

A SPECIAL REGARD: THE COURT OF JUSTICE AND THE FUNDAMENTAL RIGHTS TO PRIVACY AND DATA PROTECTION

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I. Introduction

The frequency with which the Court of Justice of the European Union (CJEU) rules on the interpretations of the rights to privacy and data protection in European Union (EU) law is constantly accelerating. The increasing case-load can certainly be attributed to the contemporary relevance of these issues in a data-driven society which leads to more cases being referred to the CJEU. However, contrary to earlier case-law, which had a rather limited effect, the recent CJEU decisions have gained prominence for their principle contribution to EU law. In 2014, the Court issued a landmark ruling in the case *Digital Rights Ireland and Seitlinger v Minister for Communications, Marine and Natural Resources* which catapulted EU citizens’ privacy and data protection rights from the margins of EU law to the center stage.¹ Already in 2015, in the case *Maximillian Schrems v Data Protection Commissioner*, the Court have had another occasion to review EU legislation for its compliance with the rights to privacy and data protection under the EU Charter.² The invalidation of the EU-U.S. Safe Harbour agreement by the Court has been stirring a global resonance in addition to receiving ample and arguably controversial coverage in international news.³

This contribution looks at how the fundamental rights to privacy and data protection are protected in the EU legal order. It primarily assesses the CJEU’s case-law’s trajectory in this field as well as the impact of its decision practice in EU law. Hereby I discuss whether the CJEU holds a particular regard for the rights to privacy and data protection since the Charter

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¹ C-293/12 and C-594/12, judgement of 8 April 2014, [2014] E.C.R. I-238.

² C-362/14, judgement of 6 October 2015, ECLI:EU:C:2015:650.

³ Cf. *Ahmed/ Waters/ Robinson*, “Data protection: No safe harbour”, FT.com, 9 October 2015, at <<http://www.ft.com/intl/cms/s/0/f2ecc7ca-6e65-11e5-aca9-d87542bf8673.html#axzz3we4BwC1X>> (accessed 25 December 2015); *Drozdiak/ Schechner*, “EU Court Says Data-Transfer Pact With U.S. Violates Privacy”, The Wall Street Journal, 6 October 2015, at <<http://www.wsj.com/articles/eu-court-strikes-down-trans-atlantic-safe-harbor-data-transfer-pact-1444121361>> (accessed 25 December 2015); *Scott*, “Data Transfer Pact Between U.S. and Europe Is Ruled Invalid”, New York Times 6 October 2015, at <http://www.nytimes.com/2015/10/07/technology/european-union-us-data-collection.html?_r=0> (accessed 25 December 2015).

of Fundamental Rights of the EU (CFR)⁴ was accorded binding legal value in 2009.⁵ Particular focus is given to the discussion of the two judgements in 2014 and 2015 cited above with which the Court underscored its determination to effectively protect these fundamental rights in the scope of EU law.

This chapter proceeds as follows: the next section will provide some background on the protection of fundamental rights in the EU legal order, in particular the rights to the protection of private life and personal data. It will briefly cover relevant EU primary and secondary law and the recognition of fundamental rights before and after the Charter came into effect. The third section unravels arguments supporting the rising relevance of the rights to the protection of privacy and personal data in the Court's decision-making practice. The last section concisely discusses the two rulings in which the Court introduced and applied a human-rights based judicial review of EU legislative acts which seriously interfere with individuals' fundamental rights to privacy and data protection. This will be followed by the conclusions.

II. Fundamental rights protection in the EU legal order

Owing to the differences in how fundamental rights are recognized in EU law the account distinguishes between the period before and after the CFR came into existence. In the pre-Charter period, the treaties did not provide for the protection of fundamental rights until 1997. The CJEU, through its case-law, introduced that “the respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court.”⁶ While being inspired by the constitutional traditions common to the Member States, the Court interpreted fundamental rights as part of the Community legal order.⁷ In 1997, the Treaty of Amsterdam introduced Art. 6(2) of the Treaty on European Union (TEU) which provided that

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.⁸

In 2000, the EU institutions officially codified the fundamental rights and freedoms of EU citizens in the CFR.⁹ The Charter consolidates fundamental rights and freedoms, as well as principles, which are recognized in the case-law of the CJEU, the European Convention on Human Rights (ECHR)¹⁰ and the common constitutional traditions of EU member states. From 2000 to 2009, the Charter had not been legally binding until Article 6(1) of the Treaty on European Union (Treaty of Lisbon) incorporated the Charter into EU primary law. The entry into force of the CFR marks an important development in EU law which is now fully

⁴ Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02.

⁵ Treaty on European Union (consolidated version, Lisbon Treaty), Art. 6(1).

⁶ CJEU, Case 11/70 (*Internationale Handelsgesellschaft*) [1970] E.C.R. 1125, §4; *Craig/ de Burca*, EU Law: Text Cases and Materials, Sixth Edition, Oxford, 2015.

⁷ CJEU, case C-119/12 (*Josef Probst v mr.nexnet GmbH*), judgment of 22 November 2012

⁸ Treaty on European Union (Treaty of Amsterdam), Art. 6(2).

⁹ *Ibid.* (fn 6).

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

grounded in its own fundamental rights system. The Charter provisions are addressed to the EU institutions and to the Member States when they implement EU law (Art. 51(1) CFR).

Out of the classical fundamental rights Art. 7 CFR guarantees the right to respect for private and family life which is closely modelled after Art. 8 of the ECHR.¹¹ Despite its title and wording this right is commonly referred to as the right to privacy.¹²

Article 7
Respect for private and family life

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

In the pre-Charter era, the protection of personal data was held to form part of the right to privacy in line with how the European Court of Human Rights in Strasbourg interprets Art. 8 ECHR to date.¹³ With the Charter a new fundamental right was introduced – the right to the protection of personal data (Art. 8 CFR) -- which was derived from EU law and the Council of Europe’s legal system.¹⁴ A particularly striking analogy of the ancestry of data protection to the right to privacy is that of the relationship between Zeus and Athena who after having appeared from Zeus’ head is thereafter regarded as his daughter.¹⁵ The right to the protection of personal data is a 'third generation' fundamental right, elevating data protection into a self-standing right under the Charter.¹⁶ Its substance, however, does not betray its regulatory origins:

Article 8
Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

The second most relevant development has been the introduction by the Lisbon Treaty of a new article on data protection in EU primary law. Article 16(1) of the Treaty on the Functioning of the European Union (TFEU) guarantees everyone’s right to the protection of

¹¹ The right to respect for private and family life also receives protection via Art. 8 of the European Convention on Human Rights (ECHR), Convention for the Protection of Human Rights and Fundamental Freedoms which is binding upon all member states of the Council of Europe.

¹² *González Fuster/Gellert*, “The fundamental right of data protection in the European Union: in search of an uncharted right”, *International Review of Law, Computers & Technology* 26:1, pp. 73-82, p. 74 and in Fn. 1.

¹³ *Dito*.

¹⁴ Art. 8 ECHR and the Convention (No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.I.1981. *Bernsdorff*, “Artikel 8”, in *Charta der Grundrechte der Europäischen Union* (Meyer (Verf.), Nomos: 2008), p. 216f.

¹⁵ *Tzanou*, ‘Data Protection as a Fundamental Right next to Privacy? “Reconstructing” a Not so New Right’ 2013 *International Data Privacy Law*, p. 88.

¹⁶ Art. 7 and 8 CFR; cf. *González Fuster /Gellert*, *International Review of Law, Computers & Technology* 26:1, pp. 73-82.

their personal data. It almost exactly mirrors the wording of Art. 8(1) CFR vesting additional meaning to this right. The contribution of Art. 16(1) TFEU to EU law has yet to be appraised, however, some argue that the right to the protection of personal data could have direct effect.¹⁷ Were this the case, individuals could invoke Art. 16(1) TFEU directly before national courts against a member state measure within the scope of EU law.

EU secondary law provides a regulatory framework for the protection of privacy with respect to the processing of personal data. Today, the most relevant legislative instruments are the Data Protection Directive (95/46/EC)¹⁸ and the sector-specific e-Privacy Directive (2002/58/EC).¹⁹ As a product of its time, the recitals to the 1995 Data Protection Directive still invoke the right to privacy as a general principle of Community law that flows from the constitution and laws of the member states and the ECHR. The e-Privacy Directive which was passed after the formal proclamation of the CFR directly relies on Art. 7 and 8 CFR for its *ratio legis*. They are both harmonization directives based on the EU competence to approximate member states' law (Art. 100a TFEU). The processing of personal data by EU institutions and bodies, however, is governed by a separate Regulation ((EC) No 45/2001).²⁰

For the sake of completeness, the EU legislator is presently in the process to finalize a comprehensive reform of data protection rules in the EU based on its newly consolidated competence in Art. 16(2) TFEU. Two legislative packages are close to be adopted. First, a proposal for a General Data Protection Regulation, which - once adopted - would replace the 1995 Directive, and as an EU regulation will be binding and directly applicable in the member states (Art. 288 TFEU).²¹ Second, a proposal for a new Directive on data protection and the free movement of such data in the field of law enforcement will be adopted which does not have yet an equivalent today.²² While these, and Art. 16 TFEU, are certainly important developments this Chapter is mainly concerned with the CJEU's regard for privacy

¹⁷ *Hijmans/ Scirocco*, "Shortcomings in EU Data Protection in the Third and the Second Pillars. Can the Lisbon Treaty be Expected to help?", (2009) 46 Common Market Law Review, Issue 5, p. 1485, p. 1517

¹⁸ Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281 , 23/11/1995, p. 31-50.

¹⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (as amended), consolidated version <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0058:20091219:EN:PDF>> (accessed 5 September 2015).

²⁰ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, Official Journal L 8, 12.1.2001, p. 1-22.

²¹ Regulation (EU) No. XXX/2016 of the European Parliament and the Council on the protection of individuals with regards to the processing of personal data and on the free movement of such data (Consolidated text, outcome of the trilogue of 15 December 2015), at <http://www.emeeeting.europarl.europa.eu/committees/agenda/201512/LIBE/LIBE%282015%291217_1/sitt-1739884> (accessed 1 January 2016).

²² Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data (Consolidated text, outcome of the trilogue of 15 December 2015), at <http://www.emeeeting.europarl.europa.eu/committees/agenda/201512/LIBE/LIBE%282015%291217_1/sitt-1739884> (accessed 1 January 2016).

and data protection as coming to the fore in its case-law to date and thus takes recourse to the legislative status quo.

III. CJEU case-law in the field of privacy and data protection

The CJEU, seated in Luxembourg, ensures “that in the interpretation and application of the Treaties the law is observed.” (Art. 19(1) TEU). The judiciary consists of the actual Court of Justice, the General Court and specialized courts, namely the Civil Service Tribunal. In the following, the case-load of the Court as well as procedural and qualitative arguments are presented in support of the rising relevance of the rights to the protection of privacy and personal data in the Court’s decision-making practice.

1. Case-load of the CJEU

With increasing frequency the CJEU had been called upon deciding cases in the field of privacy and data protection. The case-law is spread out over every proceeding at the CJEU and its courts.²³ Until October 2015 the CJEU decided 44 cases in which its reasoning concerned the right to the protection of privacy and/ or personal data.²⁴ The majority, i.e. 30 judgements, were handed-down in requests for preliminary ruling in which the justices interpreted secondary EU law concerning data protection or other EU law in relation to the rights to privacy and data protection. A look at the distribution of this case-law per year underline the upwards trend (Table 1).²⁵ The picture is complemented by six rulings on failure of member states to fulfill their obligations (Art. 258 and 260 TFEU) by not properly implementing EU law on data protection.²⁶ Furthermore, two judgements were handed-down in actions for annulment pursuant to Art. 263 TFEU and another two in appeals against judgements by the General Court.

Table 1: CJEU judgements on requests for preliminary ruling in the field of privacy and data protection

1992	2003	2004	2008	2009	2010	2011	2012	2013	2014	2015
1	2	1	3	1	1	5	2	5	4	4

2. Indications of the Court’s special regard

There are other indications for the Court’s special regard for the rights to the protection of privacy and personal data under the CFR. Whereas the great majority of cases are heard in

²³ I.e. requests for preliminary ruling (Art. 267 TFEU), proceedings regarding the failure of a member state to fulfill its obligations (Art. 258 TFEU), actions for annulment (Art. 263 TFEU) and appeals against judgments of the General Court (Art. 257 TFEU); however, not to forget the proceedings before the General Court, which succeeded the Court of First Instance, and the Civil Service Tribunal in staff matters.

²⁴ The number of cases is aggregated by searching the case-law of the CJEU (www.curia.eu) with the subject-matter “data protection”, and, in addition, using the search strings “Directive 95/46/EC”, “Directive 2002/58/EC”, “data protection” and “privacy”. Judgements in joined cases are counted as one. Replies by reasoned orders pursuant to Art. 99 of the Rules of Procedure of the Court of Justice of 25 September 2012 are neglected.

²⁵ Only proceedings under Article 267 TFEU (requests for preliminary ruling).

²⁶ Not counting the five rulings against Ireland, Sweden (two times), Austria and Greece for their failure to transpose the EU Data Retention Directive into national law.

chambers, the Court may sit as a ‘Grand Chamber’ composed of fifteen judges.²⁷ The ‘Grand Chamber’ convenes upon request by a Member State or a EU institution that is party to the proceedings, but also when a case is considered complex and important.²⁸ In now ten cases concerning privacy and data protection the Court sat as ‘Grand Chamber’.²⁹

Only the CJEU can review the legality of legislative and other acts of EU institutions and has jurisdiction to invalidate those acts. In actions for annulment (Art. 263 TFEU) findings of invalidation are made pursuant to Article 264; however, also to that effect in rulings on Art. 267 TFEU references.³⁰ In the field of privacy and data protection so far four cases of the Court resulted in the partial or full invalidation of legislative acts of the EU institutions.³¹ Notable are those rulings with which the Court invalidated legislative acts by EU institutions in their entirety and retroactively because of their incompatibility with individuals’ rights to the protection of privacy and personal data.³² The Court annulled in 2014 the EU Data Retention Directive (Directive 2006/24)³³ and in 2015 the Commission’s adequacy finding of the EU-US Safe Harbour (Decision 2000/520/EC).³⁴ Both judgements are discussed below.

3. A new quality in the Court’s reasoning

Also qualitatively there has been a sizeable shift in the Court’s reasoning in cases in which it finds an interference with individuals’ rights to the protection of privacy and personal data. In

²⁷ *Craig/ de Burca*, p. 58.

²⁸ Pursuant to Art. 251 TFEU, Art. 16 of the Statute of the Court of Justice of the European Union (consolidated version) and Art. 60(1) of the Rules of Procedure of the Court of Justice of 25 September 2012 (consolidated version).

²⁹ CJEU, case C-362/14 (*Maximillian Schrems v Data Protection Commissioner*), judgement of 6 October 2015, ECLI:EU:C:2015:650; joined cases C-293/12 and C-594/12 (*Digital Rights Ireland v Minister for Communications, Marine and Natural Resources, Seitlinger and Others*), judgment of 8 April 2014, [2014] E.C.R. I-238; case C-288/12 (*Commission v Hungary*), judgment of 8 April 2014, ECLI:EU:C:2014:237; case C-131/12 (*Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*), judgment of 13 May 2014, ECLI:EU:C:2014:317; case C-614/10 (*European Commission v Republic of Austria*), judgement of 16 October 2012, ECLI:EU:C:2012:631; joined cases C-92/09 and C-93/09 (*Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen*), judgement of 9 November 2010, E.C.R. [2010] I-11063; case C-28/08 P (*European Commission v The Bavarian Lager Co. Ltd*), judgement of 29 June 2010, E.C.R. [2010] I-06055; case C-524/06 (*Heinz Huber v Bundesrepublik Germany*), judgment of 16 December 2008, [2008] E.C.R. I-09705; case C-275/06 (*Productores de Música de España (Promusicae) v Telefónica de España SAU*), judgment of 29 January 2008, E.C.R. [2008] I-00271; joined cases C-317/04 and C-318/04 (*European Parliament v Council of the European Union*), judgment of 30 May 2006, [2006] E.C.R. I-04721.

³⁰ *Craig/ de Burca*, 579f.

³¹ CJEU, joined cases C-317/04 and C-318/04 (*European Parliament v Council of the European Union and European Parliament v European Commission*), judgment of 30 May 2006, [2006] E.C.R. I-04721; joined cases C-92/09 and C-93/09 (*Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen*), judgement of 9 November 2010, E.C.R. [2010] I-11063; joined cases C-293/12 and C-594/12 (*Digital Rights Ireland v Minister for Communications, Marine and Natural Resources, Seitlinger and Others*), judgment of 8 April 2014 [2014] , E.C.R. I-238; case C-362/14 (*Maximillian Schrems v Data Protection Commissioner*), judgement of 6 October 2015, ECLI:EU:C:2015:650.

³² CJEU, joined cases C-293/12 and C-594/12 (*Digital Rights Ireland v Minister for Communications, Marine and Natural Resources, Seitlinger and Others*), judgment of 8 April 2014, [2014] E.C.R. I-238; case C-362/14 (*Maximillian Schrems v Data Protection Commissioner*), judgement of 6 October 2015, ECLI:EU:C:2015:650.

³³ Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54.

³⁴ Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, [2000] OJ L 215/7.

the pre-Charter era, the existence of EU secondary law on data protection provided the entry point for the Court’s legal reasoning. In general, the Court’s judgements would recite the mutual objectives of the Data Protection Directive to “protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data” and to ensure “the free flow of personal data between Member States” (Art. 1(1) and (2) of the Data Protection Directive). The Court’s framing of the interrelation between the mutual objectives would come to the fore as a balance between the two or an order of priority:

However, such possibilities must be made use of in the manner provided for by Directive 95/46 and in accordance with its objective of maintaining a balance between the free movement of personal data and the protection of private life.³⁵

Directive 95/46 itself, while having as its *principal aim* to ensure the free movement of personal data, provides in Article 1(1) that Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.³⁶

In the literature, the early stance of the Court was held to favor the free movement of personal data in the light of which individuals’ rights were interpreted.³⁷

In those cases, in which a balance had to be struck between conflicting interests, the CJEU as a rule weights a statement on the fundamental rights at issue. In its seminal *Lindqvist* judgement the Court recognized a conflict between the fundamental right to freedom of expression and the right to the protection of the private life which require a fair balance to be found.³⁸ Likewise, in the case of *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy*, the Court extrapolates from the objective of the Data Protection Directive the protection of fundamental rights, in particular the right to privacy, which is not absolute but “must, to some degree, be reconciled with the fundamental right to freedom of expression.”³⁹

In subsequent case-law the Court developed the contours of how it balances the rights to privacy and data protection against the right to property equally protected as a fundamental right.⁴⁰ In several instances, the Court has been called upon to interpret EU secondary law which is designated to protect intellectual property right, such as copyright, on the one hand,

³⁵ CJEU, case C-101/01 (*Bodil Lindqvist*), judgment of 6 November 2003, [2003] E.C.R. I-12971, para. 97.

³⁶ [emphasize added] CJEU, joined cases C-465/00, C-138/01 and C-139/01 (*Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v Österreichischer Rundfunk*), judgment of 20 May 2003, [2003] E.C.R. I-04989, para. 70.

³⁷ *González Fuster/Gellert*, 74; *González Fuster*, “Beyond the GDPR, above the GDPR”, Internet Policy Review, 30 November 2015, available at <<http://policyreview.info/articles/news/beyond-gdpr-above-gdpr/385>> (accessed 9 December 2015).

³⁸ CJEU, case C-101/01 (*Bodil Lindqvist*), judgment of 6 November 2003, [2003] E.C.R. I-12971, paras 85, 86, 90.

³⁹ CJEU, case C-73/07 (*Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy*), judgment of 16 December 2008, [2008] E.C.R. I-09831, para. 53.

⁴⁰ CJEU, case C-275/06 (*Productores de Música de España (Promusicae) v Telefónica de España SAU*), judgment of 29 January 2008, [2008] E.C.R. I-00271, para. 65.

and, on the other hand, individuals' rights to privacy and data protection.⁴¹ This line of case-law postdates the formal declaration of the CFR and consequently the Court is now invoking the ECHR and the Charter in parallel:

Data protection is based on the fundamental right to private life, as it results in particular from Article 8 of the [ECHR]. The [CFR] confirmed that fundamental right in Article 7, and in Article 8 specifically emphasised the fundamental right to the protection of personal data, including important fundamental principles of data protection.⁴²

As of 2010, after the Charter was accorded binding effect, the CJEU – in citing Art. 6(1) TEU - started to ground its legal argument directly on the Charter.⁴³ It also cautiously noted 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.⁴⁴

Nevertheless, the relative weight the CJEU accorded to the rights to privacy and data protection steadily expanded corresponding to the increasing significance of personal data processing and flows. In its 2014 judgement in the case *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* the Court interpreted the Data Protection Directive's objective as ensuring "effective and complete protection of the fundamental rights and freedoms of natural persons", hereby referring to Art. 7 and 8 of the Charter.⁴⁵ Its ruling in the case *Maximillian Schrems v Data Protection Commissioner* adds to the formula ("effective and complete protection") that the Court besides envisages a "high level of protection of those fundamental rights and freedoms".⁴⁶

Conversely, interferences with the rights to privacy and data protection must be (strictly) proportionate to the aims pursued,⁴⁷ not only with a view to the precise scope of the measure but also incorporating safeguards comprehensively addressing all aspects of access to and use of personal data, its conditions of storage and security.

Against this background it is possible to appraise the impact of the new 'strict scrutiny test' the Court introduced with its ruling in the case *Digital Rights Ireland and Seitlinger v*

⁴¹ *Dito.*; case C-70/10 (*Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*), judgment of 24 November 2011, [2011] E.C.R. I-11959; Cf. on the balancing exercise *Angelopoulos*, "Sketching the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary third party liability", *Info* 17(6), p. 72, p. 74.

⁴² CJEU, case C-275/06 (*Productores de Música de España (Promusicae) v Telefónica de España SAU*), judgment of 29 January 2008, [2008] E.C.R. I-00271, para. 51.

⁴³ CJEU, joined cases C-92/09 and C-93/09 (*Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen*), judgement of 9 November 2010, [2010] E.C.R. I-11063.

⁴⁴ *Ibid.*, para. 48.

⁴⁵ CJEU, case C-131/12 (*Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*), judgment of 13 May 2014, ECLI:EU:C:2014:317, para. 53.

⁴⁶ CJEU, case C-362/14 (*Maximillian Schrems v Data Protection Commissioner*), judgement of 6 October 2015, ECLI:EU:C:2015:650, para. 39.

⁴⁷ CJEU, joined cases C-465/00, C-138/01 and C-139/01 (*Rechnungshof v Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauerermann v Österreichischer Rundfunk*), judgment of 20 May 2003, [2003] E.C.R. I-04989, para. 86; case C-275/06 (*Productores de Música de España (Promusicae) v Telefónica de España SAU*), judgment of 29 January 2008, [2008] E.C.R. I-00271, para. 54; joined cases C-92/09 and C-93/09 (*Volker und Markus Schecke GbR, Hartmut Eifert v Land Hessen*), judgement of 9 November 2010, [2010] E.C.R. I-11063, para. 72.

Minister for Communications, Marine and Natural Resources on the level of protection of the rights to privacy and data protection as well as on EU law in general. This jurisprudence finds its continuation in the case *Maximillian Schrems v Data Protection Commissioner* which in practice and for the time being effectively severed most legal avenues for lawful transfers of personal data from the EU to the U.S.

4. CJEU ruling in the case *Digital Rights Ireland*

On 8 April 2014 the CJEU delivered its judgement in the case *Digital Rights Ireland and Seitlinger v Minister for Communications, Marine and Natural Resources*.⁴⁸ The background of this case concerned the EU legislator's adoption of Directive 2006/24⁴⁹ which put in place a mandatory data retention regime in the EU. Pursuant to this Directive Member States were required to adopt measures obliging electronic communications providers to retain all traffic and location data from a variety of publicly available electronic communications services and Internet access services for a period of not less than six months and up to two years for law enforcement purposes. Following judicial challenges against national transposition measures, the High Court of Ireland and the Austrian Constitutional Court instigated requests for preliminary ruling with the CJEU.

The Court, sitting as Grand Chamber, invalidated the Data Retention Directive in its entirety and without temporal restrictions on the grounds that it disproportionately restricted the rights to privacy and data protection in Art. 7 and 8 CFR. The judges promulgated a strict scrutiny test for EU legislation that seriously interferes with fundamental rights as protected under the Charter and the ECHR and exercised a rigorous proportionality testing under the Charter.⁵⁰

In the present case, in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by Directive 2006/24, the EU legislature's discretion is reduced, with the result that review of that discretion should be strict.⁵¹

The Court dismissed the Directive's preemptive and sweeping approach to traffic data collection, the absence of clearly defined limits on access to and use of the so retained data, the long and indiscriminate period of retention, and the lack of specific rules on the conditions of storage and the security of the retained data by private operators. The proportionality assessment of the Court enumerated in great detail where the contested legislation exceeded what was necessary and proportionate in view of its objective. From this enumeration it is possible to derive a set of instructions to the EU legislator which would

⁴⁸ CJEU, joined cases C-293/12 and C-594/12 (*Digital Rights Ireland v Minister for Communications, Marine and Natural Resources, Seitlinger and Others*), judgment of 8 April 2014, [2014] E.C.R. I-238.

⁴⁹ Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive (Data Retention Directive) [2006] OJ L105/54.

⁵⁰ Ganger/ 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, p. 835.

⁵¹ CJEU, joined cases C-293/12 and C-594/12 (*Digital Rights Ireland v Minister for Communications, Marine and Natural Resources, Seitlinger and Others*), judgment of 8 April 2014, [2014] E.C.R. I-238, para. 48.

need to be respected in order for a future or other similar measures to be compatible with the EU Charter.⁵²

Conceptually, the approach taken by the CJEU qualifies as a human rights-based review which limits the scope of discretion of the EU legislator when their actions present serious interferences with human rights.⁵³ This ruling sets a precedent with which the Court asserts its new role as a guarantor of EU fundamental rights under the Charter. Incidentally, the Court signposts that it won't tolerate the bureaucratic *laissez-faire* which has come to characterize quite a few EU schemes providing for the collection and the exchange of personal data.⁵⁴

5. CJEU ruling in the case *Maximillian Schrems*

Within an unusually short timeframe - less than two weeks after the Advocate General delivered its opinion - ,⁵⁵ on 6 October 2015 the CJEU issued its ruling in the case *Maximillian Schrems v Data Protection Commissioner*.⁵⁶ Following a request for preliminary ruling by the High Court (Ireland) under Article 267 TFEU, the Court was called upon to interpret the competences of national authorities to investigate a complaint against the adequate protection of personal data when there is a Commission Decision (2000/520)⁵⁷ on the adequacy of the legal protection afforded by the EU-U.S. Safe Harbour agreement.⁵⁸ Going beyond the referral questions the Court annulled the Decision containing the Commission's adequacy finding retroactively.

Confronted with the question whether a decision of the Commission, which is formally binding on all member states and their organs to which it is addressed (Art. 288(4) TFEU), preempts the powers of the independent supervisory authority charged with overseeing compliance with data protection rules, the Court contends that:

even if the Commission has adopted a decision pursuant to Article 25(6) of that directive, the national supervisory authorities, when hearing a claim lodged by a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him, must be able to examine, with complete independence, whether the transfer of that data complies with the requirements laid down by the directive.⁵⁹

⁵² *Ganger/ Irion*, 2014 European Law Review 6, p. 835, p. 848.

⁵³ *Craig/ de Burca*, 401.

⁵⁴ *Peers*, "The Domino Effect: how many EU treaties violate the rights to privacy and data protection?" EU Law Analysis, 25 November 2014 <<http://eulawanalysis.blogspot.nl/2014/11/the-domino-effect-how-many-eu-treaties.html>> (accessed 10 September 2015).

⁵⁵ Advocate General *Bot*, case C-362/14 (*Maximillian Schrems v Data Protection Commissioner*), opinion of 23 September 2015, ECLI:EU:C:2015:627.

⁵⁶ CJEU, case C-362/14 (*Maximillian Schrems v Data Protection Commissioner*), judgement of 6 October 2015, ECLI:EU:C:2015:650.

⁵⁷ Commission Decision 2000/520 of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, [2000] OJ L 15/7.

⁵⁸ The EU-U.S. Safe Harbour authorized the transfer of personal data of EU citizens to the U.S. subject to self-certification to adhere to the safe harbour principles, cf. Annex I to Decision 2000/520.

⁵⁹ CJEU, case C-362/14 (*Maximillian Schrems v Data Protection Commissioner*), judgement of 6 October 2015, ECLI:EU:C:2015:650, para. 57.

In reiterating that the EU “is a union based on the rule of law in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights,”⁶⁰ the Court explains how a national supervisory authority or the individual complainant can escalate a complaint to the national courts. National court can make a request for preliminary ruling to the CJEU which alone has jurisdiction to declare an EU act invalid.⁶¹ With that ultimate jurisdiction in mind, the Court launched judicial review of the validity of Decision 2000/520 and took recourse to the strict scrutiny test it had developed in its ruling in the case *Digital Rights Ireland*.

[I]t must be stated that, in view of, first, the important role played by the protection of personal data in the light of the fundamental right to respect for private life and, secondly, the large number of persons whose fundamental rights are liable to be infringed where personal data is transferred to a third country not ensuring an adequate level of protection, the Commission’s discretion [...] is reduced, with the result that review of the requirements stemming from Article 25 of Directive 95/46, read in the light of the Charter, should be strict.⁶²

The Court holds that in its finding of adequacy the Commission has not based its decision on a complete assessment of the U.S. legal framework governing the protection of personal data, in particular with regards to disclosure authorities by U.S. entities when they pursue legitimate objectives, such as national security, which was explicitly exempt from the application of the safe harbour agreement.⁶³ The Court, then, extrapolates from the level of protection in the EU to the legal situation of EU-originating personal data in the U.S. stating that

[...] legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.⁶⁴

Hence, the decision of the Commission finding an adequate level of protection in connection with the arrangement under the EU-U.S. Safe Harbour failed to comply with the rules on international transfers of personal data under the Data Protection Directive leading to its annulment *ex tunc*. From a EU law perspective the reasoning of the Court is not setting new paradigms, this is largely the merit of the precedent in the case *Digital Rights Irelands*. Its impact on global flows of personal data, however, cannot be overestimated. To scholars and policy practitioners the ruling did not only strike out one of the legal means to transfer personal from the EU to the U.S., but is bound to impact on the legality and adequate safeguards when exporting personal data of EU citizens outside of the EU in general.

⁶⁰ *Ibid.*, para. 60.

⁶¹ *Ibid.*, para. 61.

⁶² *Ibid.*, para. 78.

⁶³ *Ibid.*, para. 88.

⁶⁴ *Ibid.*, para. 94.

IV. Conclusions

This Chapter traces how the CJEU, in its case-law, continuously reinforced the protection of the fundamental rights to privacy and data protection. The Courts' interpretation of the objective of the Data Protection Directive, which often is the entry point for its reasoning, transformed from being the harmonised regulatory substance of an internal market instrument to EU legislation providing for "effective and complete protection" that aims for a "high level of protection" of the fundamental rights to privacy and data protection guaranteed in Art. 7 and 8 of the CFR. This trajectory is closely linked to the ongoing constitutionalization in EU law that took traction with the entering into force of the Charter in 2009. Within the scope of EU law, the Charter guarantees the traditional right to respect for private life (Art. 7 CFR) in addition to the right to the protection of personal data (Art. 8 CFR), which is a modern codification of a new fundamental right.

However, EU constitutionalism is not the only explanation for the Court's recent vigilance on matters of privacy and data protection that surfaced in its case-law. This chapter assembled a range of indications of the Court's special regard, such as the composition of the Court as 'Grand Chamber' in now ten cases concerning privacy and data protection, the readiness with which the Court annulled EU legislation that was found to disproportionately restrict the rights to privacy and data protection in Art. 7 and 8 CFR, and the qualitative changes in the Court's interpretations in relation to these fundamental rights.

With the ruling in the case *Digital Rights Irelands* EU law now has a precedent for a full-fledged human rights-based judicial review of EU action. In invalidating the EU Data Retention Directive the Court renounced its deferential approach towards the EU legislator when they severely interfere with individuals fundamental rights. As Granger and Irion observed:

There is a symbolic dimension to the fact that the strict scrutiny test was first applied to the right to privacy: "the" human right in the information age.⁶⁵

Whether this already amounts to a new instance of judicial activism on part of the CJEU, or is rather the judiciary's response to a legacy of slack policy formulation by the EU legislator, where individuals' fundamental rights are at stake, remains yet to be seen.

⁶⁵ Granger/ Irion, 2014 European Law Review 6, p. 835, p. 850.