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Exposé zum Dissertationsvorhaben

Data Protection at EU Borders: Between User-Centrism and Prevention.

Verfasser

Mag. Antoni Napieralski

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Dissertant: Antoni Napieralski

Matrikelnummer: 11742743

Betreuer: Univ.-Prof. Dr. Nikolaus Forgó

Introduction

Recent developments in EU legislation governing processing of personal data at external borders of the Union¹ or in the area of electronic communications² show how different can the meanings of “data protection” be, depending on the context. These two examples show how the user-centric and preventive approaches in data protection interact, and what exactly the result of their interaction is.

User-centrism, stemming from the German tradition of protecting personal data, is centred on the objective of protecting human dignity. The principle of informational self-determination³ focuses on the individual and orients the law on empowering the data subject as far as possible.⁴ The preventive approach on the other hand disregards individual’s empowerment, while having a greater social good in mind, such as security. Prevention requires vast amounts of data, of which processing would be substantially hindered if the individual’s empowerment would be a parallel objective. As the preventive approach to data protection is driven by a broader trend of securitisation, a reflection upon this phenomenon will also be a necessary element of my dissertation.

¹ Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011 2017 [OJ L 327]; Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 2018 [OJ L 236]; Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU 2018 [OJ L 312]; Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726 2019 [OJ L 135].

² 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) 2002 [OJ L 201]; Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) [COM/2017/010 final-2017/03 (COD)].

³ See also Alan Furman Westin, *Privacy and Freedom* (IG Publishing 2015).

⁴ 1 BvR 209/83 *Volkszählungsurteil* [1983] BVerfGE 65, 1 - 71 (Bundesverfassungsgericht).

State of the art

Although the interaction itself, between the user-centric and preventive orders in data protection, has not yet been analysed, some of its effects on different parts of the legal system have been. For instance, the challenge of delineating the scope of applicability of the GDPR and the Law Enforcement Directive has been noted by Jasserand.⁵ Issues arising on the grounds of the principle of purpose limitation were brought up by Coudert as well as by Custers & Ursic.⁶

The phenomenon of securitisation has already been recognised in extensive scholarship; both the sociological perspective⁷ and the legal perspective⁸ allow us to gain an understanding of the interactions between the process of securitisation and broader social trends.

Additionally, in the context of data protection in the EU Area of Freedom, Security and Justice the leading research was conducted by Boehm.⁹ A more narrow study by Beck offers insight into the complex issue of illegal migration and data protection.¹⁰ Broad research of social

⁵ Catherine Jasserand, 'Law Enforcement Access to Personal Data Originally Collected by Private Parties: Missing Data Subjects' Safeguards in Directive 2016/680?' (Social Science Research Network 2017) SSRN Scholarly Paper ID 3230345 <<https://papers.ssrn.com/abstract=3230345>> accessed 7 August 2019; Catherine Jasserand, 'Subsequent Use of GDPR Data for a Law Enforcement Purpose: The Forgotten Principle of Purpose Limitation?' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3230347 <<https://papers.ssrn.com/abstract=3230347>> accessed 7 August 2019.

⁶ Fanny Coudert, 'The Europol Regulation and Purpose Limitation': (2017) 3 European Data Protection Law Review 313 <<https://edpl.lexion.eu/article/EDPL/2017/3/6>> accessed 9 August 2019; Bart Custers and Helena Uršič, 'Big Data and Data Reuse: A Taxonomy of Data Reuse for Balancing Big Data Benefits and Personal Data Protection' (2016) 6 International Data Privacy Law 4 <<http://academic.oup.com/idpl/article/6/1/4/2404459>> accessed 9 August 2019.

⁷ Zygmunt Bauman and others, 'After Snowden: Rethinking the Impact of Surveillance' (2014) 8 International Political Sociology 121 <<https://academic.oup.com/ips/article-lookup/doi/10.1111/ips.12048>> accessed 16 April 2019; Zygmunt Bauman and David Lyon, *Liquid Surveillance: A Conversation* (1 edition, Polity 2012); Dimitris Skleparis, '(In)Securitization and Illiberal Practices on the Fringe of the EU' (2016) 25 European Security 92 <<http://www.tandfonline.com/doi/full/10.1080/09662839.2015.1080160>> accessed 16 April 2019; Veronika Nagy, *Crime Prevention, Migration Control and Surveillance Practices: Welfare Bureaucracy as Mobility Deterrent* (First Edition, Routledge, Taylor & Francis Group 2018); Pat O'Malley, 'Governmentality and Risk', *Social Theories of Risk and Uncertainty* (John Wiley & Sons, Ltd 2009) <<http://onlinelibrary.wiley.com/doi/abs/10.1002/9781444301489.ch3>> accessed 26 April 2019; Jens O Zinn (ed), *Social Theories of Risk and Uncertainty: An Introduction* (Blackwell Pub 2008); Marc Schuilenburg, *The Securitization of Society: Crime, Risk, and Social Order* (George Hall tr, 2018); Marc Schuilenburg, 'The Securitization of Society: On the Rise of Quasi-Criminal Law and Selective Exclusion' *The Securitization of Society* 16.

⁸ Tobias Singelstein and Peer Stolle, *Die Sicherheitsgesellschaft: soziale Kontrolle im 21. Jahrhundert* (3., vollst. überarb. Aufl, VS Verl für Sozialwissenschaften 2012).

⁹ Franziska Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice: Towards Harmonised Data Protection Principles for Information Exchange at EU-Level* (Springer 2012).

¹⁰ Anna Beck, *Illegale Migration und Datenschutz: die Verwendung von personenbezogenen Daten – insbesondere Fluggastdatensätzen – zur Bekämpfung illegaler Migration nach Deutschland* (Verlag Dr Kovač 2018).

scientists active in the field of border studies provides an interesting insight into the role and functioning of borders in the society.¹¹

However, there are still some gaps in the current research that can be identified. The most relevant ones can be located in three areas.

First, it needs to be established whether the European data protection framework really is a coherent framework based on common principles. Investigating the nature and genesis of the user-centric and preventive approaches in current EU legislation is necessary in order to answer this question.

Second, the question of delineation and interaction between the user-centric and preventive approaches in European data protection and its impact on the scope of protection offered by the fundamental rights to privacy of communications and protection of personal data (Arts 7-8 of the Charter). In this context securitisation, as a key factor that drives the preventive trend, needs to be taken into account.

Third, the question of the nature and status of the data protection rules applicable at external borders of the EU and in the area of electronic communication. Looking at them from the perspective of the user-centric/preventive distinction they seem to present an amalgam or a hybrid of the two approaches. More interestingly, private entities which are bound by the law

¹¹ Nick Vaughan-Williams, *Border Politics : The Limits of Sovereign Power* (Edinburgh University Press 2009) <<http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=279989&site=ehost-live>> accessed 15 April 2019; Paul Trauttmansdorff, 'The Politics of Digital Borders' in Cengiz Günay and Nina Witjes (eds), *Border Politics: Defining Spaces of Governance and Forms of Transgressions* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-46855-6_7> accessed 15 April 2019; Maegan Hendow, Alina Cibea and Albert Kraler, 'Using Technology to Draw Borders: Fundamental Rights for the Smart Borders Initiative' (2015) 13 *Journal of Information, Communication and Ethics in Society* 39 <<http://www.emeraldinsight.com/doi/10.1108/JICES-02-2014-0008>> accessed 16 April 2019; Julien Jeandesboz, 'Smartening Border Security in the European Union: An Associational Inquiry' (2016) 47 *Security Dialogue* 292 <<http://journals.sagepub.com/doi/10.1177/0967010616650226>> accessed 16 April 2019; Pinja Lehtonen and Pami Aalto, 'Smart and Secure Borders through Automated Border Control Systems in the EU? The Views of Political Stakeholders in the Member States' (2017) 26 *European Security* 207 <<https://www.tandfonline.com/doi/full/10.1080/09662839.2016.1276057>> accessed 16 April 2019; Sybille Reinke de Buitrago, 'The Meaning of Borders for National Identity and State Authority' in Cengiz Günay and Nina Witjes (eds), *Border Politics: Defining Spaces of Governance and Forms of Transgressions* (Springer International Publishing 2017) <https://doi.org/10.1007/978-3-319-46855-6_9> accessed 15 April 2019; Sabine Hess and Bernd Kasperek, 'Under Control? Or Border (as) Conflict: Reflections on the European Border Regime' (2017) 5 *Social Inclusion* 58 <<https://www.cogitatiopress.com/socialinclusion/article/view/1004>> accessed 16 April 2019.

to act on behalf of the state and in state's interest are caught up in a grey area of a no-man's-land, between the GDPR and the Law Enforcement Directive (the proxies¹²).

Research outline

In order to address the three aforementioned gaps in the current scholarship, I will carry out my research in the following manner.

First, I will build upon Boehm's research.¹³ Boehm asked the following question – are the rules on processing personal data in the Area of Freedom, Security and Justice (AFSJ) compliant with EU's own data protection law? Building upon that question, I would like to ask whether there is one coherent set of data protection rules that would apply both within the AFSJ and outside of it? Such a set of rules would supposedly be based on Art 16 TFUE and Art 8 of the Charter. In theory, the rules of processing personal data for law enforcement purposes are based on the same principles as the rules for non-law-enforcement processing of personal data. However, considering the effect, i.e. the scope of individual's legal protection, I argue that those are two separate sets of rules which are based on opposing principles; the principle of user-centrism (informational self-determination) and the principle of prevention based large-scale personal data analytics. The preventive and user-centred approaches can be attributed to respectively, law enforcement and non-law-enforcement rules of processing personal data. Therefore, this dissertation will be an inquiry into the reasons, evidence and effects of disguising two separate things as one, under the name of EU Data Protection Framework.

I will begin the inquiry in one of the areas where the user-centred and preventive approaches amalgamate, i.e. at the external borders of the EU and in the area of electronic communication within the EU. The merger of these two approaches is embodied by: (i) creation of an exceptional set of exceptional data protection rules just for the EU external border environment, and (ii) the rules addressed to private entities, which are forced to act on behalf, and in the interest of the state, i.e. the proxies.¹⁴

The service providers act as custodians of people's data yet at the same time are treated by the state as its proxies supposed to carry out surveillance for law enforcement purposes. Similarly, the carriers in the Smart Borders context are being (contrary to their primary

¹² See also Alan Z Rozenshtein, 'Surveillance Intermediaries' (2018) 70 Stanford Law Review 99.

¹³ Boehm (n 9).

¹⁴ See also Rozenshtein (n 12).

commercial objectives) burdened by the state with the duty to participate in delivering the promise of security.

What follows, is a question whether the user-centred approach of some parts of the current EU data protection framework is reconcilable with the preventive approach introduced to data protection law by the trend of securitisation.

The user-centred approach, anchored in the principle of human dignity, can be traced back to the German roots of the current European data protection legislation. Following Bell, from the 70s onwards, the German data protection legislation was focused not on protecting individual's personal data, but rather on protecting the individual itself.¹⁵ One of the main concerns then was preventing datafication of human beings.¹⁶

In the 1983 Census Ruling the German Federal Constitutional Court derived the right to informational self-determination from the general right of personality (allgemeines Persönlichkeitsrecht) as outlined in the German Basic Law in Article 2(1), and read together with the principle of human dignity (Article 1(1)).¹⁷ It put a great emphasis on transparency as the prerequisite of protecting human dignity when processing personal data: not knowing who and in which circumstances could get access to one's data has a direct chilling effect on one's behaviour.¹⁸ The Court also underlined the collective aspect of it: lack of knowledge on subsequent processing of data for previously unknown purposes would impair community's ability to act politically.¹⁹ An individual shall, in principle, have a saying in how his or her data are being processed.²⁰ Since, as expressed by the Court: "[t]he value and dignity of a person, able to freely determine their own actions, and act as a member of a free society, is a central element of the constitutional order"²¹, the right to informational self-determination is a *sine qua non* requirement of upholding a free society.

Research questions:

¹⁵ Hans Peter Bull, *Informationelle Selbstbestimmung - Vision Oder Illusion? Datenschutz Im Spannungsverhältnis von Freiheit Und Sicherheit* (Mohr Siebeck 2009) 27.

¹⁶ *ibid.*

¹⁷ 1 BvR 209/83 Volkszählungsurteil (n 4).

¹⁸ *ibid.* 42.

¹⁹ *ibid.*

²⁰ 1 BvR 209/83 Volkszählungsurteil (n 4).

²¹ *ibid.* 41 (own translation).

1. Is law enforcement data protection and non-law-enforcement data protection in the EU the same data protection? Is it based on the same principles? Or are those two separate sets of rules disguised as one data protection law (with minor differences and exceptions)?
2. Are we talking about a shift from user-centrism to preventive approach, or has the distinction been there all along?
3. Which data protection regime shall private entities acting as proxies of the state when controlling mobility, follow?
4. Can the clear distinction between the scope of applicability of the GDPR and the LED be upheld?

Outline of the dissertation:

1. Introduction.

PART I *User-centrism and prevention in European data protection law.*

2. User-centrism in European data protection law.
 - 2.1. History and theoretical background of the concept.
 - 2.2. Past and current legislative and jurisprudential expressions of the concept.
3. Preventive paradigm in European data protection law.
 - 3.1. History and theoretical background of the concept.
 - 3.2. Past and current legislative and jurisprudential expressions of the concept.
4. Conclusions.

PART II *New (hybrid) data protection rules. Evidence.*

5. Exhibit A: Mobility of people (EU border control systems).
 - 5.1. Identification of the applicable data protection framework.
 - 5.1.1. Mobility within the EU: PNR Regulation.
 - 5.1.2. Mobility outside the EU: EES Regulation, ETIAS Regulation, SIS Regulation, VIS Regulation, ECRIS-TCN Regulation, PNR Agreements.
 - 5.2. Description of data flows between public institutions in the EU.
 - 5.2.1. Regulation on interoperability (borders and visa).
 - 5.2.2. Regulation on interoperability (police and judicial cooperation, asylum and migration).

- 5.3. Description of data flows between private entities and public institutions (proxy's perspective).
6. Exhibit B: Mobility of communication (EU electronic communication services).
 - 6.1. Identification of the applicable data protection framework.
 - 6.1.1. Proposed e-Privacy Regulation.
 - 6.2. Data flows between private entities and public institutions (proxy's perspective).
7. Conclusions.

PART III *Theoretical framework of the new (hybrid) data protection rules.*

8. Securitisation – description of the concept.
 - 8.1. Roots.
 - 8.2. Objectives.
 - 8.3. Symptoms (based on the outputs of Part II; tbc).
 - 8.3.1. Double purpose and the principle of purpose limitation.
 - 8.3.2. Blurred lines as to the scope of applicability of the GDPR and the LED.
 - 8.3.3. Legal status of the proxies.
9. General conclusions.
 - 9.1. Role of user-centrism in Exhibits A and B – merely a disguise?

[Research design](#)

Methodology:

The methodology applied will first consist of a dogmatic analysis of the respective EU legislation, and a second interpretation of the key findings in light of appropriate sociological scholarship.

Timeline:

WS 2018/2019: VO Methodenlehre (done); Seminar im Dissertationsfach zur Vorstellung und Diskussion des Dissertationsvorhabens (done).

SS 2019: Participation in the Surveillance Studies Summer Seminar (Queen's University, Kingston, Canada; done), submission of the Expose; signing of the Dissertationsvereinbarung;.

WS 2019/2020: Seminar im Dissertationsfach; writing Chapters 5 & 6.

SS 2020: Seminar im Dissertationsfach; writing Chapters 2 & 3.

WS 2020/2021: writing Chapters 8 & 7.

SS 2021: writing Chapter 1.

WS 2021/2022: Final corrections; Defensio.

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