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Security and the Future of Personal Data Protection in the European Union

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Introduction

The security/privacy nexus has generated much attention in the European Union (EU) during the last years. In the context of the establishment of EU's Area of Freedom, Security and Justice, the EU has promoted a broad spectrum of measures serving a wide understanding of security (ranging from crime prevention to immigration control), and characteristically entailing the massive processing of information about individuals,[1] be it through the creation of large scale EU-wide databases[2] or by facilitating information sharing among national authorities.[3] To counter the risks for individuals associated with such measures, the EU is formally relying on an elaborated system of personal data protection laws,[4] detailing concrete safeguards that substantiate the human right to respect for private life (also known as right to privacy) as established by the European Convention on Human Rights and Fundamental Freedoms (ECHR). From this standpoint, security is envisaged as a ground potentially legitimising interferences, but only under strict conditions.

The EU personal data protection framework is currently under review. In January 2012, the European Commission presented a legislative package to replace its two main instruments, and introduced in its proposals a crucial innovation in relation with their fundamental rights anchorage. The European Commission advanced indeed a construction of EU personal data protection legislation as the embodiment of the EU fundamental right to the protection of personal data, created in 2000 by the EU Charter of Fundamental Rights.[5] This initiative marks a shift away from the traditional framing of EU personal data protection law. Under the proposed framework, EU personal data protection law is envisaged as serving (primarily) not the right to privacy, but the new personal data protection right.

This contribution[6] discusses the significance of this move by examining its impact on the articulation of EU personal data protection law and security, which was until now profoundly indebted to the linkage between EU personal data protection law and the right to privacy. The article first describes the novel approach detailed in the instruments introduced by the European Commission. Second, it reviews the main uncertainties of the current status of the EU fundamental right to personal data protection, such as the vacillating views on itscore content and lawful limitations. Third, it explores the implications of placingEU personal data protection law under such (still) unstable right for the framing of personal data processing undertaken in the name of security in the EU.

1 See, notably: European Commission, *Communication from the Commission to the European Parliament and the Council: Overview of information management in the area of freedom, security and justice, COM(2010) 385 final* (2010), 20.07.2010, Brussels.

2 For instance, Eurodac (a centralized fingerprint identification system primarily concerned with requests for asylum) (Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316, 15.12.2000) or the Visa Information System (VIS) (Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS), OJ L 213, 15.6.2004).

3 For instance, with the Prüm Decision, which provides for exchange of DNA profiles,

fingerprint data and vehicle registration for investigating criminal offences, preventing criminal offences, and maintaining public security (Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008; Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210, 6.8.2008).

4 See, notably: F. Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice*, Springer, Berlin-Heidelberg, 2012.

5 Charter of Fundamental Rights of the European Union, *Official Journal (OJ) of the European Communities (EC)*, C 364, 18.12.2000, pp. 1-22.

6 This article has been prepared in the context of research undertaken for the Privacy and Security Mirrors (PRISMS) research project, co-funded by the European Commission. More information: http://prismsproject.eu/.

Rearranging EU data protection law

The legislative package published in January 2012 consists of two legislative proposals, accompanied by a Communication.[7] The first one is a proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[8] Such proposed Regulationwas designed to replace the existing centrepiece of EU personal data protection law, Directive 95/46/EC.[9] It is thus expected to constitute the generally applicable EU personal data protection instrument.[10] The second is a proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data,[11] and is intended to replace Framework Decision 2008/977/JHA.[12]

Traditionally, EU personal data protection legal instruments have been explicitly linked to the right to respect for private life as established by Article 8 of the ECHR — designated in EU law as the right to privacy.[13] This was primarily due to their historical indebtedness to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (generally known as Convention 108), adopted in 1981 by the Council of Europe as a specific development of the right to respect for private life with regard to the automatic processing of personal data.

In 1995, embracing Convention 108's very words, Directive 95/46/EC highlighted as one of its core objectives to ensure that Member States "protect the fundamental rights and freedoms of natural persons and in particular their right to privacy[14] with respect to the processing of personal data".[15] Similarly, Framework Decision 2008/977/JHA described its purpose as 'to ensure a high level of protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy,[16] (…) while guaranteeing a high level of public safety'. The European Court of Human Rights has equally been grating protection in this field by

7 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century*, COM(2012) 9 final, Brussels, 25.1.2012.

8 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, COM(2012) 11 final, Brussels 25.1.2012.

9 Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ EC,* L 281, 23.11.1995, pp. 31-50.

10 It should also bring an amendment to Directive 2002/58/EC (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *OJ EC*, L 201, 31.7.2002, pp. 37-47).

11 European Commission, *Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data*, COM(2012) 10 final, 25.1.2012, Brussels.

12 Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ *EU*, L 350, 30.12.2008, p. 60–71.

13 Art. 8(1) of the ECHR establishes: '*Everyone has the right to respect for his private and family life, his home and his correspondence'*.

14 Emphasis added.

15 Article 1 of Directive 95/46/EC.

16 Emphasis added.

expanding and perfecting its case law on the right to respect for private life ex Article 8 of the ECHR.[17]

The influence of the right to respect for private life for the shaping of EU personal data protection law was substantial. It served as the basic reference for the construction and interpretation of its exemptions and derogations. These provisions were indeed directly inspired by the content of Article 8 of the ECHR, and more concretely its second paragraph,[18] as well as the extensive case law of the European Court of Human Rights thereof, which supports a generous interpretation of the scope of 'private life'[19] and spells out the strict conditions for any interference with the right to respect for private life as described in Article 8(1) of the ECHR to be considered legitimate. For instance, the interests ofnational security can be regarded as a legitimate purpose to justify interferences with the right, if the interference is in accordance with law and if it can be regarded as necessary in a democratic society in pursuit of such interests. These requirements have already been further developed for their concrete application in cases involving the processing of data about individuals.[20]

The strong influence of Article 8(2) of the ECHR in EU personal data protection law is notably perceptible in Article 13(1) of Directive 95/46/EC, which lists a series of purposes (including national security,[21] defence,[22] and public security)[23] that can justify legitimate restrictions to other provisions of theDirective when constituting measures necessary for the achievement of the purpose. The need to read this provision in the light of the case law of the European Court of Human Rights on Article 8(2) of the ECHR was eventually stressed by the EU Court of Justice.[24]

Placing the future instruments under the right to personal data protection

The European Commission has decided to change the fundamental rightsanchorage of EU data protection law. Presumably, its main aim has been tostrongly connect the proposed instruments to a new legal basis allowing for theEU to legislate on the protection of personal data, introduced by the LisbonTreaty[25] in December 2009. This legal basis is Article 16 of the Treaty on theFunctioning of the European Union (TFEU), establishing that everyone has theright to the protection of personal data concerning them, and providing for theadoption of rules on the protection of individuals with regard to the processing ofpersonal of personal

17 See, notably: European Court of Human Rights, *Amann v. Switzerland* [GC], no. 27798/95, 65, ECHR 2000-II, and *Rotaru v. Romania* [GC], no. 28341/95, § 43, ECHR 2000.

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

19 G. Nardell QC, 'Levelling up: Data Privacy and the European Court of Human Rights' in S. Gutwirth, Y. Poullet and P. De Hert(eds), *Data Protection in a Profiled World*, Springer, Dordrecht, 2010, p. 46.

20 See Nardell, op. cit.

21 Art. 13(1)(a) of Directive 95/46/EC.

22 Ibid., Art. 13(1)(b).

23 Ibid., Art. 13(1)(c).

24 See, in particular: Judgment of the Court of 20 May 2003, Joined cases C-465/00, C-138/01 and C-139/01, *Rechnungshof (C-465/00) v Österreichischer Rundfunk and Others and Christa Neukomm (C-138/01) and Joseph Lauermann (C-139/01) v Österreichischer Rundfunk*, 2003 I-04989, § 91. See also: R. de Lange, 'The European public order, constitutional principles and fundamental rights', in *Erasmus Law Review,* 2009, vol. 1, no. 1, pp. 3-24 [p. 14].

25 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, *OJ EU*, C 306, 17.12.2007, pp. 1-271.

data, and rules relating the free movement of such data. TheLisbon Treaty also gave legally binding force to the 2000 EU Charter of Fundamental Rights (although in a slightly modified form),[26] which devotes a full provision, Article 8, to the right to the protection of personal data.

The proposed instruments, which have been based on Article 16(2) of the TFEU, pivot thus around this new right. Article 1(2) of the proposed Regulation asserts: 'This Regulation protects the fundamental rights and freedoms of naturalpersons, and in particular their right to the protection of personal data".[27][28] Article 1 of the proposed Directive defines its object as "protecting the fundamental rights and freedoms of natural persons and in particular their right tothe protection of personal data'.[29][30] The idea of EU personal data protection law serving, among all rights and freedoms, the right to privacy, has therefore been replaced with the assertion that it develops first and foremost the right to the protection of personal data.

The pertinence of alluding to the right to the protection of personal data in post-Lisbon EU personal data protection instruments is in any case hardly debatable, taking into account its presence both in the Charter and the Treaties. What is nevertheless questionable is the suitability of referring to such right not in addition to the right to respect for private life, but in place of it. In contrast, the organs of the Council of Europe that are currently discussing the upcoming modernisation of Convention 108[31] are also considering the possible mention, in the revised instrument, of the right to the protection of personal data, but they arecontemplating it as a supplement to references to Article 8 of the ECHR, and not as an alternative to them.[32]

Delete privacy

The displacement of privacy by personal data protection in the proposed legislative package has taken place at various levels. Besides being removed from the initial major objectives, the word 'privacy' has also been extracted from other provisions, summing up an almost complete expunction of all references. As an example, the notion previously widely known as privacy by design has been transformed into data protection by design, and privacy impact assessmentshave now emerged as data protection assessments.[33] And there is no allusion anymore to Convention 108 (which does refer to privacy in its text), much to thedismay of EU data protection authorities.[34]

This obliteration of privacy might have been a last-minute decision of the European Commission, as the word was present in the heading of its Communication presenting the general lines of the legislative package, titled

26 Charter of Fundamental Rights of the European Union, *OJ EU,* C 83, 30.3.2010, pp. 389-403.

27 Emphasis added.

28 COM(2012) 11 final, p. 40.

29 Emphasis added.

30 As well as ensuring that the exchange of personal data by competent authorities in the EU is not restricted for reasons connected with the protection of individuals with regard to the processing of personal data (COM (2012) 10 final, p. 26).

31 Work is ongoing since 2009. See: Consultative Committee on the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD), *Final document on the modernisation of Convention 108*, T-PD (2012)04Mos, 15 June 2012, Strasbourg, p. 4.

32 Ibid., p. 9. The mere mention of a right to the protection of personal data has however generated also some resistance in this context, as expressed for instance by the German delegation (ibid., p. 86).

33 Also noting the disappearance of the word 'privacy': L. Costa and Y. Poullet, 'Privacy and the regulation of 2012', in *Computer Law & Security Review,* 2012, no. 28, pp. 254-262 [p. 255].

34 Article 29 Data Protection Working Party, *Opinion 01/2012 on the data protection reform proposals*, WP 191, 23.03.2012, Brussels, p. 5.

'Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century'. The removal is nonetheless almost complete. Remaining allusions prove that the role foreseen for privacy is strictly minor: theright to respect for private and family life is for instance mentioned in the Preamble of the proposed Directive as one of all the rights and principles of the Charter that it respects, at the same level as, for instance, the freedom to conducta business, or linguistic diversity.[35]

Nonetheless, there is nothing in the post-Lisbon EU fundamental rights architecture that made privacy irremediably irrelevant for the purposes of personal data protection law. Even if the EU Charter added a new right to the list of EU fundamental rights, it did not bring to an end the relevance of the right to respect for private life of Article 8 of the ECHR, through which, as indicated, the European Court of Human Rights grants protection to individuals in the face of the processing of personal data. This right is mirrored in Article 7 of the Charter,and, in accordance with the Charter's general provisions, in so far the Charter contains rights corresponding to ECHR rights, their meaning and scope shall be the same.[36] Thus, the Charter arguably deals with the protection of personal data through not one but two provisions: Article 8 and Article 7.

Besides, the degree to which the right to the protection of personal data canbe regarded as autonomous from the right to privacy is, at least for the moment, questionable. There is nothing in EU law pointing unequivocally in that direction.It is true that the right is considered in an Article of its own (Article 8), different from the one on the right to respect for private life (Article 7), but it is also true that multiple provisions regulating its interpretation force the taking into accountof the content of Directive 95/46/EC, which did expressly relate personal data protection to privacy.[37] And the EU Court of Justice has (sometimes) vigorously emphasised this lineage.[38] Echoing these tensions, the Explanatory Memorandumof the proposed Regulation points out: 'data protection is closely linked to respect for private and family life protected by Article 7 of the Charter'[39] — but the proposed instrument does not expressly reverberate such close connection.

All in all, these considerations oblige to question the opportunity of eradicating privacy from EU personal data protection instruments. Its replacementwith the right to the protection of personal data, presented as an autonomous right, obliges to consider the current status of this right in EU law.

An emerging but elusive right

The EU fundamental right to the protection of personal data is still surrounded bymajor uncertainties. Article 8 of the Charter comprises three paragraphs: a first one recognises that everyone has the right to the protection of personal data concerning them; a second one states that data must be processed fairly, for specified purposes, on the basis of consent or other legitimate grounds, as well that everyone has the right to access to their data, and the right to have it rectified; and a third one establishes the need for these rules to be monitored by an independent authority. Both the literature and the case law of the EU Court of Justice provide

35 COM(2012) 10 final, p. 25.

36 Art. 52(3) of the Charter.

37 Directive 95/46/EC is made relevant for hermeneutic purposes as a source of the right, via the Charter's Explanations.

38 On the role of privacy in the case law of the EU Court of Justice on the fundamental right to the protection of personal data, see: G. González Fuster and R. Gellert, 'The fundamental right of data protection in the European Union: in search of an uncharted right', in *International Review of Law, Computers & Technology*, 2012, vol. 26, no. 1, pp. 73-82.

39 COM(2012) 11 final, p. 7. Similarly, In the Explanatory Memorandum accompanying the proposed Directive the European Commission notes that '*data protection is closely linked to respect for private and family life protected by Article 7 of the Charter'* (COM (2012) 10 final, p. 6).

contradictory guidance as to how to interpret this tripartite provision. Crucially, there are discrepancies on what constitutes the right's content, what amounts to a limitation of the right, and which limitations are lawful.

It is commonly understood that the first Articles of the Charter define the content of rights and principles, whereas guidance on their interpretation and on the determination of lawful limitations appears in the Charter's final general provisions. Following this line of thinking, Article 8 of the Charter wouldestablish a right, and Article 52 would describe the requirements for lawful limitations of the right.

It has been argued that Article 8 of the Charter is an exemption to this general rule: its content would need to be interpreted as being constituted solely by Article 8(1), according to which everyone has the right to the protection of their data, and Articles 8(2) and 8(3) would describe the lawful limitations of theright, stating when and how can data be processed.[40] The EU Court of Justice hasimplicitly backed up this understanding by occasionally referring to the right as established by Article 8(1) of the Charter, even though it does sometimes refer toit as being recognised by Article 8 as a whole.[41] At the heart of these interpretative divergences lie contrasted perceptions of what defines the core of personal data protection as a legal notion: either a general prohibition of processing personal data, or a general authorisation (under certain conditions).[42]

The EU Court of Justice has not only failed to provide clear guidance on thisissue. Its case law is also erratic as regards the very identification of the existenceof a right to the protection of personal data, its possible interpretation as an autonomous right, and the provisions relevant for the determination of lawful limitations to it. The Court, for instance, has maintained that there is a right jointly established by Articles 7 and 8 of the Charter, which it referred to as "the right to respect for private life with regard to the processing of personal data",[43] and asserted that the limitations which may lawfully be imposed on such right areexactly the same as those tolerated in relation to Article 8 of the ECHR.[44]

This view neglects the fact that the wording of Article 8(2) of the ECHR, describing the requirements for interferences with the right to respect for private life to be legitimate, does not coincide with the terminology of Article 52(1) of the Charter, which describes lawful limitations of the Charter's rights, and notoriously includes the need for limitations to respect the essence of the right being limited. It also appears to disregard that there are many other provisions relevant for the interpretation of Article 8 of the Charter, and for the determination of its limitations: according to the Treaties, the Charter's rights need to be interpreted 'with due regard to the explanations referred to in the Charter',[45] which in their turn refer to Directive 95/46/EC and a

40 See, notably: B. Siemen, *Datenschutz als europäisches Grundrecht*, Duncker & Humblot, Berlin, 2006, p. 283.

41 On the variable case law on balancing the EU right to the protection of personal data, see: G. González Fuster, 'Balancing intellectual property against data protection: a new right's wavering weight', in *IDP Revista de Internet, Derecho y Política*, 2012, no. 14, pp. 43-46.

42 For a depiction of personal data protection as intrinsically enabling data processing, see: P. De Hert and S. Gutwirth, 'Privacy, Data Protection and Law Enforcement: Opacity of the Individuals and Transparency of Power' in E. Claes, A. Duff and S. Gutwirth (eds.), *Privacy and the Criminal Law*, Antwerp-Oxford, Intersentia, 2006, pp. 61-104.

43 Judgment of the Court (Grand Chamber) of 9 November 2010, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, 2010 I-11063, § 52.

44 Idem.

45 Art. 6(1) of the Treaty on European Union (TEU). The need to take into consideration the Charter's Explanations is also established in Art. 52(7) of the EU Charter.

Regulation complementing it,[46] noting that they both 'contain conditions and limitations for the exercise of the right to the protection of personal data'.[47] The Charter also mandates that the rights appearing in the Treaties must be exercised 'under the conditions and within the limits defined by those Treaties',[48] which means that there is an obligation to bear in mind Article 16 TFEU and its explicit association of EU rules with regard to the processing of personal data with the free movementof such data.[49]

Pending a convincing clarification by the EU Court of Justice on how all these provisions interrelate, and, especially, of the exact content and limits of the EU right to the protection of personal data, the obligations stemming from its recognition remain blurred. As a matter of fact, they appear to be potentially modifiable by changes in EU secondary law, to which remit the Charter's explanations. All in all, the EU fundamental right to the protection of personal data seems to provide (for the moment) little concrete guidance on its limits. It isin this context that the European Commission has chosen to envisage the articulation of the proposed instruments with security.

Security and the changing object of EU personal data protection law

Security can be portrayed as an elastic legal concept in EU law. It takes several shapes, such as 'international', 'internal/external', 'national' or even 'essentially national' security, which do not systematically correspond to specific manifestations of sovereignty. 'Internal' and 'national' security issues envisagedin their European dimension are among the key drivers of measures adopted under the Area of Freedom, Security, and Justice, but these notions can also emerge, retracted to their national dimension, as limits to such measures.

Unsurprisingly, security has always also played different roles in EU personal data protection law. It can notably function as a limit of its scope of application, as it does in the proposed Regulation and Directive: they are to applyonly to the processing of personal data in the course of activities falling under the scope of EU law, which explicitly excludes data processing concerning 'national security'.[50]

Security has also been functioning as a ground to justify legitimate restrictions or modulations of EU personal data protection law. Traditionally, these modulations corresponded conceptually to interferences with the right to respect for private life: a processing of data related to individuals that could in principle constitute a violation of Article 8 of the ECHR could be justified if necessary for security purposes, and, if in compliance with all other requirements of Article 8(2) of the ECHR (i.e., in accordance with law, and necessary in a democratic society), the measure should be regarded not as a violation of the right, but as a legitimate interference with it.

As a consequence of the undecided structure of the EU fundamental right to the protection of personal data, personal data processing undertaken in the name of security can be regarded, depending on the

46 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ EC*, L 8, pp. 1- 22, 12.1.2001.

47 Explanations relating to the Charter of Fundamental Rights, *OJ EU, 14.12.2007*(C 303), p. 20.

48 Article 52(2) of the EU Charter.

49 As well as the fact that Art. 16(2) TFEU highlights that the rules adopted shall be without prejudice to the specific rules for processing in the area of Common Foreign and Security Policy.

50 See Art. 2(2)(a) of the proposed Regulation (COM(2012) 11 final, p. 40), and Art. 2(3)(a) of the proposed Directive (COM (2012) 10 final, p. 26). The formulation of this limitation has been criticised by the European Data Protection Supervisor (EDPS), who believes the meaning of the expression is unclear: see EDPS (2012), *Opinion of the European Data Protection Supervisor on the Data protection reform package,* 7 March 2012, Brussels, p. 15.

understanding of the right adopted, either as an interference or as a lack of interference with such right. As Article 8(2) of the EU Charter states that the processing of personal data must be grounded on the basis of consent of the person concerned or on 'some other legitimate basis laid down by law', it follows that laws legitimately imposing theprocessing of personal data in the name of security can be interpreted as a manifestation of compliance with the right. In that case, the right would be conceptualized as an enabler of processing (under certain circumstances). On thecontrary, if the right is understood as a general prohibition of processing, allegedly described in Article 8(1) of the Charter, and if therefore Article 8(2) of the Charter is read as defining the conditions for lawful limitations, it will followthat legitimately processing personal data in the name of security is a lawful limitation of the right.

These ambiguities surface clearly in the proposed Regulation.[51] Its Article 6(1) foresees that the processing of personal data can be considered lawful, inter alia, if it is necessary for the performance of a task carried out in the 'public interest' (a notion which can be read as including security) or in the exercise of official authority vested in the controller. Article 6(3) later adds that, in such cases, the processing must be grounded in EU or national law, which shall in addition respect the essence of the right to the protection of personal data, and be proportionate to the legitimate aim pursued. The wording of this latter provision undoubtedly echoes Article 52(1) of the Charter, which establishes the general applicable requirements to any limitations of the Charter's rights to be considered lawful: thus, it could be deduced that the European Commission, when designingthis provision, was approaching the grounding of processing of personal data in the name of 'public interest' as a limitation of the fundamental right to personal data protection — which implies a reading of Article 8(2) of the Charter as detailing not the substance, but the limitations of the right.

This perspective is however not explicitly adopted by the European Commission, which in addition does not reproduce in the mentioned provision the content of Article 52(1) of the Charter word by word.[52] In reality, it appears to hesitate between referring to the right to personal data protection as established by Article 8[53] or by Article 8(1) of the Charter.[54]

The proposed Regulation also includes a provision overtly devoted to possible restrictions to the different rights and obligations proposed by theinstrument, Article 21.[55] It establishes that both EU law and national law may restrict the scope of the major part of the Regulation's provisions if such a restriction 'constitutes a necessary and proportionate measure in a democratic society' for achieving any of a series of listed purposes, including public security. Here, it is patent that the drafters were thinking of derogations that would possibly constitute limitations to the fundamental right to the protection of personal data.[56] However, the content of Article 52(1) of the Charter is still not adequately reproduced: this time, the requirement of respecting the

51 Concerning the proposed Directive, see Art. 7.

52 This tension has been pointed out by the Slovenian delegation in its initial comments on the proposed Regulation (Council of the European Union, *Note from: General Secretariat to: Working Group on Information Exchange and Data Protection (DAPIX) No. Cion prop.: 5853/12, Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*, 18 July 2012, Brussels, p. 112).

53 As in the Explanatory Memorandum of the proposed Regulation (COM(2012) 11 final, p. 6).

54 See the Preamble of the Proposed Regulation: ibid., p. 17; see also the Preamble of the Proposed Directive: COM(2012) 10 final, p. 14.

55 Concerning the proposed Directive, see Art. 11(4) and Art. 13.

56 See also: COM (2012) 11 final, p. 9.

essence of theright to the protection of personal data has disappeared.

Thus, not only do the proposed instruments fail to identify clearly which ofits provisions relate to limitations of the right to the protection of personal data that they formally aim to substantiate, but, when they appear to unambiguously concern a limitation of the right, the conditions for such limitations to be lawful are not consistently spelled out. The legislative package, instead of compensatingits detachment of EU data protection law from the right to privacy with a solid construction of the right to the protection of personal data, further exacerbates thetensions and confusion surrounding its content and limits. And, at the same time,fail to substantiate requirements which had been developed and consolidated under the traditional framework.

Concluding remarks

This contribution has not dealt with whether the legislative package introduced by the European Commission meets or not the requirements of the ECHR, or of the Constitutions of the Member States, in terms of fundamental rights. It has instead centred on examining how the European Commission has positioned it in the EU fundamental rights architecture (concretely, as a development of the EU Charter), and the ambivalences of such positioning.

The decision of the European Commission to move EU personal data protection law away from its direct anchorage in the right to respect for private life, replacing it with a framing under a right of unclear meaning, is not inconsequential. It provokes a displacement of the construction of the limitationsof EU personal data protection law, from a relative well-defined legal context intoan extremely uncertain field.

The substitution of the right to privacy with the right to the protection of personal data as the cornerstone of EU personal data protection law raises notablythe question of how interchangeable could both rights be — if they are interchangeable at all. In practice, it opens up concrete questions on the exact way in which data processing measures, including the numerous and significant data processing measures supported by the EU in the context of the establishmentof the EU Area of Freedom, Security and Justice, can legitimately interfere with individual rights — but also on what is an interference, and which data processing measures are to be excluded from applicable norms.

Ultimately, the shift heralded by the European Commission's legislative package also obliges to query how fundamental can be considered a right, such as the EU fundamental right to the protection of personal data, the contours of which appear to be potentially subject to reconfiguration by changes in EU secondary law, as well as the fundamental rights dimension of a legislative package focused primarily on adjusting such a fundamental right.

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