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ARTICLE

# Balancing intellectual property against data protection: a new right's wavering weight

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**Abstract**

National authorities that impose the systematic processing of personal data on Internet service providers in the name of the protection of intellectual property do not strike a fair balance between copyright holders' interest in ensuring their right to intellectual property and the right to personal data protection of those affected by such processing. That idea has twice been upheld by the Court of Justice of the European Union (EU), in its judgements of 24 November 2011, in Case C-70/10, *Scarlet Extended SA v SABAM*, and of 16 February 2012, in Case C-360/10, *SABAM v Netlog NV*. The postulate, however, is based on an unprecedented understanding of the right to the protection of personal data as an EU fundamental right, and on an innovative approach to balancing that right and any other interests. This paper firstly introduces both the aforementioned judgements. Secondly, it places them in the context of the Luxembourg Court's case law on the protection of personal data, emphasising the institution's infrequent recognition of the existence of an EU right to the protection of personal data as safeguarded by Article 8 of the EU Charter of Fundamental Rights, and its changing interpretation of the object of EU data protection law. Thirdly, the paper describes the Court's tendency to affirm the need to balance the applicable fundamental rights while deferring responsibility for actually doing so. Against that backdrop, it describes the most striking peculiarities of the aforementioned judgements.

**Keywords**

personal data protection, privacy, intellectual property, European Union, fundamental rights

**Topic**

Law

## Equilibrio entre propiedad intelectual y protección de datos: el peso oscilante de un nuevo derecho

### Resumen:

Las autoridades nacionales que imponen el tratamiento sistemático de datos personales a proveedores de servicios de internet en el nombre de la protección de la propiedad intelectual no garantizan un justo equilibrio entre el interés de los titulares de los derechos de autor de asegurar su derecho a la propiedad intelectual y el derecho a la protección de datos de carácter personal de las personas afectadas por el tratamiento. El Tribunal de Justicia de la Unión Europea (UE) ha mantenido en dos ocasiones esta idea, en sus sentencias del 24 de noviembre de 2011, en el asunto C-70/10, *Scarlet Extended SA contra SABAM*, y del 16 de febrero de 2011, en el asunto C-360/10, *SABAM contra Netlog NV*. Sin embargo, el postulado se basa en una interpretación sin precedentes del derecho a la protección de datos de carácter personal como un derecho fundamental de la UE, así como en un enfoque innovador sobre la ponderación entre este derecho y otros intereses. Este artículo presenta en primer lugar los fallos citados. En segundo lugar, los ubica en el contexto de la jurisprudencia del Tribunal de Luxemburgo sobre la protección de datos personales, poniendo énfasis en el poco frecuente reconocimiento por parte de la institución de la existencia de un derecho de la UE de protección de datos de carácter personal, establecido por el artículo 8 de la Carta de los Derechos Fundamentales de la UE, y sobre su cambiante interpretación sobre el objeto de la legislación de protección de datos de la UE. En tercer lugar, se describe la tendencia del Tribunal a afirmar la necesidad de equilibrar los derechos fundamentales aplicables pero delegando al mismo tiempo la responsabilidad de hacerlo. Con este telón de fondo, el artículo describe las peculiaridades más llamativas de las sentencias mencionadas.

### Palabras clave:

protección de datos personales, privacidad, propiedad intelectual, Unión Europea, derechos fundamentales

### Tema:

derecho

National authorities that impose the systematic processing of personal data on Internet service providers in the name of the protection of intellectual property do not strike a fair balance between copyright holders' interest in ensuring their right to intellectual property and the right to personal data protection of those affected by such processing. Made twice in a short period of time by the Court of Justice of the European Union (EU), that pronouncement represents a powerful judicial contribution to a debate of considerable relevance at present. The postulate, however, is based on an unprecedented understanding of the right to the protection of personal data as an EU fundamental right, and on a groundbreaking approach to balancing that right and any other interests.

This paper firstly introduces the judgements of the EU Court of Justice in which the approach in question has materialised. Secondly, it places them in the wider context of the as yet embryonic Court's case law on the EU fundamental right to

the protection of personal data, a right without equivalent in the common constitutional traditions of Member States or in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). Thirdly, it analyses the specificity of the balancing upheld by the Court in the aforementioned judgements, arguing that the institution's position appears to vary depending on the context in which it is called upon to examine the interpretation and application of EU personal data protection law.

## 1. Introducing *Scarlet* and *Netlog*

The pronouncements of the Luxembourg-based EU Court of Justice were issued in the context of two separate references for preliminary rulings, submitted by two different Belgian courts. They both concerned demands of the *Société belge des auteurs, compositeurs et éditeurs* (hereafter 'SABAM') for injunctions to oblige private companies to carry out

generalised monitoring of the use of Internet services. In one case, the duty to perform such monitoring was to be imposed upon the Internet service provider (ISP) Scarlet Extended SA ('Scarlet'). In the other, the SABAM wished to impose similar obligations upon Netlog, owner of an online social networking platform.

### 1.1. Scarlet v SABAM

The first judgement was delivered in November 2011, in the *Scarlet v SABAM* (hereafter '*Scarlet*') case.<sup>1</sup> The referring court had asked the EU Court of Justice for guidance on the interpretation of EU law applicable in proceedings between Scarlet and the SABAM, concerning Scarlet's refusal to install a system for filtering electronic communications generated by the use of file-sharing ('peer-to-peer') software, despite a previous injunction to that effect.<sup>2</sup> Doing so would involve the systematic processing of IP addresses in the name of guaranteeing the right to intellectual property.<sup>3</sup> In Scarlet's view, the injunction was contrary to Belgian law implementing EU law, because it meant the imposition of a general obligation to monitor communications on its network, inasmuch as any system for blocking or filtering peer-to-peer traffic necessarily requires general surveillance of all communications passing through the network.<sup>4</sup>

The Court of Justice acknowledged that the right to intellectual property is to be protected, but also noted that

it is not an absolute right, and that it must, thus, be balanced against other fundamental rights when necessary.<sup>5</sup> In line with its 2008 judgement in the *Promusicae v Telefónica* ('*Promusicae*') case,<sup>6</sup> the Court stated that, in the context of measures adopted to protect copyright holders, national authorities and courts must strike a fair balance between the protection of copyright and the protection of the fundamental rights of individuals affected by such measures. The latter include, the Court specified, the freedom to conduct business, the freedom to receive and impart information, and the right to the protection of personal data.<sup>7</sup>

Observing that the monitoring obligations had no time limit, that they covered all future infringements and were intended to protect not only existing works but also works still to be created,<sup>8</sup> requiring the installation of a complicated, costly and permanent computer system, the Court of Justice considered that they would result in "*a serious infringement*" of Scarlet's freedom to conduct its business<sup>9</sup> and that, therefore, they did not respect the requirement that a fair balance be struck between the right to the protection of intellectual property and the freedom to conduct business.<sup>10</sup> As the system might not distinguish adequately between unlawful and lawful content, the Luxembourg Court also found that it could undermine freedom of information<sup>11</sup> and that, consequently, a fair balance with the freedom to receive and impart information had likewise not been struck.<sup>12</sup>

1. Judgement of the Court (Third Chamber), 24 November 2011, Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*.
2. *Ibid.*, § 2.
3. *Ibid.*, § 51.
4. *Ibid.*, § 25.
5. *Ibid.*, § 44.
6. Judgement of the Court (Grand Chamber), 29 January 2008, Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*. On this ruling, see: González Gozalo, Alfonso (2008). El conflicto entre la propiedad intelectual y el derecho a la protección de datos de carácter personal en las redes *peer to peer*. *Pe. i: Revista de propiedad intelectual*, 28, 13-68; González Vaqué, L. (2008). El TJCE se pronuncia sobre la obligación de comunicar datos personales a fin de garantizar la protección de los derechos de autor en un procedimiento civil: la sentencia "Promusicae". *Aranzadi Unión Europea*, año 34, mayo (5), 5-14; and Groussot, X. (2008). Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Judgement of the Court (Grand Chamber) of 28 January 2008: Rock the KaZaA: Another Clash of Fundamental Rights. *Common Market Law Review*, 45, 1745-1766. See also: Order of the Court (Eighth Chamber) of 19 February 2009, Case C-557/07, *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH*; and Ordóñez Solís, D. (2011). Las descargas ilegales en Internet: el contexto jurídico europeo de la *Ley Sinde*. *Unión Europea Aranzadi*, año 2011 - noviembre (11), 7-20.
7. *Scarlet*, § 45.
8. *Ibid.*, § 47.
9. *Ibid.*, § 48.
10. *Ibid.*, § 49.
11. *Ibid.*, § 52.
12. *Ibid.*, § 53.

The Court of Justice, moreover, taking into account that the filtering system would involve the systematic processing of IP addresses, described as “*protected personal data*”,<sup>13</sup> concluded that imposing such a system would not respect the requirement that a fair balance be struck with the right to the protection of personal data,<sup>14</sup> as safeguarded by Article 8 of the Charter of Fundamental Rights of the EU.<sup>15</sup>

## 1.2. SABAM v Netlog

A judgement echoing that approach was delivered in February 2012 in the *SABAM v Netlog* (“*Netlog*”) case,<sup>16</sup> concerning a reference for a preliminary ruling arising from proceedings between the SABAM and Netlog NV (“*Netlog*”). The issue at the heart of the proceedings was an injunction for the introduction of a system for filtering information stored on Netlog’s social networking platform. In its ruling, the Court of Justice, following a line of reasoning very similar to that developed in *Scarlet*, concluded that if the national court concerned were to apply the injunction obliging the hosting service provider to install the contested filtering system, it would not be respecting the requirement that the right to intellectual property be fairly balanced with the freedom to conduct business, the right to the protection of personal data and the freedom to receive or impart information.<sup>17</sup>

On this occasion, the Court based its assessment of the unfairness of the balance between the right to intellectual property and the right to the protection of personal data on the fact that the filtering system would involve the systematic processing of information connected with the profiles of the social network’s users, considered “*protected personal data*”.<sup>18</sup>

The *Netlog* judgement thus consolidated the reasoning that *Scarlet* established in the Court’s case law, on the basis of which Article 8 of the Charter safeguards a fundamental right to the protection of personal data, which is not fairly balanced with copyright holders’ rights when a mechanism requiring the systematic processing of personal data is imposed in the name of the protection of intellectual property. Previously, the Court had very rarely acknowledged the existence of an EU right to the protection of personal data, and had been extremely reluctant to get involved in any actual balancing of conflicting rights necessary for the implementation of EU data protection law.

## 2. A New Right in the Making

The right to personal data protection<sup>19</sup> can be described as an emerging right. It is now formally present in EU primary law, but the EU Court of Justice, the ultimate interpreter of EU law, has not yet clearly defined it or described its essential content.

### 2.1. The innovation of the Charter

The EU right to personal data protection was first mentioned as such in 2000 in the EU Charter of Fundamental Rights, an instrument only rendered legally binding (in a slightly modified form)<sup>20</sup> in December 2009, with the entry into force of the Lisbon Treaty.<sup>21</sup> Article 8(1) of the Charter establishes that “(e)veryone has the right to the protection of personal data concerning him or her”. Article 8(2) states that “(s)uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or

13. *Ibid.*, § 51.

14. *Idem.*

15. *Scarlet*, § 50.

16. Judgement of the Court (Third Chamber), 16 February 2012, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*.

17. *Ibid.*, § 51.

18. *Ibid.*, § 49.

19. On the EU fundamental right to the protection of personal data, see: Arenas Ramiro, M. (2006). *El derecho fundamental a la protección de datos personales en Europa*. Valencia: Tirant Lo Blanch; Siemen, B. (2006). *Datenschutz als europäisches Grundrecht*. Berlin: Duncker & Humblot; and Coudray, L. (2010). *La protection des données personnelles dans l’Union européenne: Naissance et consécration d’un droit fondamental*. Berlin: Éditions universitaires européennes.

20. Charter of Fundamental Rights of the European Union, *Official Journal of the European Union* C 83, 30.3.2010, 389-403..

21. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, *Official Journal of the European Union* C 306, 17.12.2007, 1-271.

some other legitimate basis laid down by law", and that "(e)veryone has the right of access to data which has been collected concerning him or her, and the right to have it rectified". Finally, Article 8(3) stipulates that "compliance with these rules shall be subject to control by an independent authority".<sup>22</sup>

The inclusion of that right in the Charter represented a remarkable new feature in the EU fundamental rights landscape. Until then, only a few Member States had witnessed the advent of a similar right to the protection of personal data in their own legal orders. The Strasbourg-based European Court of Human Rights had been providing judicial protection against the automated processing of data in the name of another right - specifically, the right to respect of private life, as established by Article 8 of the ECHR, and as developed in 1981 by the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data ('Convention 108').<sup>23</sup>

To justify the unprecedented inclusion of the right to personal data protection in the Charter, its drafters mentioned the need to update existing catalogues of rights in the light of technological progress, as well as many legal sources, notably Article 8 of the ECHR and the relevant case law of the European Court of Human Rights, in addition to Convention 108 and various EU provisions adopted in the 1990s, including both primary and secondary law. None of those sources, however, had ever mentioned the existence of a right to personal data protection as an autonomous fundamental right, separate

from the right to respect for private life. Its recognition as such in the Charter thus represented a considerable breakthrough.

## 2.2. Hesitant reception in the case law

Until recently, the EU Court of Justice had not openly embraced the evolution in question.<sup>24</sup> It was only in 2008 that it first acknowledged that Article 8 of the Charter established a right to the protection of personal data. In the 2008 *Promusicae* judgement, observing that Directive 2002/58/EC<sup>25</sup> (adopted in 2002, after the proclamation of the Charter) referred to that provision in its Preamble, the Court noted that "Article 8 of the Charter expressly proclaims the right to protection of personal data".<sup>26</sup> Such pioneering recognition, nevertheless, was of little effect, as the rest of the judgement referred to the right to respect for private life wherever it might have instead mentioned the right to personal data protection.<sup>27</sup>

### 2.2.1. The shifting object of data protection law

Even after the *Promusicae* ruling, the Court of Justice has most often dealt with the interpretation of EU data protection law without making any reference to the existence of an EU fundamental right to personal data protection. That right is crucially absent from the foremost legal instrument for data protection ever approved by the EU, Directive 95/46/EC.<sup>28</sup> Adopted in 1995 (before the Charter's proclamation in 2000), its object, in its own words, is to ensure that Member States "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with

22. On this Article, see: Ruiz Miguel, C. (2003). El derecho a la protección de los datos personales en la carta de derechos fundamentales de la Unión Europea: Análisis crítico. *Revista de Derecho Comunitario Europeo*, 7 (14), 7-43.

23. Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, 28 January 1981, European Treaty Series No. 108.

24. On the case law of the EU Court of Justice on personal data protection, see, notably: De Hert, P. and S. Gutwirth (2009). Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalism in Action. In Serge Gutwirth, Yves Poullet, Paul De Hert, Cécile De Terwangne & Sjaak Nouwt (eds.), *Reinventing Data Protection?* (pp. 3-44). Dordrecht: Springer; and Oliver, P. (2009). The protection of privacy in the economic sphere before the European Court of Justice. *Common Market Law Review*, 46, 1443-1483.

25. 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), *Official Journal of the European Communities* L 201, 31.7.2002, 37-47.

26. *Promusicae*, § 64.

27. *Ibid.*, § 65. A comparable phenomenon can be observed in the Opinion of Advocate General Kokott in Case C-275/06, delivered on 18 July 2007, as she mentions the recognition of the fundamental right to data protection in Article 8 of the Charter (§ 51), but presents her arguments in the light of Article 8 of the ECHR (§ 52 and following).

28. Directive 95/46/EC of the European Parliament and of the 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 of the European Communities* L 281, 23.11.1995, 31-50.

respect to the processing of personal data", and to prevent any restrictions on the "free flow of personal data between Member States".<sup>29</sup>

The Luxembourg Court has frequently recalled those words when framing its interpretation of Directive 95/46/EC. It did so, for instance, in its December 2008 judgement in the *Satamedia* case,<sup>30</sup> where the right to the protection of personal data was not quoted at all, although Advocate General Kokott had referred to it in her Opinion in the case.<sup>31</sup> In its 2009 *Rijkeboer* judgement,<sup>32</sup> the Court of Justice asserted that Directive 95/46/EC served primarily to protect privacy and consequentially to protect personal data, as highlighted in its Preamble and as allegedly often emphasised by its own case law.<sup>33</sup> Again, it made no allusion to the right to data protection. Likewise, there is no allusion to Article 8 of the Charter in the 2010 judgement in the *Bavarian Lager* case, despite the proceedings being directly concerned with establishing the specificity of EU data protection law compared to the content of Article 8 of the ECHR.<sup>34</sup>

Nonetheless, there have been instances in which the Court of Justice has made further mention of the EU right to personal data protection. In its 2011 ruling in the *Deutsche Telekom AG v Bundesrepublik Deutschland* ('*Deutsche Telekom*')

case,<sup>35</sup> concerning a reference for preliminary ruling partly related to the interpretation of Directive 2002/58/EC, the Court not only once again acknowledged the existence of the aforementioned right, but even asserted that Directive 95/46/EC, later developed by Directive 2002/58/EC, "is designed to ensure, in the Member States, observance of the right to protection of personal data".<sup>36</sup>

The *Deutsche Telekom* judgement was not without unclear passages, however. The Luxembourg Court appeared to situate the core content of the right to personal data protection exclusively in the first paragraph of Article 8 of the Charter.<sup>37</sup> It subsequently emphasised that the right in question is not absolute but must be considered in relation to its function in society,<sup>38</sup> and seemed to situate the description of the manner in which such consideration should take place in the second paragraph of Article 8 of the Charter.<sup>39</sup>

#### 2.2.1. The right to respect for private life with regard to the processing of personal data

A judgement illustrating many of the Luxembourg Court's uncertainties where the current framing of the protection of personal data in EU law is concerned is its 2010 ruling in the *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* ('*Schecke*') case,<sup>40</sup> concerning a reference

29. Article 1 of Directive 95/46/EC.

30. Judgement of the Court (Grand Chamber), 16 December 2008, Case C-73/07, *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy*, § 52. See also: Docquir, B. (2009). Arrêt *Satamedia*: la (re)diffusion d'informations publiques dans les médias et les exigences de la protection des données. *Revue européenne de droit à la consommation*, 2-3, 560-581; and Hins, W. (2010). Case C-73/07, *Tietosuoja- ja valtuutettu v. Stakunnan Markkinapörssi Oy and Satamedia Oy*, judgment of the Grand Chamber of 16 December 2008, not yet reported. *Common Market Law Review*, 47, 215-233.

31. Through a reference to the *Promusicae* judgement (Opinion of Advocate General Kokott in Case C-73/07, delivered on 8 May 2008, § 40).

32. Judgement of the Court (Third Chamber), 7 May 2009, Case C-553/07, *College van burgemeester en wethouders van Rotterdam v M.E.E. Rijkeboer*.

33. *Ibid.*, § 47. The Advocate General opining on the case had provided a peculiar reading of Article 8 of the Charter, which, in his words, codified the right to privacy, which had previously found a legislative expression in Directive 95/46/EC (see: Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-553/07, delivered on 22 December 2008, § 8).

34. Judgement of the Court (Grand Chamber), 29 June 2010, Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd.*

35. Judgement of the Court (Third Chamber), 5 May 2011, Case C-543/09, *Deutsche Telekom AG v Bundesrepublik Deutschland*.

36. *Ibid.*, § 50.

37. *Ibid.*, § 49. Additionally, the Court only referenced Article 8(1) of the Charter, instead of Article 8 as a whole, in its mention of the right to the protection of personal data in *Schecke* (§ 47). On this approach, see: González Fuster, G. and R. Gellert (2012). The fundamental right of data protection in the European Union: in search of an uncharted right. *International Review of Law, Computers & Technology*, 26 (1), 73-82.

38. *Deutsche Telekom*, § 51.

39. *Ibid.*, § 52.

40. Judgement of the Court (Grand Chamber), 9 November 2010, Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*. On the judgement in question, see: Bobek, M. (2011). Joined Cases C-92 & C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert*, Judgement of the Court of Justice (Grand Chamber) of 9 November 2010, nyr. *Common Market Law Review*, 48, 2005-2022.

for a preliminary ruling related to the interpretation of EU law, arising from proceedings regarding the applicants' opposition to the publication of data about them as recipients of EU funds on a public Internet site.

In its preliminary observations, the EU Court of Justice noted that the referring court maintained that the publication of the beneficiaries' data constituted an unjustified interference with the fundamental right to the protection of personal data, essentially based on Article 8 of the ECHR.<sup>41</sup> Pointing out that the Charter enjoys legally binding force,<sup>42</sup> the Court of Justice held that it should preferably interpret applicable EU law not from the perspective of the ECHR but rather in the light of the Charter,<sup>43</sup> and thus invoked Article 8 thereof, on the right to the protection of personal data.<sup>44</sup> Immediately, however, the Court added that the fundamental right to data protection "is closely connected with the right to respect of private life expressed in Article 7 of the Charter".<sup>45</sup>

The Court of Justice then underlined that the right to data protection is not absolute but must be considered in relation to its function in society,<sup>46</sup> and that such consideration must take into account not only the wording of Article 8 of the Charter,<sup>47</sup> but also the content of Article 52(1) of the same document,<sup>48</sup> where the conditions for legitimate limitations to the Charter's rights are described. Also mentioning Article 52(3),<sup>49</sup> which establishes that corresponding Charter and ECHR rights must be interpreted similarly, the Court concluded that there would be a "right to respect for private life with regard to the processing of personal data", recognised jointly by Article 7 and Article 8 of the Charter, the content of which it described as simply matching the Strasbourg case law on the applicability of Article 8 of the ECHR to the processing of data related to individuals. As a

matter of fact, the core of the Court's judgement, structured around establishing the existence of an interference with a protected right and assessing the justification for such interference, is directly inspired by Strasbourg's case law.<sup>50</sup>

One of the striking aspects of the *Schecke* judgement is the Luxembourg Court's efforts to distance itself from framing personal data protection as part of the right to respect for private life corresponding to Article 8 of the ECHR, although its reading of the Charter nevertheless took it back to the interpretation of the article in question. In making those efforts, furthermore, the Court invented a notion, the "right to respect for private life with regard to the processing of personal data", allegedly protected jointly by Article 7 and Article 8 of the Charter. That expression appeared again in a 2011 ruling, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECMD)*.<sup>51</sup>

As the *Schecke* judgement shows, the issue of framing data protection law under Article 8 of the ECHR or under Article 8 of the Charter, or under both, is not only of theoretical interest but also has consequences for the interpretation and application of EU law. Affirming the existence of an EU fundamental right to data protection opens up the questions of how it should be construed, when and how it can be restricted, and how and by whom it can be balanced, when necessary, against any other interest or right.

### 3. Balancing An Elusive Right

Fundamental rights can be subject to balancing operations in various contexts. All fundamental rights that are not absolute can be restricted or limited. The assessment of the legitimacy

41. *Ibid.*, § 44.

42. *Ibid.*, § 45.

43. *Ibid.*, § 46.

44. More precisely, the Court mentions Article 8(1) of the Charter.

45. *Schecke*, § 47.

46. *Ibid.*, § 48.

47. *Ibid.*, § 49.

48. *Ibid.*, § 50.

49. *Ibid.*, § 51.

50. *Ibid.*, § 52-89.

51. Judgement of the Court (Third Chamber), 24 November 2011, Joined Cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECMD) (C-469/10) v Administración del Estado*, § 42.

of such restrictions must always involve balancing the fundamental right itself against any other interests pursued by the limitation. Moreover, action taken to guarantee a fundamental right may need to be balanced with the need to protect other interests or rights.<sup>52</sup> These two basic scenarios are not clearly delimited, as a right's restriction will sometimes be based on the need to protect another fundamental right, thus also leading to rights having to be balanced.

### 3.1. Disparate balancing operations in the context of EU data protection law

The EU Court of Justice began developing its case law on data protection law and the balancing of different interests and rights many years before it acknowledged the existence of an EU fundamental right to personal data protection.

#### 3.1.1. Deferring responsibility for balancing

Two important decisions were delivered in 2003. The first was the *Rundfunk*<sup>53</sup> judgement, about Austrian legislation requiring the disclosure of data on employees' income. In its ruling, the EU Court of Justice had to provide guidance on the interpretation of an article of Directive 95/46/EC allowing Member States to derogate from some of its provisions in certain cases.<sup>54</sup> Arguing that while Directive 95/46/EC was principally aimed at ensuring the free movement of personal data, it also mandated Member States to protect fundamental rights and, in particular, the right to privacy,<sup>55</sup> the Court maintained that to do so it was necessary to ascertain, from the point of view of Article 8 of the ECHR, whether the relevant legislation provided for an interference with private

life and, if so, whether it was justified.<sup>56</sup> The Luxembourg Court proceeded to carry out such an analysis, drawing on the case law of the European Court of Human Rights, which emphasises the need for interferences to be proportionate to the aim pursued. That led the Court to identify the need to balance Austria's interest in ensuring optimal use of public funds against the seriousness of the interference with the right of the people concerned to respect for their private life as key.<sup>57</sup> The specific assessment of such a balancing operation in the case being dealt with was left to the national court.<sup>58</sup>

Secondly, in the judgement in the *Bodil Lindqvist* ('*Lindqvist*') case,<sup>59</sup> concerning a Swedish catechist who had published information on the Internet about her colleagues,<sup>60</sup> the Court of Justice had to examine whether some provisions of Directive 95/46/EC could be interpreted as a restriction conflicting with freedom of expression or other freedoms or rights.<sup>61</sup> In its answer, the Court underlined that Directive 95/46/EC aimed both to ensure the free movement of personal data in the EU and to safeguard fundamental rights,<sup>62</sup> but stated that it was primarily at the stage of applying national measures implementing Directive 95/46/EC in individual cases that a balance must be found between the rights and interests involved.<sup>63</sup> It was the responsibility of national authorities and courts, the Court emphasised, to ensure a fair balance between the rights and interests possibly affected by the implementation of EU data protection law.<sup>64</sup>

The *Satamedia* case concerned the interpretation of Directive 95/46/EC<sup>65</sup> in relation to proceedings revolving around,

52. Piñar Mañas, J. L. (2003). El derecho a la protección de datos de carácter personal en la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas. *Cuadernos de Derecho Público*, 19-20 (mayo-diciembre), p. 58.

53. Judgement of the Court, 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof (C-465/00) and Österreichischer Rundfunk, Wirtschaftskammer Steiermark, Marktgemeinde Kaltenleutgeben, Land Niederösterreich, Österreichische Nationalbank, Stadt Wiener Neustadt, Austrian Airlines and Österreichische Luftverkehrs-AG, and between Christa Neukomm (C-138/01), Joseph Lauer mann (C-139/01) and Österreichischer Rundfunk*.

54. In particular, Article 13. *Rundfunk*, § 67.

55. *Ibid.*, § 70.

56. *Ibid.*, § 72.

57. *Ibid.*, § 84.

58. *Ibid.*, § 88.

59. Judgement of the Court, 6 November 2003, Case C-101/01, *Bodil Lindqvist*.

60. *Ibid.*, § 13.

61. *Ibid.*, § 72.

62. *Ibid.*, § 79.

63. *Ibid.*, § 85.

64. *Ibid.*, § 90.

65. *Satamedia*, § 1.

according to the EU Court of Justice, the need to reconcile “the protection of privacy and freedom of expression”.<sup>66</sup> In its 2008 judgement on the case, the Court emphasised the idea that the obligation to reconcile the two rights lies with Member States.<sup>67</sup> In relation to such reconciliation, it merely noted that the protection of the fundamental right to privacy requires any derogations from and limitations to EU data protection law to apply only insofar as is strictly necessary.<sup>68</sup>

### 3.1.2. Invalidity of EU law due to failure to ensure a fair balance

The *Schecke* case diverged from the previously mentioned cases in that it was not (primarily) a reference for a preliminary ruling on the interpretation of Directive 95/46/CE,<sup>69</sup> but on other EU provisions. The EU Court of Justice, after drawing on both the Charter and the Strasbourg case law, eventually declared some of the contested provisions partially invalid on the grounds that the EU legislator had not fairly balanced the EU's interest “in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular”,<sup>70</sup> in relation to the data of natural persons.<sup>71</sup>

### 3.2. Balancing intellectual property against data protection (as a right)

In the *Scarlet* and *Netlog* judgements, the Court of Justice partly followed its case law derived from the 2008 *Promusicae* decision. In that ruling, the Luxembourg Court had to provide guidance on the relationship between copyright enforcement and the protection of personal data; more specifically, on the interpretation of EU law regarding the possible obligation of Member States to establish a duty to disclose personal data in order to ensure effective

protection of copyright in the context of civil proceedings.<sup>72</sup> The Court of Justice's answer to the referring court was that Member States must take care to allow a fair balance to be struck between the various fundamental rights protected by the EU legal order both when transposing EU law and when implementing transposing measures.<sup>73</sup> Mechanisms allowing for different rights and interests to be balanced are contained in EU law and in national law transposing it.<sup>74</sup> In addition, however, when implementing measures transposing EU law, national authorities and courts must avoid interpretations of them which would be in conflict with any fundamental rights or general principles of EU law, such as the principle of proportionality.<sup>75</sup>

### 3.2.1. The right to personal data protection as an applicable right

A first key way in which *Scarlet* and *Netlog* differ from *Promusicae* is that the EU Court of Justice singled out the right to the protection of personal data as one of the applicable fundamental rights in the latter cases. It did not do so in *Promusicae*, instead mentioning, in relation to striking a balance with the right to intellectual property, the right to respect for private life.

In the *Scarlet* and *Netlog* cases, the referring courts had made no mention at all of the EU fundamental right to personal data protection, or even of the Charter, alluding instead to the ECHR and, in particular, Article 8 thereof, on the right to respect for private life. The EU Court of Justice nevertheless took a deliberate decision to reformulate their questions as inquiries into the interpretation of EU law “read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights”,<sup>76</sup> amongst which it identified the right to the protection of personal data.

66. *Ibid.*, § 54.

67. *Idem.*

68. *Ibid.*, § 56.

69. Although it was so subsidiarily.

70. *Schecke*, § 77.

71. *Ibid.*, § 89.

72. *Promusicae*, § 41.

73. *Ibid.*, § 70.

74. *Ibid.*, § 66. This idea is taken from *Lindqvist* (§ 82), where it referred to the reconciliation of safeguarding fundamental rights and ensuring the free movement of data in Directive 95/46/EC.

75. *Promusicae*, § 68 (with a reference to *Lindqvist*, § 87, and to Judgement of the Court (Grand Chamber), 26 June 2007, Case C-305/05, *Ordre des barreaux francophones et germanophones et Others v Conseil des ministres*, § 2).

76. *Scarlet*, § 29, and *Netlog*, § 26.

In doing so, the Court partially adhered to the advice that Advocate General Cruz Villalón had set out in his Opinion on *Scarlet*.<sup>77</sup> Noting that since the entry into force of the Lisbon Treaty the rights established by the ECHR remain applicable as general principles of EU law,<sup>78</sup> but that the Charter has now acquired binding force, the Advocate General had argued that recourse to the former is no longer necessary, as the rights it safeguards are covered by the latter.<sup>79</sup> Also observing that Article 52(3) of the Charter establishes that corresponding Charter and ECHR rights are to be interpreted in the same light, he had advanced that, in the context of the case at least, Article 8 of the ECHR corresponds to two Charter provisions, specifically Article 7 on the right to respect for private life and Article 8 on the protection of personal data.<sup>80</sup> In addition, he had pointed out, Article 52(1) of the Charter, which stipulates the conditions in which the Charter's rights can be limited, corresponds to at least some degree to the content of Article 8 of the ECHR, although the latter provision does not refer to "*limitations*", but rather to "*interferences*".<sup>81</sup> Cruz Villalón had ultimately suggested that the referring court's mention of Article 8 of the ECHR be reformulated and replaced with a reference to Articles 7, 8 and 52(1) of the Charter, to be interpreted, nonetheless, to the necessary extent, in the light of Article 8 of the ECHR.<sup>82</sup> The Court of Justice only followed that suggestion up to a point. It granted the Charter precedence over the ECHR, but cited just a single Charter provision, namely Article 8, in relation to the protection of personal data.

### 3.2.2. A strong if laconic assertion of the lack of fair balance

A second significant way in which *Scarlet* and *Netlog* differ from *Promusicae* concerns the approach taken to balancing conflicting rights. *Promusicae* could be regarded as an example of the EU Court of Justice's tendency to defer responsibility

for balancing operations related to the application of EU data protection law to national authorities and courts, albeit with some guidance on how to go about achieving such a balance. In *Scarlet* and *Netlog*, in contrast, the Court did not merely highlight that national authorities and courts must strike a fair balance between the rights involved, but took a clear position on the lack of such a balance between the fundamental rights in conflict in the main proceedings.

A further extraordinary step taken by the Luxembourg Court in *Scarlet* and *Netlog* is related to the straightforwardness of the balancing exercise applied. In his Opinion on *Scarlet*, Advocate General Cruz Villalón had lengthily examined whether the monitoring system under consideration could be regarded as a permissible "*limitation*" to the rights recognised by the Charter, in the sense of Article 52(1) thereof, or as an "*interference*" with Article 8(1), in the sense of Article 8(2) of the ECHR.<sup>83</sup> He had stated that evaluating the monitoring system's specific impact on the right to the protection of personal data was complicated,<sup>84</sup> *inter alia* because of the difficulties related to determining whether IP addresses constitute personal data,<sup>85</sup> but had gone on to say that, in any case, the system's potential to affect the right to the protection of personal data was certainly sufficient for it to be classed as a "*limitation*" in the sense of Article 52(1) of the Charter.<sup>86</sup> He had subsequently noted that the same provision allows for limitations under certain conditions,<sup>87</sup> in particular if they are necessary to protect the rights and freedoms of others.<sup>88</sup> Limitations must notably be "*provided for by law*", an expression that, in his view, ought to be interpreted in the light of Strasbourg's case law on the requirement for them to be "*in accordance with the law*", as stipulated in Article 8(2) of the ECHR. That had eventually led him to conclude that the imposition of the monitoring system did not comply with the aforementioned requirement.<sup>89</sup>

77. Opinion of Advocate General Cruz Villalón, delivered on 14 April 2011, in Case C-70/10.

78. *Ibid.*, § 29.

79. *Idem.*

80. *Ibid.*, § 31.

81. *Ibid.*, § 32.

82. *Ibid.*, § 43.

83. *Ibid.*, § 72.

84. *Ibid.*, § 74.

85. *Ibid.*, § 75.

86. *Ibid.*, § 80.

87. *Ibid.*, § 87.

88. *Ibid.*, § 92.

89. *Ibid.*, § 108.

The Court of Justice passed over all those considerations. It simply proclaimed that the measures under consideration entailed the systematic processing of personal data and, on those grounds, concluded that the right to personal data protection had been affected and that a fair balance with the right to intellectual property had not been struck. It did not explain how exactly such processing constituted a “*limitation*” to the right, or why, if it did constitute a “*limitation*”, it could not be regarded as a legitimate one. The approach in question can be seen as being in contrast to the Court’s general case law with regard to the need to articulate any balance between fundamental rights precisely and in a manner respecting the principle of proportionality, as well as to its numerous previous endeavours to emphasise the relevance of the Strasbourg case law and (more recently) the provisions of the Charter in relation to striking a rigorous and *fair* balance.

## 4. Concluding Remarks

To recapitulate, the Luxembourg’s Court case law on the protection of personal data is marked by contradictory approaches in terms of the relevant fundamental rights deemed applicable for the purpose of interpreting EU law. When dealing directly with Directive 95/46/EC, the Court tends to read the instrument in question in the light of the right to respect for private life as safeguarded by Article 8 of the ECHR. When it interprets Directive 2002/58/EC, which is supposed to develop Directive 95/46/EC but, for chronological reasons, contains an explicit mention of Article 8 of the Charter, the Court more readily refers to the existence and applicability of an EU fundamental right to the protection of personal data. From *Rundfunk to Promusicae*, the Court had been extremely cautious with regard to determining the scope of EU personal data

protection law and weighing up conflicting fundamental rights.<sup>90</sup> When dealing directly with the interpretation of Directive 95/46/EC, it has generally left the task of striking a balance between any rights and interests involved to domestic courts and authorities.<sup>91</sup>

Against this heterogeneous background, the *Scarlet* and *Netlog* judgements stand out as peculiar. They not only affirm the existence of an EU right to data protection and its precedence over the application of Article 8 of the ECHR for the purpose of interpreting EU law insofar as the protection of personal data is concerned, but have also led to a firm assertion that the imposition of the systematic monitoring of communications in the name of copyright enforcement is incompatible with EU fundamental rights standards.

These developments might mark the beginning of a new attitude from the Luxembourg Court towards the balancing of conflicting fundamental rights. However, they might equally be just further examples of the diversity of the Court of Justice’s approaches to personal data protection, a diversity of views (or mere confusion?) likely to persist as long as the Court refuses to openly acknowledge that the catalogue of EU fundamental rights nowadays includes a right to the protection of personal data. The legislative proposal that the European Commission introduced in January 2012 with a view to replacing Directive 95/46/EC with a new Regulation<sup>92</sup> straightforwardly asserts the existence of such a right,<sup>93</sup> and includes provisions on its reconciliation with other interests and rights, such as the right to freedom of expression – even if it lacks any specific mechanism for reconciliation with copyright enforcement.<sup>94</sup> The protagonism of the right to the protection of personal data in the European Commission’s proposal is confirmation (if any were necessary) of the need for the EU Court to shape clearly the right’s limits and to clarify how it can be balanced.

90. Opinion of Advocate General Kokott in Case C-73/07, § 46.

91. A tendency that has been criticised. See, for instance: Spiecker Döhmman, I. and M. Eisenbarth (2011). Kommt das “Volkszählungsurteil” nun durch den EuGH? - Der Europäische Datenschutz nach Inkrafttreten des Vertrags von Lissabon. *Juristenzeitung*, 4 (2011), p. 175.

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