General Data Protection Regulation

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Article-by-Article Commentary

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Preface

In 2018, Europe became the worldwide leading regulator of digital goods and services as well as digital decision-making: The General Data Protection Regulation (GDPR) took effect. Conditions of consent, core principles such as lawfulness, purpose binding and data minimization, privacy by design and by default and in particular the amount of damages and fines for unlawful data processing have become parts of everyone's reality. A binding and unifying framework exists under which data processing of personal information and thus digitization work. From then on, not only European citizens but also anyone within the EU or confronted with data processing starting from establishments within the EU can trust that their human rights, their individuality, their autonomy is protected under a far-reaching and demanding legal regime.

The impact of the GDPR cannot be underestimated. Ever since it was passed two years prior to its effectuation, in 2016, a worldwide discussion on privacy and data protection has accelerated. The effects of digitization on the individual and the need for a forceful protection have left experts' secluded spaces of contemplation and research and become a far-reaching, obvious, and demanding reality. Companies and state actors alike have changed their data processing, and States as influential as Japan, Brazil and South Korea have passed similar laws to synchronize their data processing regulation with the EU legislation. Even in China and the USA data protection laws have started to regulate encroaching private companies' informational power and thus reduce – at least in the private sector – power asymmetry due to data access and data processing technology.

It might therefore be possible to state, that these rules constitute a milestone, maybe even a turning point, a "Zeitenwende", in digitization regulation. Between the Data Protection Directive (DPD) of 1995 and the GDPR of 2016, information technology had increasingly penetrated everybody's everyday life – at the industrial internet, in the (video surveilled) public sphere, in one's (smart) home, in (virtual) worlds. Connectivity has created ubiquitous computing, social networks have changed the way of communication, online marketing has targeted in personalized ways, big data has turned individuals into statistics, artificial intelligence has competed with human cognition. All these, and also further developments in digitalization – just think of quantum computing – developed under a legal regime often compared to a toothless tiger: The Member States' authorities had little power and little competences, and the Member States' laws implementing the DPD were highly fragmented leading to a race to the bottom. With the GDPR the EU started its big offensive on digitization regulation creating a human-centered, human-rights oriented information society to counteract the imbalances and asymmetries having developed as a result. The GDPR was accompanied by the Law Enforcement Directive and soon followed by a number of highly demanding and worldwide intensely scrutinized digitalization regulatory acts concentrating on many other effects of information and communication technology such as the Digital Markets Act, the Digital Services Act, the Data Governance Act, or the Data Act und the Artificial Intelligence Act, both presently in the final stages of passing. All these more or less include provisions which leave the GDPR untouched. This may in practice and in detail cause frictions, and the exact width of such declarations is not yet fully understood, but the provisions also make clear that the GDPR remains the most comprehensive data regulation act and as such a blueprint for other regulatory efforts.

It is also the EU's most prominent step of establishing Europe as an alternative to autocratic legal regimes on the one hand and data capitalist legal regimes on the other

hand, strengthening the individual's importance and thus the backbone of the rule of law and democracy.

This commentary aims at making the leading privacy law in the world more understandable. It gives practitioners from all fields, lawyers, judges, data protection authorities, scholars, academia, regulators and all who are interested in a closer understanding of the GDPR guidance on how to interpret the relevant law. With more than twenty highly knowledgeable experts on their respective fields from practice and academia, the diversity of the EU Member States (and also of UK – this book project started, as did the GDPR, with the UK still being part of the EU), the European perspective is represented thoroughly. The basic principle of the Commentary is that of autonomous interpretation. Concepts based on a particular national legal system, rule, case-law or doctrine have no value in itself. However, problems (and their solutions) in specific countries can be a valuable source of illustration and inspiration but are connected strictly to the European perspective; sometimes, it was unavoidable to rely on non-English literature. It is the Commentary's distinctive feature to offer a sound, well-researched opinion, reflecting human rights' effects and the consequences for society.

The format of a commentary is originally a German academic format. It gives argumentative guidelines by which individual problems can be approached. In a commentary of this style, each article is extensively analyzed and discussed in the light of potential and existing legal and factual problems, presenting relevant literature and judgments (concentrating on ECJ and ECtHR case law in addition to relevant Member State of national Supreme Courts and Courts of Appeal), providing an overview over the material, enlightening about the difficult underlying structures and raising critical points. Difficult, undecided and uncertain questions are not avoided; the authors offer clear positions and give precise arguments. Wording, the historical background including the trialogue, the provision's structure, the interplay with other provisions and the recitals, the goal/telos and relevant case law, statements, decisions and opinions of important stakeholders such as the EDPB (previously, the Art.-29 Working Party), or the Member States' data protection authorities and the EDPS are presented. Sections, sentences, parts and words of each provision after another are thus commented on.

Each comment on the individual provisions is preceded by the text of the article commented on. In general, there is no universal introduction that summarizes common points before a chapter or a section. The comment of the individual provision starts with a brief overview, describing and clarifying the purpose and function of the norm in order to give general arguments how to judge concrete problems. Then, the different paragraphs and sentences are explained and analyzed one after another without paraphrasing or repeating the normtext. The general structure of the comment is from the abstract/general remarks to more specific problems.

This is done by a scientific and at the same time comprehensible style; real and hypothetical examples are presented to illustrate the meaning of a provision in the course of its thorough analysis and interpretation. The commentary focuses on the regulation itself; cross-references to further provisions are made where obvious or helpful for the analysis and understanding, e.g. the Law Enforcement Directive 2016/680, the ePrivacy Directive 2002/58, Regulation 45/2001, third-country-transfer-of-data arrangement). References to the legal status under the DPD are also made.

The most prominent – and influential – commentary on privacy in German law has been Spiros Simitis' commentary, both on the DPD and on the German Federal Data Protection Law (Bundesdatenschutzgesetz). The latter was published in eight editions until 2014 and has continued on the GDPR with the involvement of two of this commentary's editors and some of our authors who partly have been long-time

companions and students of his. Spiros Simitis, who was a law professor at Frankfurt University in Germany and later became head of the Hessian data protection agency and a highest-ranking advisor to the EU, was the "father of data protection". He had developed the core principles of privacy regulation that still govern the GDPR today already in the 1960s culminating in the world's first data protections law of the state Hesse in Germany in 1970: the principles of purpose binding, data minimization, transparency, legal justification for data processing, the independent data protection authorities compensating for the inadequate resources of individuals to protect their rights. We are proud that parts of the introduction have been authored by him. As Spiros Simitis sadly passed away in the final days of compiling this commentary, this edition is also commemorating his incomparable importance for the field of data protection.[1]

The commentary has been a joint effort of the editors, the authors and the publisher. We thank them all for encouraging us to introduce this fairly new format to the European legal market and going this new path with us. Behind all of these directly visible contributors, numerous other researchers, assistants, staff and students have made its publication with their aid possible – not in the least our families who had to share us with the corrections, recommendations, discussions and editing in the past years. We thank them all from our hearts!

Brussels, Kassel and Frankfurt, June 2023

Vagelis Papakonstantinou
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[1] For more information see the obituaries on https://www.jura.uni-frankfurt.de/47000118/Forschungsstelle_Datenschutz.

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