

# **The Reform of the EU Data Protection Framework: A Better Way to Member States?**

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## **ABSTRACT**

This essay aims to evaluate the debate about the pros and cons of the proposed EU General Data Protection Regulation of 2012. Concentrating on purpose and objective of the law, arguments presenting negative issues about the proposal can be briefly sketched out: (1) dilemma between promoting free flow of personal data to function internal market of the EU and protecting fundamental rights and freedoms is uneasy to be dealt with; (2) there are practical obstacles of transferring the Directive to the Regulation; (3) the proposed General Regulation is too complex and vague to follow; and (4) with respect to the objective of the EU data protection law, once information qualifies as identified or identifiable, it falls under the data protection regime.

On the basis of acceptance of a broad conception of privacy, I argue that the promotion of a workable internal market and the protection of personal data, in particular the right to privacy, can be achieved at the same time without unnecessary crash. However, it should be noted that there are limitations with respect to broad conception of privacy. Moreover, I agree with Solove and Schwartz's argument: not every type of risk to privacy should be treated the same. However, I argue that this idea is not new in the EU data protection law regime.

## **I. Introduction**

This essay aims to critically evaluate scepticism about the proposed EU<sup>1</sup> General Data Protection Regulation (General Regulation hereafter) on personal

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<sup>1</sup> The Treaty of Lisbon amending the Treaty on European Union (TEU) and the Treaty establishing the European Community has entered into force on 1 December, 2009. Consequently, as from that date, references to the EC shall be read as the EU.

data protection,<sup>2</sup> in particular the purpose and objective of the law. The Directive is a significant milestone of the European data protection model.<sup>3</sup> Before the Data Protection Directive,<sup>4</sup> there was no effective and specific international instrument which focused on interferences through the processing of personal data. It is a main regulatory instrument in Europe, extends its worldwide influence (Article 25 of the Directive).

The Directive considers both the human rights approach and the economic approach from which it aims to harmonise data protection legislation of member states (Article 1 of the Directive). However, dilemma between promoting free flow of personal data to function internal market and protecting the fundamental rights and freedoms of nature persons is commented as rather troublesome in the field of science and technology. Limitations of collecting, processing and using personal sensitive data, for example, are considered as barriers on biomedical research improving human health. As those scientists commonly argue, such interests are diminished by the personal data protection barriers.<sup>5</sup> On the basis of this logic, biomedical scientists may feel even more upset on the reform of the General Regulation. This is because, being impressed from the outset, the proposed General Regulation seeks to reinforce the position of data subjects and enhance the responsibility of data controllers. To them, unsurprisingly, more responsibility of the controllers means higher cost and more limitations on using samples and personal data from individuals. Moreover, the European data protection model is notoriously complex – it might even be considered as too complex to achieve the ultimate goal of full harmonisation within the EU.<sup>6</sup>

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<sup>2</sup> 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)’ (2012) <[http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf)> accessed 30 January 2012.

<sup>3</sup> The difference between the European and US model of data is best described by Francesca Bignami:

‘[i]n the European Union, privacy is essential to protecting citizens from oppression by the government and market actors and preserving their dignity in the face of opposing social and political forces. In the United States, privacy is secondary.’ Francesca Bignami,

‘Transgovernmental Networks vs. Democracy: The case of the European Information Privacy Network’ (2005) 26 MICH J INT’L L 807. See also, Joel Reidenberg, ‘Setting Standards for Fair Information Practice in the U.S. Private Sector’ (1995) 80 IOWA L REV 497, 500.

<sup>4</sup> 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 L 281.

<sup>5</sup> E.g., *R v Department of Health ex p. Source Informatics* [2001] QB 424.

<sup>6</sup> Peter Blume, ‘Will it be a better world? The proposed EU Data Protection Regulation’ (2012) 2 International Data Privacy Law 130-136.

However, it should be noted that the above argument holds a presumption that the interests of internal market (e.g., research interests) and data protection rights, in particular the right to privacy, is always competing. In other words, this presumption excludes/ underestimates the possibility that both interests considered may be fostered and protected in an optimal way since it sees the balancing test as weighing one interest against the other. The above thinking has been termed the conflict model.<sup>7</sup> On the basis of this model, the purpose of the General Regulation thus presents new challenge to scientists. Two problems can be identified in this respect. Firstly, can the proposed General Regulation perfectly improve the position of data subject and, ultimately, harmonise transnational data processing within the EU internal market? Secondly, can the competing interests of both side of data processing being capable of supporting each other?

In my view, both questions can be answered. The essay consists of five chapters including this introductory remark as its section 1. To arrive at a background understanding of the reform of the EU data protection law regime, I provide an overview of the purpose and objective of the Data Protection Directive and the proposed General Regulation in section 2. This is followed by a section addressing scepticism about the high cost of implementation and the problem of conceptualising personal data of the proposed General Regulation. In section 4 I will evaluate criticisms addressed in section 3. I argue that the acceptance of a broad conception of privacy is capable of dealing with the issue at stake. However, there are limitations on the European expansionist approach of personal data protection. As regards the way of implementation, I argue that the minimal-regulation model in this field may not be adequate. Indeed, there are practical difficulties to the proposed reform. However, at least the reform presents a good start.

## **II. The Directive and roposed Regulation**

### **a. The EU Data Protection: A Complex Nature**

The EU is under an obligation to uphold international law when exercising its powers.<sup>8</sup> Article 12 of the Universal Declaration of Human Rights

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<sup>7</sup> Deryck Beyleveld, 'Conceptualising Privacy in Relation to Medical Research Values' in Sheila AM McLean (ed), *First Do No Harm: Law, Ethics and Healthcare* (Ashgate Publishing 2006) 155.

<sup>8</sup> Case C-286/90 *Anklagemyndigheden v. Poulsen and Diva Navigation* [1992] ECR I-6019, para 9. Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases and Materials* (5th edn, OUP 2011) 341.

(UDHR)<sup>9</sup> states that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

This principle is echoed in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). According to Article 216(2) TFEU,<sup>10</sup> if international agreements are entered into by the EU, those agreements are held to be an integral part of the EU legal order.<sup>11</sup> However, it should be noted that the EU is not a party to any of these aforementioned international instruments and the Union itself is not directly bound by them (although individual member states that have ratified these instruments will be).

The data protection principles stated by both the OECD Guidelines (paragraph 6) and the Data Protection Convention<sup>12</sup> (Article 11) are to be considered as minimum standards. It has been observed in a RAND report,<sup>13</sup> however, that there was considerably little harmonisation between these two regulatory texts before the introduction of the Data Protection Directive. This might be explained by the nature of these two instruments: while one is introduced for economic reasons, the other's purpose is to protect fundamental rights.<sup>14</sup> The variation of regulatory instruments at national level led to a barrier to the fluent exchange of personal data which is contained in both of the private business sector and the public sector. This characteristic is crucial to later discussions of this work. Influencing every pillar of the EU, therefore, the need to establish a foundation for a proper harmonisation, particularly in terms of the first pillar, was then reflected in the Data Protection Directive.<sup>15</sup>

After the introduction of the Data Protection Directive, several related instruments concerning different sectors for processing personal data were

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<sup>9</sup> It was proclaimed by the General Assembly of the United Nations on 10th December 1948. Available at: < <http://www.un.org/en/documents/udhr/> > accessed 28 February, 2010.

<sup>10</sup> I.e., Article 188L, which is the article number used in the text of the Lisbon Treaty.

<sup>11</sup> Case 181/73 *Haegeman v Belgium* [1974] ECR 449, para. 5. Under this circumstance, the member states are bound by international agreements as a result of their duties under Community law, not international law. See Case C-239/03 *Commission v. France (Etang de Berre)* [2004] ECR I-9325, para 26. Also, Craig and Búrca 344.

<sup>12</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS no. 108, 1981.

<sup>13</sup> Neil Robinson and others, *Review of the European Data Protection Directive* (Technical Report, 2009).

<sup>14</sup> It is noted that if one reads these two values separately, they are prone to coming into conflict. To ensure a more harmonised application of the law, a broad concept of privacy should be accepted.

<sup>15</sup> This is addressed through the Recitals 7-10 of the Data Protection Directive.

issued. With respect to electronic communications, particularly the internet, for example, Directive 2002/58/EC was issued in 2002.<sup>16</sup> Moreover, in terms of retention of information concerns in public communication networks or electronic communications services, the EU issued Directive 2006/24/EC (Data Retention Directive)<sup>17</sup> which amended Directive 2002/58/EC. The Data Retention Directive specifically applies to data protection in law enforcement activities.<sup>18</sup> The EU then issued Directive 2009/136/EC on universal service and users' rights relating to electronic communications networks and services amending Directive 2002/58/EC.<sup>19</sup> This Directive draws attention by requiring informed consent before information is retained or accessed in the users' terminal device under Article 5.3.20

Article 1 states the objective of the Data Protection Directive and is a key to the interpretation of all of the later elements of the Directive. At the pre-Lisbon stage, according to Article 1.1, for the purpose of a harmonised manner of the internal market, the Data Protection Directive aims to safeguard fundamental rights and freedoms of natural persons, especially the right to privacy, in order to enable the free flow of personal data from one EU Member State to another. In sum, under the Data Protection Directive, data protection covers the protection of all fundamental rights and freedoms regarding personal data, and in particular (but not only) the right to privacy.

Three points need to be noted here. Firstly, the Directive does not give a clear indication as to whether or not it concerns itself with striking a balance

between single market objectives and the protection of fundamental rights and

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<sup>16</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31/07/2002 P. 0037 – 0047.

<sup>17</sup> 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, 13/04/2006 P. 0054 – 0063.

<sup>18</sup> Francesca Bignami, 'Privacy and Law Enforcement in the European Union: The Data Retention Directive' (2007) 8 *Chicago Journal of International Law* 233-255.

<sup>19</sup> Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337, 18/12/2009, P. 0011-0036.

<sup>20</sup> This article has profound impact on the usage of cookies on the internet. For detailed discussion and opinions in relation to the consent exemption, see: Article 29 Data Protection Working Party, *Opinion 04/2012 on Cookie Consent Exemption* (No 00879/12/EN, WP194, 2012).

freedoms. However, before the Lisbon Treaty of 2009, the Directive (Article 1.2) per se shall not be misinterpreted as the purpose of the Directive is to essentially strike a balance between fundamental rights and internal market. This is because the central purpose of the Directive is to **enable the free flow of personal data** between the EU member states. At the post-Lisbon stage, nevertheless, as required by Article 6 TEU, human rights provisions in the EU Charter of Fundamental Rights have been upgraded as possessing the same binding legal effect as the Treaties. Yet, as Craig and De Búrca comment,

“...the legacy of the EEC’s roots in the common market project remains significant since, despite its constantly changing and expanding nature, the EU’s dominant focus remains economic, and the debate over the appropriate scope of its human rights role remains even after the important changes introduced by the Lisbon Treaty.”

In this regard, it has been suggested that this is best viewed as ‘internal’ to the activity of the protection of fundamental rights and freedoms.<sup>21</sup> Indeed, ‘the economic well-being of a country’ in relation to interests brought by the free flow of personal data between the EU members *can also be regarded as a type of interest concerning private life under the heading of the right to private life in Article 8(1), or the public interest laid down by Article 8(2)*. With the idea of the internal activity of protecting the right to private life, it is not necessary to have a conflict between the protection of fundamental rights and freedoms as such and any other factors (e.g., the free movement of personal data between the EU members). To view this matter internally, therefore, can avoid the unnecessarily and inconsistency with the notion of integrity of protecting fundamental rights and freedoms.<sup>22</sup> This is consistent with the broad concept of privacy<sup>23</sup> held by the opinions of the ECtHR and remains valid after the introduction of the Lisbon Treaty. Moreover, this idea is even more crucial with reference to rapid technological developments and globalisation which require ‘further facilitat[ion of] the free flow of data within the Union and the transfer to third countries and international organisations, while ensuring a high level of the protection of personal data.’<sup>24</sup>

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<sup>21</sup> Deryck Beyleveld, ‘An Overview of Directive 95/46/EC in Relation to Medical Research’ in Deryck Beyleveld and others (eds), *The Data Protection Directive and Medical Research Across Europe* (Ashgate Publishing 2004) 7.

<sup>22</sup> Ibid.

<sup>23</sup> I will explain this and provide a brief justification in this regard later.

<sup>24</sup> European Commission, Recital 5. In the 2012 EU General Data Protection Regulation, it is

Secondly, to interpret the fundamental rights and freedoms set out in Article 1, the rights recognised in the ECHR, which have been treated by the ECJ as a ‘special source of inspiration’ for EU human rights principles<sup>25</sup> and required by Article 6(2) TEU to accede to the ECHR, must be taken into account.<sup>26</sup> Lastly, as regards to the principles of fundamental rights and freedoms, which have been clarified by the ECJ to view the Charter as the principle basis,<sup>27</sup> Recital 11 gives substance to and amplifies those contained in the Data Protection Convention.

**b. The Proposed General Regulation: a Way to Harmonisation  
The Problem of the Directive: Too Flexible to Achieve the Goal**

Before assessing the price of implementation the proposed General Regulation in the following section, it is essential to understand the related problem of the Directive. According to Article 288 TEU, Member States must ensure the compliance of their domestic legislation with the directive before the end of the implementation period expires. The Data Protection Directive requires implementation in Member States by 24th October, 1998. Data protection legislation has been implemented by most EU Member States at various stages (although only Sweden met the deadline).<sup>28</sup> EU legislation often calls for implementing action by the national authorities. However, in England and Wales for example, some important matters are dealt with through an Act of Parliament – in this case, the Data Protection Act (DPA).<sup>29</sup>

It is observed by Craig and De Búrca that one of the most problematic

issues is the doctrine of direct effect of EC law.<sup>30</sup> For example, due to the weak nature of Article 258 TEU, direct effect could only be applied in public

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stated in Article 1(3) that ‘The free movement of personal data within the Union shall neither be restricted nor prohibited for reasons connected with the protection of individuals with regard to the processing of personal data.’

<sup>25</sup> Craig and Búrca 362.

<sup>26</sup> The draft accession agreement of the European Union to the European Convention on Human rights has been worked out by member states of the CoE. See: The Council of Europe, ‘EU Accession to the Convention’ (2013) <<http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention>> accessed 15 November 2013.

<sup>27</sup> Craig and Búrca 362. It should be noted, however, the UK, Poland, and the Czech Republic negotiated a protocol to the Lisbon Treaty with respect to the impact of the Charter.

<sup>28</sup> The Status of implementation of data protection Directive 95/46/EC could be found at: <[http://ec.europa.eu/justice\\_home/fsj/privacy/law/implementation\\_en.htm#ukingdom](http://ec.europa.eu/justice_home/fsj/privacy/law/implementation_en.htm#ukingdom)> accessed 24 April 2010.

<sup>29</sup> Colin Turpin and Adam Tomkins, *British Government and the Constitution* (6th edn, CUP 2007) 321. For a detailed description and analysis of the DPA, see: Peter Carey, *Data Protection: A Practical Guide to UK and EU Law* (3rd edn, OUP 2009).

<sup>30</sup> Craig and Búrca 180.

enforcement law.<sup>31</sup> For private enforcement law aspects (which individuals can use to challenge local courts and national action that are against the Community legal order), the ECJ offers direct effects with certain conditions, which were gradually loosened by the ECJ.<sup>32</sup>

This also occurs with regards to the effect of directives. The ECJ held the opinion that directives could have direct effect in principle in the *Van Duyn*<sup>33</sup> and the *Ratti* case.<sup>34</sup> However, the ECJ gives the consistent opinion that directives are capable of direct effect merely in a *vertical* way, meaning that they could be brought before the courts against the States (or state entities), but do not have *horizontal direct effect* which imposes obligations on a private party.

As regards the indirect effects of directives, the ECJ holds that, in many aspects, the Member States have some freedom of action in implementing the directives. However, this is not unlimited.<sup>35</sup> In the *Marleasing* case<sup>36</sup> and in later cases such as *Johnson v MDU*,<sup>37</sup> the ECJ held that the national court's obligation is to interpret domestic legislation, so far as possible, in the light of the wording and purposes of a directive and thereby comply with EU obligations. This includes the obligation arising from a directive, which applies even in a horizontal situation. Furthermore, in the *Von Colson* case<sup>38</sup> the ECJ established the principle of consistent interpretation,<sup>39</sup> according to which national courts are under an obligation to interpret national law *at all possible* to avoid a conflict with the Community law.<sup>40</sup> Also, the supremacy of EC/EU

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<sup>31</sup> Paul Craig, 'Once upon a Time in the West: Directive Effect and the Federalization of EEC Law' (1992) 12 Oxford Journal of Legal Studies 453. Also, Craig and Búrca, *EU Law: Text, Cases and Materials* 181.

<sup>32</sup> Craig and Búrca, *EU Law: Text, Cases and Materials* 181, 186-188.

<sup>33</sup> Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337, para 12.

<sup>34</sup> Case 148/78 *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629, para 23.

<sup>35</sup> Case C-553/07 *The College van burgemeester en wethouders van Rotterdam v Rijkeboer* [2009], paragraph 56.

<sup>36</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135.

<sup>37</sup> *Johnson v Medical Defence Union* [2007] EWCA Civ, para 90.

<sup>38</sup> Case 14/83 *Von Colson and Kilmann v Land Nordrhein-Westfalen* [1984] ECR 1891.

<sup>39</sup> Paul Craig and Gráinne De Búrca named this as 'the principle of harmonious interpretation'. See Craig and Búrca, *EU Law: Text, Cases and Materials* 200-207.

<sup>40</sup> It is worth noting that in *Marleasing SA v La Comercial Internacional de Alimentación SA*, it goes further to require the national courts to interpret domestic law so as to ensure achievement of the objectives of the Directive. However, Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911, subsequently, with slightly conservative attitude, holds the opinion which allow national courts to go against pre-existing domestic law, but still requires national courts to interpret national law *at all possible* to avoid a conflict with the Community law. See also, Deryck Beylveled, 'Data Protection and Genetics: Medical Research and the Public Good' (2007) 18 King's Law Journal 277.

law is declared since the *Van Gend en Loos* case<sup>41</sup> and the UK courts has accepted this since the *Factortame* case.<sup>42</sup>

On the other hand, it is well established in the UK, for example, that where domestic legislation implements a directive of the European Community, the domestic legislation must so far as possible be interpreted in conformity with the directive. As Sir John Laws posited in *Thoburn v Sunderland City Council*, the UK court is under the duty when delivering a final judgment to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.<sup>43</sup>

Nevertheless, due to the ‘negotiated’ character of EU legislation,<sup>44</sup> some domestic implementations may not interpret and apply the purposes of the EU law effectively and consistently. This surfaced when applying directives, which are one of the main ‘instruments of harmonization’<sup>45</sup> used widely by EU institutions. This can be found in the Data Protection Act 1998 (DPA) of the UK, for example, that the definition and scope of ‘relevant filing system’ given in s.1(1)(c) was explained by the House of Lord in a rather narrow way as mentioned above in the *Durant* Case. However, considering the opinions given by the ECJ to interpret provisions of national law so as to comply with the terms of a directive, this decision is open to criticism and in fact controversial.

## The Reform

The EU Commission proposed a reform of Data Protection law regime in the EU in 2012 to deal with the ‘flexible’ issue and try to harmonise the EU data protection law regime. According to the Commission, the main policy objectives are to:<sup>46</sup>

1. Modernise the EU legal system for the protection of
2. personal data, in particular to meet the challenges resulting from globalisation and the use of new technologies;

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<sup>41</sup> Case 26/62 *Van Gend en Loos v Nederlandse Administratis der Belastingen* [1963] ECR 1.

<sup>42</sup> *R v Secretary of State for Transport ex parte Faetortame (No 2)* [1991]1 AC 603 (HL).

<sup>43</sup> *Thoburn v Sunderland City Council* [2003] QB 151.

<sup>44</sup> Jean-Claude Piris, ‘The legal orders of the European Community and of the Member States: peculiarities and influences in drafting’ (2005) 58 *Amicus Curiae* 24-25.

<sup>45</sup> Craig and Búrca, *EU Law: Text, Cases and Materials* 187-188.

<sup>46</sup> European Commission, ‘Reform of the Data Protection Legal Framework’ (2013) <[http://ec.europa.eu/justice/data-protection/review/index\\_en.htm](http://ec.europa.eu/justice/data-protection/review/index_en.htm)> accessed 23 October 2013.

3. Strengthen individuals' rights, and at the same time reduce administrative formalities to ensure a free flow of personal data within the EU and beyond; and
4. Improve the clarity and coherence of the EU rules for personal data protection and achieve a consistent and effective implementation and application of the fundamental right to the protection of personal data in all areas of the Union's activities.

Moreover, on the basis of Recital 7 of the proposed General Regulation:

The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the way data protection is implemented across the Union, legal uncertainty and a widespread public perception that there are significant risks for the protection of individuals associated notably with online activity. **Differences in the level of protection of the rights and freedoms of individuals, notably to the right to the protection of personal data, with regard to the processing of personal data afforded in the Member States may prevent the free flow of personal data throughout the Union.** These differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. This difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC (emphasis added).

A significant difference between the Directive and proposed General Regulation is about the implementation. According to Articles 290 and 291 of the TFEU, the Commission is capable of

issuing further secondary legislation in the form of implementing and delegating acts. After the proposed General Regulation coming into force, the 'negotiated' character of EU legislation may no longer be a significant issue. This is because Art. 288 of the TFEU provides that,

at least in principle, a regulation needs not to be transposed into national law, as it has general application and is binding in its entirety and directly applicable in all Member States. This might be capable of covering up the weakness of the Data Protection Directive, e.g., different regulatory strength in relation to free flow of personal data required by Art. 1.2.

From Recital 7 of the proposed Regulation, moreover, as addressed above, economic development remains a dominated focus in the EU regime. The main tool of policy is to encourage a single market to achieve the goal. Unsurprisingly, therefore, Recital 4 of the proposed General Regulation states that:

The economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows. The exchange of data between economic and social, public and private actors across the Union increased. National authorities in the Member States are being called upon by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State.

However, it should be noted that such statement does not necessarily follow that the central purpose of economic development is the **only** thing concerned. Indeed, Recital 2 of the proposal emphasises that ‘[i]t should contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, the strengthening and the convergence of the economies within the internal market, and the well-being of individuals.’ This is in line with the purpose of the Directive. In this respect, the concepts and the overarching goal of regulatory method of data protection remain consistent.

### **c. Conceptualising Personal Data**

Article 2(a) of the Directive sets out that if an identifiable person can be identified ‘directly or indirectly’, then this linkable data is personal data. Moreover, such data can only be identified through ‘reasonable methods’ – those do not consume disproportionate time, energy or financial means. In this

regard, the adoption of a broad concept of personal data and privacy is noted by the Commission to cover all information concerning an *identifiable* individual.<sup>47</sup> The law, therefore, reflects ‘the intention of the European

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<sup>47</sup> COM (92) 422 final, 28.10.1992, 10.

throughout the legislative process.’<sup>48</sup>

It has been stated that the opinion of the ECtHR is treated by the ECJ as a special source of inspiration for EU human rights principles and required by Article 6(2) TEU to accede to the ECHR. It is thus plausible to look at the content and interpretation of the ECHR.

The very essence of the ECHR is the respect for fundamental rights and freedoms. This should be distinguished from the purpose of the Directive and the Regulation at issue. However, how to judge whether a specific action falls within the scope of the guaranteed rights or freedoms ‘might be open to question.’<sup>49</sup> The nature of fundamental rights and freedoms thus results in inconsistent interpretations regarding the scope of the enshrined rights: the right to privacy is included therein.

The core purpose of an article is of central importance when looking at the scope of the rights covered by any specific article under the ECHR. Take Article 8 as an example, the ECtHR identified that ‘the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities’ in the *Hokkanen* case.<sup>50</sup> It has also been underlined by the Court that the intention of Article 8(1) is to ensure that ‘the development, without outside interference, of the personality of each individual in his relations with other human beings.’ (emphasis added)<sup>51</sup>

With this in mind, it is unwise to ignore the extension of a right entailing the notion of respect. To link the rights covered by Article 8 of the ECHR to merely ‘the right to privacy’ with a sense of narrow interpreting may produce inappropriate results. It is therefore unsurprising that the Court rejects this narrow interpretation. For example, the *Niemietz* Case points out that the Court tends to interpret Article 8 broadly under its jurisprudence:<sup>52</sup>

‘[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings,’...

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<sup>48</sup> Article 29 Data Protection Working Party, *Opinion 4/2007 on the Concept of Personal Data* (No 01248/07/EN, WP136, 2007) 8.

<sup>49</sup> Jeremy McBride, ‘Proportionality and the European Convention on Human Rights’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 23.

<sup>50</sup> *Hokkanen v Finland* Series A no 299-A (1994) 19 EHRR 139 para 55.

<sup>51</sup> *Von Hannover v. Germany* (App no 59320/00) (2004) ECHR 294 para 50. See also: *Hokkanen v Finland* and *Botta v Italy* (1998) 26 EHRR 241 para 32.

<sup>52</sup> See: Beylveled, ‘Conceptualising Privacy in Relation to Medical Research Values’ 154-155. Also, David Harris and others, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 364-366.

‘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 and to exclude therefore entirely the outside world not encompassed within that circle.’<sup>53</sup>

One question, however, remains unresolved: does the Strasbourg Court possess absolute power in assessing the applicability of Article 8(1) of the ECHR? Although there is indeed a tension between the power of sovereignty owned by nation states and individual fundamental rights and freedom protected by the ECHR, Member States are not able to claim restrictions freely without any limitation on those protected rights after having signed and ratified the Convention.<sup>54</sup> Therefore, it is at least appropriate ‘for the Court to impose procedural requirements on states’ which violate interests protected by Article 8(1).<sup>55</sup>

Overall, the opinion of the ECtHR with respect to identifying whether a right is covered by Article 8, which considers that the right to private life is ‘incapable of exhaustive definition,’<sup>56</sup> is in line with the broad conception of privacy. However, the Court does provide some guidelines to understand the definition and scope of the primary aim of Article 8(1). Nonetheless, this approach is not clear enough. Two reasons can be given: first, the Court does not depend on an applicable theoretical framework and clear guidelines to deal with non-exhaustive and ill-defined definition of Article 8(1). Secondly, it is observed by David Feldman that:

[t]he field is becoming considerably more complex because of developments information technology and the explosion in the range of legal rules which seek to regulate the use of information.<sup>57</sup>

The legal justification offered by the ECHR (as well as the interpretation by the ECtHR) can be applied to the Directive for personal data protection – I have emphasised the importance of Art.1 of the Directive. It seems to me, from

the outset wording of proposed General Regulation, a broad conception of

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<sup>53</sup> *Niemietz v Germany* (1992) 16 EHRR 97 para 29. Also, *Costello-Roberts v UK* (App no 13134/87) (1993) 19 EHRR 112 para 6 and *Peck v UK* (2003) 36 EHRR 41 para 57.

<sup>54</sup> David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002) 541.

<sup>55</sup> *Ibid* 542.

<sup>56</sup> *Harris and others* 364.

<sup>57</sup> *Feldman* 531.

personal data/ privacy remains sound.<sup>58</sup>

### III. Scepticism: Full Harmonisation within the EU?

#### a. The Purpose: The Price of Implementation

The first issue concerns whether the proposed General Regulation can fully harmonise the data protection law regime in the EU. Challenges of perusing the goal of promoting economic development and protection of fundamental rights and freedoms can be identified as below.<sup>59</sup>

Dilemma between promoting free flow of personal data to function internal market of the EU and protecting fundamental rights and freedoms.

In his essay Blume suggests that two perspectives namely the EU perspective and the national/ member state perspective may be in a conflict.<sup>60</sup> His approach relates the EU perspective to the side of concerning the ‘functioning of the Union as such and in particular the single market,’ and relates the national perspective to the (high potential) competing side of ‘legal culture and tradition with respect to privacy and data protection related to the understanding of the relationship between state and citizen and between enterprise and citizen also have a high priority.’<sup>61</sup> Although he does not totally exclude the possibility of co-operation between the two interests, the argument implies a conflict model,<sup>62</sup> which potentially underestimates the possibility that both interests considered may be fostered and protected in an optimal way. This is because the argument sees the balancing test as weighing one interest *against* the other.<sup>63</sup>

For example, with respect to the relationship between data protection values and the right to benefit from a well-developed market or the right to property, this model suggests that the former interests always conflict with the

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<sup>58</sup> Recital 7 of the proposed General Regulation states, ‘[t]he objectives and principles of Directive 95/46/EC remain sound.’

<sup>59</sup> It should be noted that most issues have been identified by Blume. See: Blume 130-136. However, I disagree some of his opinions. I will explain this in the following section.

<sup>60</sup> Ibid 130-131.

<sup>61</sup> Ibid.

<sup>62</sup> Beyleveld, ‘Conceptualising Privacy in Relation to Medical Research Values’ 155.

<sup>63</sup> Katja de Vries and others, ‘The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn’t It?)’ in Serge Gutwirth and others (eds), *Computers, Privacy and Data Protection: an Element of Choice* (Springer 2011) 21.

latter one.<sup>64</sup> It views competing rights as a zero-sum trade-off and holds that the right to privacy does not in any way, or at least not in a realistic fashion, support advances in science and technology. Such a model can be summarised as follows:

- i. For those who consider that privacy values (i.e., the EU perspective) should always give way when there is a conflict, endorsing a *narrow conception of privacy*.<sup>65</sup>
- ii. In contrast, for those who maintain that privacy values should always override benefits of a well-functioned internal market (i.e., the country holds a legal culture to value privacy), since the right to privacy is not an absolute right, there must still be chances of fallacy. In fact, even the most extreme privacy advocates rarely suggest that privacy values should always override the benefits of science and technology. Moreover, there is a tendency for supporters of a narrow conception of privacy to regard the right to privacy as a personal interest while seeing the interest of internal market as a general public interest. Under a Utilitarian calculus, which should be familiar to those who adopt of narrow conception of privacy, this situation comes into play frequently. Moreover, mention should also be made to the fact that ‘if there is a high concern of privacy, it is merely communicated. Mostly there is a low interest in enhancing privacy.’<sup>66</sup> Consequently, on the basis of the narrow conception of privacy, even though privacy concerns are highly valued, privacy may still not prevail.

### 1. Practical obstacles of transferring the Directive to the Regulation

At least two practical issues can be identified in this regard. The first and most obvious problem is the potential cost for the legislation and enforcement of the ‘legal revolution’<sup>67</sup> for member states. The scope of the update of data

protection legislation in member states will cover, for instance, financial

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<sup>64</sup> See for example: *R v Department of Health ex p. Source Informatics* [1999] 4 All ER 185, [2000] 1 All ER 786, cited from Beyleveld, ‘Conceptualising Privacy in Relation to Medical Research Values’ 152.

<sup>65</sup> It is argued that, normally, the conflict model is associated with the narrow concept of privacy. Beyleveld, ‘Conceptualising Privacy in Relation to Medical Research Values’ 156.

<sup>66</sup> Daniel Guagnin, Leon Hempl and Carla Ilten, ‘Privacy Practices and the Claim for Accountability’ in René von Schomberg (ed), *Towards Responsible Research and Innovation in the Information and Communication Technologies and Security Technologies Fields* (Publications Office of the European Union 2011) 103.

<sup>67</sup> As Blume observes, ‘[t]here are numerous rules in statutory law regulating data protection which will be covered by the Regulation, provided they do not have a basis in other parts of EU law.’ The update of the new rules will be a ‘legal revolution’ in this regard. See: Blume 134.

institutions and social welfare.<sup>68</sup> Moreover, member states with minimum level of protecting personal data required by the Directive will need to make more efforts in this respect.

Secondly, in the contrast, for those nations already laid stricter data protection law than the requirement of the proposed Regulation, it is claimed that the current level of data protection will be reduced.<sup>69</sup> This is because the national data protection acts will disappear when it becomes supranational law in charge.

## 2. Too complex and too vague to follow

The text of the Directive has notoriously and regularly been argued as too complex and vague to understand. This happens at both the EU and national levels. The first question one must consider about the issue is always ‘how closely these changes fit with what already exists at the domestic level.’<sup>70</sup>

Blume has made a vivid description on this issue: they are gifts to lawyers<sup>71</sup> – for sure the difficult texts will not be gifts for the ordinary people. However, re-phrased language at national level on the basis of different native legal culture and languages may solve the problem of complexity of the Directive. Nevertheless, this cannot be applied with respect to the proposed Regulation due to the nature of the Regulation in the EU law regime.

The complexity issue produces a further problem: the text of the Regulation may not be capable of reflecting legal culture of different member states.<sup>72</sup> However, it should be noted that, as Blume recognises, this is in some sense a common characteristic of supranational law in the EU.<sup>73</sup> Indeed, this is not a new issue in relation to the Europeanization back to the last century.

### **b. The Objective: The Problem of Conceptualising Personal Data**

In their forthcoming essay two knowledgeable American scholars Schwartz and Solove argue that ‘[b]oth identified and identifiable

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<sup>68</sup> Ibid 134.

<sup>69</sup> Ibid 131.

<sup>70</sup> Maria Green Cowles, James Caporaso and Thomas Risse, ‘Europeanization and Domestic Change: Introduction’ in Maria Green Cowles, James Caporaso and Thomas Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001) 2.

<sup>71</sup> Blume 134.

<sup>72</sup> Ibid 132.

<sup>73</sup> Ibid 132.

information fall squarely within the scope of EU data privacy law, and they are treated in the same fashion'.<sup>74</sup> It is put that The duties of the data controller and the rights of the data subject are the same for both identified

and identifiable information. The crossing of the threshold for either category functions as an "on" switch for the application of EU data protection law. (emphasis added)<sup>75</sup>

In other words, it is argued that '[o]nce information qualifies as identified or identifiable, it falls under the data protection regime.'<sup>76</sup> As personal data falls within the regime, it follows that '[t]he consequence of this classification is to trigger a wide range of obligations, rights, and protections.'<sup>77</sup> Moreover, in the essay it is considered that notable changes in this respect may be found in the proposed General Regulation: personal data has been re-defined as 'any information relating to a data subject'.<sup>78</sup> However, a crucial continuity should be noted: the ultimate test regarding 'identifiability' (Directive) or indirect identification (proposed General Regulation) remains the same.<sup>79</sup>

The consistent EU broad data protection approach has been commented by them as the primary benefit. However, the equal status of both identified and identifiable personal data for triggering a full suite of obligations of data controllers and protection of data subjects is arguable. The essay thus argues that

To place all such data into the same conceptual category as data that currently relate to an identified person is an approach that lacks nuance and risks activating burdensome regulations for data processing entities that are incommensurate with actual risks to the privacy of individuals.

The two authors go on their argument according to an opinion made by the WP29.<sup>80</sup> On the basis of the argument made by the authors, if I am correct, relevant points can be sketched as follows:

- i. A broad concept of privacy/ data protection in relation to the

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<sup>74</sup> Daniel J. Solove and Paul M. Schwartz, 'Reconciling Personal Information in the United States and European Union' (2014) 102 California Law Review 7.

<sup>75</sup> Ibid 7.

<sup>76</sup> Ibid 7.

<sup>77</sup> Ibid 8.

<sup>78</sup> Art. 4.2 of the proposed General Regulation.

<sup>79</sup> Solove and Schwartz 9.

<sup>80</sup> Article 29 Data Protection Working Party, *Opinion 4/2007 on the Concept of Personal Data*.

European approach is considered beneficial by the authors.<sup>81</sup>

Yet, some types of identification of personal data ‘will not be likely to occur,

ii. which means there is not [sic] use of personal information.’<sup>82</sup> Therefore, ‘unless this gathering of information creates data that is reasonably capable of being linked to a specific person, it does not create identified information.’<sup>83</sup>

iii. Moreover, the two authors argue that the WP29 confuses collection and stated purpose with identifiability. This is because the WP29 views ‘where the purpose of the processing implies the identification of individuals, it can be assumed that the controller or any other person involved have or will have the means "likely reasonably to be used" to identify the data subject.’<sup>84</sup>

iv. Nevertheless, they argue different levels of protection/ obligation should be put on the basis of associated risks on different types of personal data. Accordingly, they suggest the concept of PII 2.0 model which ‘place personal data on a continuum that begins with no risk of identification at one end, and ends with identified individuals at the other.’ On this continuum, moreover, three categories are divided on the basis of types of personal data: identified, identifiable, and non-identifiable.

I will evaluate these addressed arguments in the following section.

#### **IV. The Argument: Harmonisation and Spectrum of Personal Data Protection**

##### **a. The Acceptance of A Broad Conception of Privacy**

First thing first: it is arguable to relate the pursuing of internal market function to the EU perspective and relate the protection of fundamental rights and freedoms to the national level. Indeed, in the Recital of the Data Protection Directive, the EU legislative institutions have regard to Article 100/a EEC,<sup>85</sup>

which allowed the Council to adopt directives ‘for the approximation of such laws, regulations or administrative provisions of the Member States as directly

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<sup>81</sup> Solove and Schwartz 14.

<sup>82</sup> Ibid 17.

<sup>83</sup> Ibid 14.

<sup>84</sup> Article 29 Data Protection Working Party, *Opinion 4/2007 on the Concept of Personal Data* 16.

<sup>85</sup> Article 115 TFEU, ex Article 94 TEC.

affect the establishment or functioning of the internal market.’ It is thus crucial for any interpretation of the Directive at issue to look at internal market harmonisation. However, after the Titanium dioxide case,<sup>86</sup> subsequent judgements of the ECJ on which were aimed to pursue multiple objectives appeared to ‘swing the balance’<sup>87</sup> in favour of legal basis which guaranteed the protection of other fundamental rights and freedoms and against 100a EEC. In the judgement of First Tobacco Advertising,<sup>88</sup> moreover, it is condemned by the Court that the EU legislature has only a power/duty to improve the condition for the establishment and functioning of the internal market rather than regulating it. Similarly, to simply relate the protection of fundamental rights and freedoms to the domestic legal culture level may not be necessarily correct, in particular considering the Charter of Fundamental Rights of the European Union and the Treaty of Lisbon.

I argue that, on the basis of the acceptance of broad concept of privacy, there is a possibility for data protection values, particularly the right to privacy, and the interest of the proper functioning of internal market being capable of supporting each other. In other words, it might be incorrect to always regard privacy/ data protection values and other values as belonging to two mutually exclusive sets. For example, with respect to the issues at stake:

- i. The fulfilment of data protection requirements, particularly the protection of the right to privacy, can support proper functioning of internal market. This can be achieved by applying a more efficient legal instrument, i.e., a Regulation. This is more or less reflected by an interesting observation which Blume remarks in his essay: European enterprises seem to support harmonisation rather than the current diverging domestic rules.<sup>89</sup>
- ii. Conversely, functioning of a better internal market of the EU improves security and convenience of the private lives of individuals (including considerations of privacy values) as well as public interests. The interests with regard to proper functioning of internal market can also provide individuals with more control over their private lives by providing them with more options. This fits with the concept of decisional privacy

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<sup>86</sup> *Commission v Council* Case C-300/89 [1991] ECR I-2867.

<sup>87</sup> Kieran St Clair Bradley, ‘Powers and Procedures in the EU Constitution: Legal Bases and the Court’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 2011) 97.

<sup>88</sup> *Germany v European Parliament and Council of the European Union* Case C-376/98 [2000] ECR I-8419.

<sup>89</sup> Blume 131.

and informational privacy under the broad conception of privacy.<sup>90</sup>

This provides the central idea of the co-operative model demonstrating that multiple objectives protecting different values/ interests in a single legislature text are capable of supporting each other rather than coming into conflict.<sup>91</sup> The acceptance of broad concept of privacy and the idea of co-operative model, moreover, is similar to Solove's disagreement against the 'all-or-nothing argument.'<sup>92</sup>

### **Limits of the broad conception of privacy**

In their essay it is considered that the analysis made by the WP29 sweeps too broadly.<sup>93</sup> In this respect, the European expansionist approach may result in comprising everything. For example, section 3(1) of the Federal Data Protection Act of Germany (Bundesdatenschutzgesetz, BDSG) refers personal data to 'any information concerning the personal or material circumstances of an identified or identifiable natural person.' The two authors of the essay provide an example to demonstrate that the possibility of identification may be highly remote for the party who has access only to key-coded data. However, according to Rejman-Greene's opinion with respect to Recital 26 of the Directive, there are principles to decide the situation of reasonable measures to identify biometric data (which is a type of sensitive data).<sup>94</sup> Only after all

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<sup>90</sup> See: Anita Allen, 'Coercing Privacy' (1999) 40 William and Mary Law Review 723-757.

<sup>91</sup> It should be noted that a variety of approaches might be adopted in pursuit of functioning of the internal market of the EU. 'Horizontal harmonisation', for example, is suggested in general requirement for the protection of consumers from identified risks arising from individual products. Bradley 99.

<sup>92</sup> Daniel J. Solove, *Nothing to Hide: the False Tradeoff between Privacy and Security* (Yale University Press 2011) 33-37.

<sup>93</sup> Solove and Schwartz, 'Reconciling Personal Information in the United States and European Union' 18.

<sup>94</sup> Marek Rejman-Greene, 'Privacy Issues in the Application of Biometrics: a European Perspective' in James L. Wayman and others (eds), *Biometric Systems: Technology, Design and Performance Evaluation* (Springer 2005) 344-345. These addressed conditions are:

1. The identity of a previously enrolled individual is only represented by a "one way" template without any possibility of reconstruction of the original record;
2. The template could also be generated by a sufficient number of other subjects in the population;
3. The template is stored on a token held by the end user;
4. The comparison, at verification, of the output of the sensor with the template, is made on the token itself;
5. All images and records relating to the enrolment are securely disposed of at the time of enrolment;

these requirements are satisfied, could it possibly be considered that non-identifiability is achieved. Hence, even in the case of sensitive data, there are imaginable cases of not being an identifiable data.

I accept the idea of broad conception of privacy held by the EU model of personal data protection. It should be noted that, however, there are limits of the broad conception of privacy. In other words, a broad conception of privacy is not to say that everything is privacy: the conception of privacy still needs to stay within some basic characteristics of privacy. Indeed, any discussion defending the fundamental value of privacy interests has to define the concept so as to differentiate it from other ideas. Logically, as there must be different ideas, the conception of privacy will never cover everything. Overall, the conception of privacy can be broad, but it still needs to be privacy rather than irrelevant conceptions e.g., the right a fair trial.

Moreover, the consequence of a broad conception of privacy is that it does not only protect one value but several. Hence, there is a second limit to the broad conception of privacy – a possibility of conflict within the co-operative model. Specifically, as Beyleveld remarks, ‘not only is privacy capable of conflicting with other non-privacy interests, but some privacy interests are capable of conflicting with each other.’<sup>95</sup> In this regard, the criterion of balancing interests, e.g., the principle of proportionality,<sup>96</sup> can then be used to assess these competing values within the conception of privacy both inter-personally and intra-personally.

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6. No other data is available that, combined with the biometric data, could link the user uniquely to a template; and
  7. The backup alternative, in case of failure of the biometric, does not expose the biometric to a process whereby a subsequent verification could reveal the person’s identity.

<sup>95</sup> Beyleveld, ‘Conceptualising Privacy in Relation to Medical Research Values’ 158.

<sup>96</sup> In other work I argue that the criterion of needfulness for action on the basis of the principle of generic consistence (PGC) is the proper criterion. For detail, see: Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001).

## Not all the same

Arguably, the broad conception of privacy may be considered as being too broad. This might lead to a conviction that the two types of data should be treated as equivalent categories. This is simply wrong. Again, take section 3(1) of the BDSG as an example, a broad conception of privacy does not require agents/ regulators to treat the two categories (i.e., the identified and identifiable agent) equally; rather, **it simply ask regulators to treat them within the concept of privacy**. In other words, to consider categories of identified/identifiable as conceptions of privacy/personal data does not necessarily mean that they will be treated them equally.

The broad conception of privacy is at least not being denied by Schwartz and Solove. What they disagree is that different levels of protection/ obligation should be put on the basis of associated risks on different types of personal data. However, I do not see that the WP29 show any disagreement on this. In fact, in the same document which the two scholars rely on to show that all the identified and identifiable personal data are treated the same, it is put that:

Retraceably pseudonymised data may be considered as information on individuals which are indirectly identifiable. Indeed, using a pseudonym means that it is possible to backtrack to the individual, so that the individual's identity can be discovered, but then only under predefined circumstances. In that case, although data protection rules apply, the risks at stake for the individuals with regard to the processing of such indirectly identifiable information will most often be low, **so that the application of these rules will justifiably be more flexible than if information on directly identifiable individuals were processed.** (emphasis added)<sup>97</sup>

Moreover, I argue that the precautionary reasoning should be considered with respect to the growing scope of personal data (or, PII). This is because it is useful in dealing with the uncertain privacy risks brought about by the capacity of re-identification. Indeed, the principle is formulated by the Nuffield Council on Bioethics in relation to the concerns over genetically modified crops that the regulators may 'impose restrictions on otherwise legitimate commercial activities, if there is a risk, even if not yet a scientifically demonstrated risk...'<sup>98</sup>

However, again, it is noted that the protected rights and freedoms are not

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<sup>97</sup> Article 29 Data Protection Working Party, *Opinion 4/2007 on the Concept of Personal Data* 18.

<sup>98</sup> Nuffield Council on Bioethics, *Genetically Modified Crops: The Ethical and Social Issues* (Nuffield Council on Bioethics, 1999) 162.

absolute. Thus, according to precautionary reasoning and the principle of proportionality, although identifiable/ re-identifiable data should be included within the scope of personal data (in a broad-concept sense) to avoid the risk of violating privacy, it needs to be proportionately treated on the basis of the possibility of being identified.

**Alone the line of logic, briefly:**

1.If data refers to an identified data subject, the risk level is high. Moreover, within the identified data, sensitive data receives even higher level of protection.

2.If data refers to an identifiable data subject, the risk level is lower than the identified one. Since there remains a possibility of risk, minimising the risk of violating fundamental rights and privacy (e.g., the right to privacy) is still needed. Since the risk of identifiable data is lower than that of identified data, to protect the competing fundamental rights and freedoms (e.g. the right to enjoy the advances of science and technology), such data should be proportionately less limited than identified data.

**b. The Regulatory Approach**

In terms of the issue regarding whether a regulation is a better approach of harmonising the EU data protection law regime, it is at least arguable that there is a demand to determine adequate regulatory instruments. Different levels of regulatory methods, however, are favoured. For instance, whenever new and powerful technologies have been developed to the point of being able to be widely applied and implemented, there will be opponents holding differing opinions. This has been termed the ‘Luddite argument’ by Solove.<sup>99</sup> Privacy and data protection advocates, for example, may be labelled as the Luddites. However, this can be rebutted by the ‘Titanic Phenomenon’, which holds that while many new technological proposals have great advantages, ‘proponents are not giving adequate thought to the consequences if they

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<sup>99</sup> Solove, *Nothing to Hide: the False Tradeoff between Privacy and Security* 201.

Luddites is a term originally means those who protested against the mechanisation of the Industrial Revolution in 19<sup>th</sup> century. Similarly, Beyleveld and Pattinson term this ‘science hatred,’ meaning the belief that science is inherently evil. Deryck Beyleveld and Shaun D. Pattinson, ‘Individual Rights, Social Justice, and the Allocation Of Advances in Biotechnology’ in Michael Boylan (ed), *Public Health Policy and Ethics* (Kluwer 2004) 70.

fail.’<sup>100</sup> This phenomenon, pointed out by Solove, refers to the tendency of those ‘quick’ users of the changing technologies: they tend to be overconfident or optimistic to apply the technology without ‘appropriate legal architecture in place to use it responsibly.’<sup>101</sup>

Another response is to abandon regulation and assume that technological prospects might/ be able to dictate the ‘right direction’ or to try at least to ‘hold the regulatory line, concentrating resources on the most serious violations.’<sup>102</sup> Indeed, positive rights to fundamental rights and freedoms are in potential conflict with the other individuals’ rights. This is because they impose obligations to the other agents that limit the other individuals’ rights. Hence, on the one hand, it has been claimed that free markets are better suggested. This is because, based on a Utilitarian argument, this model may promote the overall utility as long as the deals between the agents are not harming anyone and the deals possess the potential of bringing mutual profits. In a preference Utilitarian version, for example, it is the maximisation of the subjective preferences of agents in a calculus in which all preferences count equally. Moreover, based on the Libertarian rights ethics, voluntary exchanges uphold the respect of individual liberty. Free markets are therefore advocated by such theories.

However, there are objections to the above free-market model.<sup>103</sup> A general objection against the free-market model, for example, considers that technologies associated with human bodies are incompatible with human dignity. It can be, rather, argued that certain benefits and social practices cannot be the object of trade or patents. In terms of serious risks, moreover, Fukuyama considers that such technologies cannot be captured by the Utilitarian calculus.<sup>104</sup>

It has been argued, for instance, that it is inappropriate to patent processes or products involving tissues from human beings, as it may be contrary to human dignity.<sup>105</sup> Some regulations, according to such a consideration, incorporate a morality exclusion.<sup>106</sup> Moreover, a free-market model cannot

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<sup>100</sup> Solove, *Nothing to Hide: the False Tradeoff between Privacy and Security* 199. The ‘Titanic Phenomenon’ indicates that the designers and builders of the Titanic did not provide enough lifeboats since they thought the ship is unsinkable.

<sup>101</sup> *Ibid* 203.

<sup>102</sup> Roger Brownsword, *Rights, Regulation, and the Technological Revolution* (OUP 2008) 315.

<sup>103</sup> Michael J. Sandel, *Justice: What's the Right Thing to Do* (Penguin Books 2010) 81-91.

<sup>104</sup> Francis Fukuyama, *Our Posthuman Future* (Profile Books 2002) 101, citing from Brownsword 314.

<sup>105</sup> For example, the *Relaxin Opposition* in Europe. See: Beyleveld and Brownsword, *Human Dignity in Bioethics and Biolaw* 196-202.

<sup>106</sup> For example, the European Patent Convention and the Directive on the Legal Protection of Biotechnological Inventions. See: *ibid* 199.

avoid the possibility of an initial situation of inequality. It is debateable that not every deal is fair in a free market. This is because there are chances that the deal is made under a non-free or out-of-necessity situation. In such cases, even though there may be consent in attendance, it may still be made in an invalid way.<sup>107</sup> Overall, this objection is similar to the ‘dignity as constraint’ argument on a dignity-based perspective.<sup>108</sup>

In terms of the proposed General Regulation, it is pointed out in the press release by the Commission that ‘[t]echnological progress and globalisation have profoundly changed the way our data is collected, accessed and used’<sup>109</sup> and the cloud computing has been noted in particular as a specific type of new challenge.<sup>110</sup> Regulating technology with respect to privacy and data protection issues encounters a more specific problem: the scope and the conception of personal data are influenced by rapidly changing technology and data-sharing practices. This is because the line between personal data and non-personal data – whether the data can be identified/ identifiable – profoundly depends on technology. The scope of personal data may expand since changing technologies provide stronger and more efficient abilities to identify and re-identify data. In this regard, Paul Ohm argues that the scope of personal data<sup>111</sup> ‘will never stop growing until it includes everything.’<sup>112</sup> Ohm thus proposes an alternative approach to focus the privacy law on a different conception of personal data; the regulators should

...consider a series of factors to identify situations in which harm is likely and whether it outweighs the benefits of unfettered information flow. When they identify harm that outweighs these benefits, they should regulate, focusing on narrow contexts and specific sectors rather than

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<sup>107</sup> This is closely related to the Justice theory of John Rawls.

<sup>108</sup> Beyleveld and Brownsword, *Human Dignity in Bioethics and Biolaw* 198-202. The ‘dignity as constraint’ argument suggests that it is ‘implicated in much recent thinking about the limits to be placed on biomedicine, reflecting the belief that biomedical practice in the twenty-first century should be driven, not by the vagaries of individual choice, but by a shared vision of human dignity that reaches beyond individuals.’ See: *ibid* 29.

<sup>109</sup> European Commission, ‘Commission Proposes A Comprehensive Reform of the Data Protection Rules’ (2012)  
<[http://ec.europa.eu/justice/newsroom/data-protection/news/120125\\_en.htm](http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm)> accessed 30 January 2012 1.

<sup>110</sup> European Commission, ‘How Will the EU’s Reform Adapt Data Protection Rules to New Technological Developments?’ (2012)  
<[http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/8\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/8_en.pdf)> accessed 30 January 2012.

<sup>111</sup> It seems that Ohm does not distinguish ideas between personal data and personally identifiable information (PII). Paul Ohm, ‘Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization’ (2010) 57 *UCLA Law Review* 1704.

<sup>112</sup> *Ibid* 1742.

trying to regulate broadly across industries.<sup>113</sup>

Again, this resonates with the Utilitarian argument and therefore can be rebutted through the objections presented above. Moreover, the approach suggested by Ohm is to

...resign themselves to a world with less privacy than they would like. But more often, regulators should prevent privacy harm by squeezing and reducing the flow of information in society, even though in doing so they may need to sacrifice, at least a little, important counter values like innovation, free speech, and security.<sup>114</sup>

However, this approach faces the objections stemming from the European data protection model, which consider the protection of the flow of information as the primary purpose of the Directive and the proposed General Regulation. As we have seen, this purpose may not come into conflict with privacy values. Indeed, Solove comments that ‘where the first step is to restrict the flow of information is a move in the wrong direction.’<sup>115</sup>

Nevertheless, it should be noted that in practice some measures suggested by Ohm, may still have their merits. For example, he suggests the regulators should ‘incorporate risk assessment strategies that deal with the reality of easy reidentification as the old PII model never could.’<sup>116</sup>

As regards the choice between the European model (which regulates all forms of data collection, processing, and using in the absence of specific exemptions) and the American model (which is based on the primacy of freedom of information, whereby unless something fits the scope of specific regulations, it is not protected), having taken into account the problems of the minimal-regulation model, I contend that the European model should be favoured. Indeed, it has been suggested in a comparative study submitted to the European Commission:<sup>117</sup>

Data protection law in the EU (in all areas covered by the previous three

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<sup>113</sup> Ibid 1759.

<sup>114</sup> Ibid 1706.

<sup>115</sup> Paul M. Schwartz and Daniel J. Solove, ‘The PII Problem: Privacy and A New Concept of Personally Identifiable Information’ (2011) 86 NYU Law Review 1868.

<sup>116</sup> Ohm 1759.

<sup>117</sup> Directorate-General Justice European Commission, Freedom and Security,, ‘Comparative Study on Different Approaches to New Privacy Challenges, in Particular in the Light of Technological Developments’ (2010) <[http://ec.europa.eu/justice/policies/privacy/docs/studies/new\\_privacy\\_challenges/final\\_report\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_en.pdf)> accessed 30 January 2012 21.

pillars) can and should continue to rest on the basic data protection principles and –criteria set out in Directive 95/46/EC. The application of these broad standards needs to be clarified (as further discussed below, in particular in sub-section V.4), but they themselves do not require major revision in order to meet the new challenges. On the contrary, they reflect European and national constitutional/human rights standards of the kind just mentioned, that need to be strongly re-affirmed.

It is noted that in the 2012 EU data protection reform proposal, a single set of rules has been suggested.<sup>118</sup> This is, accordingly, consistent with the European data protection model. Moreover, as I have addressed in section 2.2, a directive with the negotiated character has resulted in an (mis-)interpretation of a narrow concept of privacy in the England and Wales (the *Durant* case). Furthermore, I argue that any criteria allocating benefits/ resources must recognise the equal status of all individuals as right-holders. This is because it is arguable that this contingent line of reasoning is commonly accepted by different individuals and cultures<sup>119</sup> – at least, this is accepted in the European and Formosan legal regime. Moreover, there are, indeed, claims that this contingent premise is valid. For example, Gauthier argues that, although not necessarily in all cases, it is in our interest to treat everyone equally in general (as we are not perfect).<sup>120</sup> There must be, therefore, an adequate framework, and an adequate moral or ethical justification, to deal with the market in order to reconcile competing rights.

## Practical Difficulties

A number of complex desiderata have to be taken into account with respect to regulatory methods.<sup>121</sup> Blume, therefore, raises concerns with practical difficulties on current Directive and the proposed General Regulation. He is not alone. The WP29 notes the practical difficulties that ‘may exist to

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<sup>118</sup> European Commission, ‘Commission Proposes A Comprehensive Reform of the Data Protection Rules’ 2. 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)’.

<sup>119</sup> Deryck Beyleveld, ‘The Principle of Generic Consistency as the Supreme Principle of Human Rights’ (2012) 13 *Human Rights Review* 17.

<sup>120</sup> David Gauthier, *Morals by Agreement* (OUP 1986), citing from Beyleveld, ‘The Principle of Generic Consistency as the Supreme Principle of Human Rights’ 17.

<sup>121</sup> In Brownsword’s *Rights, Regulation, and the Technological Revolution*, he adopts Trebilcock and Iacobucci’s opinion that a number of values may be in a tension. These values include: independence, accountability, expertise, detachment, transparency, confidentiality, efficiency, due process, predictability, and flexibility. See: Brownsword 299.

propose a general overhaul of the current *acquis*.<sup>122</sup> I would say that the Commission has considered this (although not fully). Therefore, for example, despite the WP29 has called for a comprehensive single/ common legal instrument for data protection, there are two separate legal instruments: a General Regulation and a Directive for police and judicial perspective.<sup>123</sup> However, the WP29 holds the belief that ‘the same high level of data protection should in the end be applicable to all data processing in this area, including the EU bodies.’<sup>124</sup>

Furthermore, the WP29 recommends the legislator to set a much stricter deadline<sup>125</sup> and ‘calls upon the Commission to indeed put forward such proposals.’<sup>126</sup> Indeed, the EU data protection law is difficult to understand due to its complex nature. Blume thus considers that more time will be needed to transfer the Directive to the Regulation. However, the preparation and period of drafting of the proposal is remarkably long.<sup>127</sup> On the basis of the previous experience of implementing the Directive, I consider that it is better to deal with the issue without too much hesitation.

As regards the concern of worrying about the reduction of the current level of data protection in some member states, the WP29 ‘acknowledges that the current data protection regimes for some existing instruments and bodies are further reaching than the proposed Directive’ and ‘argues that the ‘alignment of current regimes with the Directive should in no case mean lowering a current data protection standard.’<sup>128</sup> In terms of the needfulness for

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<sup>122</sup> Article 29 Data Protection Working Party, *Opinion 01/2012 on the Data Protection Reform Proposals* 5.

<sup>123</sup> European Commission, ‘Proposal for A Directive of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data by Competent Authorities for the Purposes of Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and the Free Movement of Such Data, (COM(2012) 10 final)’ (2012)  
<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0010:FIN:EN:PDF>> accessed 30 January 2012.

<sup>124</sup> Article 29 Data Protection Working Party, *Opinion 01/2012 on the Data Protection Reform Proposals* 5.

<sup>125</sup> The Commission claims to ensure a revision of other legal instruments to identify the need for alignment in three years.

<sup>126</sup> Article 29 Data Protection Working Party, *Opinion 01/2012 on the Data Protection Reform Proposals* 5.

<sup>127</sup> The extensive consultations with all major stakeholders on a review of the current legal framework for the protection of personal data lasted for more than two years. 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)’ 2.

<sup>128</sup> Article 29 Data Protection Working Party, *Opinion 01/2012 on the Data Protection*

national laws to fill the gap of the vague terms of the proposed Regulation,<sup>129</sup> as Solove suggested, considering the problem in relation to the gap between the law and changing technologies,<sup>130</sup> the '[l]aws must have sufficient breadth and flexibility to deal with rapidly evolving technology.'<sup>131</sup>

With respect to the complexity of the text, a mechanism of simplicity has thus been proposed by the Commission. To avoid unnecessary and inconsistent implementation of the Directive, therefore, the proposed General Regulation is going to be the only one which is 'responsible for taking legally binding decisions against a company ('one stop shop').'<sup>132</sup> It is commented by the WP29 that '[i]n general, the Regulation provides greater clarity through more precise definitions and provisions aimed at ensuring a more harmonised application of the law, thus facilitating the free movement of data.'<sup>133</sup>

Nevertheless, the text of the proposed General Regulation remains difficult to some extent, in particular to the ordinary people. In this regard, I argue that a well-functioning institutional framework can assist to deal with the problem at issue.

Overall, considering the practical difficulties that may occur, I argue that it is better to deal with the issue through a united and smart regulatory approach in a more efficient way. As the proposed General Regulation holds a consistent view on the conception of privacy and the consistency in levels of protection is better to achieve multiple objectives of the data Protection law, I consider this as a good start of the reform.

## V. Conclusion

The central aim of this essay is to evaluate the debate about the pros and cons of purpose and objective of the proposed EU General Data Protection Regulation of 2012. Throughout this essay, I have sought to suggest the acceptance of a broad conception of privacy to deal with the issue.

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### *Reform Proposals 5.*

<sup>129</sup> For example, 'fairly', 'legitimate purpose' in Article 5 and 'necessary' in Article 6 of the proposed General Regulation. See: Blume 133.

<sup>130</sup> Indeed, there is also a gap between legal privacy regulations and privacy practices since 'practices often do not follow the written rules.' Guagnin, Hempl and Ilten 100.

<sup>131</sup> Solove, *Nothing to Hide: the False Tradeoff between Privacy and Security* 170.

<sup>132</sup> European Commission, 'The Proposed General Data Protection Regulation: The Consistency Mechanism Explained' (2013)

<[http://ec.europa.eu/justice/newsroom/data-protection/news/130206\\_en.htm](http://ec.europa.eu/justice/newsroom/data-protection/news/130206_en.htm)> accessed 30 October 2013.

<sup>133</sup> Article 29 Data Protection Working Party, *Opinion 01/2012 on the Data Protection Reform Proposals* (No 00530/12/EN, WP191, 2012) 6.

Transferring a Directive to Regulation is never an easy work. Although the main propose of the proposed General Regulation is to pursue consistent and homogenous application of the rules of personal data protection, practical difficulties have been identified by commentators. I have evaluated criticisms made by Blume, Solove and Schwartz. On the basis of acceptance of a broad conception of privacy, I argue that the promotion of a workable internal market and the protection of personal data, in particular the right to privacy, can be achieved at the same time without unnecessary crash. However, it should be noted that there are limitations with respect to broad conception of privacy. Moreover, I agree with Solove and Schwartz's argument: not every type of risk to privacy should be treated the same. However, I argue that this idea is not new in the EU data protection law regime.

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