

# **Judicial Enforcement of Digital Privacy in Europe**

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# Complexity ingredients case law in the context

- The Luxembourg Court (creative) role of Luxembourg Court in the EU legal order
- Relationship between law, fundamental rights and new technologies
- Judicial dialogue and protection of fundamental rights in Internet
- Judicial framing, metaphors and legal imagination
- From privacy to data protection: the transfiguration of a legal concept

## From static dimension

Right to Privacy: Warren and Brandeis  
(1890, Harvard Law Review)

Art 8 ECHR , par. 1

“Everyone has the right to respect for his private and family life, his home and his correspondence”

# To dynamic dimension



- Convention of the Council of Europe No. 108/1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data
- “Processing of personal data”: from the right to privacy to the right to data protection

# Privacy and Data Protection in EU Law



- Directive 1995/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data
- «Free movement» of personal data: a mainly economic view
- No fundamental right view

# Privacy and Data Protection in EU Law



- Privacy and data protection are now ranked as fundamental rights in EU law:
  - **right to private life** (Art. 7 Charter)
  - **right to data protection** (Art. 8 Charter, Art. 16 TFEU)
- From an economic dimension («free movement of personal data») to a constitutional-based view

# Privacy and Data Protection in EU Law

- **Definitions:** Personal Data, Processing, Data Subject, Data Controller, Data Processor
- **Principles:**
  - Data quality
  - Legitimate purposes
  - Consent
- Data Protection Authorities
- Transfer to Third non-EU Countries

# The 95/46/EC Directive

## Definitions

- **'Personal Data'**: any information relating to an identified or identifiable natural person ('Data Subject')
- **'Processing of Personal Data'**: any operation performed upon Personal Data, whether or not by automatic means, such as collection, recording, organization, storage...

# The 95/46/EC Directive

## Definitions

- **‘Controller’**: the natural or legal person, public authority, agency or any other body which determines the purposes and means of the Processing of Personal Data
- **‘Processor’**: a natural or legal person, public authority, agency or any other body which processes Personal Data on behalf of the controller

# The 95/46/EC Directive

## Transfer to non-EU Countries

- (art. 25. par 6 Directive 95/46) Transfer to a third country of Personal Data may take place only if the third country in question ensures an **adequate level of protection**
- The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the **circumstances surrounding a data transfer operation or set of data transfer operations**
- MSs and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection

# The ECJ dream to be a Constitutional Court

Digital privacy privileged field

- New Bill of Rights
- Legislative inertia
- reactive matrix

3 main judicial acts

- Digital Rights Ireland (April 2014)
- Google Spain (May 2014)
- Shrems (October 2015)

# Digital Rights Ireland

## Framing

- Privacy vs Security

## Manipulation

- Rethoric use of the constitutional traditions argument
- Codifying versus transformative Constitution

# Data Retention Directive

Mandatory retention of traffic and location data (Article 5) for ISP and ECS , identifying:



**→ Content of communication excluded**

# Data Retention Directive

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Retention period between 6 months and 2 years

“for the purpose of the investigation, detection and prosecution of **serious crime**, as defined by each Member State in its national law” (Art. 1)

## The ruling

Privacy and data protection are now ranked as fundamental rights in EU law:

- **right to private life** (Art. 7 Charter)
- **right to data protection** (Art. 8 Charter)

## The ruling - Art. 52 Charter

**Any limitation** on the exercise of the rights and freedoms recognized by this Charter must be **provided for by law** and respect the **essence** of those rights and freedoms.

Subject to the **principle of proportionality**, limitations may be made only if they are **necessary** and **genuinely meet objectives** of general interest recognized by the Union or the need to protect the rights and freedoms of others.

# The ruling – The Essence of the rights

“it must be held that, even though the retention of data required by Directive 2006/24 constitutes a particularly serious interference with those rights, **it is not such as to adversely affect the essence** of those rights given that, as follows from Article 1(2) of the directive, the directive does not permit the acquisition of knowledge of the **content** of the electronic communications as such”

# The ruling – The Essence of the rights

“the use of electronic communications are **particularly important** and therefore a valuable tool in the prevention of offences and the fight against crime, in particular organized crime.”



Data retention “**genuinely satisfies** an objective of general interest.”

# The ruling – Principle of Proportionality



The Directive has exceeded the limits imposed by compliance with the **principle of proportionality**

# The ruling – Principle of Proportionality

There is no definition of “serious crime” and “competent authorities”

There are no objective and procedural criteria to establish limits of access to the metadata by the authorities

Excessive length of the retention period

# The ruling – Principle of Proportionality

The Court refuses the idea of mass surveillance of “**the entire European population**”.

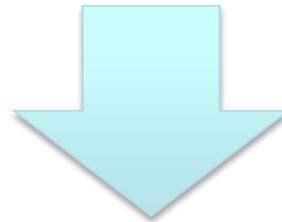
The s.c. **metadata** (art. 5), taken as a whole, allow specific and precise deductions concerning private lives, habits, relationships, movements of the users.

**Absence of any relationship** between the retained data and the serious crimes

# The ruling – Principle of Proportionality

The Directive does not ensure an high level of protection since it does not guarantee the “**destruction** of the data at the end of the data retention period”

The Directive does not require that the data in question is to be retained **within** the European Union



On those grounds, The Court rules that the Directive 2006/24/EC is **invalid**

# Right to be forgotten

- Not a new topic
- Amplification in the digital era
- It was already known in the Italian legal landscape

# Italy: A right to contextualization?

- The Italian DPA approach:
  - Removing news (especially dated) contained in online archives would undermine the protection granted to freedom of information and the right of individuals to find information
  - Data subject can ask for the application of exclusion codes by the search engine in order to limit a dissemination of the news considered to be outdated and allegedly in breach of the “right to be forgotten”: the information is retained in the online archive of the newspaper, but is not subject to indexing by external search engines
  - Balance between freedom of information and right to data protection

## Italy: A right to contextualization?

- The plaintiff (an Italian politician) alleged that the search engine run by Google displayed the news concerning his arrest occurred many years before
- The news was contained in the online archive of a leading daily newspaper
- He was not seeking the removal of the news; instead, he asked that the relevant news could be updated by the insertion of the appropriate information concerning the outcome of the criminal proceeding or, alternatively, the application of exclusion codes in order to prevent the relevant web page from being indexed by external search engines

# **Right to Be Forgotten v. Freedom of Information**

- The Italian Supreme Court (n. 5525/2012)
- The owner of a newspaper is obliged to keep up-to-date all the news contained in its online archive by the insertion of any appropriate information
- It is for the owners of websites, instead of the ISP, retrieving the contents of the same, to make sure that the news do offer a real representation of the events
- Right to be forgotten is not conceived as a right to remove from the web news concerning the data subject but as a “right to update” through contextualization
- Such an obligation seems to exist regardless of the existence of a request by the data subject

## **Case C-131/12**

### ***Google Spain, Google Inc. v. AEPD***

1. **Novelty of the case**
2. Does the activity carried out by Google as search engine amount to a processing of personal data?
3. Which legislation is applicable?
4. If so, does Google qualify as data controller?
5. If so, may a national data protection authority order Google to remove links to indexed information without prior consulting the owner of the web page?

## **Case C-131/12**

- **Does the activity carried out by Google as search engine amount to a processing of personal data? ✓**
- **Does Google qualify as data controller? ✓**

It has no relevance whether the search engine has actually knowledge of the fact the personal data are contained in the websites subject to indexing.

Google decides the aims and the goals of the data processing. Therefore, it amounts to a data controller and as such bears the obligations provided by the Directive 95/46

# Application of the European legislation (directive 95/46)

- Art. 4 Diritto nazionale applicabile
- 1. Ciascuno Stato membro applica le disposizioni nazionali adottate per l'attuazione della presente direttiva al trattamento di dati personali:
  - a) effettuato nel contesto delle attività di uno stabilimento del responsabile del trattamento nel territorio dello Stato membro

# Enforcing European values

- Punto 55: **in the context**
- Occorre affermare che il trattamento di dati personali realizzato per le esigenze di servizio di un motore di ricerca come Google Search, il quale venga gestito da un'impresa **con sede in uno Stato terzo** ma avente uno **stabilimento in uno Stato membro**, viene effettuato **«nel contesto delle attività»** di tale stabilimento qualora quest'ultimo sia destinato a garantire, in tale Stato membro, la promozione e la vendita degli spazi pubblicitari proposti dal suddetto motore di ricerca, che servono a rendere redditizio il servizio offerto da quest'ultimo

# **28-7-2016**

## **causa C-191/15**

- Il giudice del rinvio chiede, in sostanza, se l'articolo 4, paragrafo 1, lettera a) della direttiva 95/46 debba essere interpretato nel senso che il trattamento di dati personali effettuato **da un'impresa di commercio elettronico è disciplinato dal diritto dello Stato membro verso il quale detta impresa dirige le proprie attività.**

## **causa C-191/15**

- **Stabilimento: qualsiasi attività reale ed effettiva, anche minima, esercitata tramite un'organizzazione stabile**
- **Nel contesto dell'attività di uno stabilimento del data controller nel territorio di uno ST**
- **Passpartout**
- **Dalla stabilità al semplice indirizzo dell'attività economica?**

# Framing and manipulation

- Privacy vs Privacy
- Litteral interpretation disconnecting the text from the context
- Asimmetric balancing: rule and exceptions
- Enforcing European values
- Para-constitutional role for google
- Which criteria?

# Schrems Case: origins

- Maximilian Schrems, an Austrian Facebook-user presented a question to the Irish Authority, asking if his personal data on Facebook could not be sent to Facebook's american server farms, fearing a breach of his right to privacy.
- At stake Safe Harbor scheme
- EC Decision 520/2000
- Preliminary reference

# **Schrems**

The ECJ delivered its judgement on the 6<sup>th</sup> of October 2015

Annulled the EC Decision 520/2000.

Suspended the Safe harbor scheme

# Framing and manipulation

## Framing

Privacy vs Privacy

## Manipulation

- Caducazione di un atto originariamente compatibile con il diritto dell'Unione europea a causa della sua rilettura alla luce di un nuovo parametro
- Dinamizzazione del giudizio
- Da adeguatezza a equivalenza sostanziale

# Post Schrems

- (12-7-2016)
- The EU-U.S. Privacy Shield imposes stronger obligations on U.S. companies to protect Europeans' personal data.
- The Privacy Shield requires the U.S. to monitor and enforce more robustly, and cooperate more with European Data Protection Authorities.
- It includes, for the first time, written commitments and assurance regarding access to data by public authorities.

# What will it mean in practice?

## For American companies

- Self-certify annually that they meet the requirements. Display privacy policy on their website.
- Reply promptly to any complaints. > (If handling human resources data)
- Cooperate and comply with European Data Protection Authorities

## For European individuals

- More transparency about transfers of personal data to the U.S. and stronger protection of personal data.
- Easier and cheaper redress possibilities in case of complaints – directly or with the help of their local Data Protection Authority.

# Conclusions

Two opposite and contextual trends

a) Beyond the EU

b) (Re)-discovery of the classical categories of constitutional law

- (Digital) sovereignty
- Territory
- From law to geography

Paradox in transnational law