

Avv. Fabio Balducci Romano Ph.D.  
Assistant Professor of EU Law  
University of Rome "Tor Vergata"

# The Right to the Protection of Personal Data: the Case of Consumer Contracts

# Privacy

- the *right to be let alone*
- Art. 8 ECHR
- Art. 7 CFR
- ECJ *Stauder* 1969

# Data Protection

- Right to maintain control over personal data
- Dir. 95/46/EC (100A TEC, now 114 TFUE)
- Reg. 45/2001
- Dir. 2002/58/EC (privacy and electronic communication)
- Dir. 2006/24/EC (declared invalid by ECJ *Digital Rights Ireland* 2014)

# Definition

- Art. 8 CFR

## **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.

# Personal Data

## **personal data**

- shall mean any information relating to an identified or identifiable natural person

# Personal Data (2)

- Name
- Address
- Residence/Domicile (ECJ *Schwarz* 2013)
- Salary (ECJ ORF 2003)
- Recipient of a community fund (ECJ *Schecke* 2010)

# Processing

## **processing of personal data**

shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.

# Processing (2)

- Recording or loading personal data on a website (ECJ *Lindqvist* 2003, p. 25)
- Copying information already published (ECJ *Satamedia* 2008, p. 48-49)
- Activities of a search engine (ECJ *Google Spain* 2014, p. 28)

Processing does not necessarily imply modification of personal data.

# Data Subject

## **data subject**

- an identified or identifiable natural person to whom personal data refer;
- an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity

# Data Subject (2)

- Natural person
- A legal person (eg. a company) is not a data subject (ECJ *Schecke* 2010)

# Controller

## **controller**

shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data

## Controller (2)

the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved (ECJ *Google Spain* 2014, p. 38)

# Scope of Application of the EU Rules

- Art. 3 Dir. 95/46 limits the scope of application of the rules on the protection of personal data, excluding:
  - a) Activities that do not fall within the objective of EU Law (eg national security, criminal investigations, etc.)
  - b) Domestic Activities

# Scope of Application (2)

ECJ strictly interprets the exclusions provided by Art. 3 Dir. 95/46

- a) Activities regulated by national law are carried out by the State or by public authorities

# Scope of Application (3)

- b) Domestic Activities are determined by the purposes or effects of the processing: the intent is not relevant (ECJ *Lindqvist*)

eg Garante privacy docweb n. 1712776: a closed profile in Facebook is a domestic activity, because the information is accessible only to a limited number of persons.

# Lawfulness

Art. 8 Dir. 95/46

Art. 8 CFREU

- Lawful and fair
- Legitimate purpose/determined/previously communicated
- Scope of processing limited to what is necessary
- Truthfulness: data must be accurate, updated, with possible integration, rectification, erasure of inaccurate data
- Duration: limited

# Basic Principles

## 1. Lawfulness

- Consent
  - Valid
  - Free
  - Informed
  - Specific

# Basic Principles (2)

- Legitimate basis laid down by the law
  - Legal obligation of the controller
  - Use of public powers
  - Legitimate interest of the controller (limit of the fundamental rights of the data subject)

# Basic Principles (3)

In the absence of the consent:

Balance the interests of controller/data subject

# Basic Principles (4)

## 2. Necessity / Proportionality

- The right of the data subject may be sacrificed in favour of a fundamental right or legitimate interest of another person, to the extent necessary

# Content

The data subject has the right to

- Be informed
- Access his data
- Obtain rectification, erasure or blocking if the processing is not compliant with the rules (ECJ *College van burgemeester* 2009, p. 50-51)

# Content (2)

The power of control of the data subject over his data:

- The consent of the data subject does not permanently confer on the controller the dominion over such data (ECJ *Deutsche Telekom*, p. 56)

# Content (3)

Right to oblivion (ECJ *Google Spain* 2014)

- Part of the Right to the Protection of Personal Data: this includes the right to erasure of information if their recording is no longer justified