

Data protection's function in society: a search for the limits of a non-absolute right

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Abstract:

The right to data protection is not absolute, but rather it 'must be considered in relation to its function in society and be balanced against other fundamental rights' (Recital 4, GDPR). This necessarily invites us to ask—what is the function of data protection in society? This article examines how the CJEU has used the concept to emphasise the non-absolute nature of the right. This article traces the use of this concept demonstrates that the notion is used by the Court as a rhetorical device to justify the limitation of the right to data protection in various balancing contexts. It is linked to the non-absolute nature of the right to data protection, though has not been endowed with any substantial independent meaning to date. I contend that the inconsistency in the treatment of data protection's function in society is representative of challenges associated with balancing exercises by the Court. While the non-absolute nature of the right has not been a check on the expansionist tendencies of the Court in relation to the scope of data protection, it has had some effect in moderating obligations under data protection law. Further, this examination of the cases reveals a range of contexts in which the Court of Justice is resolving complex debates between different normative and political objects through the prism of the right to data protection. Given the concerns about the ever-increasing scope of data protection, I suggest that a re-engagement with the limits of data protection is desirable, informed by broader range of fundamental rights jurisprudence.

Keywords: data protection, personal data, fundamental rights, non-absolute rights, proportionality.

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1. Introduction

The right to data protection is not absolute, but rather according to the GDPR it ‘must be considered in relation to its function in society and be balanced against other fundamental rights’.¹ This legislative language originates in case law of the Court of Justice of the European Union (‘CJEU’ or ‘Court’) which predates the GDPR, and is often used in cases involving the balancing of data protection rights and other interests.

The notion of *data protection’s function in society* invites two questions. First, what is this concept that the CJEU is repeatedly employing, and to what effect? Second, what does the Court’s use of the concept say about the conceptualisation of data protection, particularly about the limits of data protection?

In response to the first question, this article traces the use of this concept across the data protection case law of the CJEU and demonstrates that the notion is used by the Court as a rhetorical device to justify the limitation of the right to data protection in various balancing contexts. It is linked to the non-absolute nature of the right to data protection, though has not been endowed with any substantial independent meaning to date.

In response to the second question, I contend that the inconsistency in the treatment of data protection’s function in society is representative of challenges associated with balancing exercises by the Court. Although the non-absolute nature of the right has not been a check on the expansionist tendencies of the Court in relation to the scope of data protection law to date, it has had some effect in moderating obligations under data protection law. Further, by examining the cases in which the function of data protection is cited, we reveal a range of contexts in which the Court of Justice is resolving complex debates between different normative and political objects through the prism of the right to data protection.

Given the concerns as to the ever-increasing scope of data protection, which undermines the administrability of data protection itself and also intrudes into other areas of normative and political priority, I suggest that a re-engagement with the limits of data protection is desirable, informed by a broader range of fundamental rights jurisprudence.

2. The idea and significance of data protection’s societal function

Data protection’s function in society is frequently mentioned in data protection cases, and as we shall see, in its current usage, its hollowness of meaning is representative of broader challenges and questions.

¹ Recital 4, General Data Protection Regulation (‘GDPR’). Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119.

The conceptualisation of data protection, and of the right to protection of personal data² (hereinafter, the 'right to data protection') more specifically, has been subject to scholarly attention along a number of dimensions, suggesting that data protection has many of the same conceptual challenges as the concept of privacy. For example, scholars examining the CJEU's case law on the 'essence' of the right to data protection have not been able to discern a consistent meaning deriving from the case law.³ Those who have sought to carve out data protection's identity through differentiation from the right to respect for private life have identified overlap and commonality rather than clear distinction.⁴

One notable strand of this literature relates to the limits of data protection. Koops describes the expansion of data protection as a regulatory disconnection, where the focus on 'personal data' issues leads to an ever-broadening definition of personal data, further disconnecting the law from widespread data collection practices.⁵ Purtova has notably further problematised the material scope of data protection, in terms of the reach of this core idea of personal data, coining the phrase 'The Law of Everything'.⁶ Others have questioned the breadth of the personal scope of the regime, with Edwards et al, Helberger and van Hoboken, Chen et al, and Finck questioning the expansion of the controller concept,⁷ and Lynskey questioning the

² Article 8, Charter of Fundamental Rights of the European Union.

³ Maja Brkan, 'The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning' (2019) 20 German Law Journal 864; Dara Hallinan, 'The Essence of the Right to the Protection of Personal Data: Essence as a Normative Pivot' [2021] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3890861>> accessed 25 August 2021.

⁴ Gloria González Fuster and Raphaël Gellert, 'The Fundamental Right of Data Protection in the European Union: In Search of an Uncharted Right' (2012) 26 International Review of Law, Computers & Technology 73; Raphaël Gellert and Serge Gutwirth, 'The Legal Construction of Privacy and Data Protection' (2013) 29 Computer Law & Security Review 522; Gloria González Fuster and Rocco Bellanova, 'European Data Protection and the Haunting Presence of Privacy' [2013] *Novática* 17; Juliane Kokott and Christoph Sobotta, 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3 International Data Privacy Law 222; Gloria González Fuster, 'Fighting For Your Right to What Exactly - The Convolved Case Law of the EU Court of Justice on Privacy and/Or Personal Data Protection' (2014) 2 *Birbeck Law Review* 263; Orla Lynskey, 'Deconstructing Data Protection: The "Added-Value" Of A Right To Data Protection In The EU Legal Order' (2014) 63 International and Comparative Law Quarterly 569; Aidan Forde, 'The Conceptual Relationship between Privacy and Data Protection' (2016) 1 *Cambridge Law Review* 135.

⁵ Bert-Jaap Koops, 'The Trouble with European Data Protection Law' (2014) 4 International Data Privacy Law 250.

⁶ Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, Innovation and Technology 40; Nadezhda Purtova, 'From Knowing by Name to Targeting: The Meaning of Identification under the GDPR' (2022) 12 International Data Privacy Law 163.

⁷ Lilian Edwards and others, 'Data Subjects as Data Controllers: A Fashion(Able) Concept?' (Internet Policy Review) <<https://policyreview.info/articles/news/data-subjects-data-controllers-fashionable-concept/1400>> accessed 21 October 2019; Natali Helberger and Joris van Hoboken, 'Little Brother Is Tagging You – Legal and Policy Implications of Amateur Data

broad personal application of the GDPR.⁸ Others have considered how the GDPR intersects with other legislative regimes.⁹ Each of these scholars situates their concerns in relation to particular aspects of the legislative regime (key actors, provisions and threshold concepts), and yet they are also speaking to the broader mission of data protection and its role in interaction with societal interests and other areas of law. Thus, if scholars are in search of the limits of data protection, the notion of ‘data protection’s function in society’ is a helpful line of enquiry to explore.

Moreover, this is significant to another line of data protection scholarship—that concerning proportionality. Proportionality has a significant role in data protection – both internally, in the balancing exercises to be conducted under certain provisions, and externally, as the right to data protection is weighed against other competing interests and rights in other contexts.¹⁰ Multiple scholars have noted the importance of the concept of proportionality in data protection law. Bygrave and Schartum argue that the proportionality principle ‘underpins’ the fair information practice principles in data protection law, and is manifest in various data protection rules.¹¹ Dalla Corte observes that ‘[p]roportionality reasoning is particularly ubiquitous in EU data protection law,’ and argues that the CJEU’s inconsistencies in the use of such reasoning is ‘due to the complexities inherent to the proportionality test, which involves several components that are often hard to articulate and interpret, and to

Controllers’ (2010) 11 Computer Law Review International 101; Jiahong Chen and others, ‘Who Is Responsible for Data Processing in Smart Homes? Reconsidering Joint Controllorship and the Household Exemption’ (2020) 10 International Data Privacy Law 279; Michèle Finck, ‘Cobwebs of Control: The Two Imaginations of the Data Controller in EU Law’ (2021) 11 International Data Privacy Law 333.

⁸ Orla Lynskey, ‘Complete and Effective Data Protection’ (2023) 76 Current Legal Problems 297.

⁹ Christina Etteldorf, ‘EDPB on the Interplay between the ePrivacy Directive and the GDPR’ (2019) 5 European Data Protection Law Review 224; Oskar Nilsson, ‘Digital Competition Law and Data Privacy in the EU – The Overlap and Interplay between GDPR, Article 102 TFEU, and DMA’ (Lund University 2023); Lusine Vardanyan and Hovsep Kocharyan, ‘The GDPR and the DGA Proposal: Are They in Controversial Relationship?’ (2022) 9 European Studies 91; Damien Geradin, Konstantina Bania and Theano Karanikioti, ‘The Interplay between the Digital Markets Act and the General Data Protection Regulation’ [2022] SSRN Electronic Journal <<https://www.ssrn.com/abstract=4203907>> accessed 16 October 2023; Konstantina Bania, ‘Fitting the Digital Markets Act in the Existing Legal Framework: The Myth of the “without Prejudice” Clause’ (2023) 19 European Competition Journal 116; Katherine Nolan, ‘Data Protection’s Intersections: Reconciling Data Protection Requirements with Regulated Data Use Beyond the GDPR’ in Róisín Á Costello and Mark Leiser, *Critical Reflections on the EU’s Data Protection Regime: GDPR in the Machine* (Bloomsbury Publishing Plc 2024).

¹⁰ I acknowledge there is a characterisation debate about whether proportionality should be named as a type of balancing. For the purposes of this article, I am considering proportionality a form of balancing exercise, albeit one within certain precedential rules. See further Raphael Gellert, ‘On Risk, Balancing, and Data Protection: A Response to van Der Sloot’ (2017) 3 European Data Protection Law Review 180; B Van Der Sloot, ‘Ten Questions about Balancing’ (2017) 3 European Data Protection Law Review 187.

¹¹ Lee A Bygrave and Dag Wiese Schartum, ‘Consent, Proportionality and Collective Power’ in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer Netherlands 2009) 5 <http://link.springer.com/10.1007/978-1-4020-9498-9_9> accessed 8 November 2018.

the characteristics of data protection itself—a relatively young right, whose substance and limitations are still under judicial and doctrinal development.¹² Tranberg observed the dynamic relationship between the Data Protection Directive and the general principle of proportionality, as the interpretation of each was informed by the other in a series of early cases, as she argues that '[t]he key to deciding the extent of a person's right to protection in connection with the processing of personal data has proved to lie largely in the [CJEU]'s application of the basic principle of proportionality'.¹³ Similarly, Herlin-Karnell argues that 'the scope of EU human-rights protection under the Charter seems to turn on the width of the proportionality principle'.¹⁴ Moreover Herlin-Karnell points out, the debate over the use of proportionality principle 'is connected to the classic debate in constitutional theory about the legitimacy of judicial review and to what extent rights can be limited'.¹⁵

Examining data protection's societal function contributes to the debate on proportionality, highlighting how the principle operates and the normative debates it frames within EU judicial balancing.

This paper draws upon and contributes to both of these literatures, by looking at balancing approaches involving the right to data protection, and examining whether balancing approaches which acknowledge the non-absolute nature of that right might serve to help us identify limits to the scope of data protection. Indeed, Lynskey has also drawn this connection between proportionality and possible limits to scope, noting that 'the extent of the role that proportionality could play in introducing flexibility to the law's application remains ambiguous',¹⁶ noting that some aspects of the law lend themselves more readily to proportionality analysis (particularly Article 5), though she notes the need for further research.¹⁷ I add to Lynskey's line of questioning by examining areas in which balancing approaches before the Court have been taken, and identifying where limits have emerged through such reasoning.

Moreover, to date, the notion of data protection's function in society has received relatively little attention. Pfisterer briefly considers this concept in relation to the right to privacy, noting that

with regard to the statement of the CJEU relating to the function in society of the rights to privacy and protection of personal data: Neither in this opinion, nor in the case law cited... does the CJEU explain or further elaborate on the function in society of these rights. In view of the missing discussion of the specific importance of the rights to privacy and

¹² Lorenzo Dalla Corte, 'On Proportionality in the Data Protection Jurisprudence of the CJEU' (2022) 12 *International Data Privacy Law* 259, 260.

¹³ CB Tranberg, 'Proportionality and Data Protection in the Case Law of the European Court of Justice' (2011) 1 *International Data Privacy Law* 239.

¹⁴ Ester Herlin-Karnell, 'EU Data Protection and the Principle of Proportionality' (2021) 4 *Nordic Journal of European Law* 66, 72.

¹⁵ *ibid* 70.

¹⁶ Lynskey (n 8) 339.

¹⁷ *ibid* 340.

protection of personal data... this is somewhat unsurprising and seems to be similarly related to the persisting uncertainty as to the ultimate object and purpose of these rights.¹⁸

Bonnici gives the most extensive consideration to the concept in her 2014 article.¹⁹ She notes that the Court 'does not attempt to address what the function of the right to the protection of personal data is in society'²⁰ in her account of the non-absolute nature of the right to data protection. I share with Bonnici an interest in the non-absolute nature of the right, and the conceptualisation of the limits to that right. However, Bonnici's account does not recognise the longer history of the idea of societal function in EU jurisprudence, in which I situate my account. Moreover, in the years since this account, much additional case law has emerged which shows the significant debates to which this notion is contributing, of which I offer an account and analysis.

Thus, the concept merits further investigation. This article seeks to develop a greater understanding of this concept, by situating the notion in precursor cases of the Court of Justice concerning fundamental rights generally, by thoroughly examining its manifestation in the data protection case law of the CJEU and by problematising what emerges.

3. The social or societal function of fundamental rights in the EU

The idea of a right's function in society first appeared in the data protection context in *Schecke*.²¹ However, this is not where the concept originated, but rather it is building on a long history of cases. The Court was expressly drawing on the *Schmidberger* case,²² wherein the non-absolute nature of freedom of expression and of assembly was to be viewed 'in relation to its social purpose'.²³ Further, if we trace the *Schmidberger* line of reasoning back, we can see the origins of this idea in some of the earliest cases of the Court concerning fundamental rights, and in particular this idea emerges in relation to the recognition of the non-absolute nature of certain fundamental rights.

¹⁸ Valentin M Pfisterer, 'The Right to Privacy—A Fundamental Right in Search of Its Identity: Uncovering the CJEU's Flawed Concept of the Right to Privacy' (2019) 20 German Law Journal 722, 731.

¹⁹ Jeanne Pia Mifsud Bonnici, 'Exploring the Non-Absolute Nature of the Right to Data Protection' (2014) 28 International Review of Law, Computers & Technology 131.

²⁰ *ibid* 133.

²¹ Case C-92/09 *Volker und Markus Schecke and Eifert* [2010] I-11063. Acknowledged by both Gellert and Gonzalez Fuster, and Bonnici. See Fuster and Gellert (n 4); Bonnici (n 19).

²² As Bonnici cites, see Bonnici (n 19) 132.

²³ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 80.

In the foundational *Nold* decision, when the Court was clarifying the status of fundamental rights as a part of the general principles of EU law,²⁴ it identified the idea of social functions of such rights.²⁵ In that case, the Court was concerned with the freedom to choose and practice one's profession, and the Court notes that:

If rights of ownership are protected by the constitutional laws of all the member states and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder.²⁶

Therefore, such rights are subject to limitations in the public interest.²⁷ Thus as Schütze acknowledges, '[f]rom the very beginning' the Court recognised limits to fundamental rights.²⁸ This was built upon in *Hauer*, wherein the Court was considering the right to property, and looked to particular constitution traditions in order to understand the limitations to that right.²⁹ The Court finds that

One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14 (2), first sentence), to its social function (Italian constitution, Article 42 (2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14 (2), second sentence, and the Irish Constitution, Article 43.2.2*), or of social justice (Irish constitution, Article 43.2.1*). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property.³⁰

While the language has changed over the years, some version of 'social function', 'social purpose' or 'function in society' of various fundamental rights has become prevalent in decisions of the CJEU, and survives into the post-Charter era. The notion of social function / function in society arises particularly in cases relating to the right

²⁴ Robert Schütze, *European Union Law* (Oxford University Press 2021) 455
<<https://www.oxfordlawtrove.com/view/10.1093/he/9780198864660.001.0001/he-9780198864660>>.

²⁵ Case 4-73 *Nold* (ECLI:EU:C:1974:51).

²⁶ *ibid*, para 14.

²⁷ *ibid*.

²⁸ Schütze (n 24) 459.

²⁹ Michelle Everson and Rui Correia Gonçalves, 'Article 16 - Freedom to Conduct a Business' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: a commentary* (2nd edn, Bloomsbury Publishing Plc 2021) 473.

³⁰ *ibid*, para 20.

to property, freedom to conduct a business,³¹ and as we will see, the rights to respect for private life and data protection.

This notion appears frequently in cases relating to the right to property, for example where that right must be reconciled with countervailing interests (such as consumer protection and public health),³² or frequently in cases where sanctions³³ or fines³⁴ are being challenged. The language varies somewhat, sometimes we see property described as a non-absolute ‘prerogative’,³⁵ whereas elsewhere the language of ‘fundamental rights’ is seen.³⁶

Another area in which the idea of ‘function in society’ or ‘social function’ frequently occurs is in cases concerning the freedom to conduct a business (Article 16 of the Charter). Frequently cited is *Sky Österreich*, wherein the Court extended the pre-Charter ‘social function’ case law to Article 16, in a case concerning the validity of aspects of the Audiovisual Media Services Directive.³⁷ The Court cited the social function line of cases and noting the language of the Charter, held that ‘the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.’³⁸ After this case, there are multiple cases in which Article 16’s ‘function in society’ is noted as the non-absolute nature of that right is proclaimed.³⁹ There have

³¹ Or some combination thereof, for example all three are cited in *Rotenberg*: Case T-720/14 *Rotenberg v Council* (ECLI:EU:T:2016:689), para 168.

³² Case C-579/19 *Association of Independent Meat Suppliers and Cleveland Meat Company* ECLI:EU:C:2021:665, para 96.

³³ Including: Joined cases C-402/05 P and C-415/05 P *Kadi And Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, para 355; Case T-181/08 *Tay Za v Council* ECLI:EU:T:2010:209, para 156; Case T-593/11 *Al-Chihabi v Council* ECLI:EU:T:2015:249, para 98; Case T-202/12 *Al Assad v Council* ECLI:EU:T:2014:113, para 113; Case T-153/15 *Hamcho v Council*, ECLI:EU:T:2016:630, para 120; Case T-405/15 *Fulmen v Council*, ECLI:EU:T:2019:469, para 80.

³⁴ Case T-138/09 *Schindler v Commission* ECLI:EU:T:2011:362, para 189.

³⁵ Case T-383/11, *Makhlouf v Council and Commission* ECLI:EU:T:2013:431, para 97: ‘According to settled case-law, those fundamental rights do not, however, enjoy, under European Union law, absolute protection, but must be viewed in relation to their function in society (see, to that effect, *Kadi*, paragraph 355). Consequently, the exercise of those rights may be restricted, provided that those restrictions correspond to objectives of public interest pursued by the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights thus guaranteed.’

³⁶ Case T-307/12 and T-408/13 *Mayaleh v Council* ECLI:EU:T:2014:926, para 173.

³⁷ Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28.

³⁸ *ibid*, paras 45-46.

³⁹ Including: Case C-277/16 *Polkomtel* ECLI:EU:C:2017:989, para 50; Case T-610/17 *ICL-IP Terneuzen and ICL Europe Coöperatief v Commission* ECLI:EU:T:2019:637, para 225; Case C-223/19 *YS v NK* ECLI:EU:C:2020:753, para 88; Case T-745/20 *Symphony Environmental Technologies plc v Parliament, Council and Commission* ECLI:EU:T:2024:45, para 316; Case C-124/20 *Bank Melli Iran v Telekom Deutschland GmbH* ECLI:EU:C:2021:1035, para 80.

also been a number of similar pronouncements in the related freedom to pursue a trade or profession (Article 15 of the Charter).⁴⁰

While we will spend more time with the cases concerning Article 8, it is worth noting that the idea of function in society has also appeared in a few cases in relation to the right to respect for private life in isolation from data protection. For example,⁴¹ in *Orde Van Vlaamse Balies and Others*, the Court considered whether a requirement, under an EU Directive concerning administrative cooperation on tax matters, for lawyer-intermediaries to notify other intermediaries of reporting exemptions on the basis of legal professional privilege was an interference with the privacy of communications between lawyers and clients under Article 7.⁴² At the outset, in examining whether the interference was justified, the Court notes ‘it must be recalled that the rights enshrined in Article 7 of the Charter are not absolute rights, but must be considered in relation to their function in society.’⁴³

Turning to the data protection context, situating the data protection cases in the broader EU jurisprudence on societal function of rights is illuminating for a few reasons.

First of all, the case law is not entirely consistent as to which rights have societal functions.⁴⁴ For example, there is suggestion in at least one decision of the General Court that all Charter rights are non-absolute and must be viewed in relation to their function in society,⁴⁵ when this is out of line with the express language of some of the Charter rights.⁴⁶ Moreover, sometimes rights which are formally non-absolute are treated as if they were absolute rights. As Groussot et al point out in the controversial *Mark Alemo-Herron* case,⁴⁷ where the Court ‘is seemingly playing Article 16 of the Charter out as an absolute fundamental right’, they argue that actually there is an absence of balancing of the social function, with the result that ‘social rights are being subsumed or forgotten’.⁴⁸ De Cecco also recognises this case as one in which an

⁴⁰ E.g. Case 44/79 *Hauer* [1979] ECR 3727, para 23; Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-03305, para 457; Case T-265/07 *CSL Behring v Commission and European Medicines Agency* ECLI:EU:T:2010:371, para 99 (with the right to property); Case C-611/12 P *Giordano v Commission* ECLI:EU:C:2014:2282, para 49.

⁴¹ See Case T-189/14 *Deza v European Chemicals Agency* ECLI:EU:T:2017:4, para 162; Case C-69/21 *Staatssecretaris van Justitie en Veiligheid* ECLI:EU:C:2022:913, para 96; Case C-623/22 *Belgian Association of Tax Lawyers and Others v Premier ministre/ Eerste Minister* ECLI:EU:C:2024:639.

⁴² Case C-694/20 *Orde Van Vlaamse Balies and Others* ECLI:EU:C:2022:963.

⁴³ *ibid*, para 34.

⁴⁴ For example, the General Court has purported to extend the idea of societal function of rights to Article 16 from the property cases, failing to recognise that there were many predecessor cases already adopting that line of reasoning. Case T-406/15 *Mahmoudian v Council* ECLI:EU:T:2019:468, para 78.

⁴⁵ Case T-593/11 *Al-Chihabi v Council* ECLI:EU:T:2015:249, para 98.

⁴⁶ E.g. Right to life (Article 2), Prohibition of torture (Article 4), Prohibition of slavery (Article 5).

⁴⁷ Case C-426/11 *Mark Alemo-Herron and Others v Parkwood Leisure Ltd* ECLI:EU:C:2013:521.

⁴⁸ Xavier Groussot, Gunnar Thor Pétursson and Justin Pierce, ‘Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights’ [2014] Lund University

absolutist approach to freedom of contract ‘seemed to erect an absolute boundary around economic autonomy, echoing a certain version of economic liberalism’.⁴⁹ As we shall see, this inconsistency in the weight placed on certain rights can certainly also be seen in the data protection context, as we do not see a coherent approach to when the non-absolute nature of the right to data protection is acknowledged.

Further, the tension between particular fundamental rights and their limitations for societal function is often hiding an ideological battle, particularly between market and social purposes. In relation to freedom to conduct a business or pursue a trade or profession, Groussot et al identify commonalities – both that these rights must be viewed in light of their social function, but also that these rights are connected to the elevation of a framework of market economy to constitutional status.⁵⁰ In the context of Article 16, Everson and Correia Gonçalves note that the Court’s invocation of the social function of fundamental economic freedoms as a settled notion in modern case law obscures the fact that the non-absolute nature is still contested, and that the Court ‘has struggled for consistency’ in its decision making.⁵¹ They point to the Court’s shifting role beyond due process driven review to consideration of economic and social rights, and legitimate general interests as a source of struggle in the interpretation of acceptable limitations of Article 16.⁵² While the same tension between market and social purposes of data protection is not the predominant tension in this context,⁵³ this insight that the limits of rights and the manner in which the judiciary shapes those limits involves ideological choice is also relevant to the normative and political decisions the Court engages with in the data protection context.

Indeed, by identifying the contexts in which data protection’s function is being cited and therefore in which the limits of data protection are being considered is most useful for this reason. As we shall see, the concept does not have a particularly developed meaning. So, rather than specifying data protection’s function, we are identifying contexts in which tensions between different parties (data subjects and

Legal Research Paper Series 14–15 <<https://dx.doi.org/10.2139/ssrn.2428181>>. However, this understanding of ‘social function’ as equating with social rights is not necessarily supported by the case law.

⁴⁹ Francesco De Cecco, ‘The Trouble with Trumps: On How (and Why) Not to Define the Core of Fundamental Rights’ (2023) 60 Common Market Law Review 1551, 1563.

⁵⁰ Groussot, Pétursson and Pierce (n 48) 1.

⁵¹ Everson and Correia Gonçalves (n 29) 463.

⁵² *ibid* 483.

⁵³ Though certainly, the tensions between economic and social purposes of data protection law have been the subject of contestation more broadly. See e.g. Roxana Vatanparast, ‘Designed to Serve Mankind? The Politics of the GDPR as a Global Standard and the Limits of Privacy’ (2020) 80 Heidelberg Journal of International Law 819; Roxana Vatanparast, ‘The Code of Data Capital: A Distributional Analysis of Law in the Global Data Economy’ [2021] *Zeitschrift für kritik - recht - gesellschaft* 98; Katherine Nolan, ‘The Individual in EU Data Protection Law’ (Doctor of Philosophy, London School of Economics and Political Science 2023); Nadya Purtova and Gijs van Maanen, ‘Data as an Economic Good, Data as a Commons, and Data Governance’ (2024) 16 *Law, Innovation and Technology* 1.

data controllers, Member States and EU institutions) and between normative and political objects are being mediated through the right to data protection and decided by the CJEU. In doing so, the fiction of the neutrality of ‘balancing’ is engaged with, and the significant power exercised by controller and judicial interpretation under the GDPR is highlighted. Next, we turn to these contexts, and look to how this notion is specifically manifesting in the data protection decisions of the CJEU.

4. Data protection’s function in society: the CJEU judgments

The concept of data protection’s ‘function in society’ makes frequent occurrences in the decisions of the CJEU.

It first appeared in the data protection context in *Schecke*, as noted above,⁵⁴ drawing on *Schmidberger*, wherein the non-absolute nature of freedom of expression and of assembly were to be viewed ‘in relation to its social purpose’.⁵⁵ In the data protection context, it was to be reworded slightly, as the Court stated that ‘[t]he right to the protection of personal data is not, however, an absolute right, but must be considered in relation to its function in society’.⁵⁶ Thus, ‘social purpose’ became ‘function in society’ in the data protection cases.

The formulation is always very similar to that taken in *Schecke*. One notable exception is the slightly longer statement by the General Court in *TC v Parliament*, when it stated

Indeed, the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and weighed on that basis against other fundamental rights, in an approach which gives each of the rights involved its proper place in the EU legal order, in the light of the facts of the case, in accordance with the principle of proportionality.⁵⁷

This decision is under appeal,⁵⁸ so we may yet see if this notion of a right’s ‘proper place in the EU legal order’ might recur.

The idea of data protection’s function in society now frequently appears in data protection decisions. The CJEU has emphasised the non-absolute nature of data protection in two types of cases: (i) those assessing the validity of EU and Member State laws, and (ii) those interpreting data protection legislation. With regard to the interpretative cases, we can see the notion of data protection’s function in society informing cases concerning derogations and cases concerning internal balancing exercises within legislation.

⁵⁴ Case C-92/09 *Volker und Markus Schecke and Eifert* [2010] I-11063.

⁵⁵ Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 80.

⁵⁶ Case C-92/09 *Volker und Markus Schecke and Eifert* [2010] I-11063, para 48.

⁵⁷ Case T-309/21 *TC v European Parliament* ECLI:EU:T:2023:315, para 114.

⁵⁸ Case C-529/23 P *Parliament v TC* [2023] C OJ 9.10.2023.

These cases are important on a technical level, as the Court is determining the validity of legal acts, and the reach of key legislative provisions. But further, they also involve the resolution of critical debates through the prism of data protection (particularly concerning the relationships between data protection and public security and public transparency and access to information). Thus, the search for limits of data protection speaks both to questions of scope of data protection, but also the outsized role that data protection has taken on in the resolution of normative and ideological debates in the EU.

4.1 Rights assessments: the non-absolute nature of the right

The most frequent use of the concept of data protection's function in society by the CJEU is a somewhat formulaic inclusion of this notion when the Court is justifying limits or interferences with the right to data protection.⁵⁹ It is often linked to the acceptable limitations to rights under the Charter under Article 52(1). In this sense, data protection's function in society has a negative meaning—it signifies the end of data protection's reach.

This was the manner of first use seen in *Schecke*, in the context of a statement of the non-absolute nature of the right to data protection, as the Court made its preliminary observations about Article 8, and explained acceptable limitations under Article 8(2)⁶⁰ and 52(1). Such inclusions of the idea of data protection's function in society have become common, though not universal, in decisions of the CJEU concerning Article 8,⁶¹ particular in two areas; in relation to public security and crime prevention, and public access to information and transparency.

In decisions concerning the balance between data protection and the fight against serious crime, and public security, data protection's function in society is often cited. In the *PNR Opinion*, the Court, in characterising the rights to data protection and privacy, again referred to data protection's function,⁶² and linked this idea to Articles 8(2) and 52(1) of the Charter.⁶³ Of course, the Court went on to find the EU-Canadian PNR Agreement incompatible with these Charter rights. In *Schwartz*, considering the taking and storing of fingerprints in passports under EU law, the Court states that 'regarding whether the processing of fingerprints can be justified on the basis of some other legitimate basis laid down by law, it should be borne in mind from the outset

⁵⁹ Sometimes in association with the other rights, particularly the right to respect for private life. See Joined cases C-245/19 and C-246/19 *État Luxembourgeois (Right To Bring An Action Against A Request For Information In Tax Matters)* ECLI:EU:C:2020:795, para 49 (adding also Article 47 of the Charter); Case C-204/21 *Commission v Poland* ECLI:EU:C:2023:442, para 334.

⁶⁰ As Fuster and Gonzalez Fuster write, this framing of Article 8(2) of the Charter as a type of limitation is curious, as lawful conditions for processing is not necessarily 'inherently opposed to the protection of personal data', but rather can be understood as an enabler of data protection. Fuster and Gellert (n 4) 77–78.

⁶¹ Case C-92/09 *Volker und Markus Schecke and Eifert* [2010] I-11063, para 48 – 50.

⁶² Specifically: 'the rights enshrined in Articles 7 and 8 of the Charter are not absolute rights, but must be considered in relation to their function in society'.

⁶³ Opinion 1/15 *Passenger Name Record Agreement* ECLI:EU:C:2016:656, paras 136-138.

that the rights recognised by Articles 7 and 8 of the Charter are not absolute rights, but must be considered in relation to their function in society.⁶⁴ Ultimately, the Court went on to find the relevant EU law was valid and a lawful interference with the rights to privacy and data protection. We see a very similar articulation of this non-absolute nature of the rights in *RL v Landeshauptstadt Wiesbaden* when the issue of the obligation to store fingerprints in identity cards under EU law was assessed and ultimately found to be invalid.⁶⁵

In *Schrems II*, when the Court was determining the standard of adequacy for the purposes of Commission adequacy decisions legitimising data transfers, again this notion of function in society makes an appearance.⁶⁶ As the Court considered the level of protection offered to data exported to the United States under Privacy Shield, the Court describes the non-absolute nature of the rights to data protection and privacy, again noting these rights ‘must be considered in relation to their function in society’, and again making reference to Articles 8(2) and 52(1) and the principle of proportionality.⁶⁷ Very similar formulations of the non-absolute nature of the rights, were seen in the *Privacy International*⁶⁸ and *Commissioner of An Garda Síochána*⁶⁹ (concerning data retention), and *Ligue des droits humains* cases (concerning passenger data communications).⁷⁰

The second notable area in which data protection’s function appears is in cases where the Court is weighing data protection against a competing right to access to information or public interest in transparency. In *OT v Vyriausioji tarnybinės etikos komisija*, when considering whether the publication of declarations of private interests of certain recipients of public funds was compatible with Articles 7 and 8, the notion recurs as the Court emphasises the non-absolute nature of these rights,⁷¹ before ultimately determining that the national legislation providing for such did infringe those rights. In the similar case of *Luxembourg Business Registers*, this same articulation recurs, as the Court considered the issue of public access to personal data in registers compiled on beneficial ownership of companies for the purposes of compliance with anti-money laundering legislation.⁷² The notion is also raised in

⁶⁴ Case C-291/12 *Schwartz* ECLI:EU:C:2013:670, para 33.

⁶⁵ Case C-61/22 *RL v Landeshauptstadt Wiesbaden* ECLI:EU:C:2023:520, para 75.

⁶⁶ Case C-311/18 *Data Protection Commissioner v Facebook Ireland* ECLI:EU:C:2020:559.

⁶⁷ *ibid*, para 172-176.

⁶⁸ Case C-623/17 *Privacy International* ECLI:EU:C:2020:790, para 63.

⁶⁹ Case C-140/20 *Commissioner of An Garda Síochána and Others* ECLI:EU:C:2022:258, para 100.

⁷⁰ Case C-817/19 *Ligue des droits humains*, ECLI:EU:C:2022:491, para 112.

⁷¹ Case C-184/20 *OT v Vyriausioji tarnybinės etikos komisija* ECLI:EU:C:2022:601, para 70 provides: ‘It should indeed be borne in mind that the fundamental rights to respect for private life and to the protection of personal data, guaranteed in Articles 7 and 8 of the Charter, are not absolute rights, but must be considered in relation to their function in society and be weighed against other fundamental rights. Limitations may therefore be imposed, so long as, in accordance with Article 52(1) of the Charter, they are provided for by law, respect the essence of the fundamental rights and observe the principle of proportionality.’

⁷² Joined cases C-37/20 and C-601/20 *WM, Sovim SA v Luxembourg Business Registers* ECLI:EU:C:2022:912, para 46.

Latvijas Republikas Saeima (Penalty Points), as the Court considered the legality of Latvian law which provided for a public register of penalty points.⁷³

In this category of cases, again we see recourse to the notion of data protection's function in society to emphasise the non-absolute nature of the right to data protection. We cannot say that it appears systematically. Different cases are routinely cited to support the proposition, and sometimes the Court does not cite previously case law at all, but merely refers to Recital 4 to the GDPR. Moreover, there are other cases in which the Court is assessing legal acts for validity by reference to Article 8 where the notion is not cited at all.⁷⁴ Nor can we say it is determinative of the outcome of the balancing process, as the non-absolute nature of the right to data protection is cited often when there is ultimately a determination of a violation of Article 8.

Why, then, might you ask is this phenomenon of interest? First, on a technical legal level, the idea of the non-absolute nature of the right to data protection is relevant to the balancing of rights exercises which are engaged with Article 8 is used to assess the validity of EU and Member State legal acts. Moreover, we see that the non-absolute nature of data protection is being raised in the context of complex policy debates about conflicting interests. The right's limits come to be relevant when the Court has to grapple with tensions between that fundamental right and contrary interests, particularly public security and access to information. Further, few limits have been drawn, as despite its non-absolute status, as Lynskey writes, data protection has been 'given remarkable weight' by the CJEU.⁷⁵

4.2 Interpretative use

The second category of cases in which we see the Court make reference to data protection's function in society is where the Court is drawing on the right as an aid to interpretation of legislation, rather than as an independent source of legal review as in previously discussed cases.

The right is very often relied upon in cases interpreting a range of data protection legislation. The Court has come to repeat the formula of understanding data protection by reference to its function in society in two contexts in particular; (i) when the Court is interpreting derogations to data protection legislation and (ii) when the Court is conducting an internal balancing exercise wherein the legislation requires data protection to be balanced against some other interest.

⁷³ Case C-439/19 *Latvijas Republikas Saeima (Penalty Points)* ECLI:EU:C:2021:504, para 105.

⁷⁴ See for example, Joined cases C-293/12 and 594/12 *Digital Rights Ireland and Seitlinger and Others* ECLI:EU:C:2014:238; C-362/14 *Schrems v Data Protection Commissioner* ECLI:EU:C:2015:650.

⁷⁵ Lynskey (n 8) 297.

4.2.1 Derogations and data protection's function in society

In a series of cases concerning derogations from the ePrivacy Directive,⁷⁶ the Court has made reference to data protection's function in society, as the Court construed acceptable limitations to data protection.

In *Deutsche Telekom*, the Court considered the legality of passing personal data of telecom subscribers to an undertaking which provided public directory services, and the interpretation of Article 12 of the ePrivacy Directive which requires transparency and opt-out protections.⁷⁷ In explaining the relationship between the Data Protection Directive⁷⁸ and ePrivacy Directive, the Court first emphasizes Article 8, and that the Data Protection Directive 'is designed to ensure, in Member States, observance of the right to protection of personal data' and the ePrivacy Directive 'clarifies and supplements' the Data Protection Directive in the electronic communication sector.⁷⁹ Next, the Court uses our concept when it states that '[h]owever, the right to the protection of personal data is not an absolute right, but must be considered in relation to its function of society'.⁸⁰ The Court then refers to Article 8(2) and the permissible limitations to that right, before going on to interpret Article 12 and the nature of the consent to be obtained under Article 12.⁸¹ Ultimately, it determined that legislation which allowed for the passing of such data from telecom service providers to the third-party directory providers was not precluded.⁸²

In other words, in this case the Court engaged in an interpretation of a provision of the ePrivacy Directive. The provision was construed as a limitation of the right to data protection, and thus the non-absolute nature of that right, including the right's function in society was to be used in interpreting the ePrivacy Directive.

Similar interpretative approaches have been seen in a number of cases concerning data retention laws, which after the invalidation of the Data Retention Directive in *Digital Rights Ireland*⁸³ are construed as derogations from the protections of rights in the ePrivacy Directive. In *SpaceNet and Telekom Deutschland*, the Court engaged with permissible derogations under Article 15 of that Directive.⁸⁴ Again, the Court refers to the non-absolute nature of the relevant Charter rights (Articles 7, 8 and 11) as

⁷⁶ Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37.

⁷⁷ Case C-543/09 *Deutsche Telekom* [2011] ECR I-3441

⁷⁸ Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

⁷⁹ Case C-543/09 *Deutsche Telekom* [2011] ECR I-3441, para 50.

⁸⁰ *ibid*, para 51.

⁸¹ *ibid*, para 52.

⁸² The interpretation of consent is arguably more liberal than would survive scrutiny today. *Ibid*, paras 66-67.

⁸³ Joined cases C-293/12 and 594/12 *Digital Rights Ireland and Seitlinger and Others* ECLI:EU:C:2014:238.

⁸⁴ Joined cases C-793/19 and C-794/19 *SpaceNet and Telekom Deutschland* ECLI: EU:C:2022:702.

relevant to the interpretation of that derogation, and that these rights ‘are not absolute rights, but must be considered in relation to their function in society.’⁸⁵ Ultimately, the Court determined that certain forms of data retention legislation were permissible. A very similar approach was seen in *La Quadrature du Net v Premier ministre and Ministère de la Culture*,⁸⁶ and there is a similar statement in *Direktor Na Glavna Direktsia* in the context of an analysis of national laws providing for lifelong storage of personal data by police authorities.⁸⁷ The link between derogations and data protection’s non-absolute nature is even more explicitly seen in *Commissioner of the Garda Síochána*, wherein the Court expressly links derogations to this non-absolute nature of the right, saying that:

[I]n so far as Article 15(1) of Directive 2002/58 allows Member States to introduce the derogations ... that provision reflects the fact that the rights enshrined in Articles 7, 8 and 11 of the Charter are not absolute rights, but must be considered in relation to their function in society. Indeed, as can be seen from Article 52(1) of the Charter, that provision allows limitations to be placed on the exercise of those rights, provided that those limitations are provided for by law, that they respect the essence of those rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others. Thus, in order to interpret Article 15(1) of Directive 2002/58 in the light of the Charter, account must also be taken of the importance of the rights enshrined in Articles 3, 4, 6 and 7 of the Charter and of the importance of the objectives of protecting national security and combating serious crime in contributing to the protection of the rights and freedoms of others.⁸⁸

By analogy, this would suggest that derogations to the GDPR⁸⁹ must also be interpreted in accordance with the non-absolute nature of the right and accommodate those other rights and important public objectives.⁹⁰ This is in line with the GDPR’s objective to protect fundamental rights and freedoms of natural persons generally, not only the right to data protection.⁹¹

⁸⁵ *ibid*, para 63.

⁸⁶ Case C-470/21 *La Quadrature du Net v Premier ministre and Ministère de la Culture* ECLI:EU:C:2024:370, para 70: ‘That being said, in so far as Article 15(1) of Directive 2002/58 allows Member States to introduce certain derogating measures, as noted in paragraph 66 above, that provision reflects the fact that the rights enshrined in Articles 7, 8 and 11 of the Charter are not absolute rights, but must be considered in relation to their function in society.’

⁸⁷ Case C-118/22 *Direktor Na Glavna Direktsia ‘Natsionalna Politsia’ Pri MVR – Sofia* ECLI:EU:C:2024:97, para 39.

⁸⁸ Case C-140/20 *GD v Commissioner of the Garda Síochána* ECLI:EU:C:2022:258, para 48.

⁸⁹ Including Article 23, Article 49, Article 85-91 GDPR.

⁹⁰ In *Puškár*, a similar approach was taken in relation to derogations from the Data Protection Directive. See Case C-73/16 *Puškár* ECLI:EU:C:2017:725, para 112.

⁹¹ Article 1(2), GDPR.

This clearly shows how data protection's function in society is a question of data protection's limits. A derogation is an acceptable limitation of the legislative standard, which intends to safeguard the right. Thus, the non-absolute nature of the right arises as the Court is interpreting acceptable departures from the legislative standard to safeguard those rights, and therefore acceptable limits to the protective standards.

4.2.2 Interpretation of internal balancing exercises

Another area in which the idea of data protection's function in society recurs in the case law of the CJEU is when the Court is engaging with areas of legislation in which a type of balancing or proportionality exercise is invoked.

In the context of the right to erasure under Article 17 of the GDPR, and the balance between the right to data protection and the right of information of the public, the notion has been referenced. In *GC and Others* when the Court was interpreting the right to erasure, and in particular the exceptions to that right, and expressly referred to the idea of the right's function in society in order to interpret such exceptions.⁹² The Court states that the exclusion 'where the processing is necessary for the exercise of the right of information, guaranteed by Article 11 of the Charter, is an expression of the fact that the right to protection of personal data is not an absolute right but, as recital 4 of the regulation states, must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality'.⁹³ The Court goes on to refer to Article 52(1) in terms of acceptable limitations to rights, and thus determines that Article 17(3)(a) of the GDPR, requires a balancing of the rights to privacy and data protection and freedom of information.⁹⁴ This same formulation was then repeated in another right to erasure case, *TU, RE v Google*.⁹⁵

Similarly, in *Google France v CNIL*, the Court was considering the territorial scope of the right to erasure and had recourse to data protection's function in society when considering the balance to be struck.⁹⁶ Again, the Court says the right to data protection is not absolute, must be considered in relation to its function in society and be balanced against other rights.⁹⁷ It adds that the 'the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world'.⁹⁸ While the GDPR is asserted by the Court to strike the balance between such rights in the EU, the Court finds that it has not struck such a balance regarding de-

⁹² Case C-136/17 *GC and Others* ECLI:EU:C:2019:773.

⁹³ *ibid*, para 57.

⁹⁴ *ibid*, paras 58-59.

⁹⁵ Case C-460/20 *TU, RE v Google* ECLI:EU:C:2022:962, para 56.

⁹⁶ Case C-507/17 *Google France v CNIL* ECLI:EU:C:2019:772.

⁹⁷ *ibid*, para 60.

⁹⁸ *ibid*.

referencing outside the EU,⁹⁹ and finds there is no obligation on search engine operators to de-reference globally.¹⁰⁰

In a couple of cases concerning the interpretation of the right of access, the Court has referred to data protection's function of society in the interpretation of the scope of that right. In *RW v Österreichische Post*, the Court was engaging in interpretation of Article 15(1)(c), and whether data subjects are entitled to know the specific recipients to whom their data has been disclosed as part of the controller's transparency obligations.¹⁰¹ The Court makes reference to the objective of the GDPR (a high level of protection of natural persons),¹⁰² but nevertheless goes on to state that 'the right to the protection of personal data is not an absolute right. That right must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.'¹⁰³ And accordingly, it may be accepted that where it is not possible to provide information, the right of access may be restricted.¹⁰⁴ In *Pankki S*, the Court was considering whether a data subject had a right to access the names of employees of the controller who had accessed his customer data where there was doubt about the legality of that access.¹⁰⁵ In considering whether the log data fell within the data to be provided under Article 15, the Court drew on recital 63 of the GDPR, which states 'that right should not adversely affect the rights or freedoms of others'.¹⁰⁶ Then the Court refers to the non-absolute nature of the right to data protection 'since it must be considered in relation to its function in society and be balanced against other fundamental rights',¹⁰⁷ and the need to strike a balance between the rights conferred on the data subject and the rights and freedoms of others.¹⁰⁸ The Court comes to a fairly generalised conclusion, finding that '[w]herever possible, means of communicating personal data that do not infringe the rights or freedoms of others should be chosen', unless that information is essential in order to exercise his data subject rights and provided the rights and freedoms of those employees are taken into account.¹⁰⁹ In both of these cases, the Court is having recourse to the idea of the non-absolute nature of the right to data protection and its function in society in order to carve out limitations to the right to access.

The other area in which data protection's function in society has manifested is in a number of cases relating to legal bases for processing, both under Article 6 and Article 9 for special categories of data. Many of the legal bases involve assessments of

⁹⁹ *ibid*, para 61.

¹⁰⁰ *ibid*, para 64.

¹⁰¹ Case C-154/21 *RW v Österreichische Post* ECLI:EU:C:2023:3.

¹⁰² *ibid*, para 44-45.

¹⁰³ *ibid*, para 47.

¹⁰⁴ *ibid*, para 47.

¹⁰⁵ Case C-579/21 *Pankki S* ECLI:EU:C:2023:501.

¹⁰⁶ *ibid*, para 77.

¹⁰⁷ *ibid*, para 78.

¹⁰⁸ *ibid*, para 80.

¹⁰⁹ *ibid*, para 80-83.

‘necessity’, which invites another type of balancing exercise. In *Norra Stockholm Bygg*, the Court made reference to data protection’s function in society in the context of an interpretation of Article 6(4) of the GDPR (necessity and proportionality of processing in a democratic society).¹¹⁰ In *Krankenversicherung Nordrhein* the Court referred to data protection’s function in society when interpreting Article 9(1) and the rules regarding processing of special categories of data.¹¹¹ Each of the exceptions to the Article 9 prohibition on processing of special categories of data is interpreted as a derogation to that prohibition,¹¹² and while referring to the balancing to be conducted under exceptions to processing categories of personal data,¹¹³ again the Court made reference to the non-absolute nature of the right to data protection and the need to consider its function in society, and balance against other rights.¹¹⁴ Additionally, in *Endemol Shine Finland*, the notion recurs as the Court had to consider the legality of processing of personal data by public authorities and the courts.¹¹⁵ Considering Article 6(1)(e) and lawful processing where ‘necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller’,¹¹⁶ the Court draws on the right of public access to official documents and the need to weigh that right against the rights to respect for private life and data protection.¹¹⁷ In doing such balancing, the Court makes reference to the non-absolute nature of these rights, and their function in society, in the determination of acceptable limitations under Article 52(1).¹¹⁸ Ultimately, because of the ‘sensitivity of data relating to criminal convictions and of the seriousness of the interference with the fundamental rights of data subjects’, the rights of the data subject are found to ‘prevail over the public’s interest in having access to official documents’.¹¹⁹

¹¹⁰ Case C-268/21 *Norra Stockholm Bygg* ECLI:EU:C:2023:145. The Court doesn’t cite previous case law, but Recital 4 of the GDPR, stating ‘the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced, in accordance with the principle of proportionality, against other fundamental rights, such as the right to effective judicial protection, guaranteed in Article 47 of the Charter (para 49).

¹¹¹ Case C-667/21 *Krankenversicherung Nordrhein* ECLI:EU:C:2023:1022.

¹¹² *ibid*, para 47.

¹¹³ In this case, under Article 9(2)(h) which allows for processing where ‘*necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional*’.

¹¹⁴ *ibid*, para 54.

¹¹⁵ Case C-740/22 *Endemol Shine Finland* ECLI:EU:C:2024:216.

¹¹⁶ Notably, although again considering the legal basis of the national courts in processing personal data, a different legal basis from *Norra Stockholm Bygg* is considered (Article 6(1)(e) compared to Article 6(4) in the previous case), suggesting an inconsistency in the conception of purpose limitation and the impact on legal basis from that previous case.

¹¹⁷ Case C-740/22 *Endemol Shine Finland* (ECLI:EU:C:2024:216), para 52.

¹¹⁸ *ibid*, para 52.

¹¹⁹ *ibid*, para 55.

Just as in the rights assessment cases, again, data protection's function in society and non-absolute nature is not universally cited in such interpretative cases. For example, in a series of cases interpreting copyright legislation in light of the right to data protection, no reference to the non-absolute nature of data protection, nor its function in society is made.¹²⁰ Similarly, there are many cases engaging with proportionality in order to interpret legislation which do not make reference to data protection's function in society or its non-absolute nature.¹²¹

What, then, is there to be learned from these decisions? Once more, we see that data protection's function in society arises as the Court considers the limits to the reach of data protection. In this context, the Court is faced with conflicts which can arise between the protective standards as set out in data protection legislation and other competing objects or parties. Where derogations from those standards are permissible, the Court interprets such derogations by reference to the right to data protection, and its non-absolute nature. Where no such derogations are present, but conflicts arise in the operation of the data protection legislation, the Court has sought to reconcile such conflicts through interpreting limitations or exceptions into the legislation. However, the Court is not consistent in always relying on the non-absolute nature of the right to data protection when engaging with such conflicts. Notably, the notion has not appeared in decisions concerned with those threshold concepts of material and personal scope that have concerned so many scholars about the expansion of data protection's scope, but only with 'internal' balancing exercises once data protection law applies. As I turn to in the next section, this has given the Court considerable power in resolving important policy and political debates.

5. Rights rhetoric and political tensions

By tracing the decisions in which the non-absolute nature of the right to data protection has been cited in a range of decisions, I have noted a range of political and ideological conflicts, mediated through the judicial modes of balancing and proportionality.

While the Court might speak in the language of rights, there are debated political issues at hand. The balance between data protection and competing interests like public access to information, public security, and the use of public information remains a contested issue. In fact, the very language of 'balancing' elides the inherently political nature of many of these debates. As Van der Sloot has observed, the label of 'balancing' has 'an aura of neutrality and objectivity', but the choice as to the weight to assign to a legal principle, and whether one principle outweighs another is a subjective choice.¹²² There is a normative question here about the desirable

¹²⁰ See Case C-275/06 *Promusicae v Telefónica de España* [2008] ECR I-00271; Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten* [2009] ECR I-01227; Case C-70/10 *Scarlet Extended* [2011] I-11959; Case C-360/10 *SABAM* (ECLI:EU:C:2012:85; Case C-461/10 *Bonnier Audio and Others* (ECLI:EU:C:2012:219).

¹²¹ E.g. Case C-73/16 *Puškár* (ECLI:EU:C:2017:725); Case C-398/15 *Manni* (ECLI:EU:C:2017:197).

¹²² Van Der Sloot (n 10) 188–189.

choice between these interests, and there is plenty of evidence in the cases that there is difference of views across the EU. Indeed, Member States have frequently defended national regimes which are found by the Court to violate EU fundamental rights. In other words, there is a secondary political question here about the locus of law-making and decision-making (i.e. EU versus Member State roles in defining and protecting public and common interests.)¹²³ In this way, the balancing or proportionality exercise which the Courts are engaging with is subsuming a series of political decisions,¹²⁴ and questions of representation, distribution and political ideology have become legal, technocratic questions.

I am certainly not the first to note this depoliticising tendency, and indeed this wider question of depoliticisation through constitutionalised fundamental rights in the EU is beyond the scope of this article but of broader interest.¹²⁵ What we can think about, however, is how this has manifested in data protection cases, and what adding these dimensions to the debate means for EU data protection law specifically. In particular, there are a number of features of EU data protection law which might exacerbate the difficulties associated with relying upon balancing and grant particular latitude to the Court.

First, the fact that the GDPR is premised upon individuated data subjects¹²⁶ and framing questions of individual rights can result in over-weighting of individual interests as compared to other competing public or collective interests.¹²⁷ While privacy scholars have long worried about the under-protection of privacy as an individual interest,¹²⁸ in the data protection context the individual right has proved very powerful before the CJEU, though not necessarily to achieve higher levels of effective protection. To date, individuals have enjoyed very strong *formal* legal protection, including over economic interests, and even though these formal

¹²³ See for example Alison L Young, 'EU Fundamental Rights and Judicial Reasoning: Towards a Theory of Human Rights Adjudication for the European Union' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar Publishing 2017). See also Dalla Corte (n 12) 263–264.

¹²⁴ Dalla Corte argues that the Court's need to grapple with these political disputes is resulting in the stretching of the proportionality doctrine in the data protection cases. Dalla Corte (n 12) 275.

¹²⁵ See Vatanparast, 'Designed to Serve Mankind? The Politics of the GDPR as a Global Standard and the Limits of Privacy' (n 53). More broadly, the idea of depoliticisation draws on the critical tradition. See e.g. Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2007); Michael A Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

¹²⁶ See Susanna Lindroos-Hovineimo, *Private Selves: Legal Personhood in European Privacy Protection* (Cambridge University Press 2021); Nolan (n 53).

¹²⁷ See Lindroos-Hovineimo (n 126). This is also a prevalent argument in the communitarian critique of privacy. See Amitai Etzioni, *Privacy in a Cyber Age: Policy and Practice* (Palgrave Macmillan 2015).

¹²⁸ E.g. Priscilla M Regan, *Legislating Privacy: Technology, Social Values, and Public Policy* (The University of North Carolina Press 1995); Daniel J Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 126 *Harvard Law Review* 1880.

protections do not always translate into effective data protection,¹²⁹ and these individual rights have been seized upon by the CJEU to significant ends.

Second, the extensive reliance on various balancing exercises under the GDPR is particularly challenging when there is little development as to the substantive content of the right to protection, beyond ‘complete and effective protection’ of the individual. A number of scholars have advocated for grounding data protection in a form of informational self-determination or personal autonomy for this very reason,¹³⁰ whereas Dalla Corte has notably advocated for a proceduralist understanding of the right.¹³¹ The challenge of a proceduralist notion is that this results in a circular form of reasoning in balancing instances; if the right means a requirement for a rules based approach, when those rules dictate rights balancing we are led back simply to a requirement for rules. The vagueness of the right to data protection, its emergence into standalone status under the Charter, and interpretation of the right by reference to a predecessor legislative regime has given the Court particular latitude in interpretation.

Third, the drafting of the GDPR also reflects a lack of political consensus on many areas. Although a Regulation in name, many areas allow for Member State divergence as there was lack of agreement in trilogue. Thus, Member States may diverge from GDPR standards on a range of areas, including the age of consent to processing in relation to information society services,¹³² processing of genetic, biometric or health data,¹³³ a broad range of derogations including by reference to national and public security, and other public interests,¹³⁴ the protection of freedom of expression and information,¹³⁵ public access to official documents,¹³⁶ employment data,¹³⁷ certain research and archival purposes¹³⁸ and more. Thus it is curious to see the Court assert that the mechanisms allowing for the balance of different rights and interests ‘are

¹²⁹ Particularly due to concerns as to the administrability and enforcement of data protection due to issues of scope, see discussion in section 2 above.

¹³⁰ E.g. Antoinette Rouvroy and Yves Poullet, ‘The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy’ in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer Netherlands 2009); Nadezhda Purtova, ‘Default Entitlements in Personal Data in the Proposed Regulation: Informational Self-Determination off the Table ... and Back on Again?’ (2014) 30 *Computer Law & Security Review* 6; Bonnici (n 19).

¹³¹ Lorenzo Dalla Corte, ‘A Right to a Rule: On the Substance and Essence of the Fundamental Right to Personal Data Protection’ in Dara Hallinan, Ronald Leenes and Paul De Hert (eds), *Data protection and privacy: Data protection and democracy* (Hart Publishing 2020).

¹³² Article 8, GDPR.

¹³³ Article 9(4), GDPR.

¹³⁴ Article 23, GDPR.

¹³⁵ Article 85, GDPR.

¹³⁶ Article 86, GDPR.

¹³⁷ Article 88, GDPR.

¹³⁸ Article 89, GDPR.

contained in the GDPR itself',¹³⁹ or the interests of a data subject 'override, as a general rule,' the rights of access to information of internet users,¹⁴⁰ given the legislation itself is unequivocal on many such balances, and rather often leaves it to Member State determination.

In light of these features, the right to data protection offers a particularly broad scope for the Court to manoeuvre, without clear legislative intent to guide the Court. Once again, we have reason to search for limits.

While the legitimacy of rights-based judicial review is a much broader field of inquiry that is beyond the ambitions of this article, a narrower question asks what current tools are available to identify such limits without requiring political or constitutional reform? I see two initial possibilities to achieve more coherency and consistency in the recognition of the limits of the right to data protection.

First, there is greater scope for reliance on the decisions of the European Court of Human Rights ('ECtHR'), which has a much deeper jurisprudence on many of the questions arising and the difficult balances to be drawn. The Charter recognises that fundamental rights under the Charter which correspond to rights under the European Convention on Human Rights are to be understood as having the same meaning and scope, while the Charter can grant more extensive protection.¹⁴¹ While the right to data protection is not the same as the right to respect for private life under Article 8 of the Convention there is substantial overlap and commonality,¹⁴² and thus helpful analogies may be drawn to balancing exercises of the ECtHR involving Article 8, or indeed the countervailing rights or interests being considered. The presence of the margin of appreciation doctrine in ECtHR decisions can also signify a lack of European consensus on particular areas of contestation,¹⁴³ and thus act as a signal to the judiciary of the need for particular awareness of competing political claims.¹⁴⁴ While the CJEU does have recourse to the decisions of the ECtHR in some data protection cases, the citation of ECtHR reasoning is uneven since the Charter was adopted.¹⁴⁵

¹³⁹ Case C-597/19 *M.I.C.M.* ECLI:EU:C:2021:492, para 112; Case C-667/21 *Krankenversicherung Nordrhein* ECLI:EU:C:2023:1022, para 54.

¹⁴⁰ Case C-131/12 *Google Spain* ECLI:EU:2014:317, para 81; Case C-136/17 *GC and Others* ECLI:EU:C:2019:773, para 53; Case C-507/17 *Google France v CNIL* ECLI:EU:C:2019:772, para 45.

¹⁴¹ Article 52(3), Charter.

¹⁴² The literature identifying this commonality and overlap is cited above at n(4).

¹⁴³ Nikos Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' (2019) 25 *European Public Law* 445.

¹⁴⁴ Or indeed to extend the CJEU's own versions of deference and margin of appreciation to the field of data protection. On the CJEU's approach in the free movement of goods context, see Jan Zyglinski, *Europe's Passive Virtues: Deference to National Authorities in EU Free Movement Law* (Oxford University Press 2020).

¹⁴⁵ See Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk* [2003] ECR I-5014, paras 69-94; Case C-92/09 *Volker und Markus Schecke and Eifert* [2010] I-11063, paras 51-52; Case C-518/07 *Commission v Germany* [2010] ECR I-01885, paras 21-22; Case C-291/12 *Schwartz* ECLI:EU:C:2013:670, para 27; Joined cases C-293/12 and 594/12 *Digital Rights Ireland and Seitlinger and Others* ECLI:EU:C:2014:238, para 35, 47-48, 54-55; Case C-212/13 *Ryneš* ECLI:EU:2014:2428, para 37-39; Joined cases C-203/15 and C-698/15 *Tele2 Sverige*

Greater attention to such decisions could redress some of the challenges associated with balancing the somewhat formless right to data protection.

Second, recalling that the notion of a right's societal function was originally derived by the Court from national constitutional traditions of non-absolute rights,¹⁴⁶ greater engagement by the Court with national constitutional traditions of fundamental rights balancing is also worth consideration. Once again, the Charter states that where it recognises rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.¹⁴⁷ The CJEU have recognised the right to respect for private life as deriving from constitutional traditions (together with Article 8 of the Convention).¹⁴⁸ In the early *Lindqvist* decision, it is notable that the Court deferred to national legislators and courts to strike the appropriate balance between data protection and freedom of expression.¹⁴⁹ More recently, the Court has typically taken a strict standard of review in data protection cases,¹⁵⁰ which has a centralising tendency. Greater engagement with constitutional jurisprudence drawing from Member State traditions, could provide a basis for a greater diversity of contributions to the contours of the right to data protection. Where such national traditions are diverse in their approaches, this may also reveal lack of EU consensus: another signal to the Court of possible political contestation.

ECLI:EU:C:2016:970, 119-120; Opinion 1/15 *Passenger Name Record Agreement*
 ECLI:EU:C:2016:656, para 39 and 114; Case C-25/17 *Jehovan todistajat* ECLI:EU:C:2018:551, para 48; Case C-345/17 *Buivids* ECLI:EU:C:2019:122, para 65-66; Case C-136/17 *GC and Others*
 ECLI:EU:C:2019:773, para 76; Case C-511/18 *La Quadrature du Net and Others*
 ECLI:EU:C:2020:791, paras 115-116, 123-125, 128; Case C-439/19 *Latvijas Republikas Saeima (Penalty Points)* ECLI:EU:C:2021:504, para 91; Case C-460/20 *TU, RE v Google*
 ECLI:EU:C:2022:962, para 59; Case C-118/22 *Direktor Na Glavna Direktsia 'Natsionalna Politsia' PRI MVR* ECLI:EU:C:2024:97, para 65.

¹⁴⁶ See discussions of *Nold* and *Hauer* in section 3 above.

¹⁴⁷ Article 52(4), Charter.

¹⁴⁸ Case C-404/92 *X v Commission* [1994] ECR I-04737, as identified by Steve Peers and Sacha Prechal, 'Article 52 - Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: a commentary* (2nd edn, Bloomsbury Publishing Plc 2021) 1657.

¹⁴⁹ Case C-101/01 *Lindqvist* [2003] ECR I-12992, para 90.

¹⁵⁰ Justified by reference to the importance of the role of the protection of personal data in light of the fundamental right to respect for private life and a reduced discretion for the EU legislature in *Digital Rights Ireland*. Joined cases C-293/12 and 594/12 *Digital Rights Ireland and Seitlinger and Others* ECLI:EU:C:2014:238, para 48. Further, even national measures in derogation from EU law were reviewed with little deference to national circumstance, discussed in section 4.2.1 above. See also Martijn Van Den Brink, Mark Dawson and Jan Zgliniski, 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU' (2025) 32 *Journal of European Public Policy* 209, 227-228.

6. Data protection's function in society and the quest for limits

By tracing the notion of data protection's function in society, we have learned that it is a device that the CJEU uses to conceptualise the right to data protection as a non-absolute right, the protection of which might be detrimental to other rights or public interests and therefore overridden. The concept is frequently used to reinforce the non-absolute nature of the right, serving primarily as an indicator of when data protection must yield to other rights or interests.

Data protection's function in society has been invoked in cases where the Court is reconciling the right to data protection with other rights and interests where the legality of EU and national legal acts are assessed by reference to the right to data protection, notably cited in multiple cases which balanced that right against interests in public security and the fight against crime and against interests in public transparency. The notion has also been cited in a number of interpretative cases, where the Court relies on the right (and its non-absolute nature) in the interpretation of data protection legislation. Its use in cases relating to derogations from legislation accord with its status as an indicator of acceptable limitations to data protection. When the Court engages with the balancing exercises within the GDPR, the notion is cited in support of the interpretation of these provisions, including in relation to the scope of data subject rights and the applicability of legal bases to data processing. The non-absolute nature of the right has been relevant to the Court interpreting limitations on data subject rights and legal bases, showing that there is some scope to contain the breadth of data protection obligations by reference to the non-absolute nature of the underlying right to data protection. However, to date that non-absolute nature of the right to data protection has not constrained the broad material or personal scope of data protection law. Moreover, I have argued that looking to the contexts in which this non-absolute nature of data protection has arisen in the case law of the CJEU is significant for another reason. These contexts demonstrate the ideological and political tensions which are being reconciled through the rubric of fundamental rights balancing in a data protection context.

When one of the significant sources of dissatisfaction with data protection in contemporary scholarship is with its overbreadth, both from the perspective of the capacity of the regime to create meaningful protection for individuals and out of a concern for regulatory and judicial over-reach into other political objects, I suggest it is time to reconsider the limits of data protection. One means by which to engage with those limits is to re-engage with the non-absolute nature of the right to data protection, informed by a broader range of jurisprudence, from the ECtHR and national constitutional traditions.