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European Leadership in Privacy and Data Protection[1]

This book with contributions on the proposed European General Data Protection Regulation offers an excellent opportunity to highlight Europe's leading role in privacy and personal data protection. This role has evolved over decades, at European level notably first in the context of the Council of Europe, and later mainly in the context of the European Union. In this respect, we have seen a growing *distinction* between 'privacy' and 'data protection' as separate concepts, most recently also in the EU Charter of Fundamental Rights. At the same time, we have seen a growing emphasis on *stronger* and *more effective* protection of personal data and on *more consistent* protection across all EU Member States. These different lines all come together in the proposed General Data Protection Regulation. Of course, the need for strong, effective and consistent protection of personal data has never been greater and will probably only grow in the future.

1. Privacy and data protection - more precisely: the right to *respect* for private life and the right to the *protection* of one's personal data - are both fairly recent expressions of a universal idea with quite strong ethical dimensions: the dignity, autonomy and *unique value* of every human being. This also implies the right of every individual to develop their own personality and to have a fair say on matters that may have a direct impact on them. It explains two features that frequently appear in this context: the need to prevent undue *interference* in private matters, and the need to ensure adequate *control* for individuals over matters that may affect them.

The concept of 'data protection' was developed four decades ago in order to provide legal protection to individuals against the inappropriate use of information technology for processing information relating to them. It was not designed to *prevent* the processing of such information or to *limit* the use of information technology per se. Instead, it was designed to provide safeguards whenever information technology would be used for processing information relating to individuals. This was based on the early conviction that the extensive use of information technology for this purpose could have far reaching effects for the rights and interests of individuals.

2. It was only after the Second World War that the concept of a 'right to privacy' emerged in international law. This first arose in a rather weak version in Article 12 of the Universal

[1] This article will appear in: "Hacia un nuevo régimen europeo de protección de datos / Towards a new European Data Protection Regime", Valencia 2015.

Declaration of Human Rights, according to which no one shall be subjected to *arbitrary* interference with his privacy, family, home or correspondence.

A more substantive protection followed in Article 8 of the European Convention on Human Rights (ECHR), according to which everyone has the right to *respect* for his private and family life, his home and his correspondence, and no interference by a public authority with the exercise of this right is allowed except in accordance with the law and where necessary in a democratic society for certain important and legitimate interests.

The mentioning of 'home' and 'correspondence' could build on constitutional traditions in many countries around the world, as a common heritage of a long development, sometimes during many centuries, but the focus on 'privacy' and 'private life' was new, and an obvious reaction to what had happened in the Second World War.

The scope and consequences of this protection have been explained by the European Court of Human Rights in a series of judgments. In all these cases, the Court considers - briefly put - whether there was an *interference* with the right to respect for private life, and if so whether it had an *adequate* legal basis - i.e. clear, accessible and foreseeable - and whether it was *necessary* and proportionate for the legitimate interests at stake.

3. In the early 1970's the Council of Europe concluded that Article 8 ECHR had a number of shortcomings in the light of new developments, particularly in view of the growing use of information technology: the uncertainty as to what was covered by 'private life', the emphasis on protection against interference by 'public authorities', and the lack of a more pro-active approach, also dealing with the possible misuse of personal information by companies or other relevant organisations in the private sector.

This resulted in the adoption in January 1981 of the Data Protection Convention, also known as Convention 108, which has so far been ratified by 46 countries, including all EU Member States, most Member States of the Council of Europe and one non-Member State.[2] The purpose of the Convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ('data protection'). The concept of 'personal data' is defined as 'any information relating to an identified or identifiable individual ('data subject')'.

This means that 'data protection' is *broader* than 'privacy protection' because it also concerns other fundamental rights and freedoms, and all kinds of data *regardless* of their relationship

[2] Uruguay was the first non-Member State to ratify the Convention in April 2013.

with privacy, and at the same time *more limited* because it merely concerns the processing of personal information, with other aspects of privacy protection being disregarded.

In this context, it should be noted that many activities in the public or the private sector are nowadays connected, in one way or another, with the collection and processing of personal information. The real objective of the Convention is therefore to protect individuals (citizens, consumers, workers, etc.) against unjustified collection, recording, use and dissemination of their personal details. This may also concern their participation in social relations, whether or not in public, and involve protecting freedom of expression, preventing unfair discrimination and promoting 'fair play' in decision-making processes.

4. The Convention contains a few basic principles for data protection to which each Party must give effect in its domestic law. These principles still form the core of any national legislation in this area. The Convention's approach is *not* that processing of personal data should always be considered as an *interference* with the right to privacy, but rather that for the *protection* of privacy and other fundamental rights and freedoms, any processing of personal data must *always* observe certain legal conditions. Such as the principle that personal data may only be processed for specified legitimate purposes, where necessary for these purposes, and not used in a way incompatible with those purposes.

Under this approach, the core elements of Article 8 ECHR, such as interference with the right to privacy only on an adequate legal basis, and where required for a legitimate purpose, have been transferred into a broader context. This only works well in practice, if the system of checks and balances, as set out in the Convention - consisting of substantive conditions, individual rights, procedural provisions and independent supervision - is sufficiently flexible to take account of variable contexts, and is applied with pragmatism and an open eye for the interests of data subjects and other relevant stakeholders. In this approach, the right to respect for private life set out in Article 8 ECHR continues to play an important role in the background, *inter alia* to determine the legitimacy of specific, more intrusive measures.

The Convention has played a major role in most Member States of the Council of Europe in setting out legislative policy. In this context, the issue of 'data protection' has been regarded from the outset as a matter of great structural importance for a modern society, in which the processing of personal data is assuming an increasingly important role.

5. Only a few years after Convention 108 had been adopted, the German Constitutional Court delivered a decision in which it formulated a right to 'informational self-determination' as an expression of the right to free development of the personality as laid down in Article 2(1) of the German Constitution. In this approach, any processing of personal data is in principle regarded as an interference with the right to informational self-determination, unless the data

subject has consented. This should be clearly distinguished from the approach followed in Convention 108, and on that basis - as we will see - in Directive 95/46/EC and the relevant provisions of the EU Charter.

A few months before Convention 108 was adopted, the OECD adopted Privacy Guidelines which, although not-binding, have also been very influential, particularly in countries outside Europe, such as the United States, Canada, Australia and Japan. The Guidelines contained a set of basic principles drawn up in close coordination with the Council of Europe and were therefore consistent with the principles for data protection in Convention 108. However, there were also quite subtle, but meaningful differences in details.

The scope of the Guidelines was limited to personal data 'which because of the manner in which they are processed, or because of their nature or the context in which they are used, pose a danger to privacy and individual liberties.' This implied the notion of 'risk' as a *threshold* condition for protection which was not entirely compatible with the fundamental rights based approach of the Council or Europe. Moreover, the need for a *legitimate* purpose and a *lawful* basis for processing of personal data per se was absent in the Guidelines. Both points are still highly relevant in global discussions.

6. Although the Council of Europe was very successful in putting 'data protection' on the agenda and setting out the main elements of a legal framework, it was less successful in terms of ensuring sufficient consistency across its Member States. Some Member States were late in implementing Convention 108, and those who did so arrived at rather different outcomes, in some cases even imposing restrictions on data flows to other Member States.

The European Commission was therefore quite concerned that this lack of consistency could hamper the development of the internal market in a range of areas - involving free circulation of people and services - where the processing of personal data was to play an increasingly important role. At the end of 1990, it therefore submitted a proposal for a Directive in order to harmonise the national laws on data protection in the private and most parts of the public sector. After four years of negotiation, this resulted in the adoption of the current Directive 95/46/EC which has a double objective: ensuring an equivalent high level of protection of personal data in all Member States and ensuring a free flow of information between Member States subject to agreed safeguards.

In that respect, the Directive started from the basic principles of data protection, as set out in Convention 108 of the Council of Europe. At the same time, it specified those principles and supplemented them with further requirements and conditions. However, since the Directive adopted generally formulated concepts and open standards, it still allowed Member States fairly broad discretion on its transposition. The result is that the Directive has led to a much

greater consistency between Member States, but certainly not to identical or fully consistent solutions.

Moreover, as the Directive was adopted when the Internet was still barely visible, it should be clear that the need for stronger protection and more consistency has only increased in recent years. On both points, the proposed General Data Protection Regulation is aimed to take the next steps.

7. Although the Directive was adopted to ensure the well functioning of the internal market, its history and background also carried a broader message. Since then the European Court of Justice has repeatedly held that it has a wide scope and also applies to the public sector of the Member States.[3] This fundamental rights origin has become more visible over the years.

The adoption of the EU Charter of Fundamental Rights, initially as a political document, in December 2000, allowed further developments to take place along this line. One of the novel elements of the Charter was that *in addition* to the right to respect for private life, it also contained an explicit recognition of the right to the protection of personal data in a separate provision. Article 7 concerning '*Respect for private and family life*' states that 'everyone has the right to respect for his or her private and family life, home and communications'.

Article 8 on '*Protection of personal data*' provides, in its first paragraph, that 'everyone has the right to the protection of personal data concerning him or her'. In the second paragraph, it provides that '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', and that 'everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified'. In the third paragraph, it states that 'compliance with these rules shall be subject to control by an independent authority'.

8. The rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 ECHR. Both are typical examples of classical fundamental rights, where *interference* is subject to strict conditions. Article 8 is largely based on Directive 95/46/EC and the Council of Europe Convention 108.

As said, the right to the protection of personal data was conceived by the Council of Europe and set out in Convention 108 in order to provide a *proactive* protection of the rights and freedoms of individuals with regard to all processing of personal data, regardless of whether such processing was an interference with the right to respect for private life or not. This was

[3] Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, [2003] ECR I-04989, at 41-43, and Case C-101/01, *Bodil Lindqvist*, [2003] ECR I-12971, at 39-41. See also Case C-524/06, *Huber*, [2008] ECR I-09705 and Case C-553/07, *Rijkeboer*, [2009] ECR I-03889.

intended as a system of 'checks and balances' to provide a *structural* protection to individuals in a wide range of situations, both in the public and in the private sector.

Directive 95/46/EC has used Convention 108 as a starting point for the harmonisation of data protection laws in the EU, and specified it in different ways. This involved the substantive principles of data protection, the obligations of controllers, the rights of data subjects, and the need for independent supervision as main structural elements of data protection. However, the nature of data protection as a system of 'checks and balances' to provide protection whenever personal data are processed was not changed. In other words: Articles 7 and 8 do not have the same character and must be clearly distinguished.

9. The Convention which prepared the Charter before it was adopted, also considered including a right to informational self-determination in Article 8, but this was rejected. Instead, it decided to include a right to the protection of personal data, to preserve the main elements of Directive 95/46/EC. Thus the essential elements set out in Article 8(2) and 8(3) correspond with the key principles of Directive 95/46/EC, such as fair and lawful processing, purpose limitation, rights of access and rectification, and independent supervision.

Moreover, it cannot be excluded that the Court of Justice might find other main elements of data protection which have not been expressed in Article 8(2) and 8(3), but are available in Directive 95/46/EC and may be seen as implied in Article 8(1) of the Charter. Such elements might also help to reinforce the elements which have already been made explicit and further develop the impact of the general right expressed in Article 8(1).

In any case, this means that the *scope* of Article 8 - involving all processing of personal data - should not be confused with the question whether the fundamental right of Article 8 has been *interfered* with. An interference with Article 8 does not arise from the mere fact that personal data are processed. Such interference can only be established if one or more of the main elements of the right to data protection - such as the need for a 'legitimate basis laid down by law' or 'independent supervision' - have not been respected.

10. The entry into force of the Lisbon Treaty in December 2009 had an enormous impact on the development of EU data protection law.

In the first place, the Charter was given the same legal value as the Treaties in Article 6(1) of the Treaty on European Union. It thus became a binding instrument, not only for the EU institutions and bodies, but also for the Member States acting within the scope of EU law. The right to the protection of personal data was moreover specifically mentioned in Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) among the general

principles of the EU. This meant that some of the main elements of Directive 95/46/EC have now reached the level of EU primary law.

In the second place, Article 16(2) TFEU now provides a general legal basis for the adoption of rules by the European Parliament and the Council, acting in the normal legislative procedure, 'relating to the protection of individuals with regard to the protection of personal data' by EU institutions and bodies and by the Member States acting within the scope of EU law, and 'the free movement of such data'. Finally, like Article 8(3) of the Charter, Article 16(2) also underlines that compliance with these rules should be subject to the control of independent authorities.

The terminology used in the main text recalls Directive 95/46/EC, but the scope of this new legal basis, which has been formulated as an obligation, goes in reality far beyond the internal market and covers in principle all EU policy areas. The term 'rules' allows the use of directives and directly applicable regulations, and the choice between the two now largely seems a political one.

11. The general basis for the review of the current legal framework in Article 16 TFEU offers a historic opportunity to deliver the main components of Article 8 Charter in a more effective and consistent set of rules across the EU.

The proposed General Data Protection Regulation, which is to replace Directive 95/46/EC in due course, is a combination of continuity and innovation. All basic concepts and principles have been confirmed, usually only subject to some clarification. The Regulation will continue to have a broad scope, very likely also involving the public sector, and provide for stronger rights for data subjects, stronger obligations for data controllers, and stronger arrangements for supervision and enforcement, including administrative fines of millions of euro. This is in recognition of the growing importance of data protection in the digital economy.

A directly binding Regulation will in principle bring much greater consistency, but in practice probably also allow some flexibility for interaction with national law, especially in the public sector. The greatest innovation is expected in larger responsibilities for controllers, although the impact of this shift will depend on the 'progressive risk based approach' currently under discussion. Innovation can also be expected in the area of supervision and enforcement, especially in relation to the details of one-stop-shops for citizens and business and in other mechanisms to ensure consistent outcomes of independent supervisory authorities.

The territorial scope of the Regulation is likely to include companies that are operating on the European market from an establishment elsewhere in the world. In a recent judgment, on the basis of the current Directive, the Court of Justice has already made an interesting step in that

direction, by linking the commercial activities of an establishment of a major search engine in Spain with those of the search engine itself established in the United States.[4]

12. The proposed Regulation has of course not been prepared in isolation. Both the Council of Europe and the OECD have also been involved in a review of their legal frameworks, and the results all appear to go in the same direction of making data protection more effective in practice. The Regulation - once adopted probably in the course of 2015 - is therefore likely to have a strong impact as a major benchmark, both for other countries around the world, and for operators whose success may depend on their capacity to ensure an effective protection of their clients' privacy and personal data.

[4] Case C-131/12, *Google Spain*, 13 May 2014, not yet published, at 55-56.