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Fighting For Your Right to What Exactly? The Convoluted Case Law of the EU Court of Justice on Privacy and/or Personal Data Protection

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The European Union (EU) is actively involved in promoting personal data processing practices for security purposes. It is also responsible for delineating the legal regime safeguarding individuals against such data processing. Two rights collide: the right to privacy and the right to personal data protection. Both are recognised as distinct in the Charter of Fundamental Rights of the EU. The Court of Justice of the EU, the highest interpreter of EU law, however, seems peculiarly confused as to how the two rights relate, whether they should be relied on separately, and how each of them can be lawfully restricted. This article looks into the most recent case law highlighting inconsistencies in this regard. It explores how the Luxembourg Court's tortuous reasoning can have negative implications for individuals. Ultimately, it argues that the persistent tendency to adjudicate on the basis of privacy 'and/or' personal data protection alters the protection deserved under each of them.

Introduction

In April 2014 the Court of Justice of the European Union (CJEU) declared invalid the Data Retention Directive,¹ one of the most

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¹ Council Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available

controversial acts ever enacted by the European Union (EU) legislature. The Luxembourg Court stated that, by obliging operators to store communications data and to make such data available for the prevention, investigation, detection, and prosecution of criminal offences, the legislature had exceeded the limits imposed by EU fundamental rights and by the principle of proportionality. The ruling sent a strong message to the Council and to the European Parliament reminding them that individuals' rights and freedoms can only be limited under strict conditions.

Only one month later, in May 2014, the same Court ruled that there is in the EU a 'right to be forgotten' enabling individuals to oblige search engine operators such as Google to ensure some data are not shown in search results made using that individual's name. The Court noted that interferences with individuals' rights in this respect cannot be justified merely by the economic interest of the search engine operator, and that these interferences might be justified by the interest of internet users in having access to that information only exceptionally. Google, a company that for many years resisted even the simple idea that European personal data protection applied to its online activities in Europe, was apparently shocked by this conclusion.²

These two rulings in such a short period of time led many to believe the EU Court of Justice had (finally) decided to take a strong stance against modern surveillance, embracing the role of EU's great defender of fundamental rights. The picture, however, looks slightly different as soon as one tries to elucidate which are exactly which fundamental rights the Court is committed to protect, and how.

How a Right Surfaced Next to Another

Since 2009, the EU has been committed to ensure two different fundamental rights directly concerned with safeguarding individuals

electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] L105/54.

² In search for advice on how to implement the ruling, the company established an Advisory Council that toured European countries looking for guidance, and called for suggestions from the public; for more information, see <www.google.com/advisorycouncil> accessed 14 November 2014.

against surveillance. They are both enshrined in the Charter of Fundamental Rights of the EU, nowadays a legally binding instrument. The first is the right to privacy, established by the Charter's Article 7, which mirrors the right to respect for private life of Article 8 of the European Convention on Human Rights (ECHR). The second is the right to personal data protection, set out by the Charter's Article 8, and which was audaciously written into the Charter in 2000 despite the fact that the ECHR does not recognise any equivalent right, and regardless of the absence of a common tradition among Member States to envision personal data protection as deserving constitutional-level recognition per se, as a *sui generis* right.

The insertion of the right to personal data protection in the EU Charter can be linked to the importance given to personal data protection by EU secondary law, as well as to the prominence that the protection of individuals against the processing of information related to them has acquired over the years in the 'living' case law of the European Court of Human Rights in Article 8 of the ECHR. Both in the context of the Council of Europe and in EU secondary law, however, personal data protection had traditionally been envisioned not as a right in itself, but rather as a legal notion serving other rights and freedoms, and most notably the right to privacy.

The key instrument of EU personal data protection law, Directive 95/46/EC³ (generally known as the Data Protection Directive), influentially echoed this approach by stating its main aim is to ensure that Member States protect the fundamental rights and freedoms of natural persons, 'and in particular their right to privacy', with respect to the processing of personal data.⁴ The Data Protection Directive was adopted in 1995, and could thus not include any reference to the EU fundamental right to the protection of personal data, which had still to see the light of day. After the EU Charter's drafting and solemn proclamation by EU institutions in 2000, and even if the Charter had not yet acquired any legally binding force, other EU instruments nonetheless started to include references to the

³ Council Directive 95/46/EC 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.

⁴ *ibid* Article 1(1).

right to personal data protection. A Directive adopted in 2002 to translate the principles set out in Directive 95/46/EC into specific rules for the electronic communications sector, Directive 2002/58/EC (generally known as the e-Privacy Directive),⁵ alluded in its preamble to both Articles 7 and 8 of the EU Charter.⁶ The Data Retention Directive, of 2006, also mentions in its preamble Articles 7 and 8 of the Charter.⁷

The entry of the Treaty of Lisbon into force in 2009 gave a new standing to the right of personal data protection in EU law. In addition to granting legally binding force to the Charter, it triggered the materialisation of Article 16 of the Treaty on the Functioning of the EU, which restates the existence of the right, and mandates the EU legislature to adopt rules substantiating this right across the whole spectrum of EU law. In line with this mandate, the European Commission presented in 2012 a legislative package to reform the current EU personal data protection legal landscape. The package comprised a proposal for a General Data Protection Regulation designed to replace Directive 95/46/EC.⁸ According to the proposal, the future General Data Protection Regulation should still pursue to protect individuals' fundamental rights and freedoms in general, but it shall no longer target 'in particular their right to privacy'; rather, it should safeguard 'in particular their right to the protection of personal data'.⁹

⁵ Council Directive 2002/58/EC 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.

⁶ *ibid* Recital 2.

⁷ Directive 2006/24/EC (n 1) Recital 22.

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

⁹ *ibid* 40.

How the EU Court of Justice Partially Acknowledged the New Reality

The reception by the EU Court of Justice of the emergence of the EU right to personal data protection has not been straightforward. The basic reason behind this is the strong commitment of the Luxembourg Court to the ECHR and to the case law thereof of the European Court of Human Rights. Strasbourg's case law traditionally anchors personal data protection principles in the right to respect for private life of Article 8 of the ECHR. Taking this into account, as well as the allusion in Directive 95/46/EC to the right to privacy as the right particularly pursued by its provisions, the EU Court of Justice has on many occasions emphasised that the main objective of EU data protection law is precisely to ensure the right to privacy.

The Luxembourg Court notably stressed the need to read the Data Protection Directive in light of the ECHR's right to respect for private life in 2003, in one of its first rulings on the Directive's interpretation.¹⁰ And it did so in spite of the fact that, by then, EU institutions had already solemnly proclaimed the EU Charter and thus had formally conceded the existence of a fundamental right to the protection of personal data. The actuality of such a right was only recognised by the EU Court of Justice in 2008,¹¹ that is, when the Lisbon Treaty had already been signed.

Since 2008, nonetheless, the EU Court of Justice has failed to develop a consistent, or clear, or even consistently unclear case law on the right to the protection of personal data. In reality, the Court has only once ruled on the basis of the autonomy of EU personal data protection, to be understood as granting individuals an additional layer of protection, distinct from the one provided by the right to privacy and independently applicable.¹² Generally speaking, whenever the Luxembourg Court has referred to the right to

¹⁰ Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk* [2003] ECR I-4989.

¹¹ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-00271.

¹² Case C-28/08 P *Commission v Bavarian Lager* [2010] ECR I-06055.

personal data protection, it has associated this right with the right to privacy, somewhat confusingly, and often in unpredictable ways.

The most prominent example of a perplexing and disconcerting elision of the right to personal data protection with the right to privacy was offered by the *Schecke* judgment in 2010.¹³ The judgment followed a reference for a preliminary ruling of the EU Court on the validity of some EU provisions on the financing of the common agricultural policy, provisions which foresaw the on-line publication of personal data of beneficiaries of EU funds, and on the interpretation of Directive 95/46/EC. The referring court had formulated its submission questioning the validity of the provisions at stake primarily in light of Article 8 of the ECHR, but the Luxembourg Court considered it necessary to explicitly depart from this standpoint, taking instead the perspective of the fundamental rights present in the Charter.¹⁴ Reading the Charter, the Court noted, two rights should be taken into account: the right to privacy, enshrined in Article 7, and the right to personal data protection, supposedly established by Article 8(1), that is, by only the first paragraph of Article 8,¹⁵ with the exclusion of its two other paragraphs.¹⁶ These two rights were presented as ‘closely connected’ with each other, to the point of forming together a composite ‘right to respect for private life with regard to the processing of personal data’.¹⁷

The approach crystallised in *Schecke* combined two ways of amalgamating the rights to privacy and to personal data protection. In addition to merging them by insisting on their close relationship, the Court operated a subtler blending by reading Article 8 of the

¹³ Case C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063.

¹⁴ *ibid* paras 44-46.

¹⁵ Art. 8(1) of the Charter of Fundamental Rights of the European Union (EU Charter) states: ‘Everyone has the right to the protection of personal data concerning him or her’.

¹⁶ The EU Charter’s Art. 8(2) (‘Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified’) and Art. 8(3) (‘Compliance with these rules shall be subject to control by an independent authority’).

¹⁷ *Schecke* (n 13) para 52.

Charter, on the right to personal data protection, as if it had been built exactly as Article 8 of the ECHR, on the right to respect for private life. Article 8 of the ECHR consists of two paragraphs, one enshrining a right to respect for private life, and a second describing the requirements applicable to legitimate interferences with such right. The Luxembourg Court transferred this structure into Article 8 of the Charter, implying Article 8(1) should be read as granting a right to personal data protection, while Article 8(2) and 8(3) would define the conditions for any limitation to the right to be regarded as lawful. This interpretation neglects the fact that the Charter's design differs from the ECHR's structure, and that in the Charter the requirements applicable to lawful limitations of the rights enshrined are to be found in its final horizontal provisions, notably in Article 52(1).

In *Schecke*, the simultaneous reading of Article 7 and 8 of the Charter after having reduced the latter exclusively to its first paragraph led to a puzzling assessment of whether there had been a lawful limitation of fundamental rights, mobilising still the interpretation of Articles 8(2), 8(3), 52(1), 52(3) and 53 of the Charter, but also of the case law of the European Court of Human Rights on the Article 8 of the ECHR. Ultimately, the Court of Justice concluded that the measures at stake had to be declared invalid because the EU legislature had failed to strike a proper balance between the objective of promoting transparency and protecting the individuals' rights. This seemed to be a positive outcome in terms of increased protection of individuals against personal data processing. The ruling, nonetheless, opened the path for the Luxembourg Court to easily rely on the close (and, thanks precisely to the Court's case law, forever-growing) connections between the right to personal data protection and the right to privacy to indulge in an unsystematic reliance on many different provisions in order to assess compliance with those rights. This practice can sometimes result in less privacy-friendly conclusions.

***Schwarz*: Joint and Mixed Reading**

The different ways of amalgamating the right to privacy and the right to personal data protection converged again in the 2013

Schwarz judgment, in which the EU Court of Justice had been asked to rule on the compliance of the use of biometric data on passports with EU fundamental rights.¹⁸ It emerged in proceedings concerning the refusal of a German city, Stadt Bochum, to issue Mr Schwarz, a German citizen, with a passport unless his fingerprints were taken so that they could be stored on that passport. Mr Schwarz brought an action before a German court disputing the validity of the EU provision imposing such practice (in Regulation No 2252/2004),¹⁹ claiming they infringed the right to the protection of personal data

... laid down, in general terms, in Article 7 of the Charter of Fundamental Rights of the European Union (“the Charter”), which relates to the right to respect for private life, and explicitly in Article 8 thereof.²⁰

In its judgment, the EU Court of Justice chose to examine simultaneously whether the provisions at stake constituted ‘a threat to the rights to respect for private life and the protection of personal data’,²¹ and whether such a threat could be justified. As in *Schecke*, the Court decided to read jointly Article 7 and Article 8(1) of the Charter. It asserted that in general ‘any processing of personal data by a third party may constitute a threat’ to the rights recognised in those provisions,²² and then moved to examine the possible justification of the ‘twofold threat’ represented by the taking and storing and fingerprints.²³

In reviewing the possible justification of the threat, the Court took an alarming series of ungrounded shortcuts. For instance, it first alluded to Article 8(2) of the EU Charter, and concretely to its reference to the need to always process personal data on the basis of

¹⁸ Case C-291/12 *Michael Schwarz v Stadt Bochum* (OJ C 367/17, 17 October 2013).

¹⁹ Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L385/1, as amended by Regulation (EC) No 444/2009 of the European Parliament and of the Council of 6 May 2009 [2009] OJ L142/1; corrigendum: OJ 188/127.

²⁰ *Schwarz* (n 18) para 12.

²¹ *ibid* para 23.

²² *ibid* para 25.

²³ *ibid* para 30.

either the consent of the person concerned or some other legitimate basis laid down by law.²⁴ It then connected this condition of a need of legal basis to the requirement of Article 52(1) of the Charter according to which any limitation of a fundamental right ‘must be provided for by law’.²⁵ The problem is, however, that the requirement according to which limitations ‘must be provided for by law’ is supposed to echo, in this context, the ECHR requirement by virtue of which interferences with the right to respect for private life are only permissible if in accordance with the law. The European Court of Human Rights has extensively elaborated on the nature of this requirement in its case law, stressing that it demands measures both to have some basis in domestic law and to be compatible with the rule of law, and thus implies the need for the law to be adequately accessible and foreseeable, affording adequate legal protection against arbitrariness and accordingly indicating with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise.²⁶

The EU Court of Justice neglects all these details, and considers the requirement of being ‘provided for by law’ emanating from Article 52(1) of the Charter to be satisfied simply because the personal data processing is foreseen by the discussed provision of Regulation No 2252/2004.²⁷ Thus, after bringing into play the right to personal data protection and the right to privacy, as well as multiple provisions of the Charter, the Court eventually falls into the trap of tautologically regarding a legal norm, the validity of which is being questioned, as being allegedly in accordance with the law because it is a law.

Also striking is the Court’s examination of conformity with the requirement of Article 52(1) of the Charter according to which limitations to EU fundamental rights must always respect the essence of rights.²⁸ The judgment merely states that ‘it is not apparent from the evidence available to the Court, nor has it been claimed, that the

²⁴ *ibid* para 31.

²⁵ *ibid* para 34.

²⁶ See, for example: *S and Marper v the United Kingdom* App no 30562/04 and 30566/04 (2009) 48 EHRR 50, para 95.

²⁷ *Schwarz* (n 18) para 35.

²⁸ *ibid* para 34.

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’,²⁹ without giving any hint as to what could constitute such essence. Eventually, the Court did not find any evidence implying the existence of any processing of fingerprints that would go beyond what is necessary in order to achieve the legitimate aim of protecting against the fraudulent use of passports,³⁰ and confirmed the validity of the questioned provision.

Digital Rights Ireland: Attempting Separation

The EU Court of Justice does not always endorse as openly as in *Schecke* and *Schwarz* the need or even the suitability of reading jointly the rights to privacy and to personal data protection. A good illustration of an attempted distinction between them can be found in the judgment whereby the Luxembourg Court declared invalid the Data Retention Directive, *Digital Rights Ireland*.³¹ In this judgment, the Court had to answer two requests for preliminary rulings, one emanating from Ireland’s High Court and another from the Austrian *Verfassungsgerichtshof* (Constitutional Court). Both national courts had explicitly inquired into the validity of some provisions of the Data Retention Directive in relation with the right to privacy laid down in Article 7 of the Charter, on the one hand, and Article 8 of the Charter, on the other.³²

The Court firstly assessed that the retention of data for the purpose of possible access to them by the competent national authorities, as provided for by Directive 2006/24, ‘directly and specifically affects private life’ and, consequently, Article 7 of the Charter.³³ It then added that ‘[f]urthermore, such a retention of data also falls under Article 8 of the Charter because it constitutes the processing of

²⁹ *ibid* para 39.

³⁰ *ibid* para 63.

³¹ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Ireland and Kärntner Landesregierung, Michael Seictlinger, Christof Tschohl and others* (OJ C 175/6, 8 April 2014).

³² *ibid* paras 18 and 21.

³³ *ibid* para 29.

personal data within the meaning of that article'.³⁴ The Court stressed that the queries submitted raised questions of whether the measures at stake met the requirements of Article 7 of the Charter, but also of whether they met those concerning the protection of personal data arising from Article 8 of the Charter,³⁵ and therefore it announced an examination of the Directive's validity 'in the light of Articles 7 and 8 of the Charter'.³⁶

This introduction was followed by a separate assessment of the existence of interferences with such rights. The Court first established that the provisions under discussion constituted an interference with the fundamental right to privacy of Article 7 of the Charter, as they derogated 'from the system of protection of the right to privacy established by Directives 95/46 and 2002/58'.³⁷ Second, it declared that they likewise amounted to an interference with the fundamental right to personal data protection of Article 8 of the Charter, because they provided for the processing of personal data.³⁸ In both cases the criteria used to establish the existence of an interference are debatable: it is unclear why the mentioned Directives would define a 'system of protection of the right to privacy', as opposed to a system of protection of personal data, and it is perhaps even more disputable that any processing of personal data shall always be regarded, *per se*, as an interference with the right to personal data protection. In any case, this framing allowed the EU Court of Justice to move to the separate assessment of the legitimacy of the interferences with Articles 7 and 8 of the Charter respectively.

To do so, the Court noted that all interferences needed to comply with the requirements of Article 52(1) of the Charter, that is, that they should be provided for by law and respect the essence of the right affected and, subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the EU, or the need to protect the rights and freedoms of others.³⁹ The Court then asserted that the measures respected the

³⁴ *ibid* para 29.

³⁵ *ibid* para 30.

³⁶ *ibid* para 31.

³⁷ *ibid* para 32.

³⁸ *ibid* para 36.

³⁹ *ibid* para 38.

essence of both the right to privacy⁴⁰ and personal data protection,⁴¹ this time giving some substance to those assertions, even if adopting questionable points of view. It innovatively argued that the essence of the right to privacy is not affected whenever data about electronic communications are processed if the processing does not allow to acquire knowledge of the content of the communications as such, and also that the essence of the right to personal data protection is respected as long as ‘certain principles of data protection and data security’ are applied.⁴²

In any case, afterwards the Court chose to leave behind the separate assessment of the legitimacy of the interferences with, on the one hand, the right to privacy and, on the other, the right to personal data protection, and entered, without any particular justification, a joint assessment. It thus stated that the provisions under discussion genuinely satisfied an objective of general interest, namely the interest of security,⁴³ but that it was still necessary to verify the proportionality of the interference at stake. In this verification, it stated that ‘in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24’, the EU legislature had only limited discretion to decide which acts were appropriate to meet the pursued objective. Therefore, from the initial plan of assessing independently the interferences with the right to privacy and with the right to personal data protection, the Court had by the end of the judgment moved towards understanding there was a single interference with one single right, designated as the right to respect for private life, and described as granting a very important role to the protection of personal data.

The Court then pointed out that

So far as concerns the right to respect for private life, the protection of that fundamental right requires ... that

⁴⁰ *ibid* para 39.

⁴¹ *ibid* para 40.

⁴² *ibid*.

⁴³ That the EU Court of Justice explicitly linked to public security in general, as well as to security as in the fundamental right to liberty and security: *Digital Rights Ireland* (n 31) para 42.

derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary'.⁴⁴

And it went on to declare that the protection of personal data allegedly resulting from Article 8(1) of the Charter 'is especially important for the right to respect for private life enshrined in Article 7 of the Charter',⁴⁵ and that '[c]onsequently' EU legislation must lay down clear and precise personal data protection rules.⁴⁶ This appeared to hint that personal data protection is 'important' because it is an element of the right to privacy, and not because it is, as such, a fundamental right. Observing that Directive 2006/24/EC failed to provide the required clear and precise rules, the Court concluded that the instrument entailed 'a wide-ranging and particularly serious interference' with the rights of Articles 7 and 8 of the Charter, not circumscribed as to ensure that it was actually limited to what is strictly necessary,⁴⁷ and thus unlawful.⁴⁸ The Court's reasoning, thus, had initially seemed to take seriously the existence of two separate rights, but eventually merged them.

This conclusion was followed by an additional consideration of whether the measures discussed met what were presented as being specific requirements of Article 8 of the Charter: the existence of independent supervision, which is indeed explicitly required by Article 8(3), and ensuring 'effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data',⁴⁹ which actually is not a requirement mentioned in the Charter's Article 8, but rather a condition found by the EU Court of Justice in the case law of the European Court of Human Rights on the right to respect for private life.⁵⁰ All in all, there was little in

⁴⁴ *Digital Rights Ireland* (n 31) para 52, referring to Case C-473/12 *IPI v Geoffrey Englebert* (OJ C 9/13, 7 November 2013) para 39, and the case-law cited, which unsurprisingly includes a reference to the *Schecke* judgment.

⁴⁵ *Digital Rights Ireland* (n 31) para 53.

⁴⁶ A view supported by a plethora of references to the case-law on Article 8 of the ECHR by the European Court of Human Rights: *Digital Rights Ireland* (n 31) paras 54 and 55.

⁴⁷ *ibid* para 65.

⁴⁸ *ibid* para 69.

⁴⁹ *ibid* para 66.

⁵⁰ In this sense, see *ibid* para 54.

Digital Rights Ireland showing the Luxembourg Court has a clear perception of the essence and contours of the two rights at stake.

Google, or Another Missed Opportunity

The *Google* judgment⁵¹ also makes visible some of the EU Court's persistent hesitations in this field, albeit in a different manner. The ruling followed a request for a preliminary ruling on the interpretation of a number of provisions of Directive 95/46/EC and of Article 8 of the EU Charter.⁵² The Court was thus from the outset confronted to the two main instruments currently embodying disparate approaches to personal data protection in EU law: the Data Protection Directive, according to which data protection serves primarily privacy, and the EU Charter's Article 8, enshrining a right to the protection of personal data as a right different from privacy.

In its analysis, the Court first pointed out that the activities of search engines are liable to affect significantly 'the fundamental rights to privacy and to the protection of personal data', and thus must comply with Directive 95/46/EC, ensuring in doing so that effective and complete protection of individuals, in particular of their right to privacy, may be achieved. The Directive's link to the protection of fundamental rights and freedoms was presented as preventing any restrictive interpretation of the Directive's words,⁵³ and the Court overtly stressed that the Directive 'accords special importance' to the right to privacy, referring to its own case law where this emphasis has been further strengthened.⁵⁴

The Court reiterated later again that Directive 95/46/EC seeks to ensure a high level of protection of fundamental rights and freedoms, in particular the right to privacy, with respect to the processing of personal data.⁵⁵ From there, however, this third time the Court did

⁵¹ Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD)* (OJ C 212/4, 13 May 2014).

⁵² *ibid* para 1.

⁵³ *ibid* para 53.

⁵⁴ That is: *Rundfunk* (n 10) para 70; Case C-553/07 *Rijkeboer* [2009] I-03889 para 47; *IPI* (n 44) para 28. See also *Google* (n 51) para 58.

⁵⁵ *Google* (n 51) para 66 (referring again to *IPI* (n 44) para 28).

not stop there but went on to claim that, as a consequence of the previous statement, the Directive's provisions must be interpreted in the light of fundamental rights, which form part of the general principles of EU law and 'which are now set out in the Charter'.⁵⁶ Having thus introduced the Charter as relevant for the interpretation of the Directive, the Court mentioned as relevant provisions both the Charter's Article 7 and Article 8, the latter being described as detailing requirements applicable to the processing of personal data that 'are implemented inter alia' by a number of provisions of Directive 95/46/EC.⁵⁷ This crucial argumentation allowed the Court to move beyond the absence of any mention of the right to personal data protection in the text of Directive 95/46/EC and to assert nevertheless the right's full relevance for the correct reading of the Directive's provisions.

Having embraced the applicability of the both Articles 7 and 8 of the Charter for the interpretation of Directive 95/46/EC, the Court then described the activities of search engine providers as 'liable to affect significantly the fundamental rights to privacy and to the protection of personal data' when searches are carried out on the basis of individuals' names, and proclaimed that individuals may request that some information no longer be made available to the general public 'in the light of his fundamental rights under Articles 7 and 8 of the Charter'.⁵⁸ Does this mean that individuals may not make such requests on the sole basis of the right to privacy? This might as well be the case, as otherwise asserting the relevance of the Charter's Article 8 was an unnecessary move. It is very probable, but still not certain.

Concluding Thoughts

The careful review of the case law of the EU Court of Justice on the rights to personal data protection and to privacy reveals not only inconsistencies and weaknesses, but more generally a lack of rigour in delimiting clearly the contours of each right, their substance, and

⁵⁶ *ibid* para 68.

⁵⁷ *ibid* para 69.

⁵⁸ *ibid* para 97.

the (seemingly randomly fluctuating) relations between them. The main negative implication of this convoluted case law is the lack of reliable authority on the right to personal data protection more than a decade after its introduction in the EU catalogue of fundamental rights. It also entails, however, another major risk: the danger of losing along the way well established principles developed under the right to respect for private life.