

A Fundamental Tension

Digitalisation has not just impacted our social and economic lives but also our most basic fundamental rights. The development of human rights has always had to respond to technological changes but never before have lawmakers, regulators and society had to adapt to the sudden changes so quickly as with digital. These rights always exist in tension with one another and must be balanced in a way that seeks to preserve their essential exercise. Some of these tensions are academic and theoretical. However, others impact our everyday lives and animate public debates.

With the rapid advancement of digital comes the need for new policy solutions and fresh discussion. Within the EU the most recent discussions have increasingly focused on the right to privacy in this digital age. Since its launch in 2018, the EU's flagship GDPR has not only influenced privacy legislation around the globe but has become a mainstream topic for discussion among academics, policymakers and industry members. While this development of privacy protection is a welcome and essential one, still far too overlooked from this debate is the extent to which the growing strength of privacy rights and demands for digital privacy rights appear to expose tensions with other fundamental rights, freedoms or important public interests, such as health (as COVID-19 crisis has shown), innovation, education and research, the freedom of expression and information, and the freedom of business and competition.

This leads us to an obvious yet difficult question: Has the drive for the protection of privacy, come to the detriment of the protection of other fundamental rights and freedoms?

A Most Favoured Right?

Respect for fundamental rights must be not only embodied in laws but made real through institutions and enforcement. Today, seemingly no right has more watchdogs and enforcers than the right to privacy and data protection. If compared in terms of ease of availability, cost to exercise, mechanisms to enforce, and resourcing of authorities, few rights are given comparable emphasis. Many citizens naturally seek to exercise their right to privacy via the GDPR and are greeted by DPAs eager and empowered to help and use-friendly channels to demand redress. By contrast, those looking to enforce their other fundamental rights, such as freedom of expression and information, or the freedom of the arts and sciences have no such institutions to defend them and much less clear and user-friendly channels to turn to.

In the wake of GDPR's sea change for the digital economy and citizen's conception of and ability to exercise their rights online, what are the practical impacts of this strong emphasis on personal data protection, enshrined through the GDPR, for other fundamental rights?

Assessing the Balance of Fundamental Rights

This a crucial question for policymakers to address to understand how we can best support the pursuit and protection of fundamental rights as personal data continues to sweep into different aspects of our lives, legislation and international relations. The paper, *Balancing Fundamental rights in Data Regulation in Europe*, seeks to advance that inquiry by examining examples of where and when we have seen privacy and other rights and fundamental clashes across the EU. This paper aims not to be a definitive assessment but instead a snapshot to spark debate in a reasoned and objective manner.

Security and Economic Rights

In today's highly digitalised economy, transnational data flows have emerged as a core driver of access to goods and services for European consumers and to international trade for European businesses, essential to the exercise of citizens' economic rights and rights to expression and information.¹ However, international transfers of personal data are subject to restrictions under GDPR, and the recent "Schrems II" decision of the CJEU has created chaos in the legal and operational measures businesses have instituted to comply with these restrictions, jeopardising critical sectors of international trade and the businesses large and small that rely on it.

Medical Research

Personal data in a health and medical context can be highly sensitive. It can also be indispensable for secondary purposes such as efforts to develop new treatments or research the spread of diseases. Therefore, the GDPR creates both heightened standards for consent and processing of health-related data as well as exceptions to allow its processing in cases to protect vital interests and for scientific research. However, in practice we see the significant barriers posed. At the extreme we see cases such as that of the *Findata authority*. The European Federation of Academies of Sciences and Humanities (ALLEA) has reached similar findings in a recent report, citing that there is "no workable legal mechanism for sharing pseudonymised health data for public sector research."²

Transparency

In democratic societies, knowledge of the activities of government and those conducting the public affairs is a critical prerequisite to informed participation in democratic processes. Knowledge of the identities of who is responsible for decisions is also important for accountability and good government. However, in many cases the interest of protecting the personal information of individuals, even when relevant to questions of public administration and policy, may prevail, such was the case in *Volker und Markus Schecke, Eifert and Commission v Bavarian Lager*.

Free Expression

The right to receive and impart information and ideas is a core fundamental right and a cherished value in democratic societies. However, when this information concerns the personal data of another person, this right collides with the right to privacy. This includes when those persons are public officials, circumstances under which there may be a particular interest in conveying the identities of persons in the interest of public accountability and political discourse or subject to journalistic exemptions. The recent *Buivids* ruling of the CJEU highlighted this profound tension.

Why Dialogue is Needed

Weighing the current balance of fundamental rights, the practical costs of what it takes to exercise them, and how we can move it in a better direction is a critical area for inquiry and discussion. However, it is also a challenging area, fraught with deeply held convictions and genuine differences of opinion regarding core values. To reach consensus, nuanced and informed dialogue is needed between stakeholders.

Today's panel is designed to bring a variety of voices together to discuss how to find this balance. Our aim is to start a debate on the future of fundamental rights in a digital society - not to end it. We do not come with prospective solutions. Instead, we want to create a space for recalibrating the debate to more fully grapple with the fact that no right is absolute and showcase that the dangers in elevating one right at the expense of others.

¹ See "Data Flows and the Digital Decade," *Digital Europe*, June 2021, <https://www.digitaleurope.org/resources/data-flows-and-the-digital-decade/>

² "International Sharing of Personal Health Data for Research," European Federation of Academies of Sciences and Humanities, April 2021, <https://allea.org/portfolio-item/international-sharing-of-personal-health-data-for-research/>