

Safeguarding Privacy by Regulating the Processing of Personal Data – An EU Illusion?

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Abstract

The European Charter of Fundamental Rights regulates the rights to privacy and to data protection as two separate rights. The substantive separation between the two rights is, however, not very clear. Often, the scholarship, court decisions and even legal documents adopted in the European Union use the two legal terms in combination or interchangeably. As a result, an illusion is created that all that is done in the EU for the protection of the right to data protection automatically also addresses the right to privacy. This illusion can potentially affect any initiatives taken by Member States to positively regulate the right to privacy in the future. The article looks at the differences between the two rights and assesses whether the main data protection legislation in the EU, the General Data Protection Regulation, also safeguards the right to privacy.

Keywords: Privacy, Data Protection, European Charter of Fundamental Rights, GDPR

1 Introduction

The Charter of Fundamental Rights of the European Union (the Charter) has the same legal value for Member States as the founding Treaties of the Union. The Charter distinguishes between a right to respect for private life (Article 7)¹ and a right to data protection (Article

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¹Article 7 of the Charter:

“Respect for private and family life-

Everyone has the right to respect for his or her private and family life, home and communications”.

8).² The formulation of Article 7 of the Charter resembles the first paragraph of Article 8 of the European Convention of Human Rights (ECHR) adopted in 1950. Like the Council of Europe framework, the EU has never conclusively defined the borders of the right to respect for private life, which is often referred to as the right to privacy (Bergkamp L. 2002, p.33). In the literature, this right is projected into different aspects of the private sphere of the individuals, namely - (i) privacy of the person concerned with the privacy of an individual's body, (ii) privacy of personal behaviour, (iii) privacy of personal communication, (iv) privacy of personal data, (v) privacy of location and space, (vi) privacy of thoughts and feelings, and (vii) privacy of association (Wright D, Raab C, 2014, pp.282-283). The formulation of Article 8 of the Charter on the right to data protection is, on the other hand, original and not to be found in other human rights conventions. The article seems to be inspired at the same time by the original Article 286 of the Treaty of the European Communities, Directive 95/46/EC, Article 8 ECHR and Convention 108.

This expressed distinction between the two rights in the Charter is a novelty. However, it did little with regard to clarifying the nature of the two rights since in official documents of the Member States as well as in the doctrine and in pronouncements by the judiciary, the terms privacy and data protection continue to be used interchangeably. For example, an official document from the Dutch Immigration and Naturalisation Service (IND) which is part of the Ministry of Justice and Security states: "*When doing so [processing of personal data], the IND strictly adheres to the stipulations of privacy legislation.*"³ By further stating that the privacy law gives rights to individuals with regards to their personal data, the document is clearly using the two rights as synonyms of each other and suggests that the legislation on protecting personal data is at the same time protecting the right to privacy.

While all would agree that both rights are closely related, it is important to clarify their links and interdependence in order to assess whether the data protection rules provide safeguards for the right to privacy. Currently, at the European Union level, exist several secondary laws regulating the right to data protection. Some of these laws were introduced before the right to data protection was recognised by the Charter and even in the absence of specific legal basis in the Treaties. These laws are mainly in the form of regulations that apply directly to the Member States, or in the form of directives that create a duty for

² Article 8 of the 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".

³ See the IND form at <<https://ind.nl/en/Forms/7630.pdf>> accessed 7 January 2020.

implementation. The right to privacy, on the other hand, is regulated only by Article 7 of the Charter and there are no other secondary laws at EU level that explicitly regulate it. Confusingly though, the right to privacy was mentioned in Article 1 of Directive 95/46/EC and other secondary laws dealing with the right to data protection. For instance, protecting the “...*right to privacy with respect to the processing of personal data*” seemed to be the preferred formulation of the EU legislator in the abovementioned Directive.

The main reason for not directly regulating the right to privacy can be traced to the origins of the European Union. It was originally created as an economic community, creating a common market and regulating the relationships between individuals and other economic entities. While the protection of many human rights included in the Charter, as for example the right to life, prohibition of torture, the right to private life, etc. are not directly reflected in the Treaties, the protection of personal data makes an exception. The right is reflected in the Treaties and secondary legislation because of the economic value that personal data have. The right is viewed as naturally belonging to the field of regulation of the EU. This reasoning also explains why a legal basis for legislating in the area of data protection was introduced in 2009 by Article 16 of the Treaty on the Functioning of the European Union (TFEU), yet no such legal basis was introduced for legislating in the area of privacy.

Another reason can be linked directly to the letter of the law. While the right to privacy in the Charter requires *respect*, the right to data protection requires *protection*. Respect for a right is legally translated into non-interference with the right and thus does not always require any active intervention by the State. Protection of a right on the other hand demands a more active role and intervention by the State.

Often though, the rights to privacy and data protection are used interchangeably and legislation regulating the right to data protection is seen as regulating the right to privacy at the same time. This might create not only confusion but also lead national legislators in Member States to falsely believe that, when implementing data protection rules, they are also actively protecting the right to privacy (Lenaerts K, 2012, pp.377-378; Art.51 Charter). Thus, any initiatives to directly regulate the right to privacy can be potentially considered as not needed and even not find the necessary support in the society.

By taking a doctrinal approach, this article analyses whether data protection legislation is also concerned with protecting the right to privacy. In this way, it straightens out any potential illusions or claims that the right to privacy is sufficiently protected by the regulation of personal data. In the latter case, no intervention from the State is needed with regards to the right to privacy since data protection rules adopted top-down at EU level are already doing it. Since the GDPR is the most recent legislation on data protection that sets the standard against which all new data protection laws shall be measured, the

focus of the analysis falls on it. After this introduction, the article analyses the nature of both rights and their overlaps. Section 2 reviews how the rights to privacy and data protection have been treated in the case law of the Court of Justice of the EU and in academic scholarship. Section 3 assesses the differences between the two rights. Section 4 analyses whether the GDPR safeguards the right to privacy. The findings are summarized in section 5.

2. Privacy and Data protection – The debate

According to some scholars in the field (De Hert P, Gutwirth S, 2006, p.79) three main elements justify the separation of the right to privacy from the right to data protection. Firstly, data protection explicitly protects values that are not at the core of privacy. Such values include, for example, the requirement for fair processing of personal data, consent, or legitimacy. Secondly, the recognition of a separate right to data protection next to the right to privacy respects the different European constitutional traditions. Contrary to countries such as Belgium that have linked data protection to privacy, countries such as France and Germany, have searched and found other legal anchors for the recognition of these rights (González Fuster G, 2014, p.92). A call from different Member States of the EU for separating the two rights was also expressed in the framework of the consultative meetings for modernising Convention 108 (Consultative Committee, 2012, p.32). Thirdly, since data protection has grown in response to problems generated by new technology (González Fuster G, 2014, p.86; Van der Sloot B, 2014, pp.6-7), it would not be beneficial to reduce all these response to technology back to just 'privacy' (De Hert P, Gutwirth S, 2006, p.80).

However, distinguishing between the two rights has not been very easy in the European Union. The confusion can be found even in documents from the European institutions. In a document on the challenges of science and research at global level, the European Commission stated that the introduction of the right to data protection generates a technical conception of the right to privacy (European Commission, 2012, p.20). In this light, privacy can be framed in terms of risk management and technical ability to protect or to penetrate the private sphere of the individuals with the use of personal data. On the contrary, in documents from the Article 29 Working Party, an advisory body that is now replaced by the European Data Protection Board, the distinction between the two rights is presented in a declarative way, as the creation of a new right by the Charter. For the Article 29 Working Party (2007, p.7), Article 8 of the Charter regulates protection of personal data as a separate right, autonomous and different from the right to privacy, even though closely linked (Article 29 Working Party, 2009, p.5).

The rest of this section is dedicated to reviewing the treatment that the two rights have received first in the case law of the Court of Justice of the EU and then in doctrinal scholarship.

2.1 The case law

A confusing and interchangeable use of the terms ‘privacy’ and ‘data protection’ can be found in the case law of the Court of Justice of the EU, especially before the entry into force of the Charter. In *Rundfunk* (Joint Cases C-465/00, C-138/01 and C-139/01, para.74), for example, the Court treated data protection and privacy as two interchangeable rights, reinforcing the belief that data protection was a subset of the right to privacy. The same occurred in *Lindqvist* (C-101/01, para.86). In *Satamedia* (C-73/07, para.55), Directive 95/46/EC on the protection of personal data was considered as an instrument for the protection of privacy, and no distinction was made between the two rights. In *Scarlet* (C-70/10, para.31), the Advocate General suggested that Articles 7 and 8 of the Charter together, correspond to Article 8 of the European Convention of Human Rights. By this reasoning, data protection would qualify as part of the right to privacy and not as a separate right.

In *Promusicae* (C-275/06, paras.64-65), the Court identified a right to data protection but considered it as closely related to the right to respect for private life referring to both rights as a single one. In *Schecke and Eifert* (C-92/09, para.52) the Court assimilated both Articles 7 and 8 of the Charter to create a new right – the right to respect for private life with regard to the processing of personal data. This formulation might seem new in the context of the Court’s line of reasoning, but it is a reflection of the formulations that can be found in a number of EU secondary laws (Directive 95/46, Art.1(1); Directive 2002/58, Art.1(1)).⁴ In its decision, the Court did not follow the opinion of the Advocate General Sharpstone (para.71) that distinguished between a classical right to privacy and a more modern right to protection of personal data. Data protection in this decision is seen as one of the aspects of the right to privacy of individuals, as privacy of personal data or as information privacy. In *Schwarz* (C-291/12, paras.29-30) the Court considered processing of personal data to directly threaten at the same time the right to privacy as well as the one to data protection.

Important evidence that shows the confusion created by the Court of Justice can be found in the *Bavarian Lager* decisions, both from the General Court (T-194/04) in first instance and by the Court of Justice in the appeal case (C-28/08P). The case concerned the request

⁴ Directive 2002/58 is currently still in force, while Directive 95/46 was repealed with the entry into force of the GDPR.

of the company to the European Commission to disclose the names of the participants at a meeting in which a decision was made against the Bavarian Lager in the field of competition law. The Commission did not disclose the names of six of the participants in the meeting since they had not given their consent to such a disclosure. In first instance, the General Court found the decision of the Commission not to disclose the six names unlawful. While clearly distinguishing between the right to privacy and the right to data protection, the Court found that the disclosure of names of the participants at a meeting was not a violation of their right to privacy. And, while names would still be covered by the data protection rules, the Court found that the exception of Article 4(1)(b) of Regulation 1049/2001 was applicable only in those cases in which the right to privacy of the individuals was infringed by the processing of personal data (T-194/04, para.123). In this way, even if the two rights were distinguishable, the Court suggested that legislation referring to data protection in the EU applies only when the right to privacy is involved.

In second instance, the Court of Justice found that the General Court had erred in law. It found that the clause of Article 4(1)(b) of Regulation 1049/2001/EC is an indivisible provision requiring that any undermining of privacy and the integrity of the individual must always be assessed in conformity with the EU legislation on the protection of personal data. It does not allow the separation of the processing of personal data into two categories (i.e. one examined in the light of the ECHR and Strasbourg case law, and the other subject to EU law) (C-28/08P, para.59). As a result, personal data could not be separated into those examined in light of privacy and those examined for compliance with data protection rules.

The right to data protection was further identified as an individual right by the Court of Justice in the *Deutsche Telekom* case (C-543/09, para.50). In this case the Court stated that Directive 95/46/EC is designed to ensure in the Member States the right to protection of personal data. Also, in its later decision in *Digital Rights Ireland* (Joint Cases C-293/12 and C-594/12) the Court drew a clear distinction between the two rights as contrasted to State interference for the purpose of prevention, investigation, detection and prosecution of serious crime. For the Court, what can be learned about the life of an individual based on metadata from electronic communications is quite extensive. This would include: habits of everyday life, permanent or temporary residences, daily or other movements, activities carried out, social relationships and social environments frequented, etc. Thus, electronic communication metadata create possibilities for interfering with the right to privacy (Joint Cases C-293/12 and C-594/12, para.27). The retention of these data, however, involves also their processing. As a result, there is simultaneously also an interference with the right to data protection.

From the above discussion of the case law from the Court of Justice it can be observed that prior to the entry into force of the Charter, the Court considered the right to data

protection as a subset of the right to privacy (Lynskey O, 2014, p.576). This is not surprising if one takes into account the way the right to data protection emerged. With the entry into force of the Charter as a binding legal instrument, the treatment of the rights changed and now the two rights are treated as separate. However, the confusion remains also in recent decisions. While the rights were considered as separate in the *Jehovan todistajat* case (C-25/17, para.18), in *Nowak* (C-434/16, para.56) the Court used the phrase: “[...] *protection of the right to privacy with regards to processing of personal data*”. Furthermore, in the *Google Spain* case (C-131/12), the Advocate General Costeja Gonzalez stated: “*the wide interpretation given by the Court to the fundamental right to private life in a data protection context seems to expose any human communication by electronic means to scrutiny by reference to this right*” (para.29).

2.2 Doctrinal Scholarship

The confusion of the two rights is not confined to the Court of Justice decisions. It is also evident in the doctrinal debate. Scholars are divided into the ones that consider data protection as part of the right to privacy, and the ones that see these rights as differing from each other, even if they have very close links.

For De Busser (2009, p.52) the aim of the right to privacy is different from the right to data protection. While the right to privacy is treated in her work as the respect for a person’s right to a personal development, the right to data protection, on the other hand, is seen as protecting the data resulting from the interference with the right to privacy. In this line of reasoning a data protection assessment follows a privacy assessment. Only the methods of gathering data that are compatible with the derogations allowed to the right to privacy will fall within the scope of application of the data protection legislation (De Busser E, 2009, p.66). In this light, data protection legislation is necessary but not enough on its own to protect the right to privacy.

For Klitou (2014, pp.16, 28) processing of personal data falls within the field of protection of the right to privacy and Directive 95/46/EC is seen as providing guidance and establishing a set of criteria’s for protecting this right. For Brown and Korff (2009, p.120) the right to privacy is shorthand for a more specific right to “data protection” which, apart protecting individuals from intrusions into their private lives, also protects them from improper collecting, storing, sharing and use of their data.

For other scholars, the right to data protection is closely related but not identical to the right to privacy (Hijmans H, Scirocco A, 2009, p.1488). For Gellert and Gutwirth (2013, pp.523-526) data protection is in certain aspects broader than privacy and in other aspects

narrower. It is broader because it applies to processing of personal data even when they do not infringe upon privacy (as it is the case with publicly available personal information). At the same time, it is narrower because it only deals with the processing of personal data.

For Kokott and Sobotta (2013, pp.225-226) the right to a protected private life differs from the right to data protection in a number of dimensions: the substantive scope, the personal scope and the obligations inferred. Concerning the substantive scope, data protection is broader since it includes all information relating to identified or identifiable persons, even if this information is not private. Concerning the personal scope, privacy is broader than data protection since it covers also the rights of legal persons.⁵ Lastly, concerning the obligations interfered with, data protection is broader than privacy since it puts obligations on both State authorities and private parties.

For Gutwirth and De Hert (2006, pp.70-80) the difference between privacy and data protection centres on opacity and transparency. Privacy is a tool of opacity that tends to guarantee non-interference in individual matters. Data protection is a tool of transparency that tends to guarantee the transparency and accountability of the powerful. For these authors the right to privacy prohibits certain arbitrary behaviours by the State while data protection does not prohibit such behaviour, rather it channels it into legitimate and normatively accepted powers. This division is of course not always a clear cut. Data protection can provide for opacity rules (as in the case of sensitive data) while privacy can allow for transparency rules (as for example when telephone wiretapping is allowed) (Gutwirth S, 2007, p.63). Gutwirth and Hildebrandt (2007, p.37) additionally argue that the right to data protection is more specific than the right to privacy since it applies only when personal data are processed. For Korff (2014) data protection is a new *sui generis* right “*linked (but not limited to) the protection of privacy, or the interests of natural persons only*”.

For other scholars, the right to data protection is linked with a potential future legal right to personality. For example, for Balducci Romano (2013, p.12) the establishment of a level playing field in the processing of personal data serves the internal market as well as individuals by giving them a new right that protects their dignity and personality, in the form of a right to data protection. For Rodotà (2009a, p.79) the EU reinvented data protection by turning it into “*an essential tool to freely develop one’s personality*”. Data protection is seen as a proactive tool, aiming to reduce the power of data controllers and

⁵ Kokott and Sobotta (2013) base this argument on the case *Bernh Larsen Holding AS and others v Norway* App no 24117/08 (ECtHR 14 March 2013), paras 104-107. However, in this case the Court refers to concerns for interference with the private life of all individuals working for the companies, and not to the rights of the companies themselves.

processors as well as information asymmetries (Rodotà S, 2009b). The right to data protection provides individuals with more control over their personal data than the right to privacy would have been able to provide. For Cannataci (2008, p.5) a way to stop the debate on the nature of both rights would have been the introduction in the Charter of a pan-European principle of *ius personalitatis* including both the rights to privacy and to data protection.

3. Privacy and Data protection – The difference

From the debate presented in the section above, one can notice that despite the contradictions concerning the qualification of the rights to privacy and data protection as separate or as parts of the same right, it is commonly accepted that the two rights are very closely linked to each other. Even though they are presented as two separate rights in the Charter of Fundamental Rights of the EU, the way the right to data protection historically evolved from the right to privacy cannot be denied (Hustnix P, 2014, pp.63-65). This author supports the line of reasoning that views the two rights as being separate, albeit very closely linked. This support is not based on any mechanical separation that the EU legislator has made in the Charter but for two main reasons that are explained below.

Firstly, it is clear that the two rights have a different scope. While the right to privacy aims at respecting the private sphere of the individuals from arbitrary interferences by State actors, the right to data protection focuses on the fair and legitimate collection and processing of personal data (by State and private actors). There is, however, an area where the two rights would meet and partially overlap with each other. In this area, there is an overlap between information privacy (or data privacy) on the one side, and data protection on the other (De Hert P, Papakostantinou V, 2013, p.273).⁶ As a result, the collection and processing of personal data interferes simultaneously with the private life of the individuals concerned. But, while the right to privacy in such situations would focus on the justification of the interference, the aspects of the private life that have been interfered with, and with the way the interference was performed, the right to data protection would be concerned with the way the personal data is processed. Data is a representation of information that can be stored or transmitted and potentially manipulated. Information is the meaning that we give to data in a certain context (Roosendaal A, 2013, p.10). The metadata from electronic communications are a clear example of such a situation. These data, once they have a meaning, are able to give detailed information on the private life of an individual (as for example with whom one communicates, the frequency and duration of these

⁶ These authors argue that the terms “information privacy” and “data protection” should be used as synonyms.

communications, etc.). At the same time, the way the data are collected, processed and accessed has consequences for the protection of personal data.

Secondly, while the passive subject of both rights is a natural person,⁷ there is a difference concerning the active person of these rights. For the right to privacy the active person is the State and its actors. Article 8 ECHR explicitly protects individuals from arbitrary State interferences and, even if this is not explicit in Article 7 of the Charter, this legal instrument is directed to the Union and its Member States. The right to data protection can have as the active subject both the State and private actors. For example, the General Data Protection Regulation protects individuals whose personal data are processed by State authorities or private companies. If the right to data protection had not emerged as a separate right from the right to privacy, then secondary EU legislation would have had a very limited effect on the protection of personal data in the hands of private actors. In this light, it has even been argued that data protection has been used as a vehicle to protect information privacy in horizontal relationships, between individuals, that the right to privacy cannot otherwise directly protect (C-101/01 *Lindqvist*, para.88).

From the above analysis, it is clear that the rights to privacy and data protection have different aims and actors. However, in situations in which the collection of personal data coincides with an interference into the private life of the individual both rights overlap. The following section analyses if data protection rules do indeed safeguard the right to privacy in such situations.

4. Does the GDPR safeguard the right to privacy?

In the previous section it was established that the right to privacy is substantially different from the right to data protection. The difference between the two rights is also exemplified in practice. Publicly available personal data, as for example the name of a person participating at a public meeting or a picture taken at a public place (*Friedl v Austria*, para.14) do not amount to an interference with one's private life *per se* but would infringe the right to data protection if the data protection rules were not followed when processing the data.⁸ On the other hand, collection of personal data complying with data protection rules (as for example the collection of fingerprints when applying for a passport) may still have an impact on the right to privacy of an individual (C-291/12 *Schwarz v Stadt Bochum*, para.30). However, there are situations in which the two rights overlap. This section

⁷ Contrary to this argument see Kokott and Sobotta (2013, p.225). These authors argue that the right to privacy applies also to legal persons.

⁸ See definition of personal data in Directive 95/46/EC, Art.2(a).

discusses whether laws adopted for the protection of personal data, and especially the General Data Protection Regulation, also safeguard the right to privacy when the two rights overlap.

For a start, the GDPR differs from its predecessor, Directive 95/46, in not directly referring to a protection of the right to privacy. The only reference to this right can be found in recital 4 which states that the Regulation respects the right to private and family life, home and communications. Thus 'respect' and not 'protection' of the right to privacy is promised in the GDPR. This is not different from the respect and observation that the regulation offers to other fundamental rights and freedoms in general. It simply means that acting in accordance with the GDPR should not create a situation in which the right to privacy of the individual is infringed. This is also not different from how all laws and State or Union actions should be drafted with regards to respecting the right.

However, in the previous section it was seen that there are situations in which one action might infringe at the same time the rights to privacy and data protection. A clear example of such a situation has been the case *Digital Rights Ireland* (Joint Cases C-293/12 and C-594/12, para.29) in which the Court of Justice of the EU found that the retention of the metadata from electronic communications infringed at the same time both privacy and data protection. Also in other cases, as for example in *Schwarz* (C-291/12, para.25), the Court has declared that any processing of personal data may pose a threat to both rights at the same time.

Because of this overlap, an idea is created that the protection that the GDPR offers to the processing of personal data would at the same time protect the right to privacy. After all, processing of personal data also refers to their collection (Regulation 2016/679, Art.4(2)) and thus is linked to the moment in which the interference with the private sphere of the individual takes place. To bring this reasoning further: if the collection of personal data is considered lawful, this would equate to a lawful interference into one's private life. In this light, even if the GDPR is not offering nor promising direct protection of the right to privacy, such protection might indirectly take place in those situations in which the right to privacy overlaps with the one to data protection. However, I argue that this conclusion does not follow directly from the wording of the GDPR provisions and might even affect the protection of the right to privacy if wrongly believed.

As it was shown above, the two rights differ at two points. The active subject and the scope of protection. While the fact that the two rights have different actors is not an impediment for their protection, their scope of protection needs a different treatment. As suggested in recital 4 of GDPR, processing of personal data respects especially the right for private and family life, home and communications. This would mean that collection of personal data

following the principle of lawfulness, fairness and transparency is to be done in such a way that the private life of individuals is also respected. However, the latter requires an *ex ante* assessment of the individual case and its circumstances while the former basically refers to the respect of the laws, good faith and transparency. The *ex ante* assessment required for respecting the right to privacy, cannot amount to a mere check if a law that allows for the interference with the private life exists, it rather requires an assessment of the necessity of the interference (*Malone v the United Kingdom*, para.81) and of its proportionality in the specific case (Milaj J, 2015, pp.609-610).

Data protection rules do not generally provide for such an *ex ante* assessment. They are actually considered to offer an *ex post* assessment that relies on the existence of laws that provide for the data processing activity as well as the compliance of the activity with the other data processing principles (Regulation 2016/679, Art.5(1)). A data subject is thus considered as a source of data rather than as an individual with a specific private sphere. In order to respect the right to privacy that the GDPR requires, an extensive interpretation of the letter of the law needs to be followed in those cases that the two rights overlap. This extensive interpretation is based on the use of the principle of proportionality.

Even though proportionality is not mentioned as one of the principles to be taken into account when collecting personal data, its assessment is provided in the GDPR when processing special categories of data (Regulation 2016/679, Art.9(2)(g)) as well as in the framework of a Data Protection Impact Assessment (Regulation 2016/679, Art.35(7)(b)). Thus, to extensively apply the proportionality principle at the moment of collecting personal data, independent of their sensitivity, will not go against the spirit of the law. As a result, even though the scope of the GDPR does not include the protection of the right to privacy, an extensive interpretation of Article 5 in combination with recital 4 would indirectly provide for this protection.

Furthermore, for a right to be protected there is also the need for established redress in cases of infringement. In the situations in which privacy and data protection overlap, Chapter 8 of GDPR that regulates remedies, liabilities and penalties does not offer any direct or indirect redress in case of interference with the right to privacy. While infringements of core data protection principles are covered by Article 83 GDPR, these principles are not at the core of the right to privacy. For the right to privacy to be protected, the amount of the fine should take into consideration the level of interference with the private sphere of the individuals. In conclusion, it can be said that the GDPR does not safeguard the right to privacy, even in those situations in which the rights to privacy and data protection overlap, unless an extensive interpretation of its provisions is followed.

5. Conclusion

The right to privacy and the right to data protection are substantially different from each other. The right to privacy demands non-interference by the State and its actors with the private sphere of the individual while the right to data protection provides for lawful ways in which personal data can be processed by States and private actors. Thus, the two rights differ in their scope of protection as well as with regards to the actors involved. Even though different, the two rights can be very close and even overlap with each other. In the areas in which the two rights overlap, a single action can infringe both rights at the same time. Thus far, in the EU, a lot of attention has focused on the right to data protection. The right to privacy seems to be left a bit behind. At times though, data protection rules are considered as protecting privacy at the same time. In outlining the differences and similarities between the two rights this article showed that the GDPR does not actively offer such protection. Its focus is on data protection and it only promises to respect the right to privacy. In principle, this is not different from what any law should offer with regards to respecting all fundamental rights.

However, the closeness between the two rights is often translated into an illusion that data protection rules protect also the right to privacy. This illusion creates the risk of leaving the right to privacy unprotected and potentially jeopardises initiatives of national legislators that would like to positively act with regards to the regulation of the right to privacy. While it cannot be denied that data protection rules introduced in the EU respect the protection of the right to privacy, they do not offer protection to the right. The two rights remain substantially different and this is also reflected by the legal provisions. The GDPR provisions will protect the right to privacy only if interpreted extensively in such a way that an *ex ante* assessment of the proportionality of any interference with the private life of the individual will take place before the collection of personal data. A similar extensive interpretation needs to be applied also with regards to the available remedies.

From the analysis it is evident that any belief that laws on data protection in the EU are also protecting the right to privacy is unable to grasp the differences between the two rights and it is an illusion. It is especially important for Member States not to be trapped in this illusion. The fact that the EU legislator has completely directed its attention to the data protection rules, leaving aside the protection of the right to privacy, should not give the wrong message. Whether this choice relates to the original economic nature of the Union, with the lack of legal basis for introducing secondary laws on human rights or to the fact that respecting a right requires mainly inaction instead of action it matters little. The right to privacy is recognized as a fundamental right in the Charter and as such, for as long as

the EU has not occupied the field, it is a duty of the Member States to act in all the possible ways for its protection.

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