

The Essence of Data Protection: Essence as a Normative Pivot

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Abstract

The concept of the essence of the Article 8 right to the protection of personal data has garnered much attention over the past few years. Yet, there remains a notable lack of clarity in relation to the concept in current law and jurisprudence. There is a lack of clarity, for example, in relation to the current scope and function of the concept of essence in the legal scheme of Article 8, as well as in relation to whether the concept of essence has a distinct role in this scheme at all. This article endeavours to address this uncertainty. In this regard, the article: i) offers a novel methodology for the identification of a cogent, functionally distinct, description of the concept of essence as it is currently used in relation to Article 8; and ii) proposes, and defends, such a description: the concept of essence as a normative pivot.

Keywords: Data protection, Fundamental rights, Charter, Essence, Core, Article 8, Article 52

1. Introduction

The concept of the essence of EU fundamental rights appears in Article 52(1) of the Charter of Fundamental Rights of the European Union (CFREU). The Article states: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms'.¹

The concept of the essence of the Article 8 right to the protection of personal data has garnered considerable interest over the past few years. Several scholars, and recently even certain EU institutions, have relied on the concept as a tool in substantive work on specific phenomena. Others have devoted time to analysing and discussing the concept itself.²

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¹ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 52(1).

² In terms of EU institutions' use of the concept, see: European Data Protection Supervisor, *A Preliminary Opinion on data protection and scientific research* (2020) 18. The work of other scholars dealing with the concept will be discussed throughout the article. Consider as an example, however: Lorenzo Dalla Corte, 'A Right to a Rule: On the Substance and Essence of the Fundamental Right to

Much scholarly work dealing with the concept, however, bemoans the lack of clarity provided in current EU law. The work laments, for example, the lack of clarity in law as to the scope and role of the concept in the legal scheme of Article 8 as well as to whether the concept has a functionally distinct role in this scheme at all.

In consequence, much work on the subject – for instance the extensive work by Brkan – turns away from trying to offer cogent descriptions of the current scope and function of the concept in law, and instead endeavours to offer normative propositions as to how the concept should be understood and used in future.³

This article looks back to the law and: i) offers a novel methodology for the identification of a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8; and ii) proposes, and defends, such a description.

After offering an overview of the concept of essence in relation to Article 8 (section 2), the article outlines the novel methodology for identifying a cogent and functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8 (sections 3-4). Next, the article works through the method to propose such a description: essence as a normative pivot (sections 5-7). Finally, the article addresses four objections which might be raised against this proposed description (sections 8-11).

2. An Overview of the Concept of Essence in Relation to Article 8

The concept of essence appears in Article 52(1) of the CFREU, which states: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms’. Article 52(1), in principle, applies in relation to all rights outlined in the CFREU which may be limited.⁴ Accordingly, it is fair to work on the base assumption that the concept is relevant in relation to the right to the protection of personal data in Article 8 of the CFREU.⁵

Personal Data Protection’ in Dara Hallinan, Ronald Leenes, Paul De Hert and Serge Gutwirth (eds.) *Data Protection and Privacy: Data Protection and Democracy* (Hart 2020) 27, 49-55.

³ See, for example: 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] German Law Journal 20(6) 864, 864-883 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-rights-to-privacy-and-data-protection-finding-the-way-through-the-maze-of-the-cjeu-constitutional-reasoning/00621C26FA14CCD55AD0B4F4AD38ED09>> accessed 16.08.2021.

⁴ There are observations, however, that the concept of essence has been seldom used in relation to certain rights and that it may be conceptually difficult to apply in relation to certain rights. See, for example: Martin Husovec, ‘The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter’ [2019] German Law Journal 20 840, 855 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-intellectual-property-rights-under-article-17-2-of-the-eu-charter/8C7CCD762A71634A6011002D3E32EDC4>> accessed 16.08.2021.

⁵ This is the position taken by several data protection scholars and has particular strength given the fact the concept has been actively used in Article 8 jurisprudence. See, for example, Dalla Corte, who takes a unique position on Article 8 and the concept of essence: ‘a violation of the essence of the right to data protection...should be constructed only in cases where the functioning of the

The concept occupies a role with normative significance in the EU fundamental rights order. There remains discussion as to the specifics of the function of the concept. Nevertheless, certain logical observations may be made on the back of the presence and position of the concept in Article 52(1). Three such observations might be made: i) the concept relates to determinations of legitimate and illegitimate limitations on fundamental rights by the EU or EU Member States – or potentially private actors where the Charter can be argued to have horizontal direct effect;⁶ ii) within the consideration of legitimate and illegitimate infringements, the concept functions as a criterion which relates to the qualification of an infringement as illegitimate; and iii) the concept functions to delineate a set of types of illegitimate infringements of rights which are in some way unique – which differ from other illegitimate infringements which do not interfere with the essence.

On the back of these general observations, a set of three more specific observations as to the relationship between the concept of essence and the Article 8 right to the protection of personal data might be made: i) the concept becomes relevant when the EU or an EU Member State – or potentially a private actor – engages in an act relating to the processing of personal data – either a legislative act defining legitimate data processing or an act of data processing – which constitutes an infringement of Article 8; ii) the concept then relates to the determination of the illegitimacy of the infringement consequent to the relevant act of personal data processing; and iii) the illegitimacy of the data processing infringement is of some unique form such that it should be seen as falling within the category of an infringement of the essence of Article 8 – as opposed to an illegitimate infringement which simply constitutes a ‘normal’ illegitimate infringement of Article 8.

The above paragraphs provided a set of general observations as to the function of the concept of essence in the EU fundamental rights order and a set of more specific observations as to how the concept applies to the right to the protection of personal data in Article 8 of this order. This latter set of observations, however, remain far too general to constitute a cogent and functionally distinct description of how the concept of essence is currently used in law in relation to Article 8. Unfortunately, such a description also does not emerge self-evidently from an analysis of law and jurisprudence concerning the concept – the difficulties of drawing a description via ordinary doctrinal and jurisprudential analysis will be discussed in more detail in subsequent sections. This raises the important question, in line with Scarcello, as to how one might go about looking for such a

regime regulating data processing is called into question, regardless of which specific provision is infringed, but rather having regard to the functioning of the system in its entirety.’ 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, Paul De Hert and Serge Gutwirth (eds.) *Data Protection and Privacy: Data Protection and Democracy* (Hart 2020) 27, 51-52.

⁶ There seems no clear reason the concept of horizontal direct effect should preclude the relevance of the concept of essence. See, for the CJEU’s recognition and discussion of the possibility of horizontal direct effect: Case C-684/16 *Max-Planck Gesellschaft zur Förderung der Wissenschaften e.V. v. Tetsuji Shimizu* [2018] ECLI:EU:C:2018:874, para 76.

description.⁷ Surprisingly, there have, hitherto, been few efforts at defining methodological approaches which might be of assistance in relation to this question.

In response to the lack of ready-made methodological approaches, the following sections elaborate such a methodology. The methodology consists of two parts. The first part consists of a general structure for the identification of the function of discrete components of a legal system.

3. A Methodology for Identifying a Description Part 1: A general structure

This general structure builds loosely on the approach of levels of abstraction. This approach has a long history in several different disciplines. As Floridi observes in his work on the philosophy of information, for example: 'levelism has been common currency in philosophy and science since antiquity'.⁸ The approach, however, has little extensive pedigree as a framing concept for investigations into concepts around data protection law.⁹

The structure is founded on the following observations as to the function and make-up of legal systems. In the first instance, in line with Teubner – amongst others – legal systems can basically be considered as knowledge systems which serve to designate social phenomena in terms of legitimacy and illegitimacy.¹⁰ On the back of this basic observation, a subsequent observation can be made that the individual functional components of a legal system – concepts, doctrines etc. – can relate to the designation of legitimacy and illegitimacy in different ways. In this regard, I would propose that such components can be categorised into three different groups according to the proximity to which – the level of abstraction at which – they relate to specific social phenomena:

1. Components may delineate the legitimacy and illegitimacy of specific, defined, social phenomena.
2. Components may function in terms of abstract tests, applicable across contexts, for the delineation of the legitimacy and illegitimacy of social phenomena.
3. Components may function as auxiliary specifications of degrees of legitimacy or illegitimacy of social phenomena – supplemental to a primary definition of legitimacy or illegitimacy via another system component.

⁷ Orlando Scarcello, 'Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?' [2020] *European Constitutional Law Review* 16 647, 648
<<https://www.cambridge.org/core/journals/european-constitutional-law-review/article/preserving-the-essence-of-fundamental-rights-under-article-521-of-the-charter-a-sisyphean-task/B6CCBE08347B15088D160ED472A62E3A>> accessed 16.08.2021.

⁸ Luciano Floridi, *The Philosophy of Information* (Oxford University Press 2011) 47.

⁹ The idea of levels of abstraction has featured in certain discussions of law and the regulation of the processing of personal data, although no work, to my knowledge, has relied on the concept as the explicit basis for a methodology in defining the function of concepts around data protection law. See, for example: Václav Janeček, 'Ownership of personal data in the Internet of Things' [2018] *Computer Law and Security Review* 34(5) 1039, 1039-1052.

¹⁰ See, for example: Gunther Teubner, *Recht als Autopoietisches System* (Suhrkamp 1989) 45.

Classification of a functional component of a legal system into one of these groups, however, logically excludes the possibility to simultaneously classify the same component in any other group – e.g. an individual component of a legal system cannot both serve to define the illegitimacy of specific, defined, social phenomena and also serve to provide a test applicable across contexts to define the illegitimacy of social phenomena.¹¹

In light of the above, a structured investigation seeking a description of the function of any given functional component of a legal system might proceed as follows:

1. The investigation should consider whether a description can be identified in terms of the specification of the legitimacy and illegitimacy of specific, defined, social phenomena.
2. If no cogent description can be identified at the first level of abstraction, then the investigation should proceed to consider whether a description can be identified in terms of an abstract test.
3. If no cogent description can be identified at the second level of abstraction, then the investigation should proceed to consider whether a description can be identified in terms of an auxiliary specification.

The key elements of investigation in the general structure elaborated above can already be mapped onto the case at hand: the Article 8 right to the protection of personal data constitutes the legal system in question; and the concept of essence – within the Article 8 system – is the functional component to be described. The general structure outlined above, however, still leaves considerable uncertainty as to how an investigation seeking a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8 should proceed at each level of abstraction. Accordingly, before moving forward, a further specification of the methodology is necessary.

4. A Methodology for Identifying a Description Part 2: A specification

The second part of the methodology thus consists of defining a set of supplemental boundary conditions which any cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8 must fulfil. Such general boundary conditions are relevant and applicable, in the same way, at all levels of abstraction at which a description is sought. These boundary conditions can thus serve to

¹¹ Any investigation looking for a description of the function of a component of a legal system which fails to consider the breakdown of delineatory roles outlined above, and the logical hierarchical relationship between these roles, will face two methodological issues. First, such an investigation runs the risk of proceeding in an unstructured fashion. Second, such an investigation risks coming up with a definition which cannot logically be correct – for example, if the investigation begins at the second level of abstraction, when a definition could have been found at the first level of abstraction. The idea that classification of a component of a legal system into one group excludes the possibility to classify the same component into another group does not mean that there is not the possibility for indeterminacy in relation to the function of a component of a legal system. In this case the possibility arises that multiple plausible descriptions might be elaborated, each of which may indeed fall into a different group.

further channel and structure the investigation at each level of abstraction. Thus, if there is reason to believe that these conditions cannot all be fulfilled by a description at a given level of abstraction, the investigation must proceed to the next level of abstraction. Three such boundary conditions are proposed, each of which is elaborated in more detail below.

First, any cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 must be scalable across the range of time and contexts in which the concept of essence in relation to Article 8 may potentially be used: the scalability condition. The aim of identifying a description is to provide clarity in relation to the current legal scope and role of essence in relation to Article 8. Any description which is not scalable across potential time and use contexts – e.g. a description which merely restates existing doctrine – will thus be inadequate. Naturally, however, there are limits to the scope of time and contexts across which a description can reasonably be expected to scale. Legal concepts change due to changes in the legal system of which they are a part as well as due to changes in the social phenomena to which they refer. In this regard, a cogent, functionally distinct, concept of essence as it is used in law in relation to Article 8 should be expected to scale across time and context to the degree that the legal assumptions on which the description is based remain valid.

Second, any cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 must correspond to the use of the concept in both law and jurisprudence: the law and jurisprudence condition.¹² In the first instance, the base line reference point for such a description must be the CFREU. Thus, any description which elaborates the concept in ways which contradict the framing of the concept of essence in the Charter will be inadequate and cannot be accepted. In turn, such a description must correspond to the way in which the concept of essence has been used across the full range of Court of Justice of the European Union (CJEU) case law dealing with the right to the protection of personal data in which concept has been engaged. The CJEU is the arbiter of the specification and adaptation of the Charter and, accordingly, the way the concept of essence appears in the Court's hermeneutics is also definitive of its current legal function.¹³

Third, any cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 must serve to differentiate the concept, either conceptually or practically, from other legal concepts serving to delineate legitimate and illegitimate limitations on EU, or EU Member State – or private party – data processing activities in EU fundamental rights law: the unique function condition. One concept looms particularly

¹² This is not to say that other descriptions of the concept of essence in relation to Article 8, which build on other reference points, could not also be put forward – for example normative descriptions not following the approach of the CJEU. Nor is this to say that such alternative descriptions could not be useful in understanding the concept of essence in relation to Article 8. Such descriptions, however, cannot be accepted as illustrative of the current function of the concept in law in relation to Article 8. See, for example, the novel normative proposition offered by Porcedda as to how the substance of the concept of essence in relation to Article 8 might be approached: Maria Grazia Porcedda, 'On boundaries. Finding the essence of the right to the protection of personal data' in Ronald Leenes, Rosamunde Van Brakel, Paul De Hert and Serge Gutwirth (eds.) *Privacy and Data Protection: The Internet of Bodies* (Hart Publishing 2018) 277, 285-312.

¹³ See, for example, the Preamble of the CFREU.

large in this respect: proportionality.¹⁴ In this regard, any description which cannot be clearly differentiated from the concept of proportionality cannot be regarded as describing a functionally distinct component of EU law and cannot be accepted. This is not to say, however, that such a differentiation must exclude any relationship between the concepts of essence and proportionality. In fact, the opposite is true. The utility and clarity of any description will rise according to the degree to which it can specify the relationship between the two concepts.

Accordingly, in line with the methodology outlined in the previous two sections, the first step in identifying a description of a cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 is: to consider whether such a description can be identified, which fulfils all three boundary conditions, at the first level of abstraction – in terms of the delineation of a specific and defined set of illegitimate social phenomena.

5. Level of Abstraction 1: Essence and the delineation of specific illegitimate social phenomena

Superficially, it looks feasible to provide a cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 in terms of the delineation of specific illegitimate social phenomena. A deeper consideration, however, reveals that any description offered at this level of abstraction will necessarily be problematic in relation to each of the three boundary conditions outlined in the previous section.

In relation to the first boundary condition – the scalability condition: any description built at this level of abstraction will be inadequate in terms of scalability across contexts. Such a description would need to be built on the back of existing specific jurisprudential clarifications as to which data processing phenomena are illegitimate by virtue of violating the essence of Article 8. Consider, in this regard, however, the fact that CJEU case law involving the concept of essence in relation to Article 8 has revolved almost exclusively around data processing in the context of State security.¹⁵ Accordingly, any description

¹⁴ Proportionality is the key concept in EU fundamental rights law dealing with limitations on rights and thus is the key concept dealing with legitimate and illegitimate infringements of rights. Accordingly, proportionality is the key concept from which essence – for this latter concept to have any functionally distinct role in EU fundamental rights law – must be differentiated. See, for example, the general discussion of proportionality as a concept related to essence in Dawson et al.'s introduction to the German Law Journal's issue on the concept of essence. Mark Dawson, Orla Lynsky, Elise Muir, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' [2019] German Law Journal 20(6) 763, 772-774
<<https://www.cambridge.org/core/journals/german-law-journal/article/what-is-the-added-value-of-the-concept-of-the-essence-of-eu-fundamental-rights/24933C5C655BA51B2FDBA5E28A1D6889>> accessed 16.08.2021

¹⁵ See, for example, the CJEU's use of the concept of essence in relation to Article 8 and the state security context in: *Opinion 1/15* [2017] ECLI:EU:C:2017:592, paras 148-151. The case of *Coty* might be argued to be an exception to this observation. The case discusses the concept of essence in relation to Article 8 – although the discussion is limited and it is not certain the discussion actually implies the relevance of the concept of essence as an analytical tool in the case. The case, however, considers how protection granted to data subjects flowing from Article 8 might impact the essence of other fundamental rights, instead of considering the essence of the right to the protection of

developed at this level of abstraction would necessarily relate solely to the State security context and suggest the concept of essence in relation to Article 8 only serves the delineation of legitimacy and illegitimacy in this context. The focus on State security in CJEU case law on essence and Article 8 to date, however, results from the specifics of the cases heard before the CJEU. The focus does not result from an exclusive doctrinal connection between the concept of essence in Article 8 and data processing for State security purposes. In this regard, there is no reason to presume the concept of essence in Article 8 cannot, and will not, in future, play a role in other contexts involving personal data processing.¹⁶

In relation to the second boundary condition – the law and jurisprudence condition: any description built at this level of abstraction will encounter two forms of problem relating to the fact that the law on the concept of essence in relation to Article 8 does not, currently, cogently describe a specific set of illegitimate social phenomena. First, the case law dealing with the concept of essence in relation to Article 8 is often confusing as to precisely whether and when personal data processing should be regarded as illegitimate by virtue of constituting an infringement of essence. For example, in the case of *Digital Rights Ireland*¹⁷, the CJEU suggested that technical and organisational measures may serve to prevent general data retention policies from constituting violations of the essence of Article 8. It is not clear, however, why, or to what degree, such measures could aid in avoiding a violation of essence or whether such measures could serve to avoid a violation of essence in all contexts. Second, the case law itself is arguably inconsistent. For example, in the *Tele2 Sverige* case¹⁸, the Court highlighted that no violation of the essence of Article 8 existed by virtue of the fact that the content of communications data – as opposed to metadata alone – was not collected in data retention procedures. Yet, in the *Digital Rights Ireland* case, the Court made statements as to the sensitivity of metadata which appear to contradict this assertion.¹⁹

personal data itself. Case C-580/13 *Coty Germany GmbH v Stadtparkasse Magdeburg* [2015] ECLI:EU:C:2015:485, paras 35-43.

¹⁶ See, for example, the contribution by Petkova and Boehm which highlights the possible relevance of the concept of essence in relation to Article 8 in the employment profiling context: Bilyana Petkova, Franziska Boehm, 'Profiling and the Essence of the Right to Data Protection' in Evan Selinger, Jules Polonetsky and Omer Tene (eds.) *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018) 285, 296-300.

¹⁷ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECLI:EU:C:2014:238, para 40.

¹⁸ Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15) v Tom Watson and Others* [2016] ECLI:EU:C:2016:970, para 101.

¹⁹ The Court acknowledged of metadata, in *Digital Rights Ireland*, that: 'Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.' Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others*

In relation to the third boundary condition – the unique function condition: any description built at this level of abstraction will not serve to differentiate the function of the concept of the essence of Article 8 from the concept of proportionality. In no instance in which the CJEU has relied on the concept of essence in relation to Article 8 to delineate the illegitimacy of specific data processing phenomena, has the Court also then consistently indicated that the same processing could not have been found illegitimate on the basis of a proportionality evaluation alone. For example, in the case of *Tele2Sverige*, the Court implied that broad state powers to access citizens' telecommunications personal data for security purposes, including the content of that data, may constitute a violation of the essence of Article 8.²⁰ In subsequent case law concerning state mass surveillance of content – for example in the recent *Schrems II* case²¹ – however, the Court has chosen to highlight such activities as illegitimate simply by virtue of constituting disproportionate interference.

No cogent, functionally distinct, description for the concept of essence as it is currently used in law in relation to Article 8 can be identified in terms of the delineation of a specific, defined, set of illegitimate social phenomena. Accordingly, in line with the methodology outlined in sections 3 and 4, the next step is: to consider whether such a description can be identified, which fulfils all three boundary conditions, at the second level of abstraction – in terms of an abstract test for the delineation of the legitimacy and illegitimacy of social phenomena.

6. Level of Abstraction 2: Essence as an abstract test

Several forms of abstract test for determining violations of the essence of the right to the protection of personal data have been proposed. These tests may usefully be broken down into two types. These two types of tests differ substantially and as such an independent

and *Kärntner Landesregierung and Others* [2014] ECLI:EU:C:2014:238, para 27. Scholarship also highlights the Court's assertions in relation to the distinction between metadata and content data as lacking clear rationale. As Christofi et. al. observe: 'What exactly justifies reaching a different outcome depending on whether what is at stake is metadata or content data?' Athena Christofi, Valerie Verdoodt, *Exploring the essence of the right to data protection and smart cities* (CITIP Working Paper, 2019) 24 <<https://spectreproject.be/output/downloads-1/exploring-the-essence-of-the-right-to-data-protection-and-smart-cities>> accessed 16.08.2021. Granger et. al. go further and suggest: 'when it summarily dismisses any interference with the essence of privacy and data protection rights, the Court unfortunately reverts to an out-dated perspective, according to which the collection of metadata is less sensitive simply because it does not concern the content of communications...In certain instances, even a single communications event can reveal as much of someone's personal circumstances as the interception of the communications content (take, for example, calling help-lines for victims of domestic violence).' Marie-Pierre Granger, Kristina Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection' [2014] *European Law Review* 6 835, 847.

²⁰ Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15) v Tom Watson and Others* [2016] ECLI:EU:C:2016:970, para 101.

²¹ Case C-311/18, *Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems* [2020] ECLI:EU:C:2020:559, para 178-185.

analysis of each type of test is warranted. Accordingly, the following two subsections deal with each type of test in turn.

6.1. Essence as an Abstract Test Part 1: General conditions tests

The first type of test consists of the delineation of general conditions under which the essence of rights might be identified: general conditions tests. Lenaerts, for example, proposes: ‘As an absolute limit on limitations...the essence of [the right to the protection of personal data] defines a sphere of liberty that must always remain free from interference’.²² Brkan is more specific and proposes a two part test considering: i) whether an interference makes it impossible to exercise the right, or even ‘undermines the sheer existence of [the] right’; and ii) whether ‘there are legitimate reasons in public interest that can override such an interference’.²³ Each of these test propositions constitutes a logical approach as to how the concept of essence could be understood and used in relation to Article 8. Such propositions, however, cannot fulfil the boundary conditions outlined in section 3 for a cogent and functionally distinct description of the concept as it is currently used in law in relation to Article 8. Problems emerge, in particular, in relation to the second and third boundary conditions.

In relation to the first boundary condition – the scalability condition: no issues are identifiable with such test propositions. Should one take such propositions as, *prima facie*, legitimate, these propositions would – significant jurisprudential change notwithstanding – provide approaches for the identification of violations of the essence of the right to the protection of personal data which are scalable across time and contexts. There is no reason, for example, that Lenaerts’ test proposition could not be used effectively over time. There is equally no reason that Brkan’s test proposition could not be used to identify violations of the essence of Article 8 across the full range of different social contexts in which personal data are processed. That such test propositions succeed in relation to this boundary condition should be no surprise. To be scalable across time and contexts is precisely what such abstract test propositions were designed to do.

In relation to the second boundary condition – the law and jurisprudence condition: unfortunately, such test propositions do not find explicit use or endorsement in any CJEU case law dealing with the right to the protection of personal data – or indeed in any CJEU case law dealing with the processing of personal data. This would not necessarily be a problem if support for one or more such propositions was directly implied in the reasoning of the Court in its use of the concept of essence in relation to Article 8. This, is not, however, the case. Indeed, Brkan, in her extensive efforts to identify the logic of the CJEU in dealing

²² Koen Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ [2019] German Law Journal 20(6) 779, 792 <<https://www.cambridge.org/core/journals/german-law-journal/article/limits-on-limitations-the-essence-of-fundamental-rights-in-the-eu/3071D1A8FB881031F8E3F6D5799959BD>> accessed 16.08.2021.

²³ Maja Brkan, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’ [2018] European Constitutional Law Review 14(2) 332, 363 <<https://www.cambridge.org/core/journals/european-constitutional-law-review/article/concept-of-essence-of-fundamental-rights-in-the-eu-legal-order-peeling-the-onion-to-its-core/004144565A2E946507E6B596A3E35346>> accessed 16.08.2021.

with the essence of the right to the protection of personal data, cannot identify any clear logical test used by the Court. Accordingly, she eventually states: ‘The Court’s case law on this issue can be depicted as a muddled maze where the final destination remains concealed due to reasoning that is full of meanders and unpredictable curves.’²⁴

In relation to the third boundary condition – the unique function condition: such test propositions encounter the problem that they cannot provide a functional distinction between the concept of essence and the concept of proportionality. In this regard, the complete range of social phenomena which could be considered as falling within the essence of Article 8 under such propositions could also be considered as constituting disproportionate interferences with the right. As Lenaerts even observes: ‘where a measure violates the essence of a fundamental right, such a measure automatically constitutes a violation of the principle of proportionality’.²⁵ It may be argued that such test propositions differentiate the concept of essence of the right from the concept of disproportionate interference via the logic involved in reaching the conclusion of illegitimacy, rather than in the final designation of illegitimacy itself. Yet, as Tridimas et. al. argue – albeit not specifically in relation to Article 8 – any consideration of essence under such tests must eventually result from a balancing of interests equivalent to a proportionality test.²⁶

6.2. Essence as an Abstract Test Part 2: Legal safeguards tests

The second type of test is more specific and consists of the delineation of the concept of essence in relation to a core set of legal safeguards: legal safeguards tests.²⁷ In relation to the right to the protection of personal data, this type of test rests on three connected

²⁴ 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] German Law Journal 20(6) 864, 865 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-rights-to-privacy-and-data-protection-finding-the-way-through-the-maze-of-the-cjeus-constitutional-reasoning/00621C26FA14CCD55AD0B4F4AD38ED09>> accessed 16.08.2021.

²⁵ Koen Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ [2019] German Law Journal 20(6) 779, 786 <<https://www.cambridge.org/core/journals/german-law-journal/article/limits-on-limitations-the-essence-of-fundamental-rights-in-the-eu/3071D1A8FB881031F8E3F6D5799959BD>> accessed 16.08.2021.

²⁶ Takis Tridimas, Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ [2019] German Law Journal 20(6) 794, 804 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-rights-an-unreliable-boundary/4D356C19F02F2C9CB5945C3C6310C2A8>> accessed 16.08.2021.

²⁷ The concept of legally defined safeguards being relevant to the delineation of the content of essence can also be argued as pertinent in relation to other fundamental rights. Consider, for example, the CJEU’s evaluation of the absence of an independent judiciary as constituting a breach of the essence of the Article 47 right to a fair trial. See, for further discussion: Kathleen Gutman, ‘The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?’ [2019] German Law Journal 20(6) 884, 899-900 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-right-to-an-effective-remedy-and-to-a-fair-trial-in-the-caselaw-of-the-court-of-justice-of-the-european-union-the-best-is-yet-to-come/B52CC437EF039A8A478C901B29A51C59>> accessed 16.08.2021.

assertions: i) there are certain legal conditions – safeguards – relevant in relation to Article 8 which constitute the essence of the right to the protection of personal data; ii) the abstract test for a violation of essence is then if one of these conditions is relevant in relation to a phenomenon but has been somehow been inadequately taken into account; and iii) there may, potentially, be the possibility for such an interference to be legitimate, but there must be particularly serious reasons for the interference – i.e. reasons over and above those which would suffice under an ordinary proportionality consideration.²⁸ As with general conditions tests, this proposition constitutes a logical approach as to how the concept of essence could be understood and used in relation to Article 8. Again, however, such test propositions cannot fulfil the boundary conditions outlined in section 4 for a cogent, functionally distinct, description of the concept as it is currently used in law in relation to Article 8. Problems emerge, in particular, in relation to the second boundary condition.

In relation to the first boundary condition – the scalability condition: no issues are identifiable with this form of test proposition. Again, should one take such test propositions as, *prima facie*, legitimate, these propositions would – significant jurisprudential change notwithstanding – provide an approach for the identification of violations of the essence of the right to the protection of personal data which are scalable across time and contexts. There is no reason, for example, that a test which used the relevance of data security safeguards, for example, as a criterion for the delineation of essence, could not be relevant across time. There is equally no reason that a test which used the purpose limitation principle as a criterion for the delineation of essence could not be relevant across the full range of different social contexts in which personal data are processed.

In relation to the second boundary condition – the law and jurisprudence condition: whilst this form of test does not find explicit use or endorsement in any CJEU case law dealing with the right to the protection of personal data, there are cases in which a very tight link is made between the relevance of the concept of essence in Article 8 and the presence or absence of certain safeguards – in particular *Opinion 1/2015* and *Digital Rights Ireland*.²⁹

²⁸ Porcedda uses her methodology to identify the essence of the right to the protection of personal data and identifies several legal safeguards as constituting aspects of the essence of the right. Maria Grazia Porcedda, 'On boundaries. Finding the essence of the right to the protection of personal data' in Ronald Leenes, Rosamunde Van Brakel, Paul De Hert and Serge Gutwirth (eds.) *Privacy and Data Protection: The Internet of Bodies* (Hart Publishing 2018) 277, 295-309.

²⁹ In *Opinion 1/2015*, the Court observed: 'As for the essence of the right to the protection of personal data, enshrined in Article 8 of the Charter, the envisaged agreement limits, in Article 3, the purposes for which PNR data may be processed and lays down, in Article 9, rules intended to ensure, inter alia, the security, confidentiality and integrity of that data, and to protect it against unlawful access and processing'. *Opinion 1/15* [2017] ECLI:EU:C:2017:592, para 150. In *Digital Rights Ireland*, the Court observed: 'Nor is that retention of data such as to adversely affect the essence of the fundamental right to the protection of personal data enshrined in Article 8 of the Charter, because Article 7 of Directive 2006/24 provides, in relation to data protection and data security, that, without prejudice to the provisions adopted pursuant to Directives 95/46 and 2002/58, certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks. According to those principles, Member States are to ensure that appropriate technical and organisational measures are

These cases support the argument for accepting this test as valid in light of the second boundary criterion. Unfortunately, this argument does not hold up under closer scrutiny. This is true for two reasons.³⁰ First, in the cases which superficially support the argument, there is another way of interpreting the use of safeguards in relation to essence: the safeguards themselves do not serve to delineate essence, but serve to change the nature of the underlying infringement such that essence is, or is not, relevant. A close look at the logic of the Court in these cases would suggest this second interpretation is more accurate. In these cases, the Court does not begin by considering the relevance of safeguards to the case and whether they have been adequately taken into account. Rather, the Court considers the presence of safeguards as justifications for why the concept of essence has not been infringed.³¹ Second, and more problematically, there are Article 8 cases in which the concept of essence is discussed quite separately from safeguards – for example in *Tele2Sverige*.³²

In relation to the third boundary condition – the unique function condition: as an abstract test for the delineation of illegitimate social phenomena, tests based around legal safeguards are subject to the same critique applicable to general conditions tests. The full range of phenomena which would be found illegitimate under this form of test could also be found illegitimate under a straightforward proportionality analysis and, accordingly, such tests do not serve to functionally distinguish essence from proportionality. However, in highlighting certain forms of infringements as, *ex ante*, particularly serious and then potentially allowing interference only on the basis of particularly weighty justifications, such tests could also be considered as auxiliary components of a broader proportionality test. In this case, there is an argument which could be made that such tests place the concept of essence in a clear hierarchical relationship with the concept of proportionality and serve the unique purpose of offering specific legal means for differentiating the severity of infringements of Article 8. This form of unique function will be discussed in more detail in subsequent sections.

In light of the analysis in the prior two sections, no cogent, functionally distinct, description for the concept of essence as it is currently used in law in relation to Article 8 can be

adopted against accidental or unlawful destruction, accidental loss or alteration of the data.’ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECLI:EU:C:2014:238, para 40.

³⁰ See also Brkan’s scepticism as to the logic of considering such safeguards as constituting the essence of Article 8. 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] German Law Journal 20(6) 864, 878-881 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-rights-to-privacy-and-data-protection-finding-the-way-through-the-maze-of-the-cjeus-constitutional-reasoning/00621C26FA14CCD55AD0B4F4AD38ED09>> accessed 16.08.2021.

³¹ See the statements from the two cases referred to in footnote 29.

³² In this case the Court observed that ‘such legislation does not permit retention of the content of a communication and is not, therefore, such as to affect adversely the essence of those rights’. Joined Cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15) v Tom Watson and Others* [2016] ECLI:EU:C:2016:970, para 101.

identified in terms an abstract test. Accordingly, in line with the methodology outlined in sections 3 and 4, the next step is: to consider whether such a description can be identified, which fulfils all three boundary conditions, at the third level of abstraction – in terms of the concept as an auxiliary specification of degrees of legitimacy or illegitimacy of social phenomena, supplemental to a primary definition via another system component.

7. Level of Abstraction 3: Essence as an auxiliary component

At this level of abstraction, I believe a cogent and functionally distinct description for the concept of essence as it is currently used in law in relation to Article 8 may be proposed. This description can be conveniently broken down into three parts: i) essence functions auxiliary to the primary definition of the illegitimacy of a data processing act via the concept of proportionality; ii) essence comes into play to describe disproportionate infringements which are particularly egregious in nature; iii) the substantive boundaries of the concept of essence, however, remain radically open – the specific set of data processing phenomena to which essence relates are yet to be fixed, the threshold of severity of infringement qualifying a breach of essence is yet to be fixed and even the conditions under which essence will be used or not are yet to be fixed. From this point forward, this proposed description will be referred to as: essence as a normative pivot. This description can fulfil each of the boundary conditions outlined in section 4, above.

In relation to the first boundary condition – the scalability condition: the description of essence as a normative pivot provides an approach – significant jurisprudential change notwithstanding – which can be used to describe the function of the concept of essence in relation to Article 8 which is scalable across time and context. The concept has no clear temporal limitations, which means its relevance and applicability need not diminish over time. Nor does the concept have any clear contextual limitations. This results from the fact that the concept does not relate directly to the delineation of illegitimate social phenomenon, but rather to the differentiation of relative degrees of illegitimacy. Accordingly, the definition can, in principle, encompass uses of the concept of essence in relation to Article 8 in relation to all types of acts of personal data processing across all social contexts – even acts relating to contexts which have, hitherto in jurisprudence, been completely unassociated with the concept of essence in relation to Article 8.³³

In relation to the second boundary condition – the law and jurisprudence condition: the concept of essence as a normative pivot fits within the framing provided by Article 52 of the CFREU. It is true that the concept of essence is discussed separately from the concept of proportionality in Article 52. It is also true, however, that the relationship between the concepts is not made explicit in Article 52 and that the wording of the Article does not

³³ Petkova and Boehm, for example, offer a case for considering certain types of profiling in the employment context as potentially violating the essence of the right to the protection of personal data. Such a context has not been considered in CJEU case law to date in relation to the essence of Article 8. Such a context could, however, be encompassed under the proposed description of essence as a normative pivot. See: Bilyana Petkova, Franziska Boehm, 'Profiling and the Essence of the Right to Data Protection' in Evan Selinger, Jules Polonetsky and Omer Tene (eds.) *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018) 285, 296-300.

preclude understanding essence as functioning auxiliary to proportionality. The concept of essence as a normative pivot is also commensurate with the use of the concept of essence in relation to Article 8 in CJEU case law. The Court's case law provides no explicit endorsement of the proposed description in relation to Article 8. There is, however, no relevant case law which cannot be accurately subsumed within the definition.³⁴ In turn, certain case law seems to offer indirect recognition for the proposed description. For example, in the *Schrems* case – concerning personal data processing, albeit with specific reference to the Article 7 right to privacy – the CJEU considered questions as to the violation of essence as subsequent to – i.e., auxiliary to – questions of the violation of proportionality and then used the concept of essence to describe egregious violations of fundamental rights.³⁵

In relation to the third boundary condition – the unique function condition: the description of essence as a normative pivot serves to distinguish the concept of essence in relation to Article 8 from all other functional components of the legal scheme of Article 8, including from proportionality. It is true the concept paints essence as describing a sub-class of illegitimate personal data processing operations which already qualify as disproportionate. Such a conceptualisation thus serves to situate the function of essence as nested within the overarching function of proportionality. Such an approach, however, does not serve to equivocate the two concepts any more than the description of the function of individual engine parts serves to equivocate the function of those parts with the function of the engine as a whole. Rather, such an approach simply clarifies a specific hierarchical relationship which exists between the two differentiated concepts.

This section elaborated a proposal for a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8: the concept of essence as a normative pivot. This section also showed how this conceptualisation of essence can fulfil each of the three key boundary conditions it was argued that any such description should fulfil. There are, however, still objections which might be raised against

³⁴ Consider, for example, the CJEU's use of the concept of essence in relation to Article 8 in *Opinion 1/15*. The CJEU state: 'As for the essence of the right to the protection of personal data, enshrined in Article 8 of the Charter, the envisaged agreement limits, in Article 3, the purposes for which PNR data may be processed and lays down, in Article 9, rules intended to ensure, inter alia, the security, confidentiality and integrity of that data, and to protect it against unlawful access and processing. In those circumstances, the interferences which the envisaged agreement entails are capable of being justified by an objective of general interest of the European Union and are not liable adversely to affect the essence of the fundamental rights enshrined in [Article] 8 of the Charter.' There is no conclusion to be drawn from this clarification that the concept of essence cannot be regarded as a sub-delineation of proportionality reserved for the categorisation of particularly egregious rights infringements which follow from the processing of personal data for PNR without adequate safeguards. *Opinion 1/15* [2017] ECLI:EU:C:2017:592, para 151.

³⁵ Case C-362/14, *Maximilian Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650, paras 92-94.

the proposed description. Four such objections are particularly worthy of discussion. In the following sections, these objections are elaborated and addressed.³⁶

8. Objection 1: Essence as a normative pivot and doctrinal inaccuracy

First, the proposed description of essence as a normative pivot might be criticised as doctrinally inaccurate. The analysis conducted to arrive at the description focused heavily on the logic and case law of Article 8. However, the right to the protection of personal data sits within a broader legal framework in which the concept of essence appears in multiple other contexts and roles. There is no indication in the CFREU that the concept of essence should necessarily be interpreted in a *sui generis* manner in relation to Article 8. Accordingly, it stands to reason that other uses of the concept of essence, in other relevant legal contexts, may also be given legal weight in terms of how the concept should be understood in relation to Article 8. There are, however, doctrinal narratives as to the function of the concept of essence, which can be constructed from other relevant use contexts, which cast doubt on the accuracy of the proposed description of essence as a normative pivot in relation to Article 8. Do such narratives then serve to refute the logic of such a definition? I do not believe so.

Two such narratives deserve discussion. Both narratives assert that the concept of essence can be considered as a concept distinct from proportionality and as relating to, as Brkan puts it, an: ‘inalienable core [of fundamental rights]’.³⁷ In this conceptualisation, the concept of essence describes an aspect of fundamental rights which can never, under any circumstances, be interfered with. The first narrative highlights that the concept of essence in the CFREU emerges on the back of comparable concepts in national constitutional law and that these national concepts can be read to function with an ‘inalienable core’ approach. One example of such an approach is argued to be provided by the German constitutional tradition, from which the concept of essence initially emerged.³⁸ The second narrative highlights that there is EU fundamental rights jurisprudence, which explicitly

³⁶ Elaborations and responses to possible normative criticisms of the proposed description of essence as a normative pivot are not offered. The description is intended to elaborate a cogent, functionally distinct, description for the concept of essence as it is currently used in law in relation to Article 8. Accordingly, the proposed description has not been put forward as a normatively ideal description and thus need not be defended against normative criticism. Such criticisms could naturally be directed at the fact the Court employs the concept of essence in this manner, however.

³⁷ 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] German Law Journal 20(6) 864, 866 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-rights-to-privacy-and-data-protection-finding-the-way-through-the-maze-of-the-cjeus-constitutional-reasoning/00621C26FA14CCD55AD0B4F4AD38ED09>> accessed 16.08.2021.

³⁸ ‘In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden’. Grundgesetz für die Bundesrepublik Deutschland 1949 (last updated 2020), Article 19(2). See also Sébastien Van Drooghenbroeck, Cecilia Rizcallah, ‘The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?’ [2019] German Law Journal 20(6) 904, 907 <<https://www.cambridge.org/core/journals/german-law-journal/article/echr-and-the-essence-of-fundamental-rights-searching-for-sugar-in-hot-milk/594CA9F2A83DF4B52A1FB6B638339FB4>> accessed 16.08.2021.

recognises the concept of essence as representing an ‘inalienable core’ of fundamental rights. One example of such jurisprudence is the Opinion of AG Cruz Villalón in the case of *Delvigne*³⁹ – in the Opinion, the AG specifically considered the concept of essence as representing a conceptual sphere in relation to which no limitation could be considered legitimate, and even attempted to outline certain substantive features of essence in relation to the right to vote under Article 39(2) CFREU.

Despite the legitimacy of these competing narratives, however, both are subject to challenge. In relation to the concept of essence in Member State constitutional traditions, Tridimas et. al. observe contradictions in national case law which undermine the assertion that the concept is either completely conceptually separate from proportionality or relates to an inalienable core of fundamental rights. They highlight, for example, German case law in which the concept of essence was referenced as violated, but in which a proportionality-like balancing exercise was conducted in reaching this conclusion.⁴⁰ In relation to EU jurisprudence, whilst there are indeed cases in which the narrative of essence as representing an ‘inalienable core’ is affirmed, there are other cases in which this narrative is not affirmed. Tridimas et. al. provide an analysis of EU case law engaging the concept of essence. In this analysis, they poignantly observe that, overall, the CJEU’s engagement with the concept of essence has: ‘not been...enlightening either as regards the meaning of [essence] or its interaction with the other conditions of Article 52(1).’⁴¹

³⁹ Opinion of Advocate General Cruz Villalón, Case C-650/13, *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* [2015] ECLI:EU:C:2015:363 paras 115–123. The AG explicitly observed: ‘In the context of the Charter, respect for the essence of the rights recognised therein acts as an absolute, insuperable limit...In other words, failure to respect the essence of the fundamental right in question leads to that right becoming ‘unrecognisable as such’ so that it will not then be possible to refer to a ‘limitation’ of the exercise of the right but rather, purely and simply, to the ‘abolition’ of the right.’ Para 115. Somewhat confusingly, however, in the same Opinion, the AG then appears to deviate from the above position and to conceptualise the concept of essence as auxiliary to the concept of proportionality: ‘In short, and on all the foregoing grounds, it will fall to the referring court to determine definitively whether the possibility of review available under national law proves, in practice, to be sufficiently accessible to prevent the deprivation of the right to vote from becoming irrevocably permanent, with the result that it is disproportionate and, in short, infringes the essence of the right.’ Para 123.

⁴⁰ Bundesverfassungsgericht [1967] *Neue Juristische Wochenschrift* 1795; Takis Tridimas, Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ [2019] *German Law Journal* 20(6) 794, 804 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-rights-an-unreliable-boundary/4D356C19F02F2C9CB5945C3C6310C2A8>> accessed 16.08.2021.

⁴¹ Takis Tridimas, Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ [2019] *German Law Journal* 20(6) 794, 806 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-rights-an-unreliable-boundary/4D356C19F02F2C9CB5945C3C6310C2A8>> accessed 16.08.2021. Scarcello, however provides an analysis of selected cases concerning essence in which he suggests that the CJEU does tend – although not completely or without difficulty – to favour an ‘absolute core’ position. Orlando Scarcello, ‘Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task?’ [2020] *European Constitutional Law Review* 16 647, 661–667 <<https://www.cambridge.org/core/journals/european-constitutional-law-review/article/preserving-the-essence-of-fundamental-rights-under-article-52-1-of-the-charter-a-sisyphean-task/B6CCBE08347B15088D160ED472A62E3A>> accessed 16.08.2021.

Given that neither of these competing narratives is supported by irrefutable evidence, it is hard to assert that either narrative should be taken as representative of irrefutable truth regarding the function of the concept of essence in EU fundamental rights law. In this regard, it is thus equally hard to assert that either narrative should be taken as representative of irrefutable truth regarding the function of the concept of essence in relation to the right to the protection of personal data in Article 8. This is not to say that the concept of essence supported by these narratives cannot, with subsequent jurisprudential clarification, become a dominant reference point for the concept of essence in EU fundamental rights law – or even in relation to Article 8. This is not yet the case, however, and there is no guarantee this will ever be the case. As a result, there is no reason the existence of these narratives should be taken as proof that the proposed description of essence as a normative pivot in relation to Article 8 should be seen as doctrinally inaccurate.

9. Objection 2: Essence as a normative pivot and alternative valid descriptions

Second, the proposed description of essence as a normative pivot might be objected to based on arguments relating to the existence and superiority of other valid cogent and functionally distinct descriptions of the concept of essence as it is currently used in law in relation to Article 8. The methodology behind the identification of the description of essence as a normative pivot included a range of conditions. It might be argued that these conditions – in particular the boundary conditions outlined in section 4 – are too limiting, and that an alteration or relaxation of certain conditions may: i) be methodologically legitimate; and ii) allow the identification of alternative valid descriptions.

One set of such alternative methodological conditions is particularly worthy of mention: i) a straightforward reading of the structure and wording of Article 52(1), indicating essence is an additional element to proportionality, could be given more weight; ii) there could be a relaxation of the need for complete correspondence between the limited and still newly emergent case law and a description, in light of the structure and wording of Article 52; and iii) the implications of conceptualisations of the concept of essence from other areas of case law – beyond Article 8 – could be taken into account in identifying a description. Accepting the legitimacy of such alternative methodological conditions may indeed support the recognition of alternative valid descriptions, including, for example, descriptions based on legal safeguards tests – see section 6.2. Do arguments concerning alternative valid descriptions then undermine the legitimacy of the concept of essence as a normative pivot? I do not believe so.

In the first instance, it is not easy to identify alternative methodological conditions which both support alternative descriptions and are not open to challenge. The methodological conditions used to identify the concept of essence as a normative pivot build on doctrinally sound approaches for discerning valid descriptions of components of EU law – for example the formulation of statutes must be taken into account and relevant case-law should be considered. Legitimate methodological deviations from these conditions are certainly possible, but require justification. It is hard, however, to find such justifications for alternative methodological conditions which would support alternative descriptions of the concept of essence in relation to Article 8. An objection to the legitimacy of the specific set

of alternative methodological conditions outlined in the above paragraph, for example, might be put forward concerning the proposition that there need not be complete consistency between a valid description and relevant case-law. It is true that the case law dealing with the concept of essence and Article 8 is both limited and still taking shape. This fact, however, also serves as a reason as to why the full range of statements in relevant cases ought to be considered. The fact that there is one logical way – amongst others – in which the wording and structure of Article 52(1) might be understood, does not seem to provide adequate justification to exclude relevant jurisprudence. One would then find oneself in the methodologically awkward position of necessarily excluding relevant legal information to validate a description.

In turn, even if the legitimacy of sets of alternative methodological conditions and the alternative descriptions they support were, *prima facie*, accepted, this would not necessarily exclude the simultaneous validity of the concept of essence as a normative pivot. Validity would only be in jeopardy if a set of alternative methodological conditions themselves excluded the concept of essence as a normative pivot. Whilst it is possible to speculate as to the possibility of alternative methodological conditions which would allow alternative valid descriptions to emerge, there is no reason to presume any such conditions should also necessarily exclude the validity of the concept of essence as a normative pivot. The validity of the concept, for example, is not excluded by the specific alternative methodological conditions outlined in the second paragraph in this section.⁴² If there is no exclusion, the situation would simply be that the concept of essence as a normative pivot

⁴² None of the three alternative conditions serve to exclude the validity of the concept of essence as a normative pivot. In relation to the first alternative condition, Article 52(1) indeed has a structure and wording which splits essence and proportionality in a way which means conceptualising essence as something supplemental to proportionality seems logical. The Article, however, also supports a reading which allows essence to be conceptualised as functioning auxiliary to the concept of proportionality. Whilst one might argue that the first reading is the more straightforward, this does not mean this is the reading which must be accepted to the exclusion of all others – see also the discussion in section 7. In relation to the second alternative condition, a relaxation of the conditions under which a description of the concept of essence must correspond to existing case law does not exclude the validity of any description – including the concept of essence as a normative pivot – which does correspond to all case law. In relation to the third alternative condition, a consideration of interpretations of the concept of essence from other areas of case law reveals – as discussed in previous sections – a broad range of interpretations of the concept as well as differing interpretations between different areas of law. The recent issue of the German Law Journal devoted to the concept of essence contains several articles – many of which have been cited previously in this piece – on the meaning of essence in different areas of EU fundamental rights law. Each of these analyses displays differences in the way that the concept of essence has been understood and used. For a summary see: Mark Dawson, Orla Lynsky, Elise Muir, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' [2019] German Law Journal 20(6) 763, 772-774 <<https://www.cambridge.org/core/journals/german-law-journal/article/what-is-the-added-value-of-the-concept-of-the-essence-of-eu-fundamental-rights/24933C5C655BA51B2FDA5E28A1D6889>> accessed 01.12.2021. This lack of harmony across other areas of case law both raises the question as to when, and the degree to which, conceptualisations from other areas of law might be legitimately imported to aid in identifying descriptions of the concept in relation to Article 8, as well as leaves the conceptual space open to recognise the validity of the concept of essence as a normative pivot in relation to Article 8.

would exist alongside another – or multiple other – plausible valid descriptions. That there might be multiple plausible interpretations of a single legal concept is neither impossible, nor even necessarily problematic – indeed, it is in such spaces of uncertainty that the development of law may take place.⁴³ In such a case, a further set of criteria would then be needed to decide which valid description was superior – it would likely depend on the criteria used and their context of application as to whether the concept of essence as a normative pivot emerged as optimal or not.

I should highlight that the above observations are not intended to suggest that other conceptualisations of essence in relation to Article 8, which may be proximate to current law, but which cannot completely fulfil one or another boundary condition to qualify as valid cogent, functionally distinct, descriptions of the concept of essence as it is currently used in law, are without utility. Rather, the utility of such conceptualisations might simply be better considered from a normative perspective – as opposed to a descriptive perspective. In this regard, there is nothing speaking against the construction of arguments highlighting the normative utility of the adoption of such conceptualisations, such as those revolving around legal safeguards, by the Court. For example, there is no reason that arguments could not be made that the adoption of a conceptualisation based around legal safeguards tests would provide harmony to the concept of essence and would provide a superior base for the future development of Article 8. Nor is there any reason that the Court could not recognise the value of such argumentation and accordingly orient its subsequent use of the concept of essence in relation to Article 8. Indeed, given the proximity of such conceptualisations to current law, the degree of jurisprudential adaptation which would be required to secure their elevation to the status of valid law would likely be minimal.

10. Objection 3: Essence as a normative pivot as conceptually irrelevant

Third, the proposed description of essence as a normative pivot could be criticised as – even if technically accurate – depicting a concept which is conceptually irrelevant. Husovec, amongst others, highlights two different general theories describing the function of the concept of essence in EU fundamental rights law.⁴⁴ First, the absolutist theory, which asserts that essence relates to the absolute core of a right which cannot be infringed under any circumstances – also discussed in section 8. Second, the relative theory, which considers essence, as Tridimas et. al. put it, as: ‘not immune from affliction, but any proportionality inquiry must take on board the heightened respect that the core element of

⁴³ Naturally, however, this would imply an uncertainty in law which could be clarified via interpretation. See, for example, the discussion in: Niklas Luhmann, *Law as a Social System* (Klaus A. Ziegert tr, Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert eds, Oxford University Press 2009) 305-356.

⁴⁴ Martin Husovec, ‘The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter’ [2019] 20 840, 840-841 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-intellectual-property-rights-under-article-172-of-the-eu-charter/8C7CCD762A71634A6011002D3E32EDC4>> accessed 16.08.2021.

a right deserves.⁴⁵ The proposed description of essence as a normative pivot shares much with the relative theory. Descriptions for essence which correspond to the relative theory, however, have faced the criticism that, as Dawson et. al. put it: '[they add] little to the traditional proportionality test whereby the degree of intrusion into a right is an inherent part of the analysis.'⁴⁶ Is it then the case that the conceptualisation of essence as a normative pivot depicts a concept which adds nothing to the proportionality test and is thus conceptually irrelevant? I do not believe so.

In the first instance, I would argue that the concept of essence as a normative pivot adds granularity to Article 8 proportionality analyses and thus has clear conceptual utility. None would suggest that all infringements of the right to the protection of personal data are of the same level of severity. This recognition is reflected in CJEU case law relating to Article 8. For example, the recent *La Quadrature du Net*⁴⁷ case includes multiple delineations of degrees of severity of different types of infringement. Such delineations are not, however, merely jurisprudential window dressing. They play a key role in facilitating the ability of the legal scheme to subtly grasp and describe its regulatory target – and potentially, to offer relevant and proportionate action points in relation to this target accordingly. In this regard, the concept of essence as a normative pivot provides a doctrinal tool for communicating such delineations and must be seen to have conceptual utility.

In turn, by providing a doctrinal reference point for the separation of degrees of severity of illegitimate infringements of Article 8, the concept of essence as a normative pivot has downstream utility in channelling the behaviour of stakeholders involved in personal data processing. In the first instance, in any case in which the concept is suggested to have been violated, this will constitute a clear normative assertion by the Court that some act of personal data processing constitutes an egregious infringement of Article 8. This will shape the practical reactions to the decision by stakeholders directly implicated in the case in relation to personal data processing. In turn, each Article 8 case in which the concept is relied upon, will serve to further clarify the range of types of acts of data processing which may be considered as representing egregious violations of Article 8. Such systemic clarification will, in turn, channel all implicated – both directly and indirectly – parties' subsequent personal data processing design choices.

⁴⁵ Takis Tridimas, Giulia Gentile, 'The Essence of Rights: An Unreliable Boundary?' [2019] German Law Journal 20(6) 794, 803 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-rights-an-unreliable-boundary/4D9356C19F02F2C9CB5945C3C6310C2A8>> accessed 16.08.2021.

⁴⁶ Mark Dawson, Orla Lynsky, Elise Muir, 'What is the Added Value of the Concept of the "Essence" of EU Fundamental Rights?' [2019] German Law Journal 20(6) 763, 767 <<https://www.cambridge.org/core/journals/german-law-journal/article/what-is-the-added-value-of-the-concept-of-the-essence-of-eu-fundamental-rights/249333C5C655BA51B2FDBA5E28A1D6889>> accessed 16.08.2021.

⁴⁷ See the multiple different forms of terminology used to differentiate the relative degrees of severity of the different forms of national security, public safety and crime prevention data processing operations addressed in the case. Joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v Premier minister and Others, Ordre des barreaux francophones et germanophone and Others v Conseil des ministres* [2020] ECLI:EU:C:2020:791, paras 81-228.

The CJEU might, of course, use other terminology to serve the same function. Indeed, the CJEU has already used the concept of ‘particularly serious’ to distinguish the severity of certain problematic acts of personal data processing operations from less problematic acts – for example in the recent *Privacy International* case.⁴⁸ The existence of such alternative terminology, however, does not, by itself, extinguish the utility of the role of the concept of essence as a normative pivot. In turn, use of such alternative terminology has two drawbacks in comparison to the use of the concept of essence. First, most alternative terminology which has been used relies on emphasis words – such as ‘particularly’. These emphasis words have multiple other uses in both vernacular and legal contexts. Such terminology is not ideal to stably convey specific connotations of the severity of Article 8 infringements across different cases and contexts. Second, and more importantly, such alternative terminology lacks the legal pedigree bestowed upon the concept of essence by Article 52 of the CFREU.

11. Objection 4: Essence as a normative pivot as substantively incomplete

Finally, the proposed description could be criticised – even if technically accurate and conceptually useful – as depicting a concept which remains substantively vague, and is therefore, incomplete. The assertion of substantive vagueness is accurate. Recall the observation, in section 7, that the specific social phenomena to which the concept of essence as a normative pivot relates are yet to be fixed, the criteria determining the threshold of severity of use of the concept are yet to be fixed, and even the conditions under which the concept will be used or not – when it is clear that it might apply – are not fixed. Is it then the case that such substantive vagueness renders the proposed description incomplete and problematic? I do not believe so.

In the first instance, the lack of clarity as to the substance of the concept of essence as a normative pivot does not manifest as a result of author choice between plausible alternative possible descriptions of essence in relation to Article 8. Rather, the lack of clarity manifests, as discussed in section 5, from the indeterminate nature of current CJEU case law on essence in relation to Article 8. Recall Brkan’s observation that: ‘The Court’s case law on this issue can be depicted as a muddled maze where the final destination remains concealed due to reasoning that is full of meanders and unpredictable curves.’⁴⁹ It is true that this lack of substantive clarity can be criticised from a normative perspective. This lack of clarity does not, however, suggest that the proposed definition of essence as a normative pivot depicts a concept which is incomplete in light of the current state of the law.

⁴⁸ Case C-623/17, *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* [2020] ECLI:EU:C:2020:790, para 71. Although significant questions do remain as to the relationship between such terms and the concept of essence in relation to Article 8.

⁴⁹ 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] German Law Journal 20(6) 864, 865 <<https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-rights-to-privacy-and-data-protection-finding-the-way-through-the-maze-of-the-cjeus-constitutional-reasoning/00621C26FA14CCD55AD0B4F4AD38ED09>> accessed 16.08.2021.

In turn, even a substantially vague concept of essence need not be considered conceptually or practically problematic. There is considerable uncertainty in the legal environment in which the concept of essence in relation to Article 8 functions: the function of Article 8 in the EU legal order remains uncertain; the range of acts of personal data processing Article 8 should serve to prohibit remains uncertain; and the normative ranking of such illegitimate acts remains uncertain.⁵⁰ In such an uncertain legal context, a substantively open and flexible concept of essence can be argued to be valuable in allowing the Court to: i) highlight varied types of personal data processing acts, for varied reasons, as constituting egregious disproportionate infringements of Article 8; and ii) to do so without jeopardising the internal consistency of EU fundamental rights law. In this regard, Christofi et. al. argue that flexibility in the conceptualisation of essence in relation to Article 8 is valuable in providing: 'a principle [which enables] different, nuanced outcomes depending on the facts of a case.'⁵¹

Equally, it should be noted that any conceptualisation of essence which lacks substantive clarity now, need not necessarily lack substantive clarity in future. Flexibility in legal concepts provides the space for subsequent clarification and specification through jurisprudence. In this regard, the quantity of jurisprudence concerning Article 8 is likely to grow over time. This jurisprudence will concretise the legal scope and function of the right to the protection of personal data within the EU fundamental rights system. This jurisprudence will also clarify the range of types of acts of personal data processing which should be regarded as constituting disproportionate infringements of Article 8 as well as how such disproportionate infringements should be classified in terms of severity. It seems likely that at least some of this case law will engage the concept of essence. Accordingly, there is no reason any concept of essence which is currently substantially vague cannot become more focussed in future.

12. Conclusion

The concept of the essence of the Article 8 right to the protection of personal data has been the subject of much consideration over the past few years. The concept has been used in substantive analyses of the bounds of legitimate personal data processing and has been a subject of study in its own right.

Many of the scholars who have relied on the concept as an analytical tool, or who have studied the concept in its own right, however, have highlighted the difficulties in elaborating a cogent, functionally distinct, description of the concept as it is currently used in law. This article aimed to address this issue.

In this regard, the article provided a novel methodology for the identification of such a description. This methodology consisted of: i) a general structured approach for the

⁵⁰ There are several works dealing with the tensions and uncertainties inherent in the Article 8 right to the protection of personal data. See, for example: Orla Lynsky, *The Foundations of EU Data Protection Law* (Oxford University Press 2015) 14-254.

⁵¹ Athena Christofi, Valerie Verdoodt, *Exploring the essence of the right to data protection and smart cities* (CITIP Working Paper, 2019) 24 <<https://spectreproject.be/output/downloads-1/exploring-the-essence-of-the-right-to-data-protection-and-smart-cities>> accessed 16.08.2021.

identification of the function of individual components of a legal system; and ii) a set of applicable boundary conditions which any cogent, functionally distinct, description of the concept of essence in relation to Article 8 should fulfil.

Relying on this methodology, the article then proposed a cogent and functionally distinct description of the concept of essence as it is currently used in law in relation to Article 8: essence as a normative pivot. In this description, the concept of essence functions as auxiliary to the concept of proportionality to describe particularly egregious infringements of the right to the protection of personal data. The substantive content of this concept remains, however, radically uncertain.

In conclusion, the article highlighted, and responded to, four critiques which might be raised against the proposed description. These critiques concerned: i) the doctrinal accuracy of the description; ii) the existence of alternative valid descriptions of the concept of essence in relation to Article 8; iii) the conceptual utility of the description within the proportionality analysis; and iv) the substantive completeness of the description.

Each critique was shown to be unfounded. In terms of doctrinal accuracy, there is no clear reason to doubt the description's legitimacy. In terms of alternative valid descriptions, there is neither definitive indication that such descriptions might be identified nor that such descriptions would necessarily exclude the validity of the concept of essence as a normative pivot. In terms of conceptual utility, the description elaborates a concept with value in facilitating the communication of different degrees of severity of disproportionate infringements of Article 8. In terms of substantive completeness, the description remains vague not due to author choice, but because of indeterminate case law.