10 The legal significance of individual choices about privacy and personal data protection[1]

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Introduction

This chapter looks into the security/privacy relationship through a legal prism. It is not about the *legal acceptability* of security measures, but rather about their legality. Policy makers in the European Union (EU) taking security-related decisions are obliged to ensure all adopted measures are compliant with fundamental rights requirements. It is true that they might also, additionally, be interested in questioning whether (some) individuals might perceive such decisions as impacting fundamental rights negatively or not.[2] These are however two different issues, and should not be conflated: one regards compliance with fundamental rights, while the other is about *perceptions of compliance*. Whereas respect for fundamental rights is unquestionably a legal issue, perceptions of compliance might be described as a societal consideration, potentially addressed from an economic perspective in terms of a possible negative impact on the commercialisation of technological products.[3]

This chapter investigates how legal compliance, as determined by judges and courts, proceeds to take into account individual choices referring to privacy and personal data protection in relation to security.[4] In other words, it is concerned with how legal decisions are taken using or ignoring individual choices related to privacy and personal data protection. As such, it does not seek to directly investigate whether decision makers might take into account these individual preferences when defining related security, technology or research policies,[5] or even when legislating.[6] The chapter will nonetheless refer to how positive law sometimes appears to integrate the consideration of individual choices.

Individual choices can manifest themselves independently – as a single, personal choice – or in conjunction with other individual preferences. In the latter case, a sum of individual choices can take the shape of a perceived public opinion, or at least of a certain public opinion, that is, representing the opinion of a certain public. This contribution takes into consideration these two possibilities, giving particular attention to situations in which the endorsement of the choices of some individuals might appear to be in conflict with the choices of other individuals.

From a conceptual view, individual choices may be regarded as both reflecting and informing individual preferences. In relation to the right to respect for private life and personal data protection, individual choices and preferences might be

pictured as globally subsumed under the term 'privacy concerns'. These 'privacy concerns' include attitudinal aspects, related to what people perceive, feel and think; cognitive aspects, related to what people know and the information they are provided with; and practical or behavioural aspects, related to what people do, particularly in the cases where choice is actually effectively in their hands (Oliver-Lalana and Muñoz Soro, 2013).[7] All these dimensions are of course interrelated, and influence each other, but might also be seemingly discordant. Individual actions and decisions related to privacy and personal data protection are always multidimensional, and sometimes inconsistent and contradictory (Muñoz Soro and Oliver-Lalana, 2012: 41). In fact, from that perspective, it would be more appropriate to speak of 'dividuals'.

An example where ignorance of the issues at stake seems to directly affect practical decisions taken by individuals on privacy-related issues can be found in the context of fingerprinting of migrants in application of EU law. The European Commission has observed that in some cases migrants who should be fingerprinted in accordance with applicable laws do not receive a clear explanation of this fact and of the legal consequences linked to their possible refusal from the competent authorities. As a result, some of the uninformed migrants decide to refuse being fingerprinted without knowing that, where they have not yet applied for asylum, their refusal could be treated as an indication that they are likely to abscond, and become an argument used to justify their detention (European Commission, 2014: 4).

The chapter first examines the principles guiding the relation between fundamental rights and individual choices. This is followed by a study of the significance of individual choices for the adjudication of the right to respect for private life, and for the adjudication and regulation of the right to personal data protection. Finally, some of the key tensions of the integration of individual choices in EU personal data protection law are discussed.

General principles of fundamental rights protection

In the EU, the relationship between security, privacy and personal data protection is most critically played out at the level of fundamental rights (González Fuster *et al.*, 2014). It is thus necessary to open up this reflection on the legal significance of individual choices in the area by looking into the very notion of fundamental rights.

Rights of all

Fundamental and human rights aim to protect everybody – all natural persons. They are recognised as such because they are considered to be rights of the highest value, to which all individuals are entitled. In the system of the Council of Europe, this idea is documented by the fact that the European Convention on Human Rights (ECHR) systematically refers to 'everyone' (even individuals who are not citizens of the States party to the Convention) as the subject of the rights

established by its provisions: for example, Article 8 of the ECHR, on the right to respect for private and family life, states that '[e]veryone *has the right to respect for his private and family life, his home and his correspondence*'. Article 34 of the ECHR, mirroring this approach, sets out that 'any person' might file an application before the European Court of Human Rights (ECtHR) claiming to be the victim of a violation of the rights it sets forth. Similarly, the Charter of Fundamental Rights of the EU asserts in its Article 7 that *everyone* has the right to respect for his or her private and family life, home and communications, while its Article 8(1) establishes that *everyone* has the right to the protection of personal data concerning him or her.

The fact that everybody is entitled to the enjoyment of fundamental rights directly implies that those rights are not exclusively destined to protect the majority of individuals, but also any members of possible minorities, both in numerical and cultural terms. Those whose choices are in conflict with the choices of the majority cannot be deprived of protection. On the contrary, typically it will be precisely those whose personal choices differ from the choices of the majority who will be most likely to seek protection in terms of their fundamental rights and freedoms. Fundamental rights protect individuals against John Stuart Mill's proverbial 'tyranny of the majority'. The majority may actually be regarded as 'naturally preserved' by the very social strength of its own normality; 'normal persons', by their condition of being normalised, enjoy a sort of shelter that people living marginal lives, dissidents and minorities in general simply lack (Díez-Picazo, 2013: 57). Freedom of expression would not make much sense if it only protected expressions of common ideas.

Translated into the specific area of privacy and personal data protection this notably entails that the right to privacy and to personal data protection must aim to protect everybody as opposed to just people with normal or average 'privacy concerns'. In reality, it is probably those with singular and extraordinary 'privacy concerns' that will be in particular need of legal protection, and it is also for them that the mentioned rights should be effectively implemented.

Rights protected with special safeguards

Fundamental and human rights are typically given an especially high status in European legal orders, which aims to preserve them from some of the oscillations of the will of the majority as represented and enacted by the legislator. This special rank is also derived from the human rights obligations originating in the ratification of international treaties and agreements, such as the ECHR. In the EU, Member States sometimes condition the adoption of norms restricting the exercise of fundamental rights and freedoms to special legislative requirements, and can provide for reinforced judicial control whenever fundamental rights are at stake. This can imply, for instance, that legal norms formally backed up by the legislator might however be declared null and void by the judiciary due to a violation of constitutionally protected rights and freedoms.

This shielding of fundamental rights and freedoms from the will of the majority through judicial review is grounded in an acknowledgement of the fact that the

rights of minorities are often violated with the majority's explicit or implicit approval. The shielding must also however be linked to another basic feature of fundamental rights, which is their dual dimension as being regarded by law as valuable both subjectively and objectively (Díez-Picazo, 2013: 55). Fundamental rights have a subjective dimension insofar as they aim to protect concrete individuals, but they also have an objective dimension in the sense that they represent foundational elements of constitutional democratic states. Owing to this objective dimension, they must be protected and promoted by public authorities regardless of the particular preferences of few (or many) individuals.

Limited possibilities of waiver

Another attribute derived from the basic premise according to which fundamental and human rights are recognised as being of the greatest importance for the legal order establishing them is that, in principle, individuals cannot relinquish them. It would be paradoxical for any legal order to place at its summit a selected set of rights and freedoms, envisioned as subjectively and objectively essential, and then to confer to individuals the possibility to renounce to them on the basis of personal choices. Establishing a general possibility to relinquish fundamental and human rights could be understood as an indication of accepting to give away a series of guarantees that are claimed to be essential. Renouncing fundamental and human rights, or even to some specific rights or freedoms, shall thus in general be regarded as legally inadmissible. Individuals cannot, for instance, decide to renounce their personal freedom and accept slavery, or to give up their freedom of expression and condemn themselves to eternal silence (Díez-Picazo, 2013: 137).

This does not mean, however, that individuals are obliged to exercise their fundamental rights and freedoms in all cases and under all circumstances. As a matter of fact, a duty to exercise these rights and freedoms can never be imposed: individuals may always choose to refrain from reacting to a violation of any of their rights. The prohibition of a global waiver of fundamental rights coexists with the recognition of individual freedom, and thus law attempts to strike a balance between the autonomy of the individual and the State's obligation to protect fundamental rights (for a discussion of the issue of waiver in these terms, see: De Schutter, 2014).

As a result of the prohibition of general waiver of rights, any exercise of a fundamental right must be considered legitimate and valid regardless of any possible previous commitment stating that a right would not be used (Díez-Picazo, 2013: 139). Individuals must remain free to decide to exercise their rights, and thus any general statement in an opposite sense is to be treated as legally inconsequential. What could happen, nonetheless, is that by first announcing that the intention to renounce exercising a right and later deciding to exercise it, individuals generate negative consequences for a third, and thus such a decision could, in certain cases, be subject to compensation.

Another important limitation of the waiver of fundamental rights is that it is never possible to relinquish exercise in favour of the State. Public authorities cannot impose, support or accept a waiver of this kind, which would go against one

of the basic functions of fundamental rights in general, that is, to limit the power of public authorities and through 'horizontal effect', of other actors (Díez-Picazo, 2013: 138). This is particularly pertinent in relation to the right to respect for private life, commonly envisaged as located at the very heart of individual freedom and aiming to ensure individuals are free from arbitrary interference by a public authority (or by others). The right's classical conception as devising an abstract space that the State cannot penetrate would be in full contradiction with granting to such State the possibility to put any kind of pressure on individuals to surrender this protection.

Individual choices in the adjudication of privacy

Moving to the issue of how individual choices operate specifically in the adjudication of the right to respect for private life, we shall now focus on the case law of the ECtHR on Article 8 of the ECHR – in search of insights to illuminate the importance of individual choices for defining the relationship between security, privacy and personal data protection.

The ECtHR's case law is of special interest due to the Strasbourg's Court's emphasis on the need to interpret the Convention in a dynamic way, also taking into account changes in social attitudes (Harris *et al.*, 2014: 8). The ECtHR famously stressed in 1978 that the European Convention is 'a living instrument' that 'must be interpreted in the light of present-day conditions'.[8] The Court, for instance, inferred that Article 8 of the ECHR encompasses an obligation not to discriminate against children born out of wedlock after observing that laws in the great majority of Member States of the Council Europe had evolved and were evolving in such a direction.[9]

Individual perceptions and the scope of private life

One of the ways in which individual choices can play a role in the adjudication related to the right to respect for private life is by affecting the construction of the notion of 'private life', which has never been defined or thoroughly circumscribed by the ECtHR (Harris *et al.*, 2014: 525). Delimiting the contours of 'private life' is decisive to determine the scope of Article 8 of the ECHR.

Generally speaking, law can approach the delimitation of this notion in two distinct ways, either by granting a wide discretion to individuals to decide what they wish to keep protected under such a term, or rather by following material criteria determining whether something should be protected or not regardless of the particular wishes of the individual affected (Díez-Picazo, 2013: 281). In the first perspective, something should be viewed as private where that is the wish of those concerned; in the second, something should be protected as private can and should be delimited on the basis of objective factors irrelevant of individual wishes. Following the first perspective can be problematic both in the cases where individuals do not wish to have any protection at all (despite the objective dimension of the right), and in situations where they desire extensive protection.

The ECtHR has generally considered that what needs to be protected under the right to respect for private life cannot vary completely from one person to another merely depending on their personal wishes, and that there is a certain minimum to be necessarily protected to ensure individuals' dignity and quality of life. The Court has stressed that 'private life' must be understood as a broad term, encompassing a zone of interaction with others, even in a public context[10] and it has put forward a number of elements to be taken into account to determine if a person's private life is affected when people are outside their home or private premises, such as the systematic or permanent record of information about individuals.[11]

The Strasbourg Court has repeatedly detached itself from the so-called 'expectations of privacy' doctrine. This doctrine, imported from the United States (US), conditions the existence of a violation of somebody's privacy to the requirement that the individual affected was actually legitimately expecting to enjoy privacy protection. The Court has observed that, in order to determine whether a measure constitutes an interference with the right to respect for private life, a person's reasonable expectations as to privacy may be a significant, but not necessarily conclusive, factor.[12] The ECtHR, therefore, does not condition the recognition of an interference with the right to respect for private life to the fact that the individual had actually any concrete expectations of privacy. The Court, nonetheless, sometimes takes into account whether actions such as the publication of recorded material occurs in a manner or degree that goes beyond what was normally foreseeable; if that is the case, this may be considered as an important element to regard the action as falling under the scope of the right to respect for private life.[13]

All in all, it can be deduced that there is no need to prove the existence of a general expectation of privacy in a concrete circumstance to actually be granted the right to obtain privacy protection. Nevertheless, individuals' expectations in terms of anticipated limited use of personal information may be a significant factor in determining whether there has been an interference with their fundamental rights. The Court, therefore, appears to grant only a limited significance to individual preference in such matters, preferring to rely on objective to criteria to determine the possible existence of interferences with the right to respect for private life under Article 8 of the ECHR.

Also in relation to other rights set out by the ECHR, the Strasbourg Court has been reluctant to grant any major relevance to societal views for the determination of the scope of the right protected. For instance, in 1978 the Strasbourg Court observed that the fact that birching of young persons had many advantages according to the local public opinion of the Isle of Man was irrelevant to the question whether such birching constituted inhuman and degrading treatment.[14]

Can public perceptions legitimise interferences?

A different issue is whether some public perceptions or choices may play a role in the legitimisation of interferences with the rights of the ECHR, and concretely with the right to respect for private life of its Article 8. This right is indeed one of those enshrined in the ECHR that might be legitimately limited in certain

circumstances and in accordance with certain requirements. When considering applications of individuals who claim their rights under Article 8 of the ECHR have been violated, the Strasbourg Court first examines whether the applicant's rights have been affected, and, if the existence of an interference is indeed established, it then turns to the question of whether the restriction can be regarded as permissible.

To be permissible, restrictions of the rights contained in Article 8 of the ECHR must be 'necessary in a democratic society' for achieving one of the aims listed in the Article's second paragraph.[15] The ECtHR has held that the requirement of being 'necessary in a democratic society' does not mean that measures constituting interferences must be 'absolutely necessary' or 'indispensable', but it has equally underlined that it is not enough for measures to be merely 'useful' or 'desirable'.[16] In the Court's view, for an interference to be 'necessary in a democratic society' it must correspond to a 'pressing social need'. The requirement of amounting to a 'pressing social need', however, does not imply that interferences must be approved be the majority of society. Two important judgments throw light on the role granted to public perceptions for the possible justification of interferences with the rights protected under Article 8 of the ECHR.

The first, *Dudgeon v UK,* dates from 1981 and was about the criminalisation of male homosexual acts in Northern Ireland.[17] In this case, the ECtHR pointed out that this prohibition concerned a most intimate aspect of private life, and, therefore, could only be justified for particularly serious reasons. The Strasbourg Court argued that some forms of legislation could be regarded as 'necessary' to protect particular societal groups and 'the moral ethos of society as a whole', but added that any measures needed nevertheless to remain within the bounds of what might be regarded as strictly necessary to accomplish the aims pursued.[18] The Court noted that it was 'relevant', in order to assess compliance with the requirements of Article 8(2) of the ECHR on the legitimacy of interferences, to examine 'the moral climate in Northern Ireland in sexual matters', which encompassed 'a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society'.[19] These elements, although relevant, were nevertheless not sufficient according to the Court to justify the maintenance in force of the impugned legislation insofar as it had the general effect of criminalising private homosexual relations between adult males capable of valid consent.[20] Indeed, they did not amount by themselves to a proof that there was a *'pressing social need'* to regard such male homosexual acts as criminal offences.[21] In this context, the Court also noted that the 'democratic society' to which alludes the requirement of being 'necessary in a democratic society' bears as hallmarks tolerance and broadmindedness.[22]

In the second judgment, *Smith and Grady v UK*, of 1999, the ECtHR addressed the investigation into and subsequent discharge of personnel from the armed forces on the basis of their homosexuality.[23] Here, the Court notably made explicit that the measures at stake could not be justified on the basis of social negative attitudes towards homosexuals. In its defence, the UK government had put forward a report allegedly expressing the general views of the personnel on the issue, but the Court

described such a report as documenting negative attitudes of heterosexual personnel towards those of homosexual orientation which 'ranged from stereotypical expressions of hostility […] to vague expressions of unease about the presence of homosexual colleagues'.[24] The Court added that, to the extent that these negative attitudes expressed 'a predisposed bias', they could not be considered to amount to sufficient justification for the interferences with the applicants' 'any more than similar negative attitudes towards those of a different race, origin or colour'.[25] Doing so, the ECtHR unambiguously declared it simply irrelevant for the justification of interferences with Convention rights these categories of negative attitudes.

Individual choices and European personal data protection

Entering into the discussion of the relationship between personal data protection and individual choices, (construed as encompassing individual attitudes, knowledge and practices) there are a few general observations that can be advanced. First of all, it must be noted that the EU legislator often appears to rely on a vision of individuals as 'data subjects', that is, as subjects of the right to personal data protection, that are poorly informed and prone to take wrong decisions (see notably: González Fuster, 2014b). This vision is sometimes illustrated by the image of individuals that are confused up to the point of ignoring that the services that they use, and that they imagine to be free services, are as a matter of fact services that they are actually paying for, not with money but through the provision of their own personal data.

This viewpoint contrasts but coexists with a second perspective, according to which data subjects must nevertheless be considered as being in a position allowing them to decide freely on whether they should consent or not to certain personal data processing practices, at least in some circumstances. This idea is firmly entrenched in EU personal data protection, through the notion of consent.

The role of consent

Under current EU personal data protection rules, individual consent can operate as one of the grounds rendering personal data processing activities lawful.[26] The provision of the Charter of Fundamental Rights of the EU on the right to personal data protection, Article 8, explicitly refers to consent by establishing that personal 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'.[27] The explicit reference to consent made in this provision actually concedes to this ground a symbolically privileged position among all other possible legitimate grounds for personal data processing detailed in EU secondary law.

Consent may however operate as a legitimate basis for personal data processing only in some circumstances, as for it to be valid data subjects must have been given a genuine and free choice and be subsequently able to refuse or withdraw consent without detriment. Despite this limitation, through the notion of consent EU personal data protection law appears to grant great relevance to individual choice.

If the major exception to the validity of consent is indeed that it shall not be valid when individuals have no real choice, this could be seen as implying that whenever they do have a choice, their choice should be taken into account.

The literature has discussed widely whether consent, as it functions in everyday situations, actually reflects the true choices of individuals or is performing independently or against such choices (Oliver-Lalana and Muñoz Soro, 2013: 160).[28] It must be stressed that in order to be valid, consent must be informed, which means that data subjects should have been appropriately informed about the specific purposes of the data processing operations to which they are consenting. Nevertheless, it is questionable whether in light of the general misinformed condition of data subjects (as discussed above), and despite the absence of any real time information provided, they could still be regarded as being informed enough as to provide fully informed consent.

The widespread use of consent as a legitimising basis for personal data processing activities and its known problems may lead one to think that, instead of allowing the expression and enforcing of individual choices, it rather ends up covering a waiver to any real possibility of effective control. This has notably led the doctrine to refer to consent as a myth (Oliver-Lalana and Muñoz Soro:167; see also Gutwirth, 2012). Despite these criticisms, the legislative package for the review of EU personal data protection law introduced in 2012 by the European Commission (2012a, 2012b and 2012c) confirmed and reinforced the prominence of consent, supported by EU institutions as contributing to the 'empowerment' of data subjects (Oliver-Lalana and Muñoz Soro, 2013: 164).

The case law of the Court of Justice of the EU (CJEU) offers some insights on the significance of individual choices in EU personal data protection law, and in particular in relation to consent. Particularly relevant is the *Deutsche Telekom* judgment,[29] of 2011, concerning the obligation placed on an undertaking assigning telephone numbers to pass to other undertakings data in its possession relating to the subscribers of third-party undertakings. In this ruling, the Luxembourg Court examined a provision of Directive 2002/58/EC[30] giving to subscribers of telecommunication services the opportunity to determine whether their personal data shall be included in public directories.[31] The Court declared that this provision did not grant to subscribers a selective right to decide in favour of certain providers: by consenting to have their data being published in a directory with a specific purpose, individuals lose standing to object to the publication of the same data in another, similar directory.[32] *Deutsche Telekom* is revealing as it appears to grant to individual choices a real impact, but an impact nevertheless limited in scope. Individuals might accept or refuse a processing of personal data (in that specific case, the publication of personal data in a directory), but cannot decide who shall be responsible for such processing (they cannot accept the processing only on the condition that it takes place under the control of a certain company, and oppose it if it is carried out by another).

Other judgments of the CJEU provide only glimpses of the role that consent is supposed to play in EU personal data protection law. A particularly puzzling example is the ruling in *Volker und Markus Schecke and Eifert*, of 2010.[33] In this case, the

Luxembourg Court dismissed the possibility that the processing of personal data at stake (namely, the online publication of beneficiaries of EU funds) was grounded on consent, noting that it was based instead on an obligation imposed by law, law which nevertheless constituted an interference with the EU fundamental right to personal data protection that had to comply with the limitations imposed by the horizontal provisions of the EU Charter.[34] What is striking, however, is that in this ruling the Court appeared to treat consent as a possible way not only to legitimise personal data processing as such, but rather as a means to actually set aside the possibility that an interference with the EU fundamental right to the protection of personal data ex Article 8 of the EU Charter had taken place at all.[35] This could be read as implying, *a contrario*, that whenever data subjects have consented to a particular data processing operation, the operation cannot be regarded as an interference with their fundamental right to personal data processing[36] – which would be highly problematic.

Choosing between individual choices and the public interest

There is however still another noteworthy judgment of the CJEU on the legal significance of individual choices for EU personal data protection. The ruling *Google Spain*, of 2014,[37] concerns the possible tensions between a particular individual choice and the potential interest of the public in opposing such choice. The CJEU addressed indeed the issue of whether data subjects have a right to request that any list of results displayed following a search made on the basis of their name does not display some information relating to them that is inadequate, irrelevant or no longer relevant. The Court asserted that data subjects have indeed such a right, in the light of Articles 7 and 8 of the EU Charter, and underlined that as a general rule this right overrides the right of the general public in having access to that information when carrying out a search using the data subject's name.[38]

This dominant role granted to the individual choice to have some information removed from a list of results in front of the potential public preference to have the information preserved is, nevertheless, not asserted with a general character, but rather as a presumption that might be contested and possibly invalidated. The Luxembourg Court observes in this sense that the overriding of the right of the general public in having access to the information upon the search on the data subject's name can in some cases not take place, if special conditions apply. That would be the case, the Court notes, if it appeared that for particular reasons, such as the role played by the data subject in public life, the interference with their fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.[39]

The views of data subjects in data protection impact assessments

Another way in which EU personal data protection law will in the future integrate a consideration of individual choice is through 'data protection impact assessments'. The General Data Protection Regulation adopted by the European Parliament and

the Council in April 2016[40] foresees establishing the obligation to carry out 'data protection impact assessments' in certain circumstances. As a general rule, an assessment shall be carried out whenever 'a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons'.[41] In the context of this assessment, and '[w]here appropriate', the data controller 'shall seek the views of data subjects or their representatives on the intended processing'.[42]

Concluding thoughts

This chapter has shown that, legally speaking, the significance of individual choice for defining the relation between security, privacy and personal data protection has multiple facets. Globally speaking, law appears to be ready to fully support personal choices, even choices that go against the choices of other individuals, however numerous or persuasive these might be. It will, for example, decide to ignore some societal opinions that are perceived as going against the basic principles of inclusiveness of democratic societies. Law can also, nonetheless, pursue the protection of individuals also against their own individual choices, and for this purpose reduce or limit the relevance of their own preferences.

Against this complex background, the role granted to consent by EU personal data protection law is noteworthy for its ambiguousness. This ambiguity can manifest itself in concrete individual decisions, where single acts of consent might appear to go against some established knowledge on the limitations on the waiver of (human) rights. More remarkably, the widespread use and misuse of consent as a ground to process personal data in the EU can also have global consequences for instance via the active use of online social media. In such instances the fact that many individuals appear to 'consent' to some popular data processing practices, is taken as evidence of their preferences or lack of 'privacy concerns'. In a similar vein, policy makers appear to have an increased interest in attempting to appraise the economic value of personal data in the eyes of data subjects, in the understanding that such examination could provide relevant orientations for future policy decision in this area.

In face of these developments, it is crucial to go back to the idea of the multidimensionality of privacy concerns, and to rethink how the limitations imposed by law on the significance of individual choice can be appropriately integrated. As noted, attitudes, knowledge and practices related to privacy and personal data protection cannot be envisaged as independent aspects, because they affect each other. From this viewpoint, one should not focus on trying to assess or calculate individuals' 'personal' preferences in relation to the use of personal data concerning them, or to merely take note of how lightly people appear to consent to certain data processing practices, but rather investigate the factors that determine these preferences and practices, and the relations between them.[43] In other words, instead of acting as if there were some pre-existing personal choices that happen to operate among the current legal landscape for privacy and personal data protection, it

might be necessary to inquire how the current legal landscape shapes attitudes and decisions, and, finally, discuss which kind of preferences and choices it should encourage or discourage (Rouvroy, 2008: 17). The exact legal significance of these choices will afterwards, in any case, shift (back) to the hands of courts and judges.

Notes

1 This chapter is based on a deliverable (5.3) written in the framework of the Privacy and Security Mirrors (PRISMS) research project. For more information, see http://prismsproject.eu/.
2 The importance of this concern is notably developed in: (European Commission, 2012a). See for instance p. 11 referring to public fear provoked by some security measures, or p. 28 stating that security technologies are often perceived as an intrusion of the personal sphere.
3 In this sense, ibid. p. 28.
4 'Law' as primarily understood here is what judges and courts do whenever they rule, rather than legislation. On the specificity of law, see e.g: (Gutwirth, 2015) and (González Fuster and Gutwirth, 2014).
5 On the relation between public debate and technological research, for instance, see (Von Schomberg, 2011: 13).
6 On the use of public opinion shifts to support decisions by policy makers, see, for instance (Dimitris Potoglou *et al.*, 2010).
7 On the limits of gathering knowledge on these dimensions, see for instance: (Szoka, 2009).
8 *Tyrer v UK*, Judgment of the Court (Chamber), of 25 April 1978, § 31.
9 *Marckx v. Belgium*, Judgment of the Court (Plenary) of 13 June 1979, § 61.
10 See, for instance, *Uzun v Germany,* judgment of the Court (Fifth Section) of 2 September 2010, § 43 and case law cited thereof.
11 *P.G. and J.H. v. the UK*, judgment of the Court (Third Section) of 25 September 2001, § 57.
12 Idem.
13 *Uzun,* § 48.
14 *Tyrer*, § 38.
15 That is, national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Art. 8(2) of the ECHR).
16 See notably *Handyside v the UK,* Judgment of the Court (Plenary) of 7 December 1976, § 48.
17 *Dudgeon v UK*, Judgment of the Court (Plenary) of 22 October 1981.
18 *Dudgeon*, § 49.
19 Ibid., § 57.
20 *Dudgeon*, § 61.
21 Ibid., § 60.
22 Ibid., § 53.
23 *Smith and Grady v UK,* Judgment of the Court (Third Section) of 27 September 1999.
24 Ibid., § 97.
25 Idem.
26 This is the general function of consent of EU personal data protection law. It also plays other roles, notably as a means to render lawful the processing of sensitive data, generally prohibited (for this purpose, consent shall be explicit), and consent can also render lawful data transfers to third countries that would be otherwise not allowed.
27 Art. 8(2) of the Charter of Fundamental Rights.
28 On consent in EU personal data protection, see also: (Kosta, 2013).

29 Case C-543/09 *Deutsche Telekom AG v Bundesrepublik Deutschland*, Judgment of the Court (Third Chamber) of 5 May 2011.
30 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), OJ L201, 31/07/2002, pp. 7–47.
31 Art. 12(2) of Directive 2002/58/EC.
32 Deutsche Telekom, § 62.
33 Joined Cases C-92/09 and C-93/09, Judgment of the Court (Grand Chamber) of 9 November 2010, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, 2010 I-11063.
34 See notably § 62 and 63.
35 See § 61 and § 64.
36 On the weaknesses of existing CJEU case law on the right to personal data protection, see notably (González Fuster, 2014a).
37 Case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Judgment of the Court (Grand Chamber) of 13 May 2014.
38 Google Spain, § 97.
39 Idem.
40 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L119, 4.5.2016, pp. 1–88.
41 Art. 35(1) of the General Data Protection Regulation. See also 35(3) for specific cases.
42 Art. 35(9) of the General Data Protection Regulation.
43 In this sense: (Rouvroy, 2008: 16).

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