

**TOWARDS A DIGITAL EUROPEAN INTEGRATION:  
CONSTITUTIONALIZATION OF EU LAW AND EUROPEANIZATION  
OF CONSTITUTIONAL LAW IN THE FIELD OF DATA PROTECTION**

**HACIA UNA INTEGRACIÓN DIGITAL EUROPEA:  
LA CONSTITUCIONALIZACIÓN DEL DERECHO DE LA UE Y LA  
EUROPEIZACIÓN DEL DERECHO CONSTITUCIONAL EN MATERIA  
DE PROTECCIÓN DE DATOS**

Mónica MARTÍNEZ LÓPEZ-SÁEZ  
*Universitat de València*

**Summary:** The European Union has experienced a slow but sure process of integration. After the initial economic construction, other stages of integration followed. Respect for fundamental rights was, from the very start, one of the distinguishing marks of the European integration project, and after the Lisbon Treaty (amending the founding treaties and incorporating the Charter of Fundamental Rights of the European Union as part of primary law with legally binding character) political integration was mostly completed and the foundation for legal integration materialised. As regards digitalisation and the fundamental right to data protection (as enshrined in the CFREU), the EU has experienced a long process of normative and case-law development, leading into a new stage, this time, of digital integration. The present paper aims at presenting what we are calling the Europeanization of Constitutional Law and the Constitutionalization of EU Law in data protection matters while analysing the digital single market as the new starting point for a new stage of European integration.

**Key words:** Integration; Constitutionalization; Europeanization; European Union; Fundamental rights; Data protection; Privacy; Digital single market.

**Resumen:** La Unión Europea ha experimentado un paulatino proceso de integración. Tras la realización de una integración económica, siguieron etapas posteriores de integración europea. El respeto hacia los derechos fundamentales, constituyó, desde sus inicios, un signo distintivo del proyecto de construcción europeo y la integración política se vio mayoritariamente realizada tras la reforma del Tratado de Lisboa (revisando los tratados constitutivos, así como incorporando la Carta de Derechos Fundamentales de la Unión Europea como parte del derecho originario y otorgándole una naturaleza jurídicamente vinculante); la integración jurídica se produjo poco después. En lo que a la digitalización y el derecho fundamental a la protección de datos concierne, la UE ha vivido un largo proceso de desarrollo normativo y jurisprudencial, conduciendo hacia una nueva etapa de integración: la integración digital. La presente comunicación acomete, por un lado, la tesis que hemos llamado europeización del Derecho Constitucional y la constitucionalización del Derecho de la UE en materia de protección de datos, y el análisis del mercado único digital como el punto de partida de una etapa emergente de integración europea.

**Palabras clave:** Integración; Constitucionalización; Europeización; Unión Europea; Derechos fundamentales; Protección de datos; Intimidación; Mercado único digital.

**Sumario:** 1. Introductory remarks and conceptual clarity. 1.1. European integration and fundamental rights. 1.2. Technological developments, digital era and their implications for fundamental rights. 1.3. A fundamental right to data protection as the regulatory approach. 1.4. Conceptual clarity on the notions of europeanization and constitutionalization. 2. The emergence and consolidation process of a fundamental right to data protection. 2.1. Europeanization of Constitutional Law in data protection matters. 2.2. Constitutionalization of European Union Law in data protection matters. 3. The digital single market: a new integration horizon. 3.1 The European Single Market in light of the Digital Age.

3.2 Towards a European Digital Union. 4. Concluding remarks: final reflections on the development of European digital integration. 5. References & final bibliography.

## 1. INTRODUCTORY REMARKS AND CONCEPTUAL CLARITY

### 1.1. European integration and fundamental rights

One of the most singular and relevant phenomena in the historical, political and, above all, legal sphere that developed in post-WWII Europe is undoubtedly the process of European integration. However, one cannot speak or merely reference the notion of “integration” without attempting to define it first. The word comes from the Latin verb *integratio*, which means to merge, unite or make a whole out of smaller parts. The truth, nevertheless, is that integration is an ambiguous concept and is interpreted in different ways and there is no single commonly used definition of integration. In addition, what makes this concept harder to grasp, is its duality: it can be defined both as the process of uniting and as any given stage achieved in this uniting process (Milczarek, 2001, 58). Many scholars have tried to give their own model of European integration. MacCormick (1999), Weiler (2003), or Meny (2000) can be considered as representatives of the three classical theories of integration: *Shared sovereignty*, *Federal Contractualism* and *Multi-level governance*, respectively. Specifically, within the context of the European Union (EU, hereinafter), the Oxford Dictionary on Contemporary World History (2008) as defined integration as “the formation of European states into the world’s closest regional association, which has assumed many of the characteristics of statehood”.

Indeed, the EU, as a consequence of more-than-a-half-a-century-long process of integration, is the only instance in human history where we find a deeply unified regional group, based on its own specific ideological and political assumptions, commonly called values and objectives. In the Preamble of the Treaty of the European Union (TEU, hereinafter), the justification and the founding principles of a new ‘union’ can be found: “[...]Drawing inspiration from [...] inheritance of Europe, [...]which have developed the universal values [...]inviolable and inalienable **rights of the human person, freedom, democracy, equality and the rule of law;** [...]ending of the division of the European continent [...]need to create **firm bases for the construction of the future Europe[...]**”(emphasis added).

The EU is a genuine and unique creation of supranational integration governed by its own Law. In fact, one can argue that it is the most successful ‘experiment’ to date of ‘supranational governance’ with the original goal to ensure peacekeeping in Europe and protect human rights. Although the EU originally emerged with purely economic objectives, it now undoubtedly constitutes a political organization whereby freedom, democracy and human rights are essential cohesion factors. In accordance with the founding treaties, the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are certainly at the forefront of European integration (Art. 2 TEU). In other words, respect for fundamental rights is one of the distinguishing marks of the European integration project (Jimena 2006).

The idea of rights as an integrating or unifying force is not a stranger to political and constitutional theory for “there is hardly anything that has greater

potential to foster integration than a common bill of rights" (De Búrca, 1996). Indeed, the development of a fundamental rights system for those within the European Union is a key element for the very consolidation of the Union as a political community approaching federal models (Biglino, 2003, 46), and, therefore, it seems difficult to imagine a consolidated political unit without the presence of a basic common bill of rights for all those who are part of the whole (López Guerra, 2011, 19). In this regard, the adoption and entry into force of the Lisbon Treaty, amending the constitutive treaties and recognizing the binding nature of the Charter of Fundamental Rights of the European Union (CFREU, hereinafter), was a milestone in the European integration process: creating a European Bill of Rights and making the European Union more constitutional in nature.

The CFREU was initially adopted in 2000, in the form of a Convention, through synthesis of common constitutional traditions of the Member States of the EU and international commitments on the protection of human rights. Altogether, it was a compilation of the rights contained in the 1950 European Convention on Human Rights, as well as those derived from the Constitutions of the Member States, the rights enshrined in the then-called Community Law, those contained in the European Social Charter, and those established by the European Court of Justice and the Court of Strasbourg case-law. As Tajadura (2010, 266) has highlighted, it was a matter of collecting 'the very essence of the common European *acquis* in the field of fundamental rights'. Hence, all civil, political, economic and social rights of European citizens were incorporated into a single text<sup>1</sup>. In other words, for the first time in the EU, a catalogue of "fundamental" rights (so-recognized in its Preamble) was created, representing an updated version of human rights culture.

Initially the CFREU was not given binding effect, and it was not until the entry into force of the Lisbon Treaty, in 2009, that its status was altered making it a legally binding document and giving it the same value as the other founding treaties. This legal landmark is also symbolic when thinking about the process of *constitutionalization* of the EU (Cruz Villalón, 2002, 10), as it gave greater visibility to fundamental rights through the enshrinement of a dogmatic text (Jimena, 2009, 63). The attribution of full and binding legal nature to the CFREU makes it one of the essential elements of both political and legal integration of the European Union. As regards political integration, the CFREU recognizes equality of rights for all EU citizens, part of that political community. As regards legal integration, the CFREU serves as the basis for EU and EU Law legitimacy.

## **1.2. Technological developments, digital era and their implications for fundamental rights**

The accelerated pace of information and communication technologies (ICT, hereinafter) has marked and radically changed the scale and manner in which data is exchanged and used, thus transforming the economy and society.

---

<sup>1</sup> As Tajadura (2011, 221) has also pointed out, one of the most significant developments with respect to the CFREU, in comparison with other similar normative instruments, was the fact that there was an "equalization" of first, second and third generation rights, thus overcoming the simplistic and misguided traditional prioritization of civil and political rights over economic, social, cultural and emerging rights.

Technological advances and, more specifically, digitalization, have created a new socio-digital reality and has favoured the storage, processing and massive transmission of information. Among the main elements of the digital age, the disappearance of distance between space-time in both creation and diffusion of contents, developments of search engines and the rise of information freedoms as a direct consequence of the widened threshold of public tolerance regarding privacy invasion online, are worth highlighting.

The importance that technological development has acquired is undeniable, but the massive storage, processing and dissemination of information presents a potential risk for individuals' fundamental rights. This new digital reality undoubtedly poses real problems with respect to the protection of fundamental rights such as the right to honour, the right to private and family life, the right to privacy, the right to own image, the right to data protection, and, more generally, it can take its toll on free development of the personality and human dignity. It is, then, easy to understand growing concerns for the potential use of the information available on the *World Wide Web*, at a time of rapid technological and human development, in which the free and direct access to the web is an almost inescapable reality and in which there is a massive use of its contents. Hence, the approach of the legislative and the judiciary to extend their protection and guarantee mechanisms. However, new threats generated from this new ever-changing reality pose constant challenges on how to effectively regulate data protection. In this regard, the EU has experienced a decade-long progress of regulatory development of digitalization, in general, and data protection, in particular, reflected both in its legislation and case law.

### **1.3. A fundamental right to data protection as the regulatory approach**

As will be seen below, the right to the protection of personal data has been explicitly recognized as a fundamental right at a European Union level, established in Article 8 CFREU and its nature and scope has been interpreted by the Court of Justice of the European Union (CJEU). Respect of private life and its values is deeply rooted in Civil Law traditions and is, in a way, inseparable from the existence of liberty and dignity. The content of linked and already-recognized fundamental rights (such as the right to honour, private life and own image) did indeed serve as justification for the legal positioning and enshrinement of the right to data protection as a fundamental right competing with other rights, freedoms and interests.

The emergence of the right to data protection as a fundamental right has been studied by a plurality of scholars. Some scholars have focused on a more theoretical facet of its emergence in Europe (González, 2015, 55), others on the limits to data protection as a fundamental right (Blasi, 2016, 144), and some on its clash with other rights and freedoms (Cotino, 2011, 386 and Troncoso, 2010, 23). Other authors have focused on the practical implications of data protection's current regulatory framework, emphasizing national judicial guarantee mechanisms (Rallo, 2009, 97), focusing on EU case-law (Kuner, 2015, 20) and analysing data protection in a wider global economic context (Taylor, 2016, 5). In this regard, the relevance and topicality of the subject at hand must be highlighted, following the recognition, at EU level, of this right by various

judgments of the Court of Justice of the European Union, as well as the recent adoption of a General Data Protection Regulation.

#### **1.4. Conceptual clarity on the notions of europeanization and constitutionalization**

The development of legislative, judiciary and executive institutions, as well as the enshrinement and codification of fundamental rights constitute processes which are founding elements for a social democratic State based on the Rule of Law. However, these developments are not solely restricted to the nation-state, for the EU, over the last 67 years, has undergone a remarkable transformation; a process of 'constitutionalization' (Cruz Villalón, 2002, 10) given the existence of constitutional-like elements such as political institutions, reflecting the separation of powers (organic elements), and the codification of fundamental rights through a bill of rights (dogmatic elements). Hence, in the present paper, when speaking of *constitutionalization*, we refer to the EU's institutional framework and legal order, which increasingly comes to reflect a Constitutional State<sup>2</sup>. *Mutatis mutandi*, *europeanization*, in the present paper, will refer to the internal institutional transformation and national normative developments so as to ensure national legal orders conform to EU standards. In other words, *europeanization* is the opening and acceptance of the legal order to EU values and demands.

## **2. THE EMERGENCE AND CONSOLIDATION PROCESS OF A FUNDAMENTAL RIGHT TO DATA PROTECTION**

### **2.1. Europeanization of Constitutional Law in data protection matters**

The initial realization of the right to data protection was first evidenced in Europe in the 1970s, with the adoption of two different regulatory frameworks: through *ad hoc* legislation (the case of certain German *Länder*, and soon after Germany, Sweden, France, Norway, Luxembourg and Denmark) and through constitutional provisions (such as the Austrian, Portuguese and Spanish cases) relating to automatic personal data-processing. In the case of the latter, this either included specific references to the protection and processing of data in Constitutional texts, or provided partial constitutional status to pre-existing *ad hoc* legislation (González, 2015, 56-71). The rest European countries followed in their footsteps, though mainly due to international normative developments regarding the processing of personal data, ultimately, the adoption of the OECD Guidelines

---

<sup>2</sup> It is clear that the nature of a "constitutional State" cannot be attributed to the EU as a supranational organization nor can its primary law (including the CFREU after the Treaty of Lisbon reform) be qualified as a "formal constitution". But nevertheless, it is common to refer to the process of *constitutionalization* of Europe (Cruz Villalón 2002) or to the idea of European "material constitution" (Bar 2004).



on the Protection of Privacy and Transborder Flows of Personal Data (1980)<sup>3</sup> and, given the lack of binding nature of the former, the adoption of the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981)<sup>4</sup> soon followed.

The reason behind the need for an international convention on data protection was, basically, due to the awareness that most of national legal orders in Europe shared common fundamental principles in relation to data protection, but, somehow, there were vast regulatory disparities, inconsistent with common objectives and aspirations to unity and human rights protection. Hence, we see the first instance of *europeanization* of Constitutional Law within Europe, extrapolating common national (at times constitutional) standards to a regional level. The 1981 Convention is thus presented as a transcendental legal instrument for two main reasons: first, it remains the only legally binding international instrument on data protection, and secondly, it constitutes a key step in the development of substantive law, since it alludes to the relationship between the processing of personal data and constitutionally protected concepts, such as private life and, though no definition is given, lays down criteria and principles so as to ensure a high level of protection for personal data<sup>5</sup>.

This 1981 Council of Europe convention was, in a way, the starting point for the recognition the right to data protection at an EU level. Indeed, data protection enjoys recognition and regulation in the European Union, reflected both in primary and secondary law. With regard to primary law, or in other words, the founding treaties, we find that Article 39 TEU lays down, as an exception to the procedure laid down in Article 16 of the Treaty on the Functioning of the European Union (TFEU, hereinafter), specific provisions on the protection of personal data in the field of the Common Foreign and Security Policy. Additionally, and more comprehensively, Article 16 TFEU includes a new general (legislative) competence to regulate data protection. Thus, in both founding treaties, a right to data protection is recognized, not only to safeguard human dignity, but all rights related to it, in the face of challenges regarding the new digital era paradigm; and additionally, the EU has established a specific legal basis so as to legislate rules (of a derivative nature) aimed at guaranteeing individual rights in the field of data protection.

The CFREU, given the same legal force as the founding treaties after the Treaty of Lisbon reform, not only guarantees respect for private and family life in Article 7, but enshrines a right to data protection, giving it its own provision, in Article 8<sup>6</sup>. Article 8 not only expressly recognizes a right to the protection of

---

3

<http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm>

<sup>4</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>

<sup>5</sup> In spite of its success and relevance, taking into account ratification by all EU Member States, as well as its influence on national data protection regulation, it should be pointed out that the Convention is currently in the process of being amended; the review process began in January 2011 and is ongoing. Should 2013 proposed revisions be accepted, the new Data Protection Convention would replace that of 1981 as an international and up-to-date regulatory standard for data protection.

<sup>6</sup> The coexistence of these two provisions can be justified as a reconciliation between the two major approaches to the regulation of this right by Member States' national legal orders (a compromise between legal systems and traditions that recognized the right to data protection as intrinsically linked to privacy,

personal data (first paragraph), but also refers to key data protection principles (second paragraph) and guarantees their application via an independent regulatory authority (paragraph 3)<sup>7</sup>. Some scholars have considered this provision as a breakthrough, producing a 'Copernican' change (Piñar Mañas, 2009, 93) for data protection regulation. Here, once again, we see another aspect of the process of *Europeanization* of Constitutional Law at EU level in matters of data protection: the European catalogue of fundamental rights included this right as a direct result of international normative development and Member States' constitutional experiences. The Lisbon Treaty, in this regard, introduced two important innovations in relation to the right to data protection: firstly, the attribution of a specific general competence to the EU to legislate in this matter, and, secondly, it included the CFREU as part of the founding treaties, which recognized, for the first time, at EU level, an independent right data protection. Both of which sped the process of political and legal integration and set the basis for digital integration in the EU.

In spite of the legal basis set down through primary law, we can also find normative developments exhaustively regulating the right to data protection in EU secondary law. The main European legal instrument for data protection until last year was Directive 95/46 / EC (Data Protection Directive, hereinafter)<sup>8</sup>, as the instrument adopted to harmonize data protection regulation in the field of the EU internal market and free movement of data, linked to the four 'community' freedoms. It is the first EU instrument, prior to the CFREU adoption and the Treaty of Lisbon reforms, which recognized the right to data protection through the protection of privacy. It defined the concept of "personal data" and regulated principles to abide by in the context of data processing. Even though formally speaking, it is a mere directive (*de minimis* rule), objective of which was binding whereas its means were left to Member States (and their national parliaments with a transposition procedure), they, in fact, enjoyed a limited margin of discretion in applying its provisions<sup>9</sup>. The recently adopted General Data Protection Regulation 2016/679<sup>10</sup> (GDPR, hereinafter) repeals and replaces Directive 95/46 / EC<sup>11</sup>. There was, undoubtedly a need to upgrade the legal apparatus relating to data

---

and those which recognized the right to data protection as an independent and autonomous fundamental right (Martínez, 2004, 219).

<sup>7</sup> While it is true that the CFREU does not provide an explicit definition, this is justified by the fact that, having been adopted and entered into force several years after the adoption of the Data Protection Directive in 1995 (which did include a clear definition), it was understood that Article 8 covered all pre-existing EU legislation on data protection.

<sup>8</sup> 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 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

<sup>9</sup> As noted in CJEU judgment 24 November 2011 (Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) (C-468/10) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) (C-469/10) v Administración del Estado): "*it has been held that the harmonisation of those national laws is not limited to minimal harmonisation but amounts to harmonisation which is generally complete*" (par. 28-29).

<sup>10</sup> 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). <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN>

<sup>11</sup> Note: the GDPR came into force 25 May 2016, although it won't be directly applicable until 25 May 2018, taking into account its adaptation period (see Art. 99 GDPR).

protection: the Data Protection Directive was adopted at a time when the development of the *World Wide Web* was at an early stage and the challenges posed in the current digital era were not foreseen nor regulated. This panorama, therefore, required uniform and effective standards to ensure that the most fundamental rights at risk were effectively protected. This new legal framework has entailed a comprehensive review of the European data protection system, both at the formal and substantive level, since a decision was made to amend the current legislation through a 'robust' legal instrument (a regulation -not a directive-) and addresses new challenges and problems previously unregulated (Rallo, 2012, 16). Another factor that led to the need for a different kind of legal approach was the lack of harmonization of legislation to date and the legal gaps and guarantees for the effective exercise of the right to data protection. The GDPR, therefore, provides a single standard and set of rules, directly applicable in all Member States, with a two-fold purpose: to achieve a uniform level of protection throughout the EU and avoid regulatory divergences so as to not hinder free movement and protection of personal data.

Regulatory parameters of the EU are necessarily complemented by other, less well-known-but-equally-important safeguards present in the EU so as to ensure fundamental rights enshrined in the CFREU. There are, in fact, quite a number of specialized human rights protection mechanisms, but due to space limitations, I will only mention the most relevant actor in data protection matters, the European Data Protection Supervisor (EDPS, hereinafter): the independent authority at EU level to ensure, first and foremost, that the fundamental right to data protection is respected within the EU<sup>12</sup>. Given my participation in the Civil Society Summit on 16 June 2016 at the seat of the European Data Protection Supervisor, it is worth mentioning that a background paper was drafted on *Developing a 'toolkit' for assessing the necessity of measures that interfere with fundamental rights*<sup>13</sup>, in other words the initial development of a checklist to ensure compliance with data protection regulation.

By way of conclusion, on the one hand, all these normative and institutional developments and the leap from Directive to Regulation as the new *modus operandi* of the EU, validate the evolving process of European digital integration so as to ensure an effective protection of fundamental rights, in general, and the fundamental right to data protection, in particular. On the other hand, these normative developments have allowed for a true consolidation and enshrinement, within the EU, of a fundamental (dare I say 'constitutional') right to data protection and can, therefore, be qualified as the culmination of an initial process of *europianization* of Constitutional Law, in data protection matters, at EU level.

---

<sup>12</sup> This independent body was created in 2001 and within its functions include supervising the EU administration's processing of personal data to ensure compliance with privacy rules; advising EU institutions and bodies on all aspects of personal data processing and related policies and legislation; handling complaints and conducts inquiries; working with the national authorities of EU countries to ensure consistency in data protection; monitoring new technologies that might have an impact on data protection. For more information on its current specific priorities, see its 2015-2019 Strategy. Available via: [https://edps.europa.eu/sites/edp/files/publication/15-07-30\\_strategy\\_2015\\_2019\\_update\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/15-07-30_strategy_2015_2019_update_en.pdf)

<sup>13</sup> [https://edps.europa.eu/sites/edp/files/publication/16-06-16\\_necessity\\_paper\\_for\\_consultation\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/16-06-16_necessity_paper_for_consultation_en.pdf)



## 2.2. Constitutionalization of European Union Law in data protection matters

The Lisbon Treaty allowed for the ‘acquisition’ of binding legal force of the CFREU and for the legal base for a future accession of the EU to the European Convention on Human Rights. The transformation of the CFREU into a legally binding document with primary law status laid down the beginning of a multilevel protection of fundamental rights, finally taking up a structural position within EU legal integration (Lanzoni, 2012, 575). The CFREU presents, in the sharpest relief, the indivisibility of human rights (Douglas-Scott, 2011, 651) where the choice for the term ‘fundamental’, was likely not a coincidence. Though classified as the EU catalogue of rights, it is not a freestanding bill of rights for it technically only applies within the field of EU Law<sup>14</sup>. Nevertheless, despite its scope being understood as not universal<sup>15</sup> (Douglas-Scott, 2011, 652), its direct and indirect influence, through the CJEU’s interpretation of the rights therein and the use of both by national judges (via direct application of the CFREU or via judicial dialogue), when interpreting rights, has made a key legal instrument responsible for the *constitutionalization* of EU Law.

The open acceptance of European values is now considered standard in fundamental constitutional principles. Indeed, clauses relating to an ‘opening’ to European and International human rights standards, so as to gradually extend and effectively set down fundamental rights guarantees to all individuals, lies as one of the distinctive features of Second World War constitutional systems<sup>16</sup>. In addition, normative and jurisprudential advances within the EU’s integration process have also had a huge impact in the acceptance, formal recognition and application of fundamental rights (enshrined in the CFREU or recognized and interpreted by the CJEU) in national legal orders.

Although the praetorian work of the CJEU in the field of fundamental rights is undoubtedly, its judicial activity has been described as timid, in relation to the CDFUE, given its delay in referencing to its provisions (Jimena, 2014, 183). However, the emerging case-law of the CJEU on data protection issues, through judicial dialogue (by means of the reference for a preliminary ruling) has been a major advance in recognizing, in practice, the importance of protecting this fundamental right. For all other major judgments on data protection issues<sup>17</sup>, the

---

<sup>14</sup> See Article 51(1) CFREU: “*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*”

<sup>15</sup> Though we should not forget either the fact that Article 6(3) TEU, as amended by the Treaty of Lisbon, provides that “*fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law*”.

<sup>16</sup> Sharing Jimena Quesada’s (2009, 70) point of view, the CFREU, with its new EU primary law status, should mean, for example, including it within Article 10(2) of the Spanish Constitution, and therefore, granting it a special interpretative category: “an internal constitutional *canon*”.

<sup>17</sup> Stauder (C-29/69, judgment of 12 November 1969); Rechnungshof (C-465/00, C-138/01 y C-139/01, judgment 20 May 2003); Lindquist (C-101/01, judgment of 6 November 2003); Huber (C-524/06, judgment of 16 December 2006); Commission v. Germany (C-518/07, judgment of 9 March 2010); Schecke (C-92/09 y C-93/09, judgment 9 November 2010); Commission v. Austria (C-614/10, judgment



*Google Spain, SL* case (C-131/12)<sup>18</sup> seems most appropriate to analyse the *constitutionalization* of EU Law in the Spanish experience. The doctrine derived from the CJEU's decision of 13 May 2014 results in the definite enshrinement of the *right to be forgotten* in the digital world (a right to right to delete, hide or even cancel personal data linked to past events that may affect human dignity or free personal development; derived from the fundamental right to data protection). The CJEU provided a broad definition of the concepts and the scope of territoriality of the 1996 Directive, given its obsolescence, and adopts a favourable approach and interpretation to ensure an effective and complete protection of the right to personal data protection. It is worth noting the CJEU's emphasis on the fundamental right to data protection, a right that is immediately given preferential nature and seems to be prioritized over search engines' and operators' economic rights and freedom of expression.

Once the CJEU decision was issued (answering questions on EU Law interpretation), the Spanish National high Court, taking into account the aforementioned judgment, was able to resolve the dispute. In judgment 29 December 2014, we find the National High Court decision, expressly recognizing a right to be forgotten by directly applying the doctrine established by the CJEU ruling of 13 May 2014, though making some further clarifications<sup>19</sup>. Ever since the CJEU *Google Spain* decision, the Spanish judiciary has made use of its interpretation and has even extended it. In this respect, see Supreme Court decision of 5 April 2016 on the right to be forgotten and search engine operations, reinforcing the right to delete and forget personal data that is harmful to fundamental rights such as the right to honour or the right to privacy and where a perception, by third parties, can cause social stigmatization (see Legal Basis 5, point 13). There are little over two dozen judgments that have reaffirmed a right to digital oblivion in Spain, based both on the initial European and Spanish case-law, fact which can be extrapolated to the rest EU Member States.

Lastly, the impact of EU Law (namely, the adoption of the GDPR) and the CJEU's case-law relating to fundamental rights in general, and the right to data protection, in particular (*Google Spain SL* case, among others), can be seen by the national normative reforms in the field of data protection. Looking, once again, at the case of Spain, in order to comply with EU standards, the Data Protection Law (known in Spanish as LOPD) reform is underway. The joint work of the AEPD and the Public Law Division of the General Codification

---

16 October 2012); *Digital Rights Ireland Ltd* (C-293/12 y C-594/12, judgment 8 April 2014); *Weltimmo* (C-230/14, judgment 1 October 2015); *Schrems* (C-362/14, judgment of 6 October 2015), among many others.

<sup>18</sup> In this case, a reference for a preliminary ruling (RfPR, hereinafter) had been referred by Spain's National High Court, with questions concerning the interpretation of Articles 2 (b) and (d), Article 4 (1) (a) and (c), Article 12 (b) and Article 14.1 (A) of the Data Protection Directive as well as Article 8 CFREU. The RfPR was made within the context of a dispute between *Google España SL* (together with *Google Inc*) and the Spanish Data Protection Agency and Mr *Costeja González* in relation to a decision taken by the latter following a complaint by Mr. *Costeja González* against *Google*, requesting the adoption of necessary measures to remove his personal data and to prevent access to such data in the future.

<sup>19</sup> It should be noted that this judgment was appealed to the Spanish Supreme Court and gave rise to judgment of 14 March 2016, which has modified the jurisprudential doctrine established by the National High Court, insofar as it obligates users who want to exercise their Rights to enforce against the head office of the search engine in question.

Commission of the Spanish Ministry of Justice will crystallize in a first draft of the bill amending the LOPD. As regards the right to be forgotten, for example, this preliminary draft of the bill seeks to include, expressly this data protection guarantee, giving more power of control to citizens regarding their personal data online, while weighing in its scope with other rights at stake (i.e. information rights, freedom of expression and transparency, among others). The transformation of the Spanish legal order and the reinforcement and evolution of fundamental (constitutional) rights such as the right to data protection -both at normative and jurisprudential levels- so as to comply with EU standards shows, once again, the advances of the *constitutionalization* of EU Law.

### 3. THE DIGITAL SINGLE MARKET: A NEW INTEGRATION HORIZON

#### 3.1 The European Single Market in light of the Digital Age

Technology, and digitalization in particular, have advanced and continue to advance in an unprecedented fashion, affecting all facets of everyday life: the *Internet of Things* (Weber, 2010, 23), social networking sites, search engines, *Cloud Computing* (Cheng and Lai, 2012, 241), electronic commerce, *Business Intelligence* (Sabherwal and Becerra-Fernandez, 2011, 6-8), *Neuro-marketing* (Hernández, 2015, 3) and cybersecurity, just to name a few emerging practices of the digital age. Truth is, the world has gone digital, and global economy is rapidly following in its footsteps. ICTs are no longer bound to a specific sector but rather form the foundation from which modern innovative economic systems are built. The Internet and digital technologies are transforming how individuals, businesses and modern societies function; there are specific markets that rely on personal data to function (Acquisti, Taylor and Wagman 2015). The decisive role that digital will play in transforming Europe was recently underlined in the European Commission White Paper on 'The Future of Europe'<sup>20</sup>.

European internal single market was originally based on the freedoms of movement of goods, services, persons and capital (four traditional freedoms which were introduced in the Treaty of Rome more than half a century ago, before the emergence of digitalization). Today our societies and economies are increasingly dependent on the processing and transfer of data and some have even discussed why and how a freedom of movement (free flow) of data should be given stronger protection and even be upgraded as a fifth freedom within the EU's internal single market<sup>21</sup>. With this new reality, the European Union has opted for a giant leap forward towards a Digital Single Market: a market in which the free movement of goods, persons, services, capital and data is ensured under conditions of fair competition and high level of consumer and personal data

---

<sup>20</sup> COM (2017) 2025. Available via: <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-2025-F1-EN-MAIN-PART-1.PDF>

<sup>21</sup> For an interesting legal analysis on this point, see the Swedish National Board of Trade (Kommerskollegium) report *Data flows – a fifth freedom for the internal market?*. Available via: <http://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/Data%20flows%20-%20A%20fifth%20freedom%20for%20the%20internal%20market.pdf> (pgs 25-29).

protection, irrespective of Member State nationality or place of residence. This Digital Single Market intends to improve access and connectivity, create better business environment, drive growth and jobs, improve copyright rules to be able to make everything more accessible, bring together current and future data structures from all disciplines, among others<sup>22</sup>.

### 3.2 Towards a European Digital Union

Though currently in the form of *soft law*, the EU has made strides in making European Digital Union a reality. In this regard, mentioning the most relevant and recent EU *soft* legislation, is a must. *Europe's 2020 Strategy*<sup>23</sup> was the first *soft law* instrument which made the need for digital integration clear, though presented as a flagship initiative called “A digital agenda for Europe” with the aim is to deliver sustainable economic and social benefits via a Digital Single Market and with the general objective to adapt EU and national legislation to the digital era “so as to promote the circulation of content with high level of trust for consumers and companies”. More specifically on the transformation of the Internal Single Market to keep up with the digital revolution, a *Digital Single Market Strategy*<sup>24</sup> was adopted in 2015 based on three pillars: (a) better access for consumers and businesses to online goods and services across Europe, (b) creating the right conditions for digital networks and services to flourish, and (c) maximising the growth potential of our European Digital Economy. What all three pillars have in common is the fact that, as President Juncker stated is that they are “ambitious legislative steps towards a connected digital single market”<sup>25</sup>. I would argue, that these are important steps towards a European Digital Union. After 2 years of implementation, the European Commission issued this past May of 2017 a *Mid-Term review*<sup>26</sup> on the Digital Single Market Strategy, to see what the EU

<sup>22</sup> European Commission A DIGITAL SINGLE MARKET FOR EUROPE factsheet (2016-2017)

Available via: [https://edps.europa.eu/sites/edp/files/publication/17-03-14\\_opinion\\_digital\\_content\\_en\\_0.pdf](https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en_0.pdf)

<sup>23</sup> COM(2010) 2020 final. COMMUNICATION FROM THE COMMISSION EUROPE 2020 A strategy for smart, sustainable and inclusive growth of 3 March 2010. Available via: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC2020&from=en>

<sup>24</sup> COM(2015) 192 final. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Digital Single Market Strategy for Europe of 6 May 2015.

Available in: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>

<sup>25</sup> See President Juncker's Political Guidelines Speech for the European Commission titled “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change”. Available in: <http://www.eesc.europa.eu/resources/docs/jean-claude-juncker---political-guidelines.pdf> (pg. 5).

<sup>26</sup> COM(2017) 228 final. COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on the Mid-Term Review on the implementation of the Digital Single Market Strategy A Connected Digital Single Market for All of 10 May 2017. Available via: [http://eur-lex.europa.eu/resource.html?uri=cellar:a4215207-362b-11e7-a08e-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:a4215207-362b-11e7-a08e-01aa75ed71a1.0001.02/DOC_1&format=PDF) Including improvement, transformation and development, for an European Digital Strategy, of Internet connectivity, online marketplace for consumers and businesses, conditions to create and distribute content in the digital age, fair, open and secure digital environment, an European Data Economy, digital skills and opportunities for workers, start-ups and digitisation of industry and service sectors, digital innovation for modernising public services,

has done so far. EU efforts were praised for advancing towards a European Digital Single Market, with the suppression of retail roaming charges, the implementation of cross-border portability of online content services, the initial legislative stages to regulate unjustified geo-blocking, among others. In the field of data protection, after the success of the GDPR adoption, a proposal for a revised ePrivacy Regulation has been presented that would complement the GDPR, further increasing legal certainty and the protection of users' privacy online, while also increasing business use of communications data, based on users' consent<sup>27</sup>. As the Commission Mid-term Review (2017, 23) concludes with: "A strong European Union rests on a fully integrated internal market and an open global economic system. In the digital world, this includes the free flow of information and global value chains, facilitated by a free, open and secure internet". Once, again, we see the words "integration" "European Union" and "digital world" together. A new type of integration is well under way in the EU: this time, a digital one.

#### **4. CONCLUDING REMARKS: FINAL REFLECTIONS ON THE DEVELOPMENT OF EUROPEAN DIGITAL INTEGRATION.**

The digital era has been the result of an ongoing technological revolution; ICTs have become the catalysts responsible for a 360 degree shift of how the world functions. From their first materialisation, to their current status, thanks to ICTs, society has advanced exponentially, in terms of availability, access to technology and interconnectivity, but also in terms of diffusion and storage of information. All this has created growing communication and interdependence between States, companies and citizens of the world. Technological advances have been an unquestionable advantage, facilitating the growth and efficiency of very diverse sectors of the economy and society. To stay behind would mean losing the high-speed train of growth and economic and social progress and the EU cannot afford to remain a mere spectator of the advances of emerging digitalized societies and economies. However, the possibilities offered by ICTs also call into question the lack of sufficient implementation of fundamental rights protection mechanisms, in general, and the protection of the right to data protection, in particular. In that sense, the EU has considered that digital advances require a more solid and coherent framework for the protection of personal data, linked to human dignity and privacy of EU citizens.

Pioneering legal orders regulating data protection through *ad hoc* legislation or through constitutional provisions and the adoption of the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data were the legal templates that allowed for the normative emergence of the right to data protection in the EU. The Lisbon Treaty reform began a true process of political and legal integration (especially with the new status of the CFREU) and, with the inclusion of specific legal bases (in both the

---

investments in digital technologies and infrastructures, among many others. See Staff Working Document SWD(2017) 155 final for a more detailed analysis of these questions.

<sup>27</sup> Similarly, the Commission has undertaken a public consultation with all relevant stakeholders on an EU free flow of data cooperation framework within the Digital Single Market and is striving for a European Cloud Initiative



TEU and TFEU) for data protection, this also meant the initial construction of digital integration. The CFREU, specifically enshrining a fundamental right to data protection was a key component of the normative and case-law developments that have reframed EU's integration processes. Through an *Europeanization* of Member States' Constitutional Law and a *Constitutionalization* of EU Law in Member States' legal orders to conform to EU standards, as well as a new regulatory approach of the single European digital internal market, the European Union is on its way, albeit slowly, to an ambitious goal of achieving a new stage of integration: the digital one.

## 5. REFERENCES & FINAL BIBLIOGRAPHY

- Aguar de Luque, L. (2003): "Los derechos fundamentales en el proceso de integración europea". *Cuadernos de Derecho Público* 18 (January-April), 173-189.
- Aparicio Vaquero, J.P. and Batuecas Caletro, A. (2015): *En torno a la privacidad y la protección de datos en la sociedad de la información*. Comares. Granada.
- Arenas Ramiro, M. (2008): "La protección de datos personales en los países de la Unión Europea". *Revista Jurídica de Castilla Y León* 16 (septiembre), 113- 168.
- Bar Cendón, A. (2004): "La Constitución de la Unión Europea: contexto, reforma y virtualidad". *Revista Valenciana d'Estudis Autònoms* (Ejemplar dedicado a *Europa en la encrucijada*) 43-44, 100-153.
- Bennett, C.J. (1992): *Regulating Privacy: Data Protection and Public Policy in Europe and the United States*. Cornell University Press. Ithaca.
- Biglino Campos, P. (2003): "Derechos Fundamentales y Competencias de la Unión: el argumento de Hamilton". *Revista de Derecho Comunitario Europeo* 14 (january-april), 45-68.
- Blasi Casagran, C. (2016): "Límites del derecho europeo de protección de datos en el control de fronteras de la UE". *Revista CIDOB d'Afers Internacionals* 111 (December), 127-151.
- Brown, I. (2010): "Internet self-regulation and fundamental rights". *Index on Censorship* 1, 98-106.
- Cheng, F.C. and Lai, W.H. (2012): "The Impact of Cloud Computing Technology on Legal Infrastructure within Internet-Focusing on the Protection of Information Privacy". *Procedia Engineering* 29, 241-251.
- Cotino Hueso, L. (2011): "La colisión del derecho a la protección de datos personales y las libertades informativas en la red: pautas generales y particulares de solución". In L. Cotino Hueso (Ed) *Libertades de expresión e información en Internet y las redes sociales: ejercicio, amenazas y garantías*. PUV. Valencia, pp. 386-401.
- Cruz Villalón, P. (2002): "La Constitución inédita. La dificultad del debate constitucional europeo". *Revista Española de Derecho Europeo* 1, 9-29.
- De Búrca, G. (1996): "The Language of Rights and European Integration". In G. More and J. Shaw (Eds.) *New Legal Dynamics of European Union*. Oxford University Press. Oxford.
- De Hert, P. and Papakonstantinou, V. (2014): "The EDPS as a unique stakeholder in the European data protection landscape, fulfilling the explicit and non-explicit expectations", In Hijmans, H. and Kranenborg, H (eds.) *Data Protection Anno 2014: How to Restore Trust?, Contributions in honour of Peter Hustinx, European Data Protection Supervisor (2004-2014)*. Insertia. Bruselas, pp. 237-252.
- Douglas-Scott, S. (2011) The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review* 11(4), 645-682.
- García Romero, S. (2016): "Nuevo marco jurídico europeo en protección de datos: novedades conocidas y otras no tan conocidas". *Diario La Ley* 8691, 1-5.
- González Fuster, G. (2015): *The Emergence of Personal Data Protection as a Fundamental Right of the EU*. Springer. Brussels.
- Greenlead, G. (2012): "The influence of European data privacy standards outside Europe: Implications for globalisation of Convention 108". *International Data Privacy Law* 2(1), 1-36.
- Jimena Quesada, L. (2006) *Sistema europeo de derechos fundamentales*. Colex. Madrid.

M. Martínez: "Towards a digital European integration: constitutionalization of EU law and europeanization of constitutional law in the field of data protection"

- Jimena Quesada, L. (2009): "La Carta de Derechos Fundamentales de la UE: rango legal y contenidos sustantivos". *Cuadernos europeos de Deusto* 40, 63-83.
- Jimena Quesada, L. (2014): "La consagración de los derechos fundamentales: de principios generales a texto fundacional de la Unión Europea". *Cuadernos europeos de Deusto* 50, 173-197.
- Joerges, C. and Weiler, J.H.H. (2000): What Kind of Constitution for What Kind of Polity? - Responses to Joschka Fischer. RSCAS - European University Institute. Florence.
- Kuner, C. (2015): "The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines". *LSE Law, Society and Economy Working Papers* 3, 1-23.
- Lanzoni, L. (2012): "Protección y limitación de los derechos humanos en el Art. 52 de la carta de los derechos fundamentales de la Unión Europea". *Revista de Derecho Político* 83 (January-April), 575-601.
- Liñán Nogueras, D.J and Martín Rodríguez, P.J. (2009). "Reflexiones sobre los derechos fundamentales en la Unión Europea a la luz del Tratado de Lisboa". In A.M Badia Martí, A. Pigrau i Solé, A. Olesti Rayo (Eds.) *Derecho internacional y comunitario ante los retos de nuestro tiempo: homenaje a la profesora Victoria Abellán Honrubia*, Vol. 2 (La Unión Europea ante los retos de nuestro tiempo), pp. 1053-1077.
- MacCormick, N. (1993): "Beyond the Sovereign State". *Modern Law Review* 56(1), 1-18.
- MacCormick, N. (1999): *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*. Oxford University Press. Oxford.
- Martínez Martínez, R. (2004): *Una aproximación crítica a la autodeterminación informativa*. Thomson Civitas. Madrid.
- Milczarek, D. (2001): "Genesis of the United Europe. From the Roman Empire to the European Union". In D. Milczarek, A. Adamczyk, K. Zajackowski (Eds.) *Introduction to European studies. A new approach to uniting Europe*. Centrum for Europe University Warsaw. Warsaw, pp. 57-72.
- Ordoñez Solís, D. (2014): *La protección judicial de los derechos en internet en la jurisprudencia europea*. Reus. Madrid.
- Palmowski, J. (2008): *A Dictionary of Contemporary World History*. Oxford University Press. Oxford.
- Rallo Lombarte, A. (2009): "La garantía del derecho constitucional a la protección de datos personales en los órganos judiciales". *Nuevas Políticas Públicas: Anuario multidisciplinar para la modernización de las Administraciones Públicas* 5, 97-115.
- Rallo Lombarte, A. (2012): "Hacia un nuevo sistema europeo de protección de datos: las claves de la reforma". *Revista de Derecho Político UNED* 85, 13-56.
- Sabherwal, R and Becerra-Fernandez, I. (2011): *Business Intelligence Practices, Technologies and Management*. Hoboken. John Wiley & Sons.
- Tajadura Tejada, J. (2010): "Derechos fundamentales e integración europea". *Estudios de Deusto* 58(1), 265-285.
- Tajadura Tejada, J. (2011): "La 'desconstitucionalización' de los Derechos Fundamentales en el Tratado de Lisboa: los límites de la integración diferenciada". In J.I. Ugartemendía Eceizabarrena and G. Jáuregui Bereciartu (Eds.) *Derecho constitucional europeo. Actas del VIII Congreso de la Asociación de Constitucionalistas de España*. Tirant lo Blanch. Valencia, pp. 219-241.
- Taylor, L. (2016): "Data subjects or data citizens? Addressing the global regulatory challenge of big data". In: Hildebrandt and Van den Berg (Eds.) *Freedom and Property of Information: The Philosophy of Law Meets the Philosophy of Technology*. Routledge. London, pp. 1-30.
- Troncoso Reigada, A. (2010): *La protección de datos personales. En busca del equilibrio*. Tirant Lo Blanch. Valencia.
- Weber, R.H. (2010): "Internet of things-New security and privacy challenges". *Computer Law & Security Review* 26, 23-30.
- Weiler J.H.H. (1999): *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration*. Cambridge University Press. Cambridge
- Weiler J.H.H. and Wind, M. (2003): *European constitutionalism beyond the state*. Cambridge University Press. Cambridge.