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The EU rights to privacy and personal data protection: 20 years in 10 questions

Discussion paper[1]

Gloria González Fuster and Hielke Hijmans

The rights to privacy[2] and to personal data protection, enshrined respectively in Art. 7 and 8 of the Charter of Fundamental Rights of the European Union (EU) (hereafter, the 'EU Charter'),[3] have been particularly powerful in determining the evolution of EU law and policy over the last years. On their basis, the Court of Justice of the EU (CJEU) declared invalid the Data Retention Directive,[4] advised against the conclusion of a negotiated agreement on the transfer of Passenger Name Record (PNR) data to Canada, and brought down the major legal instrument allowing for the transfer of personal data to the United States (US).[5] The CJEU has also asserted, on the basis of Art. 7 and 8 EU Charter, the existence of rights in the hands of individuals in relation to data about them processed by search engines. Judgments such as *Digital Rights*,[6] *Schrems*[7] and *Google Spain*[8], but also the Court's *Opinion 1/15* on the PNR agreement between the EU and Canada,[9] have demonstrated the importance of these two fundamental rights for EU law, also against the background of a continuously developing data-driven information society built on the massive of use of personal data.

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[1] Prepared for the International Workshop 'Exploring the Privacy and Data Protection connection: International Workshop on the Legal Notions of Privacy and Data Protection in EU Law in a Rapidly Changing World' of 14th May 2019, co-organised by the Brussels Privacy Hub (BPH) and the Law, Science, Technology and Society (LSTS) Research Group at the Vrije Universiteit Brussel (VUB).

[2] More exactly, right to respect for private life. Both terms will be used as synonyms in this Discussion Paper.

[3] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

[4] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, pp. 54–63.

[5] The 'Safe Harbour Agreement'.

[6] Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger*, ECLI:EU:C:2014:238.

[7] Case C-362/14, *Schrems*, ECLI:EU:C:2015:650.

[8] Case C-131/12, *Google Spain*, ECLI:EU:C:2014:317.

[9] Opinion 1/15 of 26 July 2017, ECLI:EU:C:2017:592.

The coexistence of these two rights in the EU Charter of Fundamental triggered many questions. Very few have been answered since in a clear, consistent, or consensual manner. We take this lack of consensus about the nature of both rights and their interactions as a starting point, noting, moreover, that the CJEU has not expressed itself manifestly clearly on these issues either, despite the important case law mentioned before.

The purpose of this Discussion Paper is not to close any debates, but rather to facilitate, provoke and stimulate further discussions, by taking stock after the first two decades of coexistence of the rights to privacy and personal data protection in the EU legal framework, and by (re-)formulating some of the most recurrent questions, in addition to putting forward some that are perhaps seldom asked, but, in our view, not less important.

1. **But, wait, are there seriously two different rights?**[10] This is possibly the most fundamental question of them all. Depending on the approach taken in this regard, the whole debate might be deemed to be, in the end, absolutely futile. The question refers to whether the EU right to the protection of personal data might be, actually, something different from the right to privacy.

    a) **Yes.** There are undoubtedly two different rights, at least in EU law, one may need to admit, on the basis of the EU Charter, the Treaty on the Function of the EU,[11] secondary law, and the case law of the CJEU. The EU Charter enshrines in its Art. 7 a right to respect for private life,[12] and, in Art. 8, a right to the protection of personal data.[13] The General Data Protection Regulation (GDPR)[14] describes as the first of its objectives to protect the fundamental rights and freedoms of natural persons, '*in particular their right to the protection of personal data'* (Art. 1(2) GDPR).

    b) **No.** There are not really two different rights, one could argue. Even if indeed the EU Charter has a special provision on the right to the protection of personal data, this might be a mere dimension of the broader right to privacy. This view is fully consistent with the path followed by the Council of Europe, framing

[10] This is a genuine quote from a civil servant working at an EU institution, from 2017.

[11] Art. 16(1) of the Treaty on the Functioning of the EU (TFEU).

[12] Art. 7 EU Charter, 'Respect for private and family life': '*Everyone has the right to respect for his or her private and family life, home and communications'.*

[13] Art. 8 EU Charter, 'Protection of personal data': *'1) Everyone has the right to the protection of personal data concerning him or her. 2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3) Compliance with these rules shall be subject to control by an independent authority*'. See also, on this subject: Gloria González Fuster (2014), *The Emergence of Personal Data Protection as a Fundamental Right of the EU*, Springer.

[14] 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), OJ L 119, 4.5.2016, pp. 1–88.

personal data protection as entrenched in the right to respect for private life, as established by Art. 8 of the European Convention for the Protection of Human Rights (ECHR). Although the EU Charter appears to formally establish two different rights, in reality Art. 7 and 8 of EU Charter '*are so closely linked*' that that they may be regarded as establishing a single '*right to respect for private life with regard to the processing of personal data*'.[15]

c) There are indeed two 'rights', but they are not completely different. This answer might help reconciliating the fact that there appear to be, formally, two rights, but at the same time these two rights seem to be closely related, and occasionally interchangeable. Art. 7 EU Charter has a wide scope, covering the respect for private and family life, home and communications. Thus, it is possible to argue that somehow the right to personal data protection is different from the right to privacy, but not completely. This answer, in any case, inevitably triggers the question of to what extent the rights to privacy and data protection might be different, and to what extent they are the same.

2. Are these two 'rights' really, really supposed to be separated? This question presupposes that we might at least temporarily accept that there are actually two 'rights' and inquires about the distance that separates them – if any.

a) Yes. The right to privacy and the right to the protection of personal data must be envisioned differently, as this was actually the point of recognising them in two separate provisions of the EU Charter. As a matter of fact, a number of Member States also enshrine at the highest level of their legal framework a distinction between a right to privacy and a right to the protection to personal data. Historically, the birth of national data protection laws was in a number of instances absolutely dissociated from any privacy considerations. Under EU law, data protection rules should ensure not only fundamental rights but also the free flow of data, an objective that has nothing to do with privacy. It is appropriate, therefore, to construe the right to privacy and the right to data protection as separate rights, with a different content, and possibly serving different purposes. Legally speaking, nowadays it must be accepted that *'[t]here is no equivalent provision to Article 8 of the Charter (protection of personal data) in the ECHR'*,[16] and it is not pertinent to force a correspondence between the scope of Art. 8 EU Charter and Art. 8 ECHR.

b) No. The protection of personal data should not and cannot be detached from privacy issues. The right to the protection of personal data *'emanates from the*

[15] Opinion of AG Cruz Villalón delivered on 12 December 2013, *Digital Rights Ireland and Seitlinger and Others*, Case C 293/12, ECLI:EU:C:2013:845, § 62, referring notably to: *Volker und Markus Schecke and Eifert*, § 52.

[16] Opinion of AG Sharpston, 27 September 2018, Case C 345/17, *Buivids,* ECLI:EU:C:2018:780, § 61. See also: '*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*' (Joined Cases C-203/15 and C-698/15, *Tele2 Sverige and Watson and Others*, , EU:C:2016:970, § 129.

more general right to privacy',[17] and this is and must remain crucial for its interpretation. Directive 95/46/EC,[18] of 1995 (generally known as the 'Data Protection Directive') was explicitly built upon such premises, and aimed at safeguarding individuals' '*right to privacy with respect to the processing of personal* data' (Art. 1(1)). The object of the national laws on the processing of personal data from which it partially took inspiration was described as '*to protect fundamental rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the* [ECHR] *and in the general principles of Community law*'.[19] Even before, in 1981, Council of Europe's Convention 108 had been adopted[20] because, in view of new technologies, privacy rules existing at the time – and most notably Art. 8 ECHR - did not appear to provide sufficient protection. Data protection, thus, serves privacy, and shall not be detached from it.

c) **Actually, all human rights are connected, and the right to privacy and the right to personal data protection are particularly deeply interconnected, and in a way tend to converge**. The two rights are clearly coupled in the relevant case law of the CJEU, where they are not *systematically* distinguished – and where they are occasionally presented in complex interwoven manners.[21] In case of doubt, it is always possible – and arguably advisable - to refer to both. This is not uncommon practice: it is for instance accepted to submit to the CJEU requests for preliminary rulings referring to possible violations of the rights of individuals under '*Articles 7 and/or 8 of the Charter*'.[22] In other words, the rights could be separated, but it is better not to separate them completely.

3. **What is exactly the difference between the right to privacy and the right to data protection?** This question might be addressed either by presupposing we know in advance what are the right to privacy and the right to data protection about, or,

[17] Opinion of AG Sharpston, 27 September 2018, Case C 345/17, *Buivids,* ECLI:EU:C:2018:780, § 30.

[18] 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, OJ L 281, 23.11.1995, pp. 31–50.

[19] Quote from recital 10 of the Data Protection Directive.

[20] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No 108 – Explanatory Report pts 1-4, as explained by Hielke Hijmans (2016) *The European Union as Guardian of Internet Privacy*, Springer, 2.10.

[21] See, for example: '*The protection of the fundamental right to respect for private life at the European Union level requires that derogations from the protection of personal data and its limitations be carried out within the limits of what is strictly necessary'*, C-73/16, *Puškár*, EU:C:2017:725.

[22] Reference for a preliminary ruling in Case C-311/18, *Facebook Ireland and Schrems,* Preliminary questions published in OJ (2018), C 249/15, (eventually asking about a possible violation of '*Articles 7, 8 and/or 47 of the Charter*').

alternatively, by accepting we might discover more about both rights (or re-discover them) while we try to disentangle them.

a) **There are multiple, clear and significant differences, in particular in terms of scope and rationale.** Conceptually, the rights to privacy and personal data protection cannot only be separated: they can also contrasted. They can be framed as being built on divergent premises or inscribed in a variety of binaries: transparency vs. opacity,[23] ex post vs. ex ante. They pursue different objectives in different ways.

b) **There is no real difference.** Ultimately, it is all about privacy, which is a broad notion. This is clear in the case law of the European Court of Human Rights (ECtHR), which has 'assimilated' the fundamental right to personal data protection to the rights guaranteed by Art. 8 ECHR, '*treating it as a more specific expression of the right to privacy in respect of the processing of personal data'*.[24] That is how it should be. Thus, there is no reason why any safeguards developed in the realm of EU data protection shall not be regarded as incorporated into the scope of Art. 8 ECHR, and thus also under Art. 7 EU Charter.[25] One could even accept the existence of a right to the protection of personal data as a right which is distinct from the right to privacy, and subject to an autonomous regime, while considering that what data protection seeks to ensure is respect for privacy.[26]

c) **There are subtle, but not irrelevant differences.** The rights to privacy and to personal data protection ultimately pursue similar objectives, in not completely dissimilar ways. They could be qualified as two sides of the same coin, where privacy represents the underlying value, and data protection lays down the rules of the game.[27] In practice, whenever it is determined there has been an interference with Art. 7 EU Charter, it is usually simultaneously also determined there has been an interference with Art. 8 EU Charter, and/or vice versa.[28] This can be seen as proving there are profound similarities between them.

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[23] De Hert, Paul, and Serge Gutwirth (2006), 'Privacy, data protection and law enforcement. Opacity of the individual and transparency of power', *Privacy and the criminal law,* pp. 61-104.

[24] Opinion of AG Sharpston, 27 September 2018, Case C 345/17, *Buivids,* ECLI:EU:C:2018:780, § 61.

[25] For instance, addressing the right to access from the lens of Art. 7 EU Charter, on the basis of *Rijkeboer*, (C-553/07, EU:C:2009:293, § 49), Opinion 1/15, § 219.

[26] For instance: Opinion of AG Cruz Villalón delivered on 12 December 2013, *Digital Rights Ireland and Seitlinger and Others*, Case C 293/12, ECLI:EU:C:2013:845, § 55.

[27] Hijmans, op. cit., 2.13.

[28] See, for instance: C-468/10 and C-469/10, EU:C:2011:777, ASNEF and FECEMD, § 45; Opinion 1/15, § 125 and § 126; Opinion of AG Saugmandsgaard Øe, 3 May 2018, Case C 207/16, *Ministerio Fiscal*, ECLI:EU:C:2018:300, § 78.

4. **So, then, what is this right to the protection of personal data about?** This becomes a crucial question once the reality of this right is accepted. If there is indeed a right different from privacy, we need to know what its scope might be, and how it can be lawfully limited.[29]

    a) **The right to the protection of personal data is about imposing obligations on those who decide to process personal data, granting subjective rights to the individuals about whom data are being processed, and establishing independent monitoring of compliance with the obligations and respect of rights**. This is what Art. 8 EU Charter establishes, and what the GDPR develops. It means, in a nutshell, that the right to the protection of personal data has a triangular structure. We could call this a triangle, or refer to 'three pillars'. Such triangle or 'three pillars' are built on the fundamental assumption that they must encompass any data related to identified or identifiable individuals, regardless of the nature of the data, or of the possible sub-sequent use of such data.[30]

    b) **The right to the protection of personal data finds it origins in the German concept of informational self-determination,** as developed by the *Bundesverfassungsgericht* in 1983. It reflects the idea that persons can be considered the owners of their own personal data.[31] This perspective could also mean that data processing should, in principle, be based on consent (other grounds for processing being an exception to consent), and that processing of personal data without consent is an exception to the right to data protection guaranteed by Art. 8 EU Charter, which therefore must comply with requirements of Art. 52(1) Charter.

    c) **The right to data protection is an expression of the notions of fairness and proportionality, as elaborated under EU law.** The notion of fairness is mentioned in Art. 8 EU Charter and in Art. 5 GDPR. In any case, the right is concerned with some safeguards that apply whenever personal data are processed – if a data processing operation involves the processing of personal data, it may also constitute a breach of the right guaranteed in Art. 8 EU Charter. To know which processing operations might be lawful, it is necessary to take into account not only Art. 52(1) EU Charter, but also Art. 8(2) and 8(3).

[29] A casual reader might wonder how it can be possible that a right has been enshrined for 20 years at the highest level of a whole legal framework, but still not much is known about the right's content. In this regard, it might be useful to point out that, although the EU Charter was solemnly proclaimed in December 2000 by the European Parliament, the Council of Ministers and the European Commission, it acquired legally binding force only with the entry into force of the Lisbon Treaty (signed in 2007) – that is, in in December 2009. During this period, from 2000 to 2009, it could only be applied '*with caution'*, as expressed by AG Ruiz-Jarabo Colomer in his Opinion in Case C-553/07, *Rijkeboer,* ECLI:EU:C:2008:773, § 22.

[30] This being an idea also developed by the ECtHR in relation to data protection safeguards under Art. 8 ECHR; see, for instance: Opinion 1/15, § 124.

[31] This is argued for instance by Nadezhda Purtova (2009), 'Property Rights in Personal Data: Learning from the American Discourse', *Computer Law & Security Review*, Vol. 25, No. 6, 2009, pp. 507–521.

5. **But what is then the right to privacy?** Once (and if) it is established that there is an EU right to the protection of personal data, it might be worth asking whether and how this could affect the conception of the EU right to privacy.

    a) **The right to privacy under Art. 7 EU Charter cannot be exactly the same as Art. 8 ECHR.** If Art. 8 ECHR includes data protection safeguards, but for the EU Charter data protection safeguards are provided under Art. 8, it is inappropriate to assert that Art. 7 can still be exactly the same as Art. 8 ECHR. In addition, the criteria for lawful limitations under Art. 52(1) EU Charter must be interpreted autonomously, and thus might not fully correspond to the criteria established under Art. 8(2) ECHR.

    b) **The right to privacy under Art. 7 EU Charter corresponds to Art. 8 EHCR.** This derives necessarily from Art. 52(3) of the EU Charter, according to which insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. Privacy is, in line with the case law of the ECtHR, a broad notion, although in essence it is about the recognition of a private space or sphere, which cannot be invaded by others. A specific element of the right to privacy is the confidentiality of communications (in the ECHR, 'correspondence'). As the ECHR is a living instrument, the notion of privacy as in Art. 8 ECHR has evolved over time, and it does now, in any case, also cover the processing of any information relating to an identified or identifiable individual,[32] including information relating to their working environment.

    c) **It depends on how you look at it.** The situation has evolved over time and is continuously evolving. In this sense, during many years the main message from the CJEU appeared to be that EU data protection law was 'about privacy' (and thus, inversely, privacy was 'about data protection') – thus feeding the correspondence between Art. 8 ECHR and Art. 7 EU Charter, envisioned as encompassing data protection safeguards. This has however changed over time, because in much of the CJEU's case law the rights under Art. 7 and Art. 8 EU Charter are mentioned at equal footing.

6. **What is the essence of each of these rights?** This question is pivotal for assessing the legality of any limitation of these rights, as limitations are only permissible if they do not interfere with the essence of the rights.[33]

[32] See for instance: Opinion 1/15, § 122.

[33] Art. 52(1) EU Charter: '*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*'.

a) **We have limited knowledge on that, as the case law of the CJEU has been especially uninspired in this respect.** In *Digital Rights*, for example, the CJEU touched upon the essence of Art. 8 EU Charter, by ruling that – in order to respect its essence - certain principles of data protection and data security must be respected.[34] This is somehow unconvincing, as the approach does not appear to match the underlying (triangular) structure of Art. 8 EU Charter. Most strikingly, the CJEU has repeatedly insisted on the fact that independent supervision is an '*essential component of the protection of individuals with regard to the processing of personal data*',[35] but has not asserted such as essential element should be regarded as related to the essence of the right to data protection in the sense of Art. 52(1) EU Charter.

b) **It is very clear.** In *Digital Rights*, the CJEU did an attempt to distinguish the two rights while explaining their essence.[36] The Court held that the essence of the right to privacy was not at stake given that the Data Retention Directive, whilst allowing access by third parties to metadata of communications, it did not *'permit the acquisition of knowledge of the content of the electronic communications as such*.'[37] In *Schrems*, the Court stated that legislation permitting public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Art. 7 EU Charter.[38]

c) **The answer to this question will become clearer in due time.** CJEU case law might be read as providing indications of potential future developments, based for instance on the wording of *Digital Rights,* where the judgment emphasises the risk of data processing '*that is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance'*.[39] Other possible indications relate to the power relations between data subjects and data controllers. *Google Spain* is important in this context, because it ensures that search engines as key players on the Internet are subject to data protection law. Another indication can be found in the

[34] *Digital rights*, § 40.

[35] Opinion 1/15, § 229; C-518/07, *Commission* v *Germany*, EU:C:2010:125, § 25; C-288/12, *Commission* v *Hungary*, EU:C:2014:237, § 48; C-362/14, *Schrems*, EU:C:2015:650, § 41.

[36] See, on essence: 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*, Volume 14, Issue 2, June 2018, pp. 332-368.

[37] *Digital rights*, § 39.

[38] *Schrems*, § 94 (it did so while discussing the necessity of the measure at stake, although it might be debated whether necessity and proportionality might even need to be considered if the essence is violated).

[39] Digital Rights, § 37.

pending case *Planet49,*[40] which may lead to the end of so called 'cookie walls' illustrating the difference in powers between data subjects and controllers.

7. **Does any of these questions have any interest beyond academia?** This is a question academics often like to ask.

    a) **Yes.** These are very important issues for a variety of actors, and for a number of different reasons. For instance, the distinction and interconnections between Art. 7 and Art. 8 EU Charter can have a direct impact on the competences and responsibilities of data protection authorities (DPAs). Independent monitoring is a legal requirement following from EU primary law, in particular Art. 8(3) EU Charter and Article 16(2) TFEU, but only insofar as data protection is concerned – even if, somehow confusingly, the CJEU has propounded DPAs are the '*guardians of the right to private life*'.[41] For the judiciary, it essential to be aware of the full implications of Art. 8 EU Charter and the case-law thereof.[42]

    b) **No.**

    c) **They can, and, well, they should.** It is critical for the legislator to address the distinction and interconnections between Art. 7 and Art. 8 EU Charter in a clear and consistent manner. The current discussions on the proposed e-Privacy Regulation, but more generally also on other Digital Single Market files (including discussions about Artificial Intelligence) demonstrate the practical importance of these issues.[43]

8. **Are there any implications in terms of global issues?** This is a question that very quickly needs to be explicitly addressed, notably in connection with the relatively wide territorial scope of the GDPR and the strict provisions on data transfers.

    a) **Yes.** One of the key elements of EU data protection law is that it sets strict conditions for transfers of personal data to third countries, to avoid that these transfers could affect the level of protection it generally establishes. In order to protect data subjects protected under EU law in a serious manner, it is

[40] *Planet 49*, Opinion of AG Szpunar, 21 March 2019, ECLI:EU:C:2019:246.

[41] Case C-288/12, *Commission v Hungary,* ECLI:EU:C:2014:237, § 53.

[42] In the proceedings related to *Puškár*, the Supreme Court of the Slovak Republic notably claimed that the Constitutional Court of the Slovak Republic had not taken into account '*the relevant case-law of the Court of Justice on the application of EU law on the protection of personal data*' (§ 31).

[43] See in this sense: Maja Brkan, David Dumont and Hielke Hijmans (2018), *The ePrivacy Regulation and the EU Charter of Fundamental Rights,* legal note written for the Centre for Information Policy Leadership, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_legal_note_epr_and_the_charter_of_fundamental_rights_9_november_2018.pdf.

unavoidable that the EU fundamental right to personal data has, sometimes, an impact in jurisdictions outside of the EU. In this sense, the CJEU has been very clear about the fact that third countries can only be deemed to provide 'adequate protection' if such protection is 'essentially equivalent'[44] to that provided under EU law, which is, first and foremost, the level of protection defined by the EU fundamental right to personal data protection. Also, other transfer mechanisms must provide for effective safeguards within third countries.[45] Ultimately, this question takes us back to the question of what is exactly the content of Art. 8 EU Charter, and then to the question of which elements of such content must be guaranteed in a 'essentially equivalent' manner when data move out of EU law (independent supervision, right of access, etc.).

b) Not particularly. Actually, any disruption to global data flows generated by EU data protection law should be duly mitigated. It is possible for international players to understand is that for Europe privacy is a human right, but it would be unacceptable for the EU to assert, on the basis of the EU Charter, worldwide scale restrictions on personal data processing. As a matter of fact, the analysis of the EU Charter and EU data protection law can lead to conclude that, in relation to personal data protection, no extraterritorial effects are accepted in EU law.[46]

c) Yes, but we need to be careful to avoid extra-territorial effects that could lead to the balkanisation of the Internet. The Internet might not be able to cope with some developments related to the assertion of the existence of an EU right to the protection of personal data. It is in this context important that the distinction between two fundamental rights is a typical feature of EU law, and not necessarily recognised in other regions of the world. For example, the object of protection in the United States is 'data privacy', or 'informational privacy'. This could be a matter where the EU must make an effort and adapt its fundamental rights approach to the realities of other regions. In practice, attention must be given for instance to avoid clashes between an over-reaching construction of the 'right to be forgotten' and the human rights of others, including third countries. Another specific issue in relation to which these discussions could soon become (even more) crucial are developments related to Brexit: some actors in the United Kingdom have marked the boundaries between obligations derived from the ECHR and those derived from the EU Charter and the case-law of the CJEU thereof;[47] in the event of

[44] In accordance with *Schrems,* § 68, § 73-74.

[45] This is one of the issues at stake in the pending Case C-311/18, *Facebook Ireland and Schrems*, preliminary questions published in OJ (2018), C 249/15.

[46] See, in this sense: *Google*, Opinion of AG Szpunar, 10 January 2019, Case C-507/17, especially § 47-57.

[47] In this sense, see the question of the Court of Appeal (England & Wales) (Civil Division) in *Watson and Others:* '*Does [the Digital Rights judgment] expand the scope of Articles 7 and/or 8 of [the Charter] beyond that of Article 8 of the European Convention of Human Rights … as established in the jurisprudence of the European Court of*

Brexit, the need for a disentanglement between the scope of Art. 8 ECHR, on the one hand, and Arts. 7 and 8 EU Charter, on the other hand, is to become potentially particularly intense.

9. Is it in any way a problem that these two different rights coexist in EU law?

a) **Not really.** The fact that a right to the protection of personal data is recognised does not prevent reliance on other fundamental rights, such as, for instance, the right to privacy. The GDPR itself is clear about the fact that all other fundamental rights, in addition to the protection of personal data, also matter. The CJEU, when confronted with issues referring to the importance of personal data, has also been clear about the importance of 47 EU Charter (right to an effective remedy and to a fair trial), in connection to Art. 8 but also Art. 7 EU Charter, Art. 21 EU Charter (non-discrimination),[48] and Art. 11 EU Charter (freedom of expression and information).[49]

b) **Definitely.** In reality, the very existence of a right to the protection of personal data constitutes somehow a threat to fundamental rights, to the extent that it flaws our perspective on the many critical issues. Its defence is typically based on a misconception of what individuals and groups really need, and its over-expansive development, in conjunction with the fact that data are constantly playing a more important roles in our *datafied* lives in this data-driven world, is a danger for other rights and interests. In a way, this whole notion of data protection seems to lead to downplaying the importance of human rights considerations. The CJEU, however, since the very origins of case law on these matters, emphasised the connection between EU data protection law and fundamental rights.[50]

c) **The truth is that we do not need to draw a clear-cut distinction between the rights to privacy and personal data protection to make them matter.** In his seminal lecture on the significance rights, at the occasion of the 40th International Conference of Data Protection and Privacy Commissioners in Brussels, the CJEU's President Lenaerts did not distinguish the two rights

Human Rights …?' (Joined Cases C-203/15 and C-698/15, *Tele2 Sverige and Watson and Others*, EU:C:2016:970, § 59).

[48] See notably Opinion 1/15.

[49] See for instance: *Tele2 Sverige and Watson and Others*.

[50] Much to the surprise of those who, like AG Tizzano, were convinced that the Data Protection Directive was primarily an internal market instrument. See, for instance: Opinion of AG Tizzano, 19 September 2002, Case C-101/01, *Lindqvist,* ECLI:EU:C:2002:513, § 6 and 7; and Opinion of AG Tizzano, 14 November 2002, Joined cases C-465/00, C-138/01 and C-139/01, *Rundfunk,* ECLI:EU:C:2002:662, esp. § 51-53.

either.[51] Lenaerts insisted on the importance of these two rights in protecting individuals against 'profiling'.

10. Which are the main challenges for the future?

a) **One should keep in mind the existence of the EU right to personal data protection, its particular scope and nature.** There are still many open questions in this regard, especially on the issue of permissible limitations. For many years, certain data protection safeguards have been envisioned as a sort of interface between the right to privacy and other rights and interests. Embracing the fact that personal data protection is a right *per se* requires moving away from such an idea, into the still partially unknown territory of determining lawful limitations of Art. 8 EU Charter. This includes for example how to reconcile data protection and data processing for journalistic, artistic, or literary purposes.[52] Until now, the reconciliation has been typically framed as a need to balance '*the right to privacy and the right to freedom of expression'*,[53] with some occasional hesitations.[54] A key challenge is, thus, to understand better the evolving interconnections between the right to privacy and the right to personal data protection. Only from such a refined understanding it will be feasible to envision how these rights relate to other rights and interests, such as (the right to) security.[55]

b) **Whatever the challenges might be, it is important to keep coming back to general notions such as dignity, freedom, autonomy.** Dignity is a core value for the EU Charter – it is enshrined in its Art. 1, which means it is relevant for all its provisions. Freedom is also extremely important. Both Art. 7 and Art. 8 EU Charter belong to the Title '*Freedoms'.* Autonomy is generally also crucial as a general principle. These principles and fundamental values shall guide action in these debates which are concerned with fundamental issues.

c) **The essential question in this context is whether the developing information society leads to a convergence of the rights under Art 7. and Art 8. EU Charter, because potentially all processing of personal data affects privacy rights (especially if privacy is broadly construed), or whether the right to data protection more and more protects other rights, values and interests, such**

[51] The video of this lecture is available here: https://www.privacyconference2018.org/en.

[52] See, for instance: Reference for a preliminary ruling from the Court of Appeal (England & Wales) (Civil Division) lodged on 7 November 2018 – *SY v Associated Newspapers Ltd* (Case C-687/18).

[53] Case C–345/17, *Buivids*, ECLI:EU:C:2019:122, § 63.

[54] Referring to the need to '*reconcile the fundamental rights to privacy of personal data and freedom of expression':* Opinion of AG Sharpston, 27 September 2018, Case C 345/17, *Buivids,* ECLI:EU:C:2018:780, § 61.

[55] Request for a preliminary ruling in *Ordre des barreaux francophones and germanophone and Others* (Case C-520/18).

as non-discrimination, or power asymmetries. The first hypothesis speaks for itself, the second might be explained by the example of automated decision making (Art. 22 GDPR), a 'data protection' rule that can be seen as a safeguard against non-discrimination by algorithms, and not necessarily as a means to protect privacy.