PRIVACY THROUGH THE BACK DOOR?

PERSPECTIVES AND PROBLEMS

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OVERVIEW

EU law: a sheep in wolf’s clothing?
<table>
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<tr>
<th>EUROPEAN UNION</th>
<th>COUNCIL OF EUROPE</th>
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<td>No fundamental rights competence: EU Charter of Fundamental Rights apply when Member States are ‘implementing EU law’</td>
<td>European Convention on Human Rights (ECHR) - power to declare fundamental rights infringements</td>
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<td>Enacts legislation with direct impact between private parties</td>
<td>ECHR: no direct horizontal effect - applies only between State signatories</td>
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<td>Limited (if any) role in sovereignty-sensitive areas, such as state security, public security, defence and criminal law (Article 3 &amp; 13 of Directive 95/46; Article 15 of Directive 2002/58)</td>
<td>ECHR applies to the activities of the State in all areas</td>
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THE SNOWDEN REVELATIONS

Big Brother Watch et al v UK (ECtHR)
https://www.privacynotprism.org.uk/
ROLE OF EU LAW?

Symbiosis of data processing: critical ‘hook’ for EU jurisdiction

- Digital Rights Ireland: Data Retention Directive as an internal market mechanism
- Schrems: Article 25 Data Protection Directive to regulate cross-border data flows
DRD examined in light of EU Charter:
- ‘Particularly serious’ interference with Articles 7 and 8 by obligation to retain data, plus further interference when data accessed
- Article 52(1) EU Charter: serves an objective of general interest; must not interfere with essence of the right
PROPORTIONALITY

- Discretion of legislature reduced; review of discretion should be strict [48]
- Scope of application: covers in a generalised manner, all persons & all means of electronic communication as well as traffic data without differentiation’ [57] → no link to crime
- No criteria limiting access and use (‘serious crime’; no substantive or procedural limits; no prior authorisation)[60-62]
- Time limit: no objective justification [64]
- Security: data security; not held in the EU [66-68]
Interpretation of ‘adequate’ (not identical but ‘a level of protection... that is essentially equivalent’ to EU

Third country ‘ensures’ adequate protection: includes practice and regular review.

Commission: reduced discretion and strict standard of review
EU’S PRIVACY POTENTIAL

Acknowledging that public and private sector data processing are two sides of the same coin

Breathing life into the EU Charter: EU Institutions and Member States subject to strict review

Reassuring Member States that the ‘Solange’ doctrine remains active thereby protecting the supremacy of EU law
BREYER - CHANGES AFOOT?

Storage of IP addresses by Federal Republic of Germany

German law allowed collection and use only to charge for use of media

Storage necessary to prevent cyberattacks?
POTENTIAL PITFALLS?

Risk of clash - or competition - with the ECtHR?

Judicial overreach? Respecting competences and comity

Is the highwater mark too high? Challenges of practical solutions (eg. Data sovereignty)

A developing fundamental rights governance system? Preliminary references stemming from activism
QUESTIONS?