as procedural safeguards under the proportionality assessment of Article 52(1) CFR. Such approach reveals a rather restrictive understanding Article 8(2) and (3) CFR. It further implies that the Court favours a prohibitive conceptualisation of the right to data protection, where processing of personal data is forbidden unless the conditions of Article 8(2) and (3) CFR are complied with. Nevertheless, through the assessment of said compliance, the role of Article 52(1) CFR and its relation to Article 8(2) and (3) CFR is particularly unclear. Articles 8(2), 8(3) and 52(1) CFR as a whole seem to serve a sui generis proportionality test devised by the CJEU, whereby, instead of clearly examining the compliance of the processing activity with the conditions under Article 8(2) and (3) CFR, the Court basically performs a cherry-picking type of balancing exercise with minimum references to these two provisions.

In fact, each element under Article 8(2) and (3) CFR make limited and confusing appearances in the CJEU’s rulings. The Court has not yet hinted at a possible interpretation of the fairness principle. In particular, as mentioned under section 2, an elaboration of what fair processing consists of, whether it is synonymous to the secondary law principle, and how the concept of fairness may affect and shape the fundamental right to data protection has not made its way in the Court’s line of reasoning. Similarly, the CJEU has not engaged in the discussion of what is the extent of the interference with the purpose limitation principle found in Article 8(2) CFR and how this interference may be justified according to Article 52(1) CFR. In La Quadrature du Net, the CJEU clarifies that ‘any processing of data must, under Article 8(2) of the Charter, be consistent with specified purposes’, without making any reference to the compatible use...
The omission could imply that only the purpose specification principle is enshrined under Article 8(2) CFR. An elaboration on the link between purpose limitation in Article 8(2) CFR and the objective requirement under Article 52(1) CFR is equally absent. The CJEU only confirms the presence of a purpose corresponding to an objective of general interest, whilst an analysis of when the purpose limitation principle is respected, that is purpose specification, compatibility of purposes and restriction upon a proportionality assessment, is lacking. However, this approach renders the purpose limitation principle under Article 8(2) CFR in essence useless; the examination of the existence of an objective of general interest would have been performed regardless, in accordance to Article 52(1) CFR.

In cases concerning the data subject’s right of access, the CJEU does not necessarily rely on Article 8(2) CFR to substantiate its argumentation. More surprisingly, in La Quadrature du Net, the Court refers to ‘the rights [of individuals] under Articles 7 and 8 of the Charter to request access to their personal data’, as if the right of access is conferred by both the right to privacy and the right to data protection. Insofar as supervision by an independent authority under Article 8(3) CFR is concerned, it enjoys slightly more attention within the CJEU jurisprudence. Apart from comprising an ‘essential element’ as mentioned above, it also ‘intends to ensure the effectiveness and reliability of the monitoring of compliance with the [data protection] rules’. The Court has further clarified that ‘if that were not so, persons whose personal data was retained would be deprived of the right, guaranteed in Article 8(1) and (3) of the Charter’ to lodge with the national supervisory authorities a claim seeking the protection of their data.

In conclusion, returning to the issue of what is the nature of the right to personal data protection enshrined in Article 8 CFR and how to interpret its structure, the CJEU jurisprudence bears more questions than answers. Although the starting point, that an interference with the right manifests when personal data are processed, represents the right as prohibitive, any
further elaboration on how interferences may be justified is subject to a confusing analysis under both rights to privacy and to data protection, with irregular references to Article 8(2) and (3) CFR. The CJEU has missed thus far the opportunity to engage into an examination of Article 8 CFR in its entirety and independently from other fundamental rights. Discussing the justifiability of interferences under both rights simultaneously disallows the right to data protection from reaching its full potential as an independent right.152

5. A NOVEL APPROACH TO THE FUNDAMENTAL RIGHT TO PERSONAL DATA PROTECTION

5.1 Backdrop

The analysis in the previous sections leads us to the conclusion that a coherent and unequivocal interpretation of Article 8 CFR and the principles and rights therein is currently lacking within literature, jurisprudence and amongst national constitutional traditions,153 arguably allowing for an autonomous interpretation.154 The academic conceptualisations primarily rely on historical or teleological methods in order to define the structure of the right to data protection, while the CJEU appears to be equally influenced by its historical ties with the right to privacy. As demonstrated, however, this approach has provided inconsistent guidance on how to assess the right and its permissible limitations in practice. We therefore suggest to start by adopting a textual or grammatical interpretation as the first step; that is to follow the wording of the CFR and of Articles 8 and 52 therein. Textualism safeguards legal certainty and should not be contradicted by contextual or teleological interpretations; instead the context and purposes pursued should support and complement the textual and grammatical interpretation of a legal provision.155 In this way, the letter of the CFR can provide for a more solid ground and clear point of reference to start the analysis. Accordingly, Article 8 CFR should be considered independently of other rights, and Article 52(1) CFR should apply to Article 8 CFR in its

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153 According to CFR, Art 52(4), the CFR rights that result from constitutional traditions which are common to Member States should be interpreted in harmony with said traditions. As discussed under section 2.1 National initiatives, however, the fundamental right to data protection is enshrined in less than half of the EU Member States and varies in nature, scope and purposes.

154 See also Maria Tzanou, The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance (Hart Publishing 2017); Maja Brkan, ‘The Court of Justice of the EU, Privacy and Data Protection: Judge-Made Law as a Leitmotif in Fundamental Rights Protection’ in Maja Brkan and Evangelia Psychogiopoulou (eds), Courts, Privacy and Data Protection in the Digital Environment (Edward Elgar Publishing 2017); Orla Lynskey, ‘Article 8: The Right to Data Protection’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020).

totality. On a secondary level, the origins, rationales and functions of the CFR and of the right to personal data protection can complement and guide the interpretation of all sub-provisions under Article 8 CFR, and their limitation under Article 52(1) CFR. In that regard, some of the discussions within previous sections on the goals that the fundamental right to personal data protection seeks to achieve can be relied upon in order to further advance the interpretation of Article 8 CFR.

To support the textual reading of Article 8 CFR as a standalone right, we thereby also turn to the rationale of the CFR, which is to strengthen the protection of fundamental rights ‘in light of changes in society, social progress and scientific and technological developments by making those rights more visible’. Fundamental rights seek to safeguard values commonly upheld in liberal democratic societies, inter alia human dignity, liberty and autonomy. Human dignity, pursuant to the CFR Preamble, ‘constitutes the real basis of fundamental rights’. In other words, the different constitutionally enshrined fundamental rights pursue this common aim, but of course have diverse contents. Personal data protection and privacy can serve the same values but operate distinctively from one another; they do not necessarily need one another to materialise their protective function. Focusing on understanding data protection as a standalone right respects the letter of the CFR and allows it to reach its full potential by virtue of empowering individuals with control over their personal data. In that way, the right to data protection can provide a clearer visibility of fundamental rights at large and ultimately result in a strengthening of citizens’ rights and freedoms. Through a different starting point, this outcome ultimately aligns with the core claim previously put forth by authors like De Hert, Gutwirth, González Fuster, Gellert, Lynskey, Tzanou and Dalla Corte analysed under section 3.2, being the independence of the right to data protection.

Consequently, we reject approaches that understand data protection as a non-distinct right, as a right that must be strictly interpreted in light of the right to privacy, or as a right that must prove its added value in comparison to other fundamental rights in order to claim its independence, or justify its independence by invoking the highest values it seeks to safeguard, as posited by scholars within section 3.2. The argument by Rouvroy and Poullet that the separation will alienate data protection from the values it seeks to protect appears unfounded and contradictory to the concept of fundamental rights protection itself. Similarly, the suggestions by Hijmans and Kranenborg that Article 8 CFR cannot be read as being subject to the conditions of Article 52(1) CFR seem to go against the wording of the CFR.

156 Preamble CFR.
157 Preamble CFR. As Dupré notes, democracy is anchored on the values of human dignity, equality and liberty, and human rights are a means to protect these values. Catherine Dupré, ‘Dignity, Democracy, Civilisation’ (2012) 33 Liverpool Law Review 263.
158 Preamble CFR.
159 See also Gloria González Fuster, The Emergence of Personal Data Protection as a Fundamental Right of the EU, vol 16 (Springer International Publishing 2014).
In line with our textual interpretative proposition, we further suggest to detach the understanding of the right from the dualistic ‘permissive/prohibitive’ conceptualisation, which is predominant in literature. In our view, it is representative of a false dichotomy and has resulted in conflicting interpretations on the application of Article 52(1) CFR, as demonstrated in section 3.3. Taking into account that Article 52(1) CFR stipulates the exceptional circumstances under which the right to data protection may be permissibly interfered with, and must therefore apply to Article 8 CFR in its totality, the nature of the right as prohibitive or permissive bears in practice little importance. Instead of focusing on the rationales underlying data protection in order to justify and define its nature and structure, we propose to rely on previous literary discussions as guiding lens for the interpretation of the Article 8 CFR sub-elements when assessing the right’s permissible limitations. In the following section, we put forward a working proposition on how the right to personal data protection under Article 8 CFR can be interpreted as a complete and standalone right. We draw from and seek to advance some of the analysed scholarly approaches, insofar as they similarly move past the debates on the nature of the right as permissive or prohibitive, and similarly understand the right to data protection as an independent right that seeks to empower the individual. Our approach finally aims at highlighting the role that the notions, principles and rights enshrined within Article 8 CFR can have, through a comprehensive application of Article 52(1) CFR on Article 8(1), (2) and (3) CFR.

5.2 The Independent Right to Data Protection Through a Different Lens: Proposition and Testing

In this section we unfold our approach by gradually examining the conditions for permissible interferences with the right to personal data protection. We explain our proposition in general terms, and then systematically illustrate it in practice by using a real example that has been heavily scrutinised by the CJEU. More specifically, we rely on the example of data retention legal instruments, which are liable to interfere with Article 8 CFR, as they impose the obligation upon electronic communications service providers (ECSPs) to process specific types of personal data, that is to retain metadata and further provide access to said data to LEAs, for the purposes of fighting crime and safeguarding national and public security. Of

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163 See similarly Orla Lynskey, ‘Article 8: The Right to Data Protection’ in Michal Bobek and Jeremias Adams-Prassl (eds), The EU Charter of Fundamental Rights in the Member States (Hart Publishing 2020) and to a lesser degree Maria Tzanou, The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance (Hart Publishing 2017), as explained under section 3.2 Right as prohibitive or permissive?.


165 We refer to authors who argue in favor of an independent right to data protection under section 3.2 Right as prohibitive or permissive?. Therein, we focus solely on the discussions around the values underlying the right to data protection, instead of the argumentations on the right’s nature as prohibitive or permissive.

166 Metadata are traffic data and location data that derive from the process of a communication’s transmission and refer to technical, temporal and spatial elements, for instance the where, when and amongst who a conversation took place in accordance with the e-Privacy Directive, Art 2(b) and (c).
course, not all data retention instruments interfere with the right to data protection in exactly the same manner, as the permissibility of interference may depend on the types of metadata and types of crimes involved each time. Nevertheless, the CJEU has built a common line of reasoning and has derived overarching general principles in cases concerning such data retention measures adopted at the national and EU levels.167 This important body of case law has shaped our understanding of the right to data protection and its permissible interferences as discussed throughout this chapter. Therefore, the area of data retention offers a suitable example to compare amongst the approaches analysed herein and our proposition. In this way, we aspire to point out considerations emanating from Article 8 CFR that are currently missing from literature and jurisprudence but can advance the safeguarding of the fundamental right to personal data protection.

To start with, what constitutes an interference with, or limitation on (as per Art 52(1) CFR wording), the right to personal data protection should be established. We suggest — following the CJEU’s approach — to adopt the understanding that an interference with the right to personal data protection manifests as soon as the measure under investigation falls within the scope of personal data processing. The CJEU consistently states that data processing activities such as retention, access or use of data, regardless of the nature of the information contained, fall within the scope of Article 8 CFR and must therefore meet the requirements laid down therein.168 In this way, the CJEU considers a legal instrument, which regulates and imposes such data processing activities, as constituting an interference with the right to personal data protection.169 This approach is in line with the wording of Article 8(1) CFR, as well as the ECtHR tradition, whereby an interference with the right to privacy is often understood as an act that falls within the scope of the right.170 This interpretation does not ascribe any quality to


170 See e.g., in relation to Art 8 ECHR Niemietz v Germany App no 13710/88 (ECtHR, 16 December 1992), paras 27–33; Peck v the United Kingdom App no 44647/98 (ECHR, 28 April 2003 Final), paras 57–63.
the nature of the right (as prohibitive or permissive pursuant to the literature analysed under section 3), but rather requires a factual assessment of whether personal data processing is involved; an assessment that would take place in any case before all other considerations under Article 8 CFR.

Thereby, in the case of data retention legal instruments, an interference with the right to personal data protection is established insofar as the law imposes the processing of personal data, that is, in this case, the retention of metadata by the ECSPs and the subsequent provision of access to LEAs.

Once an interference has been established, the conditions of essence, finality, legality and proportionality under Article 52(1) CFR should be examined. As argued in sections 3 and 4, the application of Article 52(1) CFR and its relation with Article 8 CFR lacks clarity and cohesion within both academia and jurisprudence. Scholarly discussions are conflicted, while the CJEU often makes a confusing analysis of Articles 8 and 52(1) CFR. Accordingly, the CJEU examines the essence in procedural terms; the legality and finality only in relation to Article 8(1) CFR; and the proportionality, in terms of suitability and necessity, with irregular references to some of the elements under Article 8(2) and (3) CFR. As detailed below, we suggest that first, the non-violation of the essence should be confirmed, through an investigation of the core values the right to personal data protection seeks to serve. To that end, we also turn to some of the scholarly discussions under sections 3 and 4. Second, the existence of an objective, and its legitimacy as an objective of general interest, should be grounded; an assessment that pursuant to the wording of Article 52(1) CFR is independent from the elements within the right itself. Third, the legality and, fourth, the proportionality in the broad sense should be determined vis-à-vis all the elements within Article 8 CFR; it is within these last steps of the legality and proportionality assessment that the principles and rights under Article 8(2) and (3) CFR gain most importance.

In order to understand, first, whether there has been a violation of the essence of the right to personal data protection, we propose the following working definition on the basis of the aforementioned analyses. Pursuant to the absolute approach put forth by Brkan and others, if the essence, that is the core, of a right, is adversely affected, then the right is rendered null. Accordingly, we suggest that the essence of the right to personal data protection be defined not by reference to the elements under Article 8(2) and (3) CFR as organisational measures pursuant to the CJEU jurisprudence, but by virtue of the highest values the right seeks to

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171 Similarly, Sicurella and Scalia consider the right to data protection, as part of the ECHR interpretation of Art 8 ECHR, not a prohibitive one, and its the legal protection as relying not on prohibitions but on provisions regulating the way power is exercised. Still, they consider data processing to represent per se an interference with the right. Rosaria Sicurella and Valeria Scalia, ‘Data Mining and Profiling in the Area of Freedom, Security and Justice: State of Play and New Challenges in the Balance between Security and Fundamental Rights Protection’ (2013) 4 New Journal of European Criminal Law 409.

172 A complete and comprehensive examination of the essence of the right to personal data protection would require an analysis of its own, beyond the scope of this chapter.

serve, such as human dignity and autonomy. Commonly argued by several authors, the right to data protection serves as a means to safeguard these values as well as other fundamental rights by empowering individuals and providing them with substantial control over their personal data. Although assessing when the essence of the right is adversely affected will also depend on factual elements, it may be surmised that when an individual is rendered utterly powerless or deprived of their autonomy, the essence of the fundamental right to personal data protection is violated.

The CJEU contends that the essence of the right to data protection may not in the case of data retention be considered as adversely affected because the processing concerns metadata and not the content of the communications, upon condition that organisational and technical measures ensuring data protection principles are in place. However, this distinction, whereby metadata are considered to convene less sensitive information than content data, and the implementation of organisational and procedural safeguards, should not be the only nor most influential factors in assessing respect with the right’s essence; instead they could be considered in a complementary fashion. The overarching role and position of the individual, the degree of autonomy and quality of control may more suitably testify to the effect the interference has on the essence of the right to personal data protection. A discussion on how data retention schemes affect the citizen in an environment where security interests are prioritised is thereby much warranted.

Second, the ‘objective of general interest recognised by the Union’ should be substantiated. In that regard, assessing the significance of the objective in light of European values should be independent from the assessment of the purpose limitation principle. The former seeks to evaluate the gravitas of the values sought through the act under investigation, while the latter examines how clearly the processing purpose is articulated, as well as the extent to which

174 See also Dawson, Lynskey and Muir who suggest that following a macro-level approach, the essence may be defined taking into account the moral principles that underlie the EU human rights system as a whole: Mark Dawson, Orla Lynskey and Elise Muir, ‘What Is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ (2019) 20 German Law Journal 763.


processing activities remain faithful to the originally specified purpose or deviate within the strict boundaries of the conditions set by the purpose limitation principle.\(^\text{177}\)

In cases of data retention legal instruments, the aim pursued concerns national and public security, that belong to the general interests recognised by the Union. In contrast to the CJEU’s approach, this conclusion fulfils the condition of objective of general interest under Article 52(1) CFR but provides little information as regards respect with the purpose limitation principle under Article 8(2) CFR.

Thirdly, for an interfering measure to be ‘provided by law’, it must be grounded in the law and meet the quality of law requirement, which encompasses the accessibility, foreseeability and provision of judicial safeguards, namely effective oversight, by the interfering legal act.\(^\text{178}\) A legal act is considered accessible and foreseeable insofar as it allows individuals to know with sufficient precision the rules applicable to a given situation, the consequences of an infringement and the conditions under which the government may take actions.\(^\text{179}\) In order for the interfering measure to be provided by law and respect Article 8(2) and (3) CFR, it should clearly define the purposes and legal bases for all foreseen processing activities by the State and justify any potential further processing for incompatible purposes beyond the initial ones.\(^\text{180}\) It should further detail the substantive and procedural steps foreseen towards ensuring fair processing, enable the rights to access and rectification or explain their envisaged restriction, and demonstrate how the processing activities are subjectable to supervisory authorities.

The condition of legality requires that the data retention instrument clearly and sufficiently describes the processing activities of retention and provision of access that take place, and the manner in which the principles and rights under Article 8(2) and (3) CFR are guaranteed. As processing in this case cannot rely on consent under Article 8(2) CFR, the legal basis for the processing undertaken by the ECSPs, as well as the basis for any subsequent processing by LEAs should be elucidated. The interfering measure should lay out the specific purposes rather than merely invoking the safeguarding of security and combating of crime. Similarly,

\(^{177}\) See e.g., Article 29 Data Protection Working Party, ‘Opinion 03/2013 on purpose limitation’ (2013) WP203.


the measure should delineate the modalities regarding the exercise of the rights to access and rectification before both ECSPs and LEAs, as well as the oversight by national authorities as per Article 8(2) and (3) CFR.

Fourthly, in accordance with the principle of proportionality lato sensu, the infringing measure must be suitable and appropriate to meet the pursued objective of general interest, strictly necessary and least onerous in relation to that aim, and proportionate in the strict sense, that is achieving a fair balance. As mentioned in section 4.2, explicit reference to the latter is often omitted in the CJEU’s case law, arguably included in the necessity test considerations.\(^{181}\) It has been further claimed that the examination of less restrictive alternatives may be more challenging due to its occasionally subjective nature.\(^{182}\) The CJEU may indeed lack the expertise to assess the existence of equally suited but less onerous means to achieve the data processing purpose in each case. In an era of overwhelmingly growing automation, however, which is constantly challenging our society and norms, the CJEU should at the very least question data processing systems in relation to the core data protection principles they are meant to abide by. In that regard, we consider the rights and principles enshrined within Article 8(2) and (3) CFR as means that aid and elucidate this proportionality lato sensu assessment (and not as containing the conditions under which limitations on the right to data protection are allowed, pursuant to several authors referred to within section 3.2). In this vein, any limitation on the principles of fairness, purpose limitation and lawfulness and the rights to access and rectification should be examined for their suitability, strict necessity and fair balancing.

For the interpretation of the principles and rights under Article 8 CFR, a minimum threshold should be set by the secondary data protection law framework, as argued in section 2.3.2.\(^{183}\) In other words, on a fundamental rights level, the principles of fairness, purpose limitation and legality, the rights to access and rectification, and the requirement of independent oversight should afford at least the protection guaranteed by secondary law, while they should be able to provide for protection that extends beyond it. To that end, the aim of individuals’ empowerment as the rationale underlying the right to data protection put forth by academic accounts previously analysed, can further guide the interpretation of the rights and principles under Article 8(2) and (3) CFR subject to the proportionality test of Article 52(1) CFR. For instance, Article 8(2) CFR should be understood as encompassing the purpose limitation principle in its entirety pursuant to secondary law, and not only the purpose specification principle therein.

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\(^{183}\) GDPR, Art 5(1)(a), (b), Art 6(1), (4) and Art 15; DPLED, Art 4(1)(a), (b), (2), (3), Art 8, Art 9(1), (2) and Arts 14–15.
Fairness under Article 8(2) CFR should be also understood as a holistic consideration and assessment of substantive and procedural elements safeguarding individuals in relation to the risks posed by the processing activities.

Proportionality lato sensu sets a high threshold for the interfering measure, which should prove that any limitation on the fairness, purpose limitation and legality principles as well as the rights to access and rectification are suitable, least onerous and achieving a fair balance. The CJEU has not (yet) performed an examination of this type and order. Pursuant to our approach, the question of when is metadata retention appropriate and effective should be answered. To that end, a metadata retention measure should be accompanied by information on types of crimes and investigatory practices for which metadata retention has proved invaluable, for instance when it concerns serious crimes, regional, nationwide or cross-border cases, prevention and/or detection and/or prosecution of crime. In addition, a fair balancing imposed by both Article 52(1) and Article 8(2) CFR demands that considerations of the values behind the data protection principles and rights under Article 8(2) CFR be well taken into account. It is within this secondary level analysis that the values discussed under section 3 are better fitted to frame Article 8 CFR. Placing the right to personal data protection on the balancing scale therefore requires attention to, inter alia, informational self-determination and control underlying the right in its totality, trust, predictability and reasonable expectations of individuals, as embedded in the purpose limitation principle and informational empowerment as put forth by the right of access. Any balancing assessment should juxtapose the security gains with the impacts on society and on the individual and their position in the informational world, including the normalisation of surveillance and the implication of numerous innocent citizens. As regards the purpose limitation principle under Article 8(2) CFR in particular, apart from specifying the purposes of processing undertaken by both ECSPs and LEAs, the interfering measure should justify how the evident incompatibility of initial (collection of data for provision of services by ECSPs) and subsequent (law enforcement) purposes is justified, as


well as describe the guarantees for such repurposing to consist of a necessary and proportionate measure in relation to the latter objective. Finally, any restriction to the data subject rights for the purpose of safeguarding the investigatory integrity and interests should be limited to that specific aim and subject to control by the national supervisory authority.

6. CONCLUSIONS

This chapter sketched an overview of the history and the diverse conceptualisations in relation to the fundamental right to personal data protection. Throughout this analysis, we contended that debating on how to define the right in relation to privacy, or strictly as prohibitive or permissive, is detrimental to the right to personal data protection itself and, consequently the rights and interests of citizens at large. The examination of limitations on the right to personal data protection strictly in relation to the right to privacy, instead of an independent assessment as a standalone right, has resulted in several open questions. For instance, the relation of Article 8 CFR and the principles and rights therein with secondary data protection law remain unsettled, while a clearly delineated understanding of the right’s essence is lacking.

A forward looking approach, whereby the fundamental right to personal data protection is interpreted as an independent right, in line with, first, the wording and, second, the rationales of the CFR, is thereby brought to the fore. Our proposition aims at highlighting the potential that Article 8 CFR as a standalone right and its sub-provisions have in safeguarding the fundamental right to data protection. To illustrate our proposition, we examined Article 8 CFR through the prism of its permissible limitations under the conditions of Article 52(1) CFR. Scholarly accounts analysed throughout the chapter regarding the highest values the right to personal data protection seeks to protect were employed to complement the assessment of the right’s potential violations. We finally argue that a conceptualisation of Article 8(2) and (3) CFR, based on, but not limited to, secondary law, as fundamental components of the right to personal data protection, could provide for a higher degree of protection of citizens’ rights and freedoms. In this vein, we advocate a more substantial examination of how the principles and rights enshrined in Article 8 CFR may be interfered with pursuant to Article 52(1) CFR. It is nevertheless, for the ultimate arbiter, the CJEU, to provide answers and decide on the fate and future of the right to personal data protection.

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