

Study on the essence of the fundamental rights to privacy and to protection of personal data

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Abstract:

This background paper explores the requirement of respecting the ‘essence’ of the rights to respect for private life and of right to the protection of personal data whenever these rights are limited under European Union (EU) law. The requirement is explicitly established in Article 52(1) of the Charter of Fundamental Rights of the EU, and currently also mentioned in EU secondary law. With the aim of facilitating further reflection and discussion on the requirement’s application notably when limitations of the right to personal data protection are at stake, the paper reviews current knowledge on the subject and illustrates the significant limitations of existing knowledge. Taking stock of the relevant literature and case law, mainly of the Court of Justice of the EU and of the European Court of Human Rights (ECHR), it also identifies a few key issues deserving further analysis and discussion. The paper concludes by suggesting it can be useful to focus not on speculating about *what* would be the essence of the rights at stake, but rather on *when* must a limitation of a right be regarded as a breach of the essence requirement.

Keywords: essence; personal data protection; respect for private life; fundamental rights; European Union; Charter of Fundamental rights of the European Union

Executive summary

The Charter of Fundamental Rights of the European Union (EU) establishes that the EU fundamental rights to the respect for private life and to the protection of personal data may be limited only if the limitations at stake respect the rights' essence. The paper reviews current knowledge on this 'essence requirement' taking stock of the pertinent case law of Court of Justice of the EU (CJEU), the European Court of Human Rights (ECtHR) and selected national courts, building on the growing literature on the subject.

The starting point of the contribution is that the interpretation of the essence requirement finds itself at the crossroads of three elusive issues: the very notion of 'essence' in EU fundamental rights law, the content of the EU fundamental right to personal data protection, and the often-ambiguous relation between this right and the right to respect for private life. These three issues are discussed in detail.

The explicit reference in Article 52(1) of the EU Charter to the obligation to respect the essence of rights as a condition for their lawful limitations was formally a novelty, even though the CJEU had previously already referred to the need to respect the very substance of fundamental rights, and the ECtHR had also relied on similar arguments. Similar mechanisms can also be found in national legal frameworks.

The case law of CJEU reveals that the essence requirement may be applied by the Court without there being a particularly clear delimitation of the essence of a right as such. In this sense, it can be useful to envision the essence requirement not as an imperative imposed on courts to clearly delimit a core area of each right, but rather as a tool put in their hands to declare unlawful certain types of limitations of rights.

Regarding the content of the EU fundamental right to personal data protection, there is currently no consensus on what it comprises exactly. This unsettled status of the content of the EU fundamental right to personal data does not facilitate the identification of what could be its essence. In addition, a certain ambiguity also surrounds the relation between this right and the EU fundamental right to respect for private life. Even though there has been an evolution in the CJEU case law, and the two rights have been progressively recognised as existing independently and detached from each other, they are not necessarily applied in isolation.

The essence requirement has played an important role in the case law of the CJEU about the rights to respect for private life at personal data protection – it has been mentioned in multiple judgments. The cases where a specific right’s limitation was deemed not to respect the essence of a right are nevertheless, comparatively, only a few instances.

A recurrent mismatch between what the CJEU has stressed as important elements of the right to personal data protection, on the one hand, and the facets mentioned by the Court when applying the essence requirement, on the other, appears to confirm that the CJEU is not primarily concerned with construing the essence of the right as the core of a well-articulated series of spheres.

In light of the described landscape can be identified a number of issues deserving further consideration, taking also into account ongoing policy and legislative developments. These issues concern the mentioned connection between the essence requirement and the delimitation of right’s content, the specificity of the right to personal data protection, the criteria to determine that the essence requirement is not respected, and, finally, the surfacing of references to the essence requirement in other instruments of EU data protection law.

As the essence requirement may be applied without a simultaneous clear demarcation by the courts of the content of a right, the content of the right to personal data protection may therefore be, at least to some extent, discussed independently from the limited list of elements highlighted when the essence requirement is at stake in the CJEU case law. The question of which data protection safeguards are part of the content of the right guaranteed under Article 8 of the EU Charter remains in any case open.

Another important question that remains open is whether the progressive increase in requests for preliminary rulings specifically on the interpretation of the General Data Protection Regulation (GDPR), which refers in its first Recital to Article 8 of the EU Charter but not Article 7, will eventually lead to a clearer focus in the CJEU case law on the singularity of Article 8 of the EU Charter. Future case law should throw further light on the criteria relevant to determining that the essence requirement is not respected.

In any case, references to the essence requirement are currently not confined to Article 52(1) of the EU Charter - the requirement appears also in provisions of secondary law. Examples of such more recent manifestations are the reference to the essence in Article 25 of Regulation

2018/1725, for instance, or in the Standard Contractual Clauses adopted by the European Commission in June 2021. These developments imply that not only the legislator and the judiciary, but also data controllers and processors, should be able to determine there has been a breach of the requirement to respect the essence of EU fundamental rights, including of the essence of the rights to respect for private life and to personal data protection.

This study thus situates existing knowledge on the essence requirement insofar as it relates to the EU fundamental right to personal data protection, illustrating the limitations of such knowledge. The numerous cases pending in front of the CJEU which concern data protection law in general could in the upcoming months and years offer more relevant insights on the way in which courts might use this tool to put an end to unacceptable violations of the EU Charter. In the meantime, references to the essence requirement are surfacing in a variety of instruments, including, for instance, Standard Contractual Clauses, obliging actors different from the courts and the legislator to understand how to deal in practice with this still elusive requirement. A pragmatic approach to the current challenges could focus not on speculating on *what* would be the very essence of the rights at stake, but rather on *when* must a limitation of a right be regarded as a breach of the essence requirement.

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1. Introduction

The Charter of Fundamental Rights of the European Union (EU)¹ enshrines a right to the respect for private life, in Article 7, and a right to the protection of personal data, in Article 8. Both rights can be limited under certain conditions, but only if the limitations respect the rights' 'essence' – in line with the EU Charter's Article 52(1). This essence requirement remains to date relatively unclear.

The present study reviews current knowledge on the essence requirement, with the aim of facilitating further reflection and discussion on its application when the right to personal data protection is at stake. The study takes stock of the case law of Court of Justice of the EU (CJEU), as well as of the case law of the European Court of Human Rights (ECtHR) on the European Convention for the Protection of Human Rights and Freedoms (ECHR)² and of national courts, when particularly relevant, and builds on the growing literature on the subject.

The starting point of this contribution is that the essence requirement of the EU fundamental right to personal data protection is at the crossroads of several furtive paths: the seemingly evasive notion of 'essence' in EU fundamental rights law, the elusive content of the EU fundamental right to personal data protection, and the often ambiguous relation between this right and the EU fundamental right to respect for private life.

The study first briefly introduces the applicable legal framework. Second, it presents the main elements necessary to apprehend the conceptual puzzle under study, that is, the notion of essence, the right to personal data protection, and the relationship between this right and the right to respect for private life. Pertinent case law of the CJEU, of the ECHR and of national courts on the matter is then reviewed. Finally, the study identifies a few key issues deserving further analysis and discussion.

2. Legal framework

Title II of the EU Charter, named '*Freedom*s', encompasses several rights including the right to respect for private life (Article 7) and the right to the protection of personal data (Article 8). **Article 7** establishes that '*Everyone has the right to respect for his or her private and family life, home and communications*'. **Article 8** is devoted to the protection of personal data. This Article's first paragraph proclaims that '*Everyone has the right to the protection of*

¹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391. Hereafter, 'the EU Charter'.

² Signed at Rome on 4 November 1950.

personal data concerning him or her'.³ Its second paragraph states 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. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified*'. The third and final paragraph of Article 8 foresees that '*Compliance with these rules shall be subject to control by an independent authority*'.

The interpretation and limitations of both fundamental rights are governed by the General Provisions of Title VII.⁴ **Article 52(1)** of Title VII of the EU Charter establishes that:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

In line with Article 57(2) of the same Title, '*The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States*'. These Explanations⁵ include further details on the permissible limitations of EU fundamental rights.

The **Explanation on Article 7** indicates that the rights guaranteed in such provision '*correspond to those guaranteed by Article 8 of the ECHR*'.⁶ Therefore, and in accordance with Article 52(3), '*the meaning and scope of this right are the same as those*' of Article 8 of the ECHR, and '*the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR*'.⁷

The **Explanation on Article 8** lists the sources taken into account for the drafting of the provision,⁸ notably including Directive 95/46/EC.⁹ This Explanation also comprises a

³ The right is also mentioned in Art. 16(1) of the Treaty on the Functioning of the European Union (TFEU).

⁴ Arts. 51-54 EU Charter.

⁵ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

⁶ Art. 8(1) ECHR states: '*Everyone has the right to respect for his private and family life, his home and his correspondence*'.

⁷ Art. 8(2) ECHR concerns permissible interferences: '*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.*'

⁸ In full: '*This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC (...) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union*'.

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

reference to Regulation (EC) No 45/2001,¹⁰ even if this Regulation was actually adopted after the original drafting of the EU Charter, and thus of the provision that it ‘explains’. Finally, the Explanation on Article 8 states that both Directive 95/46/EC and Regulation (EC) No 45/2001 ‘*contain conditions and limitations for the exercise of the right to the protection of personal data*’.

Directive 95/46/EC was eventually replaced by Regulation (EU) 2016/679 (General Data Protection Regulation, GDPR),¹¹ and Regulation (EC) No 45/2001 by Regulation (EU) 2018/1725.¹² None of these instruments contains a generic provision establishing general conditions and limitations for the exercise of the right to the protection of personal data. They specify, however, conditions limiting the possible restriction of some data subject rights and connected obligations. Concretely, such a restriction shall only be permitted if it ‘*respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard*’ one of the listed objectives.¹³

The **Explanation on Article 52** of the EU Charter details that the wording of its first paragraph – where the essence is mentioned - is based on the case law of the CJEU, according to which restrictions may be imposed on the exercise of fundamental rights only if, in addition to complying with other requirements, such restrictions do not constitute an interference ‘*undermining the very substance of those rights*’.¹⁴ This hints that the terms ‘essence’ and ‘very substance’ of a right might be used interchangeably.¹⁵

¹⁰ Regulation (EC) No 45/2001 of the European Parliament and of the Council 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 [2001] OJ L8/1.

¹¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1–88.

¹² 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 (hereafter, EUDPR).

¹³ Art. 23(1) GDPR, Art. 25(1) EUDPR.

¹⁴ The Explanation refers to Case C-292/97, *Kjell Karlsson and Others*, Judgment of the Court (Sixth Chamber), 13 April 2000, ECLI:EU:C:2000:202, para. 45, which refers to Case 5/88, *Wachauf*, Judgment of the Court (Third Chamber) of 13 July 1989, ECLI:EU:C:1989:321, para. 18.

¹⁵ They are indeed generally perceived as synonyms (Koen Lenaerts (2012), ‘Exploring the limits of the EU Charter of Fundamental Rights’, *European Constitutional Law Review*, 8(3), p. 391). Sometimes the term ‘*the very essence*’ is used (see, for instance: Opinion of Advocate General Saugmandsgaard Øe delivered on 19 December 2019, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, ECLI:EU:C:2019:1145, Case C-311/18), para. 278).

3. State of knowledge

The entry into force of the EU Charter in 2009 delineated an unprecedented legal landscape for the protection of personal data in the EU. Article 8's recognition of a right to personal data protection as a distinct fundamental right, next to Article 7's right to respect for private life, constituted a major novelty at European level.¹⁶ In the context of the Council of Europe, data protection safeguards had traditionally been regarded, and are still regarded, as belonging to the scope of Article 8 of the ECHR's right to respect for private life.

The explicit reference in Article 52(1) of the EU Charter to the obligation to respect the essence of rights as a condition for their lawful limitations was also formally a novelty. Although it is true that the CJEU had occasionally referred to the need to always respect the very substance of rights, and that the ECtHR had also relied on similar arguments,¹⁷ the text of the ECHR does not openly put forward any essence requirement.

3.1. The essence requirement

The origins of the essence requirement can be traced back to German constitutional law, where it is closely connected to the obligation imposed on the legislator to regulate certain rights only with laws of a certain quality – in order to avoid encroachments of fundamental rights by the legislator.¹⁸ The essence requirement was also incorporated into the legal frameworks of other Member States.¹⁹ The original rationale behind the imperative to respect

¹⁶ In some Member States, however, data protection had developed following different paths. On the origins of the right, see: Gloria González Fuster (2014), *The Emergence of Personal Data Protection as a Fundamental Right of the EU*, Springer.

¹⁷ The ECtHR has sometimes referred to the fact that interferences with rights shall respect the rights' essence. Cf., for instance: *Prince Hans-Adam II of Liechtenstein v Germany*, Judgment of the Court (Grand Chamber) of 12 July 2001, Application no. 42527/98, ECLI:CE:ECHR:2001:0712JUD004252798, para 44., mentioning the Court 'must be satisfied that the limitations applied do not restrict or reduce the access [to the courts] left to the individual in such a way or to such an extent that the very essence of the right is impaired'.

¹⁸ Cf. Art. 19 of the Basic Law of the Federal Republic of Germany of 1949: its first paragraph states that a fundamental right may be restricted by or pursuant to a law; the second paragraph establishes that in no case may the essence of a basic (fundamental) right be affected ('*In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden*').

¹⁹ For instance, the Spanish Constitution establishes that constitutionally protected fundamental rights and freedoms can only be regulated by law, a law that must in any case respect the essential content of such rights and freedoms (Art. 53(1) of the Spanish Constitution of 1978). Similarly, Art. 18(3) of the Portuguese Constitution prohibits the lessening of the essential content of constitutional provisions. Other Member States with similar provisions include Estonia, Hungary, Poland, Romania, the Slovak Republic, and the Czech Republic (Takis Tridimas and Giulia Gentile (2019), 'The essence of rights: An unreliable boundary?', *German Law Journal*, 20(6), p. 796). The exact notion and terminology can vary (for instance, referring to the 'eternity clause' applicable to privacy and data protection constitutional standards in Slovakia: Martin Husovec (2017), 'Courts, privacy and data protection in Slovakia: A hesitant guardian?' in Maja Brkan and Evangelia Psychogiopoulou (eds.), *Courts*,

the essence of rights is thus connected to an obligation imposed on the legislator, in order to guarantee that fundamental rights are preserved and that regulating the exercise of rights does not threaten the reality of such rights.

In EU law, references to the need to respect the ‘very substance’ of fundamental rights appeared in cases in which the CJEU considered the possibility for Member States to restrict EU fundamental rights. Restrictions are permissible, the Court stated, but only if they do not impair the very substance of fundamental rights.²⁰ References to the ‘very substance’ of fundamental rights can be found in the case law of the CJEU from both before and after the entry into force of the EU Charter.²¹ Understood as a prohibition of balancing at national level, the notion of the essence in EU law is also linked to important discussions about sovereignty and the division of competencies between the EU and Member States.²² A prohibition of certain balancing by Member States implies indeed that there shall be no margin of manoeuvre for national authorities to embrace certain measures regarded as infringing EU fundamental rights.

The wording of Article 52(1) of the EU Charter implies that any limitation of one of the fundamental rights of the EU Charter that shall be regarded as not respecting the essence of the right in question is to be deemed unlawful,²³ irrespective of the objective of general interest pursued by such limitation, if any.²⁴ The legal consequences of this qualification are thus extremely significant. The EU Charter, however, offers no guidance regarding how to

privacy and data protection in the digital environment, Edward Elgar Publishing, p. 181). In some Member States, there is no equivalent constitutional provision, but the judiciary has developed related principles that also aim at limiting the action of the legislator (referring to the so-called ‘cliquet anti-retour’ as inspired by the same philosophy as the essence requirement: Laurence Burgorgue-Larsen (2002), ‘L’appréhension constitutionnelle de la vie privée en Europe : Analyse croisée des systèmes constitutionnels allemand, espagnol et français’, in F. Sudre (ed.), *Le droit à la vie privée au sens de la Convention européenne des droits de l’homme*, Bruylant, pp. 69-115.

²⁰ Cf., in this sense, *Wachauf* para. 18.

²¹ See, for instance: Judgment of the Court (Grand Chamber) of 3 September 2008, *Kadi, Joined cases C-402/05 P and C-415/05 P*, ECLI:EU:C:2008:461, para. 355; *Makhlouf v Council*, Case T-383/11, Judgment of the General Court (Sixth Chamber) of 13 September 2013, ECLI:EU:T:2013:431, para. 97.

²² In this sense, for instance: Agustín José Menéndez (2003), ‘Rights to Solidarity: Balancing Solidarity and Economic Freedoms’, in Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *The Chartering of Europe*, Nomos, p. 185.

²³ To be lawful, limitations that respect the essence of the right also have to comply with the other requirements of Article 52(1) of the EU Charter.

²⁴ Very few voices in the literature argue differently; as an illustration of other possible readings, endorsing the idea that limitations that do not respect the essence of the right to data protection may be lawful if the data subject ‘consents’: Zlatan Meškić and Darko Samardžić (2017), ‘The Strict Necessity Test on Data Protection by the CJEU: A Proportionality Test to Face the Challenges at the Beginning of a New Digital Era in the Midst of Security Concerns’, *Croatian Yearbook of European Law & Policy*, 13(1), p. 142.

determine the boundaries of the ‘essence’ of any right. This has been connected to an overall – and possibly deliberate - ‘shapelessness’ of the EU Charter.²⁵

Not respecting the essence may be interpreted as questioning or invalidating the very existence of a right. The CJEU has applied the essence requirement of Article 52(1) EU Charter for instance by asserting that a contested measure respected the essential content of a right because it included certain conditions ensuring that the right was ‘*not called into question as such*’.²⁶

Terms sometimes used as synonyms of respecting the essence include the ‘*observance of the essence*’,²⁷ and to ‘*not adversely affect the essence*’.²⁸ Not respecting the essence of a right might not mean to merely ‘touch’ or ‘interfere with’ a very important element of a right; if this occurs, but it occurs under certain conditions, the essence might nevertheless be respected.²⁹ Nevertheless, traditional formulations in EU law privileged the idea that the substance should be ‘*left untouched*’.³⁰

The European Data Protection Supervisor (EDPS) has described the non-respect of the essence as implying that a right ‘*is in effect emptied of its basic content and the individual cannot exercise*’ it.³¹ This appears to at least partially conflate the requirement of respecting the essence of a right with the possibility to exercise a right. It could potentially mean that if the essence requirement is not respected, this will inevitably have as consequence that the right

²⁵ Niall Coghlan and Marc Steiert, ‘Analytical introduction’ (2020), in *The Charter of Fundamental Rights of The European Union: The Travaux Préparatoires and Selected Documents*, European University Institute (EUI), p. 21.

²⁶ See, in relation to Art. 50 EU Charter: Case C-524/15, *Luca Menci*, Judgment of the Court (Grand Chamber) of 20 March 2018, ECLI:EU:C:2018:197, para. 43. In relation to Art. 47 EU Charter and personal data protection: Case C-73/16, *Puškár*, Judgment of the Court (Second Chamber) of 27 September 2017, ECLI:EU:C:2017:725, para. 64 (‘*that obligation respects the essential content of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter. That obligation does not call into question that right as such*’), referring to the imposition of an additional procedural step as a precondition for bringing a legal action intended to ensure the protection of rights conferred by EU data protection law.

²⁷ Opinion of Advocate General Saugmandsgaard Øe delivered on 19 July 2016, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, ECLI:EU:C:2016:572, Joined Cases C-203/15 and C-698/15, para. 155.

²⁸ *Ibid.*, para. 156.

²⁹ See, in this sense: Case C-117/20, *bpost SA v Autorité belge de la concurrence*, Judgment of the Court (Grand Chamber) of 22 March 2022, ECLI:EU:C:2022:202, para. 43 (‘*Such a possibility of a duplication of proceedings and penalties respects the essence of Article 50 of the Charter, provided that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation*’).

³⁰ In this sense, Case 4-73, *Nold*, Judgment of the Court of 14 May 1974, ECLI:EU:C:1974:51, para. 14.

³¹ EDPS, Guidelines on the assessment of the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data, 19 December 2019, p. 8 (also referenced in: EDPB-EDPS Joint Opinion 04/2022 on the Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, 28 July 2022, p. 10). See also: EDPS, Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit, 11 April 2017, p. 4.

cannot be exercised. The relation between the two statements can also be read differently, however, and in particular as meaning that any limitation that would render the exercise of a right impossible (as opposed to merely more difficult)³² might be regarded as compromising the right's essence.

The European Data Protection Board (EDPB) has argued that restrictions of data subject rights and data protection principles that would be so '*extensive and intrusive*' that they would '*void a fundamental right of its basic content*' must be regarded as unlawful for not respecting the right's essence.³³ In 2020, the EDPB declared that '*restrictions adopted in the context of a state of emergency suspending or postponing the application of data subject rights and the obligations incumbent to data controllers and processors, without any clear limitation in time, would equate to a de facto blanket suspension of those rights and would not be compatible with the essence of the fundamental rights and freedoms*'.³⁴

Brkan has put forward that the essence of a fundamental right may be regarded as not respected when '*the interference with the fundamental right calls into question the existence of the fundamental right either for a particular right holder or for all right holders and if overriding reasons for such interference do not exist*'.³⁵ The latter idea,³⁶ however, might also be conceived in the opposite direction: when an interference is such that it may not be justified by any overriding reasons, it may be considered that the essence of the right is not being respected.

As noted by Brkan, in any case, limitations not respecting the essence shall not be equated with 'serious' or 'particularly serious' limitations.³⁷ There might be very serious limitations of rights that nevertheless are regarded as respecting the right's essence. At the same time, as

³² As in *Pušár*, cited above.

³³ The EDPB has stated for instance that '*a general exclusion of data subjects' rights with regard to all or specific data processing operations or with regard to specific controllers would not respect the essence of the fundamental right to the protection of personal data, as enshrined in the Charter*' (EDPB, Guidelines 10/2020 on restrictions under Article 23 GDPR, Version 2.0, 13 October 2021, p. 7). A previous version of these Guidelines also provided as example of lack of respect of the essence '*a general limitation*' of data subject rights for specific data processing operations (EDPB, Guidelines 10/2020 on restrictions under Article 23 GDPR, Version 1.0, 15 December 2020, p. 6), but the version adopted in 2021 after public consultation only refers to '*a general exclusion*'.

³⁴ EDPB, Statement on restrictions on data subject rights in connection to the state of emergency in Member States, 2 June 2020, p. 4. The EDPB added that '*the postponement or suspension - without any specific limit in time - of the handling, by the controller, of the data subject requests would amount to a complete obstacle against the exercise of the rights themselves*' (idem).

³⁵ Maja Brkan (2018), 'The concept of essence of fundamental rights in the EU legal order: Peeling the onion to its core', *European Constitutional Law Review*, 14(2), p. 363.

³⁶ Also expressed in these terms: '*as long it is possible to (out)balance a fundamental right with a competing right or interest, the essence of a right does not come into play*' (ibid., p. 365).

³⁷ Brkan (2018), op. cit., p. 360.

pointed out by Lenaerts, limitations that do not compromise the essence of a right might be described as ‘less intense’ than those at issue when the essence is compromised.³⁸

National courts applying the essence requirement do not always make explicit the criteria used to identify an instance of lack of respect of the essence. Generally speaking, they may either focus on identifying breaches of what makes the right recognizable as such, in abstract terms, or review what is generally understood by the doctrine to be the essential content of the right.³⁹

The CJEU typically does not explain the reasons behind its own use of the essence requirement.⁴⁰

The relationship between the essence requirement and the proportionality requirement is often debated in the doctrine. The discussion notably revolves around to which extent applying the essence requirement would follow – or not – a similar logic as applying the proportionality requirement.

The CJEU has in the past alluded to interferences infringing ‘*upon the very substance of the rights guaranteed*’ as ‘*disproportionate and intolerable*’ interferences.⁴¹ Arguably, a *disproportionate* interference is an interference that has been subject to a proportionality assessment, which it failed. To some extent, acknowledging a lack of respect of the essence is thus always at least indirectly dependent on having considered a possible balancing act,⁴² and the endorsement of the fact that a balancing shall not happen.⁴³

In practice, in any case, interferences that are deemed not to respect the essence requirement cannot be justified and cannot be deemed lawful through any balancing exercise, as

³⁸ Koen Lenaerts (2019), ‘Limits on limitations: the essence of fundamental rights in the EU’, *German Law Journal*, 20(6), p. 784.

³⁹ See, in this sense: Luciano Parejo Alfonso (1981), ‘El contenido esencial de los derechos fundamentales en la jurisprudencia constitucional; a propósito de la sentencia del Tribunal Constitucional de 8 de abril de 1981’, *Revista española de derecho constitucional*, 3, p. 189.

⁴⁰ Advocate General Bobek was for instance critical of the judgment in *Menci*, and observed that the Court had ‘*simply axiomatically stated*’ that the measure at stake respected the essence of the right (cf. Opinion of Advocate General Bobek delivered on 2 September 2021, Case C-117/20, *bpost SA v Autorité belge de la concurrence*, ECLI:EU:C:2021:680, para. 110). Bobek also accused the CJEU of having ‘*ended up in a situation in which the very essence of Article 50 of the Charter was lost*’ (ibid., para. 117).

⁴¹ Case C-28/05, *Dokter and Others*, Judgment of the Court (Third Chamber) of 15 June 2006, ECLI:EU:C:2006:408, para. 75.

⁴² In the words of Klatt and Meister: ‘*the basis of this core protection remains relative to the competing principles. The extent of a seemingly absolute protection still depends on balancing*’, Matthias Klatt and Moritz Meister (2012), *The constitutional structure of proportionality*, Oxford University Press on Demand, p. 68. It is also possible to refer to this impossibility of balancing as ‘*the partial prohibition of balancing what is balanceable*’ (Carsten Bäcker (2021), ‘Limited Balancing: The Principle of Human Dignity and Its Inviolability’ in Jan-R. Sieckmann (ed.), *Proportionality, Balancing, and Rights Robert Alexy’s Theory of Constitutional Rights*, p. 95).

⁴³ Noting that reliance on the essence requirement by the courts will necessarily take into account the specific features of each case: Opinion of Advocate General Pitruzzella delivered on 27 January 2022, *Ligue des droits humains ASBL v Conseil des ministres*, Case C-817/19, para. 92.

they will have to be regarded as unlawful. Carrying out a formal proportionality assessment becomes thus unnecessary.⁴⁴

Advocate General Pitruzzella has argued that *'the concept of the 'essence' of fundamental rights must be defined restrictively, so that it continues to perform its role as a bastion against attacks on the very substance of those rights'*.⁴⁵ This wording might appear to contradict the case law of the CJEU, which has repeatedly stated that restrictions to fundamental rights must be interpreted restrictively. As the essence requirement aims actually at restricting such restrictions,⁴⁶ it would seem it should rather be applied *broadly*. The main message of the Advocate General is nevertheless that the essence requirement should not be used lightly.⁴⁷

The term 'essence' used for the essence requirement might be somehow misleading, to the extent that it could suggest that it is necessarily concerned with delimiting a specific nucleus inside a larger mass, a sort of small sphere at the centre of a larger sphere.⁴⁸ Other terms used, such as the *'inalienable substance'*⁴⁹ of rights, equally seem to allude to a sort of platonic reality that could be pictured transcending the application of the essence requirement to concrete cases. While these images have undoubtedly been influential, they can be deceptive if understood as impelling courts to draw spheres inside fundamental rights or necessarily rely on a clearly defined distinction of a nucleus as a condition to apply Article 52(1) of the EU Charter.

Advocate General Pitruzzella has in this sense argued that determining what constitutes the essence of a fundamental right *'is an extremely complex task'* and that *'in practice it is almost impossible to do so'*.⁵⁰ For Ojanen, the only possible way to *'define the essence of a fundamental right'* is *'by taking into account carefully the normative elements of each fundamental right and the characteristics of a particular case'*.⁵¹ Ojanen also argues that *'the*

⁴⁴ As the limitation shall in any case be regarded as contrary to the EU Charter (Opinion of Advocate General Saugmandsgaard Øe delivered in Case C-311/18, op. cit., para. 272).

⁴⁵ Opinion of AG Pitruzzella Case C-817/19, op. cit., para. 92.

⁴⁶ A 'limitation of the limitations', or *Schranken der Schranken* in the German doctrine. The essence requirement can also be described as a limit to the limitability of fundamental rights (Robert Alexy (2010), *A Theory of Constitutional Rights*, Oxford University Press, p. 192).

⁴⁷ In the words of Lenaerts, *'the CJEU must proceed with caution when defining the circumstances under which the essence of a fundamental right is compromised'* (Lenaerts (2019), op. cit., p. 793). The German Federal Constitutional Court relies only rarely on the essence requirement (Andrej Lang (2020), 'Proportionality Analysis by the German Federal Constitutional Court' in Mordechai Kremnitzer, Talya Steiner and Andrej Lang (eds.), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*, Cambridge University Press, p. 58).

⁴⁸ Brkan (2018), op. cit., p. 332.

⁴⁹ Opinion of AG Pitruzzella in Case C-817/19, op. cit., para. 92.

⁵⁰ *Idem*.

⁵¹ Tuomas Ojanen (2016), 'Making the essence of fundamental rights real: the Court of Justice of the European Union clarifies the structure of fundamental rights under the Charter: ECJ 6 October 2015, Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*', *European Constitutional Law Review*, 12(2), p. 326.

essence of a fundamental right cannot usually be determined in light of its textual formulation in the Charter, but that *‘the identification of the essence is a matter of contextual, moment-to-moment interpretation’*.⁵²

It is true that in the case law of the CJEU it is possible to read sometimes, in relation to some rights, what appears to be an explicit and unambiguous assertion that certain elements form part of the right’s essence.⁵³ The President of the Court of First Instance for example stated that to reduce copyright to a purely economic right to receive royalties *‘dilutes the essence of the right’*.⁵⁴

In other cases, however, the essence requirement is applied by the Court without there being a particularly clear delimitation of the essence as such. In this sense, it might be useful to envision the essence requirement not as an imperative imposed on courts to conceive of a core of each right, but rather as a tool put in their hands to declare unlawful certain types of limitations of rights.

3.2. The right to the protection of personal data

There is no consensus about the content of the EU fundamental right to personal data protection.⁵⁵ A textual analysis of Article 8 of the EU Charter reveals that the provision comprises three types of elements: data processing principles to be respected (*‘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’*),⁵⁶ rights granted to the data subject (*‘Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified’*),⁵⁷ and the obligation to guarantee independent monitoring (*‘Compliance with these rules shall be subject to control by an independent authority’*).⁵⁸

⁵² *Idem*.

⁵³ See, for instance: ‘(the) requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial’ (Order of the Vice-President of the Court of 14 July 2021, Case C-204/21 R, *European Commission v Republic of Poland*, ECLI:EU:C:2021:593, para. 84).

⁵⁴ Order of the President of the Court of First Instance, 26 October 2001, *IMS Health Inc., v Commission of the European Communities*, Case T-184/01 R, ECLI:EU:T:2001:259, para. 125.

⁵⁵ In the words of Dalla Corte, there is currently no *‘univocal, authoritative conception of what constitutes the right to data protection’* (Lorenzo Dalla Corte (2020), ‘A Right to a Rule: On the Substance and Essence of the Fundamental Right to Personal Data Protection’, in Dara Hallinan, Ronald Leenes, Serge Gutwirth and Paul De Hert (eds.), *Data Protection and Privacy: Data Protection and Democracy*, Hart Publishing, p. 28).

⁵⁶ Art. 8(2) EU Charter.

⁵⁷ *Idem*.

⁵⁸ Art. 8(3) EU Charter.

This vision of the right to personal data protection as comprehending three key components is consistent with the historical development of data protection in Europe. Already in 1980 Hondius described ‘(a)ll European data protection laws’ as having ‘adopted a tripartite structure’.⁵⁹ This conception also matches the actual structure of the main EU data protection law instruments.⁶⁰

The described understanding of the right to data protection could seem to be in conflict, however, with readings of Article 8 of the EU Charter which interpret its second and third paragraph as referring not to the content of the right, but to requirements to be respected by any of its limitations (in addition to the requirements of Article 52(1)).⁶¹ From this perspective, it becomes less clear what would be the actual content of the right – presumably encapsulated by Article 8(1) of the EU Charter. This phenomenon is as a matter of fact not specific to this fundamental right: there is not always a clear-cut distinction between the limitations of a fundamental right and the description of the material extent of the guarantee contained in a constitutional provision.⁶²

There is currently a broad agreement on the fact that the EU right to personal data protection and the right to respect for private life are different rights, even if closely linked.⁶³ The EU legal framework has evolved in the past decades from a situation where EU data protection law was directly linked to Article 8 of the ECHR, on the right to respect for private

⁵⁹ ‘The law imposes certain obligations on data users, confers certain rights on data subjects, and places on the government the duty to supervise compliance with those obligations and rights’, Frits W. Hondius (1980), ‘Data law in Europe’, *Stanford Journal of International Law*, 16, p. 95. Hondius had previously defined ‘data protection’ as ‘the legal rules and instruments designed to protect the rights, freedoms and interests of individuals whose personal data are stored, processed and disseminated by computers against unlawful intrusions, and to protect the information stored against accidental or wilful unauthorised alteration, loss, destruction or disclosure’ (Frits W. Hondius (1975), *Emerging Data Protection in Europe*, North-Holland Publishing Co., p. 1).

⁶⁰ For instance, in relation to the GDPR, Chapters II and IV concern data processing principles and related obligations; Chapter III, data subject rights, Chapters VI and VII, independent monitoring.

⁶¹ The CJEU has sometimes referred to Art. 8(2) EU Charter as concerned with the limitations that may be imposed on that right, signalling its connection with Art. 52(1) EU Charter (cf. : ‘it follows from Articles 8(2) and 52(1) of the Charter that, under certain conditions, limitations may be imposed on that right’, *Joined Cases C-468/10 and C-469/10, ASNEF and FECEMD*, Judgment of the Court (Third Chamber) of 24 November 2011, ECLI:EU:C:2011:777, para. 42). Kranenborg contends that the only plausible way to consider Art. 52 as a general limitation clause applying to Art. 8 (a provision then not envisioned thus as detailing permissible limitations) would be to construe Art. 8 as establishing a right to informational self-determination (Herke Kranenborg (2021), ‘Article 8 – Protection Personal Data’, in Steve Peers, Tamara Hervey, Jeff Kener and Angela Ward (eds.) *The EU Charter of Fundamental Rights: A commentary* (Second edition), p. 281). On this issue, see also: Gloria González Fuster and Serge Gutwirth (2013), ‘Opening up personal data protection: A conceptual controversy’, *Computer Law & Security Review*, 29, pp. 531-439.

⁶² Alexy (2010), *op. cit.*, p. 185.

⁶³ The doctrine has progressively embraced the fact that even though Arts. 7 and 8 EU Charter are in some way ‘closely linked’, and although there are ‘considerable overlaps’ in the scope of the right to privacy and the right to personal data protection, these rights ‘should not be considered to be identical’ (Juliane Kokott and Christoph Sobotta (2013), ‘The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR’, *International Data Privacy Law*, 3(4), p. 228).

life, to the current coexistence of two different fundamental rights in the EU Charter, and the connection of EU data protection law primarily with Article 8 of the EU Charter.⁶⁴ Before the drafting of the EU Charter, the CJEU had openly stressed the connection between EU data protection law and the ECHR, mainly as a response to arguments that framed EU data protection law as only secondarily concerned with fundamental rights.⁶⁵

At national level, it cannot be stated that the recognition of a separate right to personal data protection would form part of the constitutional traditions common to Member States, as national traditions are actually very diverse, and they do not all embrace the separate existence of such right. Nonetheless, as highlighted by Erdos, when examining the Member States that have incorporated a right to personal data protection '*within their own primary or constitutional texts, what is striking is that this recognition has almost invariably emerged in parallel with, rather than later from, inclusion of a general right to privacy*'.⁶⁶

In ECtHR case law, data protection safeguards are still nowadays envisioned as pertaining to the right to respect for private life of Article 8 of the ECHR,⁶⁷ not to a separate right. In the context of the Council of Europe there have been numerous calls over the decades asking for a separate right to personal data protection to be recognised, but none have been successful.⁶⁸

Certainly because of this evolving and in a way disparate situation, it has been noted that that relationship between Articles 7 and 8 of the EU Charter '*is not entirely clear*'.⁶⁹

⁶⁴ A milestone in such evolution was the *Bavarian Lager* judgment, in which the Court ruled that a reference to '*privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*' in Regulation No 1049/2001 (Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/31) could not be restrictively interpreted as only applying when Art. 8 ECHR was at stake (Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd.*, Judgment of the Court (Grand Chamber) of 29 June 2010, ECLI:EU:C:2010:378, para. 65).

⁶⁵ See, in this sense, for instance: Maria Tzanou (2010), 'Balancing Fundamental Rights: United in diversity? Some Reflections on the Recent Case Law of the European Court of Justice on Data Protection', *Croatian Yearbook of European Law & Policy*, 6(1), pp. 53-74.

⁶⁶ David Erdos (2021), *Comparing Constitutional Privacy and Data Protection Rights within the EU*, University of Cambridge Faculty of Law Research Paper 21/2021, p. 20.

⁶⁷ The Modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data Convention 108 ('Convention 108+') defines its object and purpose as '*to protect every individual, whatever his or her nationality or residence, with regard to the processing of their personal data, thereby contributing to respect for his or her human rights and fundamental freedoms, and in particular the right to privacy*' (Art. 1). The Preamble does refer to the '*right to protection of personal data*', but only to recall it '*is to be considered in respect of its role in society and that it has to be reconciled with other human rights and fundamental freedoms*'.

⁶⁸ See, for example: Recommendation 890 (1980) of the Parliamentary Assembly, which, noting '*that some member states have made the protection of personal data a constitutional right, and that other countries are planning to do so*' (§ 2), recommended examining '*as part of the extension of the rights in the European Convention on Human Rights, the desirability of including in the convention a provision on the protection of personal data, by amending Article 8 or 10, or by adding a new article to the convention*' (§ 3). See also: Frits W. Hondius (1997), 'Protecting Medical and Genetic Data', *European Journal of Health Law*, 4, p. 363.

⁶⁹ Tobias Lock (2019), 'Articles 6-19', in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, 2019, p. 2123.

The EU data protection *acquis* is considerable,⁷⁰ and examining it might help to delimit the content of the right to personal data protection. The relationship between Article 8 of the EU Charter and EU secondary law might nevertheless be more complex than what the Explanations of the EU Charter invite to think. The GDPR, for instance, does not exclusively serve the fundamental right to personal data protection, even if its legal basis is Article 16 of the TFEU and the very first recital of its Preamble explicitly refers to Article 8(1) of the EU Charter) and Article 16(1) of TFEU. The GDPR's objective is to protect '*fundamental rights and freedoms of natural persons*' in general, in addition to guaranteeing the free movement of personal data within the EU.⁷¹ It certainly does have, at the same time, a special connection with the right to personal data protection, which it '*in particular*' aims to protect.

Having explored the foundations of EU data protection law, Lynskey concluded that enhanced individual control over personal data was one of its facets, but not the only one.⁷² Bieker has looked into the content of the EU fundamental right to personal data protection from the perspective of a prior analysis of EU secondary data protection law, itself explored from the standpoint of a review of the historical development of thinking about data protection law.⁷³ He derives a series of principles from such analysis, to which the notion of essence is then connected.⁷⁴

⁷⁰ The right to personal data protection has been portrayed as 'one of the most regulated fundamental rights at the EU level' (Vasiliki Kosta (2015), *Fundamental Rights in EU Internal Market Legislation*, Hart Publishing, p. 142).

⁷¹ Art. 1 GDPR. See also Recital 4, according to which '*This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity*'.

⁷² Orla Lynskey (2015), *The foundations of EU data protection law*, Oxford University Press, p. 272. Von Grafenstein has likewise underlined the limitations of conceptualising the right to personal data protection as a right to 'data-determination' which would grant data subjects a say in determining the purposes of data processing (Maximilian von Grafenstein (2020), 'Refining the Concept of the Right to Data Protection in Article 8 ECFR-Part I: Finding an Appropriate Object and Concept of Protection by Re-Connecting Data Protection Law with Concepts of Risk Regulation', *European Data Protection Law Review*, 6, p. 515).

⁷³ Felix Bieker (2022), *The Right to Data Protection: Individual and Structural Dimensions of Data Protection in EU Law*, Springer Nature, p. 226.

⁷⁴ In an example described by Bieker, a 'case where a Member State does not allocate resources to a supervisory authority so as to enable it to enforce the EU data protection legislation' would constitute the negation of 'the principle of control and thus violate the individual's right to data protection', in the sense of vulnerating its essence (ibid., p. 253).

Some scholars have insisted on the connections between Article 8 of the EU Charter with the German right to ‘*informational self-determination*’,⁷⁵ while others have highlighted the weaknesses of such understanding.⁷⁶

The unsettled status of the content of the EU fundamental right to personal data does not facilitate the identification of what could be its essence (or ‘essential content’, as expressed in other languages)⁷⁷. The opposite is also true: uncertainty about what could be the essence of the right to personal data protection does not help construing the content of the right. In the literature attempts can be found to approach this moving puzzle from different entry points.⁷⁸ Tzanou, for instance, examined the notion of the essence or ‘*hard core*’ of data protection as a means to reconstruct the right to data protection so it can ‘*stand independently on the side of the right to privacy*’.⁷⁹

Sometimes, the content of the right and its essence seem to be jointly apprehended. For Ausloos, control over one’s personal data – framed as an infrastructure regulating power asymmetries to ensure autonomy, freedom, and human dignity - constitutes the central tenet of the right to data protection, ‘*it constitutes its essence*’.⁸⁰

Hallinan, noting the lack of existing ready-made methodologies to determine what could constitute the essence of the right to personal data protection proposed a methodology in which the essence is envisioned as a ‘*normative pivot*’, the content of which, nevertheless, would remain in the words of the author ‘*radically uncertain*’.⁸¹

⁷⁵ In this sense, and also arguing that the ‘acknowledgement of the right to Data Protection as a fundamental Right, distinct from the traditional fundamental right to privacy, enacted in Article 7 of the Charter is questionable’: Antoinette Rouvroy and Yves Poullet (2009), ‘The right to informational self-determination and the value of self-development: Reassessing the importance of privacy for democracy’, in Serge Gutwirth, Yves Poullet, Paul De Hert, Cécile De Terwangne and Sjaak Nouwt (eds.), *Reinventing data protection?*, Springer, p. 71.

⁷⁶ E. g., Nikolaus Marsch (2020), ‘Artificial intelligence and the fundamental right to data protection: Opening the door for technological innovation and innovative protection’, in Thomas Wischmeyer and Timo Rademacher (eds.), *Regulating Artificial Intelligence*, Springer, p. 43. See also, on this issue: Kranenborg (2021), op. cit., p. 239.

⁷⁷ E. g. ‘Wesensgehalt’, ‘wezenlijke inhoud’, ‘contenu essentiel’, ‘contenido esencial’.

⁷⁸ For instance, Dalla Corte has argued that the right to personal data protection would be the ‘*right to have a system of rules regulating personal data processing*’ (Dalla Corte (2020), op. cit., p. 49) before deducing from such finding that the essence of the right may be described as a collective will, or ‘*the collective decision of generally allowing the processing of personal data by virtue of its promises, while at the same time regulating it on account of its perils*’ (ibid., p. 53).

⁷⁹ Maria Tzanou (2013), ‘Data protection as a fundamental right next to privacy? ‘Reconstructing’ a not so new right’, *International Data Privacy Law*, 3(2), p. 98.

⁸⁰ Jef Ausloos (2020), *The Right to Erasure in EU Data Protection Law: From Individual Rights to Effective Protection*, Oxford University Press, p. 61. Also evoking ‘control’ as the essence of the right to personal data protection: ‘*The concept of informational self-determination captures this notion of control as the essence of Article 8 in the Charter to a large extent*’ (ibid., p. 62).

⁸¹ Dara Hallinan (2021), ‘The Essence of Data Protection: Essence as a Normative Pivot’, *European Journal of Law and Technology*, 12(3), p. 24.

Regarding the limitations to the right to personal data protection, there is currently a certain degree of circularity in EU law. As detailed above, the EU Charter must be interpreted in light of its Explanations, which insofar as limitations are concerned refer to the GDPR and to Regulation (EU) 2018/1725, which in their turn establish that limitations must respect ‘*the essence of the fundamental rights and freedoms*’⁸² – not only of the right to personal data protection, but presumably of all rights. To comply with this requirement, it seems necessary to take as main reference the EU Charter, which does not explain much about the essence requirement.

Echoing this relative degree of uncertainty, the essence requirement has been described as the most difficult to explain requirement applying to EU data protection limitations.⁸³

For comparative purposes it can be interesting to consider the case law of the Spanish Constitutional Court on Article 18(4) of the Spanish Constitution, which imposes on the legislator a mandate to regulate the use of computers. In a 1993 judgment, STC 254/1993,⁸⁴ the Constitutional Court decided to read such provision taking into account Council of Europe’s Convention 108.⁸⁵ Reading it in such light, the Court argued that this provision functioned as a guarantee for other rights, while at the same time constituting a right in itself.⁸⁶ The Court described then the ‘essential content’ of such (new, then still unnamed) fundamental right, stating that it had a negative component, whereby the use of computers must be limited,⁸⁷ but also a positive component, concerning the right to control the use of computerised data.⁸⁸ This positive component was referred to with both the terms ‘computer freedom’ and ‘habeas data’.⁸⁹

Years later, in 2000, the Spanish Constitutional Court ruled on a case which questioned the constitutionality of some provisions of national data protection law, attacked because of their alleged breach of the essence of both Articles 18(1) and 18(4) of the Spanish

⁸² Art. 23(1) GDPR, Art. 25(1) EUDPR.

⁸³ Jeanne Pia Mifsud Bonnici (2014), ‘Exploring the Non-Absolute Nature of the Right to Data Protection’, *International Review of Law, Computers & Technology*, 28(2), p. 136.

⁸⁴ Sentencia 254/1993, de 20 de julio de 1993. Recurso de amparo 1.827/1990. BOE núm. 197, de 18 de agosto de 1993, pp. 28-34.

⁸⁵ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108). Its use as an interpretative tool was considered in line with constitutional obligations in this sense (Art. 10(2) of the Spanish Constitution).

⁸⁶ Legal foundation 6 of STC 254/1993.

⁸⁷ Legal foundation 7 of STC 254/1993.

⁸⁸ Murillo de la Cueva’s reading of the case law of the Spanish Constitutional Court for instance located in the essential content of the right established by Art. 18(4) of the Spanish Constitution the relation of necessity between the objective of the processing and the processing as such (Pablo Lucas Murillo de la Cueva (1999), ‘La construcción del derecho a la autodeterminación informativa’, *Revista de estudios Políticos*, 104, p. 52).

⁸⁹ Legal foundation 7 of STC 254/1993.

Constitution.⁹⁰ In that judgment, the Court compared the right to privacy (*intimidad*) of Article 18(1) with what was by then called the right to the protection of personal data of Article 18(4), insisting on the singularity of the latter.⁹¹ The peculiarity of the right to the protection of personal data, contended the Court, resides not only on the fact that its scope is broader, in the sense that it covers also the processing of personal data in general, but also on the peculiarity of its content: the right to personal data protection grants to individuals the right to impose on third parties some obligations, to guarantee that individuals have control over the data about them.⁹² The Court expounded that a series of powers legally conferred to individuals are thus absolutely necessary to effectively guarantee the legal interests at stake, and that depriving individuals of such powers and of the control over the personal data about them would amount to a breach of the essence of the fundamental right, in the sense of Article 53(1) of the Spanish Constitution.

In the Spanish case law, thus, the delineation of the essence of the right to the protection of personal data has historically played a crucial role in the very recognition of the right. In addition, it is worth noting that the right's essence has been described in terms that emphasise its singularity in relation to the right to privacy. Moreover, the content of the right's essence has been substantiated and reasoned. The approach contrasts strikingly with the manifestations of the essence requirement in the case law of the CJEU.

3.3. The right to respect for private life

The ECtHR has traditionally avoided defining the notion of 'private life',⁹³ warning about the risk of circumscribing this notion too narrowly. The Court has notably stated that *'it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses'*.⁹⁴

⁹⁰ Sentencia 292/2000, de 30 de noviembre de 2000. Recurso de inconstitucionalidad 1.463/2000. Promovido por el Defensor del Pueblo respecto de los arts. 21.1 y 24.1 y 2 de la Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, «BOE» núm. 4, de 4 de enero de 2001, pp. 104-118.

⁹¹ Legal foundation 6 of STC 292/2000.

⁹² Idem.

⁹³ Cf.: *'the concept of "private life" is a broad term not susceptible to exhaustive definition'* (*Pretty v. the United Kingdom*, Judgment of the Court of 29 April 2002, Application no. 2346/02, ECLI:CE:ECHR:2002:0429JUD000234602, para. 61).

⁹⁴ Adding that *'Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings'* (*Niemietz v. Germany*, Judgment of the Court of 16 December 1992, Application no. 13710/88, ECLI:CE:ECHR:1992:1216JUD001371088, para. 29). Also noting that there is a risk when searching for the essence of the right to respect for private life to reductively locate privacy's essence in a single overarching principle (e. g. liberty, inaccessibility, or control) or an inexistent 'autonomous, precultural core' of the self: Julie E. Cohen (2013), 'What privacy is for', *Harvard Law Review*, 126(7), pp. 1907-1908.

Particularly influential case law on this subject comes from the German Federal Constitutional Court, which has referred to a ‘*core area of private life, which enjoys absolute protection*’.⁹⁵ The Court has declared in this regard that ‘*(e)ven exceptionally significant interests of the general public cannot justify an interference with this domain of private life that is absolutely protected.*’⁹⁶ This should not be interpreted as meaning that the notion of private life might be circumscribed to an ‘inner circle’ in which individuals may live their own personal lives, as the ECtHR has underlined that such interpretation would be problematically narrow.⁹⁷

At EU level, during the last years situating the right to respect for private life in relation to data protection has generated much discussion. In a nutshell, what has taken place is an evolution in which the two rights have been progressively recognised as existing independently and detached from each other, although not necessarily in order to be applied in isolation, but rather – often - jointly. These developments have however not always been straightforward and have taken place amidst numerous divergent views and statements on the relation between the two rights.

Advocate General Cruz Villalón wrote in 2013, in his Opinion in the *Digital Rights Ireland* case,⁹⁸ that ‘*Article 8 of the Charter enshrines the right to the protection of personal data as a right which is distinct from the right to privacy*’, but, that even if ‘*subject to an autonomous regime*’, ‘*data protection seeks to ensure respect for privacy*’.⁹⁹

Cruz Villalón also explained that although the right to personal data protection was based on the right to respect for private life (referencing Kokott),¹⁰⁰ and although they are so closely linked that they may be regarded as establishing a single ‘*right to respect for private life with regard to the processing of personal data*’,¹⁰¹ this finding ‘*cannot apply systematically*’.¹⁰² In his view, the link between the two rights depends on the nature of the data at issue. He

⁹⁵ BVerfG, Judgment of the First Senate of 2 March 2010 - 1 BvR 256/08, non-authoritative translation available at http://www.bverfg.de/e/rs20100302_1bvr025608en.html, para. 314.

⁹⁶ BVerfG, Judgment of the First Senate of 19 May 2020 - 1 BvR 2835/17 -, non-authoritative translation available: http://www.bverfg.de/e/rs20200519_1bvr283517en.html , para. 200. The Court has also explained that ‘*The protection of the core of private life guarantees the individual a domain of highly personal life and ensures an inviolable core of human dignity that is beyond the reach of the state and provides fundamental rights protection against surveillance*’ (idem).

⁹⁷ *Denisov v. Ukraine*, Judgment of the Court (Grand Chamber) of 25 September 2018, Application no. 76639/11, ECLI:CE:ECHR:2018:0925JUD007663911, para. 96.

⁹⁸ Opinion of Advocate General Cruz Villalón delivered on 12 December 2013, *Digital Rights Ireland*, Joined cases C-293/12 and C-594/12, ECLI:EU:C:2013:845.

⁹⁹ *Ibid.*, para. 55.

¹⁰⁰ He grounded this statement in Advocate General Kokott’s Opinion in *Promusicae*, concretely in para. 51.

¹⁰¹ As the CJEU did in *Volker und Markus Schecke and Eifert*.

¹⁰² Opinion of AG Cruz Villalón, *op. cit.*, para. 63.

distinguished between data that ‘*are personal but no more than that*’, ‘*for which the structure and guarantees of Article 8 of the Charter are best suited*’,¹⁰³ and ‘*data which are in a sense more than personal*’, because they ‘*qualitatively, relate essentially to private life, to the confidentiality of private life, including intimacy*’.¹⁰⁴ Arguing that when such data are involved, they raise an issue which relates ‘*primarily to the privacy guaranteed by Article 7 of the Charter and only secondarily to the guarantees concerning the processing of personal data referred to in Article 8 of the Charter*’,¹⁰⁵ he claimed it was ‘*necessary to assess the validity of Directive 2006/24 primarily from the perspective of interference with the right to privacy*’.¹⁰⁶

Cruz Villalón also stated that a ‘private sphere’ forms the core of the ‘personal sphere’ and seemed to link the former to Article 7 and the latter to Article 8, before noting that ‘*it cannot be ruled out that legislation limiting the right to the protection of personal data in compliance with Article 8 of the Charter may nevertheless be regarded as constituting a disproportionate interference with Article 7 of the Charter*’.¹⁰⁷

Advocate General Kokott had written in her 2007 Opinion for *Promusicae*¹⁰⁸ that data protection legislation was ‘*based on the fundamental right to private life, as it results in particular from Article 8*’ of the ECHR. She grounded this statement in a reference to a paragraph of the CJEU *Rundfunk* judgment of 2003,¹⁰⁹ paragraph in which actually the Court merely stated that ‘*the collection of data by name relating to an individual's professional income, with a view to communicating it to third parties, falls within the scope of Article 8*’ of the ECHR.¹¹⁰

In 2016, the CJEU explicitly asserted that ‘*Article 8 of the Charter concerns a fundamental right which is distinct from that enshrined in Article 7 of the Charter and which **has no equivalent** in the ECHR*’.¹¹¹

¹⁰³ Ibid., para. 64.

¹⁰⁴ Ibid., para. 65.

¹⁰⁵ Ibid., para. 66.

¹⁰⁶ Ibid., para. 67.

¹⁰⁷ Ibid., para. 61.

¹⁰⁸ Opinion of Advocate General Kokott delivered on 18 July 2007, *Promusicae*, Case C-275/06, ECLI:EU:C:2007:454.

¹⁰⁹ Ibid., para. 51.

¹¹⁰ Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, para. 73 et seq.

¹¹¹ 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*, Judgment of the Court (Grand Chamber) of 21 December 2016, ECLI:EU:C:2016:970, para. 129. This had also been argued by Advocate General Øe in his Opinion in these Joined Cases (op. cit., para. 79).

4. Case law on the essence of the rights of Art. 7 and 8 EU Charter

Having delineated the general contours of the essence requirement and of the rights to personal data protection and to respect for private life, this section reviews more in detail the specific case law of the ECtHR and of the CJEU throwing light on the essence of the right to the protection of personal data, which cannot be in practice separated from a consideration of the essence of the right to respect for private life.

4.1. ECtHR

Advocate General Øe observed in 2019 that although the ECtHR had sometimes relied on the notion of essence, it *'has not had recourse, in its case-law relating to Article 8 of the ECHR, to the concept of violation of the essential content, or the very essence, of the right to respect for private life'*.¹¹²

The ECtHR has repeatedly stated that while *'the essential object'* of Article 8 ECHR *'is to protect the individual against arbitrary interference by the public authorities'*, *'in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private and family life'*. These obligations, the Court has noted, *'may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves'*.¹¹³ This does not mean that positive obligations would be excluded from the essence of Article 8 ECHR, as the term *'essential object'* is not used here in that sense. *'The boundary between the State's positive and negative obligations under Article 8'*, in addition, *'does not lend itself to precise definition'*, has explained the Court.¹¹⁴ Foreseeing data protection safeguards might be required under a State's positive obligations under Article 8 ECHR, the ECtHR has considered.¹¹⁵

¹¹² Opinion of AG Øe in Case C-311/18, para. 282.

¹¹³ *Bogomolova v. Russia*, Judgment of the Court (Third Section) of 20 June 2017, Application no. 13812/09, ECLI:CE:ECHR:2017:0620JUD001381209, para. 52.

¹¹⁴ *Von Hannover v. Germany (no. 2)*, Judgment of the Court (Grand Chamber) of 7 February 2012, Applications nos. 40660/08 and 60641/08, ECLI:CE:ECHR:2012:0207JUD004066008, para. 99. The ECtHR has also stated that *'[w]hile the boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition, the applicable principles are nonetheless similar'* (*Bărbulescu v. Romania*, Judgment of the Court (Grand Chamber) of 2015 September 2017, Application no. 61496/08, ECLI:CE:ECHR:2017:0905JUD006149608, para. 112).

¹¹⁵ See for instance, the judgment in *I v. Finland*, a case in which the applicant complained there had been a failure on the part of a hospital to guarantee the security of her data against unauthorised access, and, *'in Convention terms, a breach of the State's positive obligation to secure respect for her private life by means of a system of data protection rules and safeguards'* (*I v. Finland*, Judgment of the Court (Fourth Section), Application no. 20511/03, ECLI:CE:ECHR:2008:0717JUD002051103, para. 37).

The ECtHR has over the decades underlined the special importance of some aspects covered by the rights of Article 8 ECHR: for example, it has stated that an individual's name, gender, religion, sexual orientation and ethnic identity constitute '*essential aspects*' of their private life and identity.¹¹⁶ The Court also emphasised that personal development has some '*essential components*' including, for instance, the right to the protection of one's image, which presupposes the right to control the use of that image.¹¹⁷

The Court has also insisted on the link between Article 8 ECHR and respect for human dignity and human freedom, described as '*the very essence of the Convention*'.¹¹⁸

Despite all these insights, it is not possible to delimit with precision an 'essence' that would trigger the same legal consequences as in the essence requirement in Article 52(1) EU Charter.

4.2. CJEU

As pointed out, the CJEU already referred to the obligation to respect the very substance of fundamental rights before the entry into force of the EU Charter.¹¹⁹ In 1992 the CJEU referred to the right to respect for private life as a fundamental right protected by the EU legal order,¹²⁰ before noting that Member State may adopt measures likely to obstruct Treaty freedoms if the measures are justified in line with EU law read in light of EU fundamental rights. These rights, noted then the Court, '*do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the objectives*

¹¹⁶ *Ciubotaru v. Moldova*, Judgment of the Court (Fourth Section) of 27 April 2010, Application no. 27138/04, ECLI:CE:ECHR:2010:0427JUD002713804, para. 53.

¹¹⁷ *Bogomolova v. Russia*, para. 53.

¹¹⁸ '*Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings*' (*Christine Goodwin v. the United Kingdom*, Judgment of the Court (Grand Chamber) of 11 July 2002, Application no. 28957/95, ECLI:CE:ECHR:2002:0711JUD002895795, para. 90.

¹¹⁹ References to the very substance also appear later. In 2011, in a case concerning the processing of medical data (*Staff Regulations of officials and Conditions of Employment of other servants*, Case F-46/09, Judgment of the European Union Civil Service Tribunal (First Chamber) of 5 July 2011, ECLI:EU:F:2011:101), the Civil Service Tribunal referred to the obligation not to infringe '*the very substance*' of fundamental rights as an obligation that could be considered after the identification of a pursued objective of general interest (para. 113). The Tribunal also stated that '*Article 8(2) of the ECHR must be taken as a reference point*' for such an assessment (*idem*). In the same judgment the Tribunal also stated that '*the protection of personal data plays a fundamental role in the exercise of the right to respect for private and family life, embodied in Article 8 of the ECHR*' (para. 123).

¹²⁰ Case C-62/90, *Commission of the European Communities v Federal Republic of Germany*, Judgment of the Court of 8 April 1992, ECLI:EU:C:1992:169, para. 23.

pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.¹²¹

The right to data protection has been described as a privileged field for the development of the progressive autonomy of the EU fundamental rights law in relation to the ECHR.¹²² The CJEU has indeed by now made clear that the EU Charter is the key reference in this area, where '*Article 7 of Charter guarantees the right to respect for private life, whilst Article 8 of the Charter expressly proclaims the right to the protection of personal data*'.¹²³

Despite having overall embraced the existence of the fundamental right to personal data protection as a right on its own, the CJEU is perceived as not having been particularly active in devising the notion of the essence of the right to personal data protection.¹²⁴

The table below aims at synthesising the appearances of the essence requirement in the case law of the CJEU about the protection of personal data. The red cells indicate the cases where a specific limitation was deemed not to respect the essence of a right. As can be seen, these are comparatively few instances. Also, as noted by Lock, where the CJEU '*has found the essence of a right to have been infringed, it has done so largely apodictically without much discussion*'.¹²⁵

¹²¹ Ibid., para. 23.

¹²² Romain Tinière (2020), 'Protection des données à caractère personnel', in Fabrice Picod et al., *Charte des droits fondamentaux de l'Union européenne: Commentaire article par article*, 2e éd., Bruylant, p. 228. In contrast, divergence between the interpretation of Art. 7 EU Charter and Art. 8 ECHR has not been an issue, the idea that they must correspond (in line with Art. 52(3) EU Charter) being broadly embraced. Advocate General Jääskinen, for instance, described in 2003 Art. 7 EU Charter as '*in substance identical to Article 8 of*' the ECHR (Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C-131/12, *Google Spain and Google*, ECLI:EU:C:2013:424, para. 114).

¹²³ Case C-131/12, *Google Spain SL and Google*, Judgment of the Court (Grand Chamber) of 13 May 2014, ECLI:EU:C:2014:317, para. 69. See also: Case C-601/15 PPU, *J. N. v Staatssecretaris voor Veiligheid en Justitie*, Judgment of the Court (Grand Chamber) of 15 February 2016, ECLI:EU:C:2016:84, paras. 45-46.

¹²⁴ In this sense, see: Yordanka Ivanova (2021), 'The role of the EU Fundamental right to data protection in an algorithmic and big data world', in Dara Hallinan, Ronald Leenes and Paul De Hert (eds.), *Data Protection and Privacy: Data Protection and Artificial Intelligence*, Hart Publishing, pp. 145-186. Arguing that after an initial period of 'enthusiasm' about Art. 8 EU Charter the CJEU might have decided to favour more restrictive approaches: Marie-Pierre Granger and Kristina Irion (2018), 'The right to protection of personal data: The new posterchild of European Union citizenship?', in Sybe de Vries, Henri de Waele and Marie-Pierre Granger (eds.), *Civil Rights and EU Citizenship: challenges at the crossroads of the European, national and private spheres*, Edward Elgar Publishing, pp. 279-302.

¹²⁵ Tobias Lock (2019), 'Articles 51-54', in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, p. 2251.

Table 1 - Key CJEU case law

	Art. 7 EU Charter	Art. 8 EU Charter	Art. 47 EU Charter
Schwarz C-291/12 13 October 2013	'it is not apparent from the evidence available to the Court, nor has it been claimed, that the limitations placed on the exercise of the rights recognised by Articles 7 and 8 of the Charter in the present case do not respect the essence of those rights' (para. 39)		
Digital Rights Ireland C-293/12 and C-594/12 8 April 2014	'the retention of data required by Directive 2006/24 constitutes a particularly serious interference with' the rights laid down in Art. 7 EU Charter', but 'it is not such as to adversely affect the essence of those rights given that (...) the directive <u>does not permit the acquisition of knowledge of the content of the electronic communications as such</u> ' (para. 39)	the required data retention is not 'such as to adversely affect the essence of the fundamental right to the protection of personal data enshrined in Article 8 of the Charter, because (...) Directive 2006/24 provides, in relation to data protection and data security, that, without prejudice to the provisions adopted pursuant to Directives 95/46 and 2002/58, <u>certain principles of data protection and data security must be respected</u> by providers of publicly available electronic communications services or of public communications networks. According to those principles, <u>Member States are to ensure that appropriate technical and organisational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data</u> ' (para. 40)	
'Schrems I' C-362/14 6 October 2015	'legislation <u>permitting the public authorities to have access on a generalised basis to the content of electronic communications</u> must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter' (para. 94, with ref. to Digital Rights Ireland, para. 39)		'legislation <u>not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data</u> , does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter' (para. 95)

<p>Tele2 Sverige AB C-203/15 and C-698/15 21 December 2016</p>	<p><i>'that data, <u>taken as a whole, is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained</u>, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them'</i> [with ref. to <i>Digital Rights Ireland</i>, para. 27] and <i>'In particular, that data <u>provides the means (...) of establishing a profile of the individuals concerned, information that is no less sensitive, having regard to the right to privacy</u>, than the actual content of communications'</i> [with ref. to AG Opinion paras. 253, 254 and 257-259] (para. 99), and thus</p> <p><i>'The interference entailed by such legislation in the fundamental rights enshrined in Articles 7 and 8 of the Charter is very far-reaching and must be considered to be particularly serious'</i> (para. 100), but</p> <p><i>'such legislation <u>does not permit retention of the content of a communication and is not, therefore, such as to affect adversely the essence of those rights</u></i> [with ref. to <i>Digital Rights Ireland</i>, para. 39] (para. 101)</p>		
<p>PNR Canada Opinion 1/15 26 July 2017</p>	<p><i>'even if PNR data may, in some circumstances, reveal very specific information concerning the private life of a person, <u>the nature of that information is limited to certain aspects of that private life</u>, in particular, relating to air travel between Canada and the European Union'</i> (para. 150) and thus the interference is 'not liable adversely to affect the essence of the fundamental rights enshrined in Article 7' (para. 151)</p>	<p><i>'the envisaged agreement <u>limits, in Article 3, the purposes for which PNR data may be processed and lays down, in Article 9, rules intended to ensure, inter alia, the security, confidentiality and integrity of that data, and to protect it against unlawful access and processing</u></i>' (para. 150) and thus the interference is 'not liable adversely to affect the essence of the fundamental right' enshrined in Article 8 (para. 151)</p>	
<p>Puškár C-73/16 27 September 2017</p>			<p>merely imposing an additional procedural step as a precondition for bringing a legal action 'respects the essential content of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter' (para. 64)</p>
<p>'Schrems II' C-311/18 16 July 2020</p>			<p>refers to the essence and <i>'Schrems I'</i> in para. 187, and eventually concludes that <i>'the ombudsperson mechanism to which</i></p>

			<i>the Privacy Shield Decision refers does not provide any cause of action before a body which offers the persons whose data is transferred to the United States guarantees essentially equivalent to those required by Article 47 of the Charter' (para. 107)</i>
<i>État luxembourgeois</i> C-245/19 and C-246/19 6 October 2020			<i>'national legislation such as that at issue in the main proceedings must be regarded as not adversely affecting the essence of the right to an effective remedy guaranteed to the taxpayer concerned' (para. 84)</i>
<i>Ligue des droits humains</i> C-817/19 21 June 2022	<i>although 'it is true that PNR data may, in some circumstances, reveal very specific information on the private life of a person', 'in so far as, on the one hand, <u>the nature of that information is limited to certain aspects of a person's private life, concerning that person's air travel in particular, and, on the other hand, the PNR Directive expressly prohibits in Article 13(4) thereof the processing of sensitive data within the meaning of Article 9(1) of the GDPR, the data covered by that directive do not by themselves allow for a full overview of the private life of a person.</u> In addition, that directive, in Article 1(2) thereof read in conjunction with Article 3(8) and (9) thereof as well as Annex II thereto, circumscribes the purposes for which those data are to be processed. Lastly, that same directive, in Articles 4 to 15 thereof, lays down the rules governing the transfer, processing and retention of those data as well as the rules intended to ensure, inter alia, the security, confidentiality and integrity of those data, and to protect them against unlawful access and processing. In those circumstances, the interferences which the PNR Directive entails do not adversely affect the essence of the fundamental rights enshrined in Articles 7 and 8 of the Charter' (para. 120)</i>		

As also illustrated by the above table,¹²⁶ the CJEU has actually never based a determination of the unlawfulness of a limitation of the right to personal data protection on the

¹²⁶ In the table appear in red the cells corresponding to a statement of a breach of the essence requirement. In green, the cases in which the CJEU has discussed the requirement but put aside a breach of the essence

fact that such limitation would not respect the essence of the right to the protection of personal data. When the CJEU has discussed compliance with the essence requirement of a limitation of the protection of personal, it has always stated that – in that particular case – there was no breach of the essence requirement of the right to the protection of personal data.

The CJEU has interestingly proclaimed that *‘legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter’*.¹²⁷ This assessment has been presented by the Court as deriving from the fact that *‘the very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law’*.¹²⁸ The CJEU left unanswered the question of whether legislation that would not provide for the right to have access to personal data and the right to obtain rectification would – perhaps in some cases – not respect the essence of the right to personal data protection. This could seem logical taking into account the text of Article 8 of the EU Charter, which explicitly mentions those rights.

Commentators have noted that *‘(i)t is difficult to find a common thread between’* the different CJEU holdings on the essence *‘that would identify the essence of the rights to private life and data protection’*.¹²⁹ Lenaerts has stressed that what the case law of the CJEU suggests is that *‘in order to determine whether a measure compromises the essence of a fundamental right, one must not only examine the intensity, but also the extent, of the limitation at issue’*.¹³⁰

Regarding the manner in which the essence requirement is applied, it is important to note that the essence requirement is not systematically discussed by the Court when assessing limitations of the relevant rights of the EU Charter.¹³¹ When considered, the requirement is not

requirement. In orange, a case in which it seems to have based the assessment on a breach of the essence requirement, without however explicitly stating that the limitation did not respect the essence of the right.

¹²⁷ *Facebook Ireland and Schrems (‘Schrems II’)*, Case C-311/18, Judgment of the Court (Grand Chamber) of 16 July 2020, ECLI:EU:C:2020:559, para. 187, referring to *Maximillian Schrems v Data Protection Commissioner (‘Schrems I’)*, Case C-362/14, Judgment of the Court (Grand Chamber) of 6 October 2015, ECLI:EU:C:2015:650, para. 95 and case-law cited.

¹²⁸ *Idem*.

¹²⁹ Dominique Moore (2020), ‘Article 23 – Restrictions’, in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds.), *The EU General Data Protection Regulation: A Commentary*, Oxford University Press, p. 554.

¹³⁰ Lenaerts (2019), *op. cit.*, p. 785, referring in particular to Opinion 1/15 of the Court (Grand Chamber) of 26 July 2017, ECLI:EU:C:2016:656. This idea can be connected, for instance, to the judgment in *Delvigne*, in which the CJEU found that a limitation of the right to vote respected the right’s essence because it did *‘not call into question that right as such, since it has the effect of excluding certain persons, under specific conditions and on account of their conduct’* (Case C-650/13, *Delvigne*, Judgment of the Court, (Grand Chamber) of 6 October 2015, ECLI:EU:C:2015:648, para. 48).

¹³¹ A reference to the essence requirement is also not systematically preceded by a mention of the requirement by the Advocate General; for instance, there was no mention in the Opinion preceding the *Digital Rights Ireland*

systematically mentioned at the same moment of the unfolding of the CJEU's argumentation.¹³²

The CJEU sometimes makes a clear effort to consider limitations to the rights under Art. 7 and under Art. 8 of the EU Charter separately and differently, but it has also sometimes considers jointly limitations to Article 7 and to Article 8 of the EU Charter.¹³³ This approach can be traced back to 2010, when the CJEU proclaimed in the *Volker und Markus Schecke* judgment that the fundamental right to the protection of personal data 'is closely connected with the right to respect of private life',¹³⁴ and eventually referred to the existence of a combined 'right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter'.¹³⁵ The Court then stated that 'the limitations which may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8' of the ECHR.¹³⁶

Beyond the references to the essence requirement, in the case law of the CJEU can also be found certain references to what could be described as the content of Article 8 of the EU Charter. In *Google Spain and Google*, the CJEU stated that it is on the grounds of the rights of Article 7 and 8 EU Charter that data subjects may request that some information is no longer made available to the general public,¹³⁷ thus echoing that data subject rights (at least two of them: the right to access data and the right to have data rectified) are part of the rights protected under the EU Charter. Previously the Court had already referred to 'the significance of the data subject's rights arising from Articles 7 and 8 of the Charter'.¹³⁸

The CJEU has also noted that 'the requirement that compliance with the EU rules on the protection of individuals with regard to the processing of personal data is subject to control by an independent authority derives from the primary law of the European Union and, in

judgment, as noted in: Orla Lynskey (2014), 'The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland', *Common Market Law Review*, 51(6), p. 1803.

¹³² The Court might first consider whether a limitation is provided for by law, and pursues a general interest, and only as a third step discuss whether the essence is respected. See, for instance, Case C-291/12, *Schwarz*, Judgment of the Court (Fourth Chamber) of 17 October 2013, ECLI:EU:C:2013:670, paras. 35-39.

¹³³ In the table above, this has been reflected by merging the cells of the column of Art. 7 and Art. 8 EU Charter.

¹³⁴ Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke*, Judgment of the Court (Grand Chamber) 9 November 2010, ECLI:EU:C:2010:662, para. 47.

¹³⁵ *Ibid.*, para. 52. This 'synthetic' right, which would apply to 'any information relating to an identified or identifiable individual', is often mentioned in the CJEU case law (cf., for instance: C-70/18, *Staatssecretaris van Justitie en Veiligheid v A, B, P*, Judgment of the Court (First Chamber), 3 October 2019, ECLI:EU:C:2019:823, para. 54).

¹³⁶ *Idem.*

¹³⁷ Case C-131/12, *Google Spain SL and Google*, Judgment of the Court (Grand Chamber) of 13 May 2014, ECLI:EU:C:2014:317, para. 97 and para. 99.

¹³⁸ See, for instance: Joined Cases C-468/10 and C-469/10, *ASNEF and FECEMD*, Judgment of the Court (Third Chamber) of 24 November 2011, ECLI:EU:C:2011:777, para. 40.

particular, from Article 8(3) of the Charter of Fundamental Rights of the European Union and Article 16(2) TFEU'.¹³⁹ The Court observed in this sense that '*The establishment in Member States of independent supervisory authorities is thus **an essential component of the protection of individuals with regard to the processing of personal data***'.¹⁴⁰ This fact might be interpreted as supporting the idea that Article 8 of the EU Charter describes the actual content of the right to personal data protection, content which comprises the monitoring by an independent data protection authority as a necessary substantial element.

The mismatch between what the CJEU has stressed as important elements of the right to personal data protection, on the one hand, and the facets mentioned by the Court when applying the essence requirement, on the other, appears to confirm that the CJEU is not primarily concerned with construing the essence of the right as the core of a well-articulated series of spheres. Accepting the limitations of the current situation¹⁴¹ invites a series of reflections on its implications.

5. Key issues

The described landscape allows to identify a number of issues deserving further consideration, taking also into account ongoing policy and legislative developments. They concern the connection between the essence requirement and the delimitation of right's content, the specificity of the right to personal data protection, the criteria to determine that the essence requirement is not respected, and, finally, the surfacing of references to the essence requirement in other instruments of EU data protection law.

¹³⁹ Case C-288/12, *Commission v Hungary*, Judgment of the Court (Grand Chamber) of 8 April 2014, ECLI:EU:C:2014:237, § 47. See also: Case C-614/10, *European Commission v Republic of Austria*, Judgment of the Court (Grand Chamber) of 16 October 2012, ECLI:EU:C:2012:631, para. 36: '*the requirement that compliance with European Union rules on the protection of individuals with regard to the processing of personal data is subject to control by an independent authority derives from the primary law of the European Union, inter alia Article 8(3) of the Charter of Fundamental Rights of the European Union and Article 16(2) TFEU*'.

¹⁴⁰ Case C-288/12, *Commission v Hungary*, Judgment of the Court (Grand Chamber) of 8 April 2014, ECLI:EU:C:2014:237, para. 48. Such wording originates in Recital 62 of Directive 95/46/EC: '*the establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data*'. A CJEU judgment about the interpretation of Directive 95/46/EC described supervisory authorities as '*the guardians of [the] fundamental rights and freedoms*' for which the Directive aimed at establishing a high level of protection of fundamental rights and freedoms with respect to the processing of personal data (Case C-518/07, *Commission v Germany*, Judgment of the Court (Grand Chamber) of 9 March 2010, ECLI:EU:C:2010:125, para. 22). See also, on this issue: Kranenborg (2021), op. cit., pp. 277-280.

¹⁴¹ Marked, according to Dalla Corte, by an increase of '*the potential arbitrariness*' of the analysis of the CJEU that in exchange would '*a very marginal addition to the protective capacity of the right to personal data protection*' (Lorenzo Dalla Corte (2022), 'On proportionality in the data protection jurisprudence of the CJEU', *International Data Privacy Law*, ipac014, July 2022, p. 17).

5.1. Link between the essence and the content of rights

As explained above, the correspondence between the essence requirement and the content of a right is less straightforward than what its name (and especially the ontological connotations of the term ‘essential content’) might invite to believe. The application of the essence requirement should not be envisaged as necessarily leading to – or starting with – the delimitation of a larger realm which would constitute the content of the right, and thus comprise both an essence and a periphery, as well as clear bounds around and between them.

The essence requirement can be applied without a simultaneous clear demarcation of the content of a right. The content of the right to personal data protection may thus be at least to some extent discussed independently from the limited list of elements highlighted when the essence requirement is at stake, although such elements must be regarded as part of the content of the right.

The question of which data protection safeguards are part of the content of the right guaranteed under Article 8 of the EU Charter remains open.

5.2. The specificity of the right to personal data protection

There is, at least at a conceptual level, a link between the essence requirement and the singularity of fundamental rights. To take into account the essence requirement seems to require being attentive to what makes a certain right unique, as negating such uniqueness may amount to invalidating the right ‘as such’, and to nullifying its existence.

The CJEU does not systematically put forward the singularity of the right to personal data protection. It is true that the Court, when examining compliance with the essence requirement, has sometimes separated the application of the essence requirement to the right to respect for private life and to the right to the protection of personal data. The opposite is however also true.

The Court still very often refers jointly to both Article 7 and 8 of the EU Charter when generally adjudicating on EU data protection law, without putting forward any particular distinction regarding the implications of relying on one provision or the other.¹⁴² This happens also in cases in which the CJEU is confronted with requests for preliminary rulings in which

¹⁴² See, for instance, for a recent example: Case C-184/20, *OT v Vyriausioji tarnybinės etikos komisija*, Judgment of the Court (Grand Chamber) of 1 August 2022, ECLI:EU:C:2022:601, paras. 60, 61, 66, 70, 81, 85, 112, 116, 126.

the referring court mentioned only Article 8, or Article 8 and 52 of the EU Charter, but not Article 7.¹⁴³

It is difficult to determine to which extent the proliferation of joint invocations by the CJEU of Article 7 and Article 8 of the EU Charter corresponds to a deliberate choice by the Court to preferably apply them together, or rather a legacy practice, notably linked to the fact that the e-Privacy Directive (directly relevant in many of the judgments about data retention) does refer to both Article 7 and 8 in its Preamble.¹⁴⁴

An important question that thus remains open is whether the progressive increase in requests for preliminary rulings specifically on the interpretation of the GDPR, which refers in its first Recital to Article 8 of the EU Charter but not Article 7, will eventually lead to a clearer focus in the CJEU case law on the singularity of Article 8 of the EU Charter.

5.3. Criteria for the qualification of the limitation

The CJEU has in its case law sustained the idea that when certain types of personal data are involved the limitation of the relevant EU fundamental rights might be regarded as particularly serious, or more serious than if other types of personal data were at stake.¹⁴⁵

As noted above, in principle the lack of respect of the essence of a right does not necessarily follow from a higher degree of seriousness of a limitation as such. A very serious limitation of a right might or not be regarded as compromising the essence of a right. Equally, the essence of the right to personal data protection might potentially be affected regardless of whether the personal data at stake are particularly sensitive or not.

In addition to the intensity or nature of the limitation, the extent to which such limitation applies can also play a role in finding that the essence has been compromised. This was illustrated for instance in the described reaction of the EDPB to the restrictions on data subject rights in connection to the state of emergency in Member States in 2020, which underlined the problematic character of the blanket – generalised – suspension of data subject rights.

The exact ways in which these different criteria are relevant remains unclear.

¹⁴³ See, for instance : Case C-708/18, *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of the Court (Third Chamber) of 11 December 2019, ECLI:EU:C:2019:1064, para. 32, 33, 47, 52, 55, 60.

¹⁴⁴ See Recital 2 of 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) [2002] OJ L201/37: ‘*In particular, this Directive seeks to ensure full respect for the rights set out in Articles 7 and 8 of that Charter*’.

¹⁴⁵ On this issue, see notably: Lorna Woods (2021), ‘Data Retention: AG opinions on the latest CJEU cases on national laws’, *EU Law Analysis*, 24 November 2021.

5.4. References to the essence in other instruments

References to the essence requirement are not confined to Article 52(1) of the EU Charter. As noted above, the requirement appears also in provisions of secondary law.

In the GDPR, there are three mentions of the need to respect the essence. All of them clearly refer to a requirement that must be complied with by the legislator, establishing a strong link between an obligation to legislate in some cases, and the need to legislate by respecting the essence of relevant fundamental rights. In this sense, Article 9(2)(g) of the GDPR refers to the possibility to process special categories of data if the processing is necessary for reasons of substantial public interest, on the basis of EU or Member State law which shall, among other requirements, '*respect the essence of the right to data protection*'. This obligation to respect the essence of the right to personal data protection is clearly imposed on the EU or national law that would allow for the processing. Equally, Article 9(2)(j) of the GDPR establishes that it shall be possible to process special categories of data if necessary '*for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1)*' (of the GDPR) and based on EU or Member State law which shall, *inter alia*, '*respect the essence of the right to data protection*'. In a similar vein, Article 23(1) of the GDPR states that EU or national law may restrict certain rights and obligations '*when such a restriction respects the essence of the fundamental rights and freedoms*', and if in compliance with other requirements.

Regulation (EU) 2018/1725 comprises similar provisions with similar formulations, in Articles 10(2)(g), 10(1)(j), and 25(1). Under the latter, however, are allowed restrictions to certain rights and obligations not only by the adoption of legal acts, but also, '*in matters relating to the operation of the Union institutions and bodies*', on the basis of '*internal rules*' laid down by such EU institutions and bodies.¹⁴⁶ The restrictions allowed by internal rules of EU institutions and bodies shall also respect '*the essence of the fundamental rights and freedoms*'.

This provision potentially obliges all EU institutions and bodies to be in a position to firmly assess whether a limitation respects or does not respect the essence of all relevant

¹⁴⁶ The provision could be perceived as triggering questions as to whether the internal rules of EU institutions and bodies should actually be allowed to restrict data subject rights and connected data processing obligations, to the extent that this may constitute a limitation of the right to data protection that must not only comply with the essence requirement, but also the other requirements of Article 52(1) of the EU Charter, including the obligation for the limitation to be provided for by law. The EDPS Guidance on this provision highlights that '*in general, restrictions should be provided for by legal acts; in cases where there is no legal act but where necessity is proven, restrictions may be provided for by internal rules*' (EDPS, *Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects rights*, updated on 24 June 2020, p. 6).

fundamental rights, including the right to personal data protection – as ultimately compliance with the essence requirement is delegated to them. The current guidance available for such purposes is however currently very limited.¹⁴⁷

Most crucially, what deserves attention is the EDPS *Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects rights* which provides a ‘Model of internal rules’ and recommends the adoption of the following sentence: ‘*The [EUI] should apply restrictions only when they respect the essence of fundamental rights and freedoms (...)*’.¹⁴⁸ This seems to signal a further delegation of the essence requirement, whereby it would be for EU institutions and bodies to self-impose, by virtue of their own internal rules, to respect the essence of fundamental rights and freedoms at the very moment of actually applying a restriction of data subject rights or data processing obligations. This constitutes thus an additional departure from the original idea according to which the essence requirement is a requirement that accompanies the requirement according to which limitations of fundamental rights must be provided for by law.

Another interesting example of a reference to the essence can be found in the Standard Contractual Clauses adopted by the European Commission in June 2021.¹⁴⁹ Module Four of Clause 14, in Section III (‘Local laws and obligations in case of access by public authorities’) states that, in the context of transfer from a data processor to controller, the parties ‘*warrant that they have no reason to believe that the laws and practices in the third country of destination applicable to the processing of the personal data by the data importer [...] prevent the data importer from fulfilling its obligations under these Clauses*’, before adding that ‘*This is based on the understanding that laws and practices that **respect the essence of the fundamental rights and freedoms** and do not exceed what is necessary and proportionate in a democratic society to safeguard one of the objectives listed in Article 23(1) of Regulation (EU) 2016/679, are not in contradiction with these Clauses*’.

¹⁴⁷ The EDPS’ *Guidance on Article 25 of the Regulation 2018/1725 and internal rules restricting data subjects rights* quotes in this regard the EDPS’ *Necessity Toolkit*, hinting that what should be considered is ‘*whether the right is in effect emptied of its basic content and the individual cannot exercise the right*’ (p. 8).

¹⁴⁸ Furthermore, the ‘Model – Extract of General Data Protection Notice informing data subjects of possible restrictions’ included in such *Guidance* recommends that controllers inform data subjects about the fact that they have rights such as ‘*the rights of access, rectification, right to erasure, to restriction of processing, of notification in case of rectification or erasure or restriction of processing and right to data portability*’ but that ‘*one or several of these rights may be restricted*’ although ‘*such restriction will (...) respect the essence of the above-mentioned rights*’ (p. 30). It is very questionable that such formulation may amount to clear information, as it is unclear what would be the essence of all these separate data subject rights and how is the respect of such essences supposed to mean.

¹⁴⁹ Commission Implementing Decision (EU) 2021/914 of 4 June 2021 on standard contractual clauses for the transfer of personal data to third countries pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council [2021] L 199/31.

The text does not specify to which ‘fundamental rights and freedoms’ it is referring to – presumably, to the fundamental rights and freedoms of the data subject under EU law. It must in any case be read in light of Preamble 19, according to which the parties should warrant that ‘*they have no reason to believe that the laws and practices applicable to the data importer*’ would not be in line with the requirement of respecting the ‘*essence of the fundamental rights and freedoms*’ at stake. The clauses thus seem to put on the shoulders of the parties to agree on an assessment of whether local laws and practices respect or not the essence of EU fundamental rights and freedoms, including of the right to personal data protection.

This triggers the question of whether such parties, processors and controllers, including third-country controllers, can actually easily apprehend how to apply such requirement. For instance, it might be necessary for them to know whether (and when) not complying with the principle of lawfulness would amount to not respecting the essence in this context.

Furthermore, it obliges to ask question of whether the essence requirement in this context could perhaps be something different than the essence requirement as a tool in the hands of EU judiciary to declare unlawful certain types of limitations of rights by the legislator.

6. Concluding remarks

This study has situated existing knowledge on the essence requirement insofar as it relates to the EU fundamental right to personal data protection, also illustrating the limitations of such knowledge. The numerous cases pending in front of the CJEU which concern data protection law in general could in the upcoming months and years offer more relevant insights on the way in which courts might use this tool to put an end to unacceptable violations of the EU Charter. In the meantime, references to the essence requirement are surfacing in a variety of instruments, including, for instance, Standard Contractual Clauses, obliging actors different from the courts and the legislator to understand how to deal in practice with this still elusive requirement. A pragmatic approach to the current challenges could focus not on speculating on *what* would be the very essence of the rights at stake, but rather on *when* must a limitation of a right be regarded as a breach of the essence requirement.

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