Chapter 14

Equal Rules, Unequal Effects: Challenging Member State Equality Through One-Size-Fits-All Regulations

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Abstract

The EU aims to improve the living and working conditions of its citizens while fostering economic unity, with a particular focus on reducing regional disparities. The EU holds exclusive competence in certain areas, with Member States only able to legislate when authorised or required by EU law. In areas of shared competence, both the EU and Member States can legislate, but Member States must act only when the EU has not already exercised its authority. Although the EU does not have general competence over private law, it harmonises certain aspects of private law to support its broader objectives. The EU primarily uses directives to regulate general private law, allowing flexibility for Member States to adapt laws to their legal systems. However, the shift towards regulations is seen as a response to the interconnectedness between trade and private law, promoting uniformity across Member States. This approach enhances the single market but raises questions about its compatibility with diverse national legal traditions. The effectiveness of this regulatory shift in promoting equality will depend on the EU's ability to balance uniformity with respect for national legal practices.

This chapter also aims to evaluate the development trends in the unification of law and their outcomes, presented through an explanatory study of the General Data Protection Regulation, an act that has changed not only the legal framework for the protection and processing of personal data but also the business environment. Given that Member States do not have the economic strength as the EU, a question has

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arisen as to whether the regulation has limited the ability of some states to shape an appropriate but protective framework for their own economic interests.

Keywords: private law, legal tradition, directives, regulations, unification of private law, harmonisation of private law, data protection

1. Introduction

This chapter examines the implications of the EU's increasing reliance on regulations in place of directives as its preferred legislative instrument, with a particular focus on the principle of equality among Member States. The transition from directives, which afford national authorities discretion in transposition and implementation, to directly-applicable regulations has marked a significant evolution in the EU's legislative practice. While often justified by the need for legal certainty, uniformity, and efficiency, this development also raises important questions on the distribution of power and preservation of equality within the EU's multi-level legal order.

The principle of equality of Member States, enshrined in Art. 4(2) of the Treaty on European Union (TEU), is a cornerstone of the EU's constitutional architecture. It affirms the equal status of all Member States under EU law, irrespective of their demographic, economic, or political weight, and entails a commitment to mutual respect for national identities and legal traditions. However, the replacement of directives with regulations may unsettle this balance by diminishing national autonomy in areas traditionally subject to domestic legal, political, or cultural differentiation. While the uniformity imposed by regulations ensures consistent application, it may inadvertently obscure or aggravate underlying asymmetries among Member States in terms of administrative capacity, legal infrastructure, or institutional trust. This is of particular relevance to civil law, since the private interest is exceptionally attractive to state intervention.

This leads to the central question this study seeks to address: Has the replacement of directives with regulations endangered the principle of equality among the EU Member States? This chapter addresses this question in five sections. The first section examines general rules on the competence of the EU in civil law. The second examines the legal tradition in civil law, which aims to illustrate the importance of national laws in civil law. The third section evaluates approximation or harmonisation in civil law, and the fourth section examines the limitations of these processes. The fifth section outlines explanatory studies on legal protection of data from directives to regulation.

2. On EU Competence in Civil Law Matters

The EU and its historical predecessors have approached governance without clearly differentiating public and private sectors.[1] The founders adopted a functional perspective, aiming to establish a cohesive entity that promotes collective goals. When Member States decided to join the EU, they agreed to transfer a portion of their sovereignty to the Union, aiming to foster economic and social progress across the Member States by collaborating with each other to dismantle barriers that have historically divided Europe.[2]

The EU mainly aimed to enhance the living and working conditions of its citizens while promoting economic unity. This involves a commitment to reducing disparities between regions, focusing on uplifting less advantaged areas. The EU seeks to ensure that all regions develop constantly to achieve the essential objective of the improvement of the living and working conditions across Europe and strengthen the unity of economies, reducing the differences between Member States.[3] According to Art. 2(1) of the Treaty on the Functioning of the European Union (TFEU), the EU holds exclusive competence in specific areas, meaning that only the EU can legislate and create legally binding acts in those domains. Member States can legislate only if the EU specifically authorises the legislation.[4]

In areas of shared competence, both the EU and Member States have the authority to legislate and adopt binding acts. However, Member States may exercise their legislative competence only when the Union has not already acted in that area, or if the Union has decided to cease exercising its competence.[5] This framework is designed to maintain a balance of authority between the EU and its Member States, ensuring that actions are coordinated and effective in achieving common objectives.[6]

Discussion on traditional division of law into private and public is not particularly relevant in the EU law.[7] The function of the legislature matters more. Unlike traditional legal frameworks in Member States, the EU's legislative approach is rather

1 Distinction between public and private sectors is typical for traditional legal systems, even without is common criteria in theory for making clear boundaries between these two parts of law. Vodinelić, 1982, pp. 657–709; Padjen, 2007, pp. 443–461.

2 Treaty on the Functioning of the European Union, Preamble, para. 3.

3 TFEU, Preamble, paras. 4, 6.

4 TFEU, Art. 2/1. The unity as such could not be reached merely by unification of laws. Namely, the coherence of a country's legal system can be disrupted by how European law, once implemented, is interpreted. EU directives must be interpreted based on their wording and intended purpose. However, this approach often conflicts with traditional methods of interpreting national law, which tend to focus more on legislative history and the overall structure of the legal system. Smits, 2011a, p. 118.

5 TFEU, Art. 2/2.

6 Smits, 2006, pp. 68–74.

7 According to Semmelmann, two aspects raise important constitutional questions related to the public-private distinction. One is the thorny issue of the legal basis for the adoption of private law measures, and the second is the increasing influence of what is referred to as 'social', 'constitutional', or 'political', in other words 'public' values in private law. Semmelmann, 2012, p. 27.

functional, meaning that the criterion for legislative action is whether the impending issue holds common relevance for the Member States and the Union as a whole.[8] Consequently, the EU does not possess general competence over all aspects of private law. Certain important elements that fall under the scope of private law in traditional meaning are addressed within the EU framework. However, while the EU may have a limited role in private law, it still plays a crucial part in harmonising certain private-law matters that are essential for achieving common goals and ensuring cohesion among Member States. To date, limited attention has been given to the normative question of what the diminishing role of the state in shaping private law implies for the regulation of private legal relationships. A revised theory of the sources of private law is clearly needed – one that places less emphasis on the nation-state and instead considers the appropriate level of regulation (whether local, regional, national, European, or supranational), relevant actors (such as legislators, regulatory bodies, courts, or the parties themselves), and specific subjects to be governed.[9]

With respect to this, the TFEU obtains the EU's legislative authority regarding private law in Arts. 114, 115, and 352. Art. 114 empowers the European Parliament and the Council to adopt measures aimed at harmonising laws, regulations, or administrative actions within Member States which are essential for the establishment and functioning of the internal market.[10] This process is followed in accordance with the ordinary legislative procedure, which involves collaboration with the Economic and Social Committee to ensure that various perspectives are considered. Additionally, Art. 115 outlines a special legislative procedure in which the Council, acting unanimously, is responsible for issuing directives to align the laws and regulations of Member States that directly affect the establishment or functioning of the internal market.[11]

Finally, Art. 352 provides a flexible legal basis for the EU to take necessary measures in areas not explicitly covered by other provisions, if such measures are necessary for achieving the EU's objectives.[12] Using the procedure for monitoring the subsidiarity principle, the Commission shall draw national Parliament's attention to proposals based on this provision.[13] Since its establishment, the EU has focused on several private-law issues deemed essential for the internal market, including the regulation of freedom of establishment, which facilitates cross-border business operations, and company law, which aims to foster entrepreneurship, consumer protection, credit contracts, intellectual property law, and the recently regulated usage

8 Considering the functionality of the EU private law, scholars emphasises that this approach could lead to injustice in European private law, for which Eurocentrism should be responsible. Hesselink, 2022, p. 116.

9 Smits, 2011b, p. 8.

10 TFEU, Art. 114/1.

11 TFEU, Art. 115.

12 TFEU, Art. 352/1.

13 TFEU, Art. 352/2.

of Artificial-Intelligence systems. This comprehensive approach fosters trust and security for both consumers and businesses in the EU.

Under the scope of general private law, the EU primarily uses directives as its legislative tool. This approach helps it set specific goals for Member States to achieve while allowing each country the flexibility to develop its laws to meet these objectives. By doing so, states can create provisions that align with their unique legal systems, traditions, and the interests of their citizens, ensuring that the regulations are more relevant and accessible.

According to the principle of subsidiarity, the EU should only act in areas that do not fall under its exclusive competence when the objectives of such an action cannot be effectively achieved by Member States at central, regional, or local levels.[14]

Moreover, when EU takes action on matters not explicitly governed by its law, the principle of proportionality applies: the content and form of EU actions should not exceed what is necessary to achieve the objectives set forth in the Treaties.[15] This ensures that EU measures are appropriate and tailored to their goals, balancing the need for effective action with respect for the autonomy of Member States. While special conditions apply, the expansive nature of Art. 352 permits the EU to act in situations when it is essential to create new legal frameworks rather than merely harmonising or replacing the existing national laws.[16]

According to the principle of subsidiarity, enshrined in Art. 5(3) of TEU, the EU should act in areas outside its exclusive competence only when the objectives of proposed actions cannot be sufficiently achieved by the Member States, whether at the central, regional, or local levels. Complementing this, the principle of proportionality, as outlined in Art. 5(4) of TEU, requires that the content and form of the EU action must not exceed what is necessary to achieve the objectives of the Treaties. These principles are designed to safeguard the autonomy of Member States and ensure that the EU action remains both appropriate and restrained.

However, in practice, tensions have emerged, particularly in areas traditionally reserved for national regulation, such as private law, family law, or inheritance law. The broad but ambiguous wording of Art. 352 of TFEU, which allows the EU to adopt measures deemed necessary to attain treaty objectives even in the absence of specific legal bases, has raised concerns about an expansive interpretation of EU competences. Rather than limiting itself to coordination or harmonisation, the EU has sometimes created new legal frameworks, potentially encroaching upon legal

14 TFEU, Art. 5/3.

15 TFEU, Art. 5/4.

16 Mańko, 2015, p. 12.

domains deeply rooted in national traditions and sensitive to domestic constitutional identities.[17]

When such circumstances arise, the Council must act unanimously, based on a proposal from the Commission and after securing the consent of the European Parliament. This ensures that any measures taken are well-considered and reflect a consensus among Member States.[18]

Given the EU's functional legislative approach aimed at protecting the single market, the shift from directives to regulations can be understood in the context of the close relationship between trade, which is at the core of European integration, and private law, as it is understood in traditional approaches. Therefore, targeting issues as the EU goal rather than pure national matters, leads to the movement on legal acts area. Namely, obvious expansion of regulations is the natural consequence of the current understanding of the objectives of a single market. Considering that regulations provide a uniform legal framework that applies directly across all Member States, this uniformity enhances the efficiency of cross-border trade and ensures that businesses and consumers operate under the same set of rules. The transition to regulations may strengthen interrelationships within the EU by fostering a more cohesive legal environment.

However, from the perspective of private law, the implications of this legislative shift warrant deeper examination. On the one hand, the use of regulations can promote equality by ensuring that all citizens and businesses are subject to the same legal standards, thereby preventing unequal treatment arising from varying national laws.[19] On the other, one could argue that an over-reliance on regulations might signal a failure to adequately address the unique legal traditions and contexts of Member States. If regulations are perceived as top-down impositions rather than

17 Court of Justice of the European Union (CJEU) has generally supported a broad interpretation of EU competences. In Spain v. Council (C-36/98) and Germany v. Parliament and Council (C-376/98), the Court has emphasised the Union's ability to legislate where internal market objectives are at stake, sometimes at the expense of national regulatory autonomy. While this jurisprudence strengthens the legal basis for the EU action, it also fuels debates over whether the principles of subsidiarity and proportionality are effectively limiting EU overreach. The principles of subsidiarity and proportionality have come under increasing scrutiny in a recent case law. In C-662/23 (Zimir), the CJEU imposed procedural obligations on national asylum systems, raising concerns over EU overreach.

18 TFEU, Art. 352/1.

19 Ugo Mattei emphasised that the development of a regulatory framework should not be limited to a purely technocratic effort aimed at achieving harmonisation or uniformity. Instead, it must evolve into a political dialogue through which fundamental values are balanced and agreed upon via democratically accountable mechanisms. For European citizens to view new institutional arrangements as legitimate, they must develop trust and confidence in them as instruments for advancing social justice. If key decisions about the social justice model underpinning the market order are obscured behind technical procedures, it will risk generating widespread disillusionment with the ideals and legitimacy of the EU. Accordingly, the Commission, the Council of Ministers, and the European Parliament are urged to reorient the initiative, critically reassess the scope and aims of the Action Plan, and take responsibility for guiding the development of European private law so as to ensure the legitimacy of its vision of social justice. Mattei, 2004, pp. 673–674.

collaborative frameworks, they could create challenges for Member States in aligning their legal systems with EU mandates. This could inadvertently highlight disparities rather than promote equality, especially if Member States struggle to implement these regulations effectively within their legal contexts.

To conclude, while the shift towards regulations can enhance integration and promote equality within the EU, assessing whether these measures are genuinely responsive to the diverse legal landscapes of Member States is essential. The effectiveness of this approach in achieving true equality will depend on the EU's ability to balance uniformity with national legal traditions and practices.

3. On Legal Tradition in Civil Law Matters

The six European nations that signed the Treaty of Rome in 1957 maintained their distinct civil laws, functioning independently from one another. These laws were applied and interpreted within national judicial systems, and their autonomy was thus emphasised. Even when the legal provisions of two countries overlapped because of historical factors, their courts were not expected to operate in the same manner or share insights when handling similar cases.[20]

National private law was not merely the product of historical legislative acts from individual countries; it was deeply intertwined with the political and ideological developments that shaped modern European states. Civil codes symbolised the existence of these nations as political and legal entities, carrying significance comparable to that of constitutional documents.[21]

Given these dynamics, unsurprisingly, the Treaty of Rome was primarily oriented towards public law. The four freedoms it sought to establish – the free movement of goods, services, people, and capital – could be achieved without intervening in national civil laws. This approach not only protected European civil codes from the forces of Europeanisation but also, to some extent, safeguarded the sovereignty of the Member States. However, over time, this regulatory framework proved unsustainable. As the EU expanded and the market evolved, the line between public and private law began to blur under the pressures of functionalism.[22]

EU legislation derives its legitimacy from a partial surrender of national sovereignty, explicitly articulated in the founding Treaty. However, the enumerated powers of the community did not explicitly encompass private law. Consequently, EU legislators found it necessary to demonstrate that a common market could not be created without harmonising the private laws of Member States. In accordance

20 Caruso, 1997, pp. 8–9.
21 Caruso, 1997, p. 9.
22 Caruso, 1997, p. 9.

with Art. 100A, they had to persuasively argue that national private laws 'directly impact the establishment and functioning of the common market', thus justifying the issuance of directives for the approximation of such laws.[23]

4. On Approximation of Law

In the context of EU law, the terms approximation and harmonisation are related but not identical. Approximation refers to the earlier practice of gradually bringing national laws closer together, especially in cases in which legal differences could disrupt the internal market. This approach, which dates back to the early European Economic Community treaties, allowed Member States more freedom and did not require full legal consistency. Conversely, harmonisation gained importance with later EU treaties and involves a more structured and binding method for aligning laws. It usually takes the form of directives that set common rules for all Member States, either setting minimum requirements or enforcing complete alignment. Essentially, approximation is a looser, more flexible process, while harmonisation seeks a more unified legal system across the EU.

'Approximation of laws' involves aligning the national laws of EU Member States with a common set of rules, standards, or regulations established at the EU level. This process is typically executed through EU directives, which require Member States to adjust their national laws to comply with certain European norms.[24] Harmonisation has a clear goal, to serve a common objective. Moreover, harmonisation is a means of achieving legal consistency and maintaining balance between different legal traditions. By guarding legal traditions and the core of particular legal systems, harmonisation has a potential to ensure greater legal certainty and predictability in cross-border legal matters. This process facilitates horizontal cooperation between Member States and reduces barriers to the free movement of people, goods, services, and capital within the EU. Thus, the approximation of laws plays a crucial role in advancing integration and the functioning of the EU's single market.[25]

Approximation or harmonisation of certain legal concepts refers to the process of gradually eliminating or reducing divergences in the laws of different countries. These differences often arise from varying national legal traditions, interpretations, and practices. The goal is to ensure a more consistent and unified approach to key legal principles across all EU Member States, thereby fostering greater coherence within the broader European legal framework. As mentioned earlier, the harmonisation process is intrinsically linked to the broader EU objectives, which varies

23 Caruso, 1997, p. 10.
24 LexisNexis EU Law expert, 2024.
25 Vukadin, 2015, p. 194.

depending on the specific context. In sectors aimed at achieving a high level of harmonisation, the usual measure is the adaptation of regulations at the European level. Regulations do not require national transposition but are directly applicable in all Member States. This significantly reduces the margin for individual interpretation or adaptation by national governments, ensuring the uniform application of laws across the EU.[26] Maximum harmonisation seeks to establish uniform legal standards across the EU, leaving little room for variation among Member States.

Maximum harmonisation is typically pursued in areas where a high degree of consistency is necessary to ensure the functioning of the EU's single market, such as in trade, competition, and consumer protection laws.[27] When this is not the case, directives are more appropriate instruments, as they establish a framework for further legislation in each Member State or a mandatory common standard that must be met. However, Member States retain some degree of discretion in how they implement the directive. This allows national laws to reflect local conditions, traditions, or specific circumstances, while still achieving a degree of convergence on key issues. In the context of the principle of 'different but equal', directives seem to protect the interests of both the EU and those of the Member States, as this approach facilitates the preservation of the diversity of legal and cultural systems in each Member State.

Nonetheless, both approaches share the same goal: the reduction of legal fragmentation and the elimination of obstacles to greater, and eventually complete, integration within the EU. By narrowing gaps between national laws, the EU seeks to eliminate barriers to the free movement of goods, services, people, and capital, while enhancing cooperation between Member States. The approximation of law flows in accordance with two guiding principles: subsidiarity and proportionality. To clarify, subsidiarity means that the EU only acts when objectives cannot be achieved at the national, regional, or local level. When this is the case, the EU's intervention is limited to measures that are strictly necessary to achieve the defined goals. Regardless of the level of harmonisation or the chosen approach, the approximation of law is an ongoing, and often never-ending, process. It involves not only the adoption of EU-originated legal acts but also the adaptation of national legal systems.

26 Certain authors perceive elements of state interventionism within the mechanisms of legal harmonisation, which may be regarded as unwarranted within the domain of private law. Nikolić, 2008, p. 430.

27 Novković, 2010, p. 276.

5. Weak Points of Approximation of Law in Civil Matters

Although the core goals of the European Communities have largely remained unchanged since their inception, the environment in which these goals are pursued has evolved significantly. Direct and indirect factors have played a crucial role in reshaping the EU. Key events and developments, such as the EU's enlargement, bringing in states with different legal and cultural traditions, the 2008 global financial crisis, Brexit, the COVID-19 pandemic, conflicts in Ukraine and Gaza, and advancements in digitalisation and artificial intelligence, have all had profound impacts. These events have affected not only the politics, economy, and market but also the environment and human rights within the EU and its Member States. To understand the issue of the approximation of law in civil law matters, it is important to define the core challenges involved.

Typically, discussions on EU law often focus on whether the EU act should apply directly, as in the case of regulations, or whether national law should be adopted to implement a directive. This can give the impression that the question of harmonisation is simply about the mode of application. However, the process is much more complex than it may appear when reduced to a formal explanation of procedures for application or adoption.

First, notably, that EU law lacks the characteristics of a fully developed legal system, despite the existence of tens of thousands of regulatory acts. In the absence of comprehensive normative competence, only certain aspects of legally relevant matters are addressed. This sector-specific regulation is often fragmented and unclear, complicating its application and rendering the overall legal framework dysfunctional.[28] From the perspective of Member States, harmonising national laws requires not only the implementation of directives but also the adaptation of numerous sector-specific regulations. The challenge lies not just in the complexity of the implementation process, but in its consequences for the national legal system. When a single directive is to be implemented, a Member State typically needs to amend multiple legal acts. For citizens, this can create instability and uncertainty, particularly in civil law matters where private interests and the autonomy of will are paramount.

Moreover, in the context of civil law, it is essential to recognise that written legal acts are not the only source of legal rules; customs also hold significance. Additionally, public order – which is not exhausted in the term of written regulations but encompasses legal principles, societal morals, and good customs – has an obligatory nature in private law relationships.

The situation is not much different when it comes to regulations that Member States apply directly.[29] To bring national law into compliance with a regulation, numerous legal acts may need to be amended, adopted, or repealed. This issue arises

28 Nikolic, 2004, p. 187.
29 Bobek, 2013, pp. 143–153.

even with regulations that introduce entirely new sectors, such as those regulating artificial intelligence. To be precise, the exponential use of digital technologies and its continuous and dynamic development, especially in the case of artificial intelligence and blockchain technology, present new challenges for legislative authorities of Member States. The task is burdensome for Member States, considering that national laws do not necessarily align with EU standards set by new regulations. New EU members have been facing this issue since their accession. Unfortunately, the gap between 'old' and 'new' EU members seems more pronounced than ever.[30]

One of the key challenges faced by national legislators is the need for rapid legislative changes. This urgency often leads to significant consequences for legal systems that are inadequately prepared. A major contributing factor is the lack of a clear and coherent strategy for national law development. In many cases, regulations are drafted hastily, often with the primary goal of meeting external standards or deadlines. As a result, the legislative process frequently lacks the necessary depth and foresight, hindering the creation of a stable and well-structured legal framework. Furthermore, economic impacts of specific regulations are rarely assessed, which means that decisions are made without a full understanding of their long-term effects on the economy and society.[31]

Moreover, EU expectations often overlook the crucial fact that a legal norm can only be truly effective if it aligns with the level of legal awareness within the population and the specific socio-economic conditions of a given society. Even the most well-crafted and technically effective legal solutions in one Member State may not be directly applicable or suitable for another, particularly when social, cultural, and legal contexts differ significantly. For example, legal standards adopted in more developed Member States, though technically achievable, often require much higher material investments in less developed countries. In these cases, whether the benefits of these standards outweigh the associated costs is not always clear.

Furthermore, the imposition of high legal standards without sufficient flexibility to adapt them to the unique circumstances of each national society can create a significant disconnect between the normative framework and the real-world conditions to which these standards must be applied. This growing misalignment can lead to unwilling situations where regulations, despite being officially enacted, are not effectively implemented or adhered to in practice, mainly because the content of these regulations is out of traditional understanding of law in a particular state. The result is often a proliferation of laws and regulations that, while formally adopted, fail to achieve their intended goals or are disregarded by those they are meant to govern.[32]

30 Micklitz, 2008, pp. 37–47.
31 Nikolic, 2004, p. 202.
32 Nikolic, 2004, p. 203.

The insistence on unifying legal frameworks by imposing normative solutions can disrupt the internal coherence of national legal systems.[33] This undermines trust in the legal system as a whole, ultimately eroding its effectiveness. When legal norms are imposed without considering the specificities of the domestic context, it can lead to a mismatch between the objectives and practical application of law, which diminishes the legitimacy of the legal system in the eyes of the public. As a result, not only does the legal system become less effective in achieving its goals, but public confidence in the rule of law is also weakened.[34]

Finally, though both directives and regulations are appropriate mechanisms for achieving the goal of the EU, the transformation of directives to regulations garnered the attention of the EU institutions and scholars. Arguments for this tendency are found in explanatory documents, accompanied to recent regulation and directives. Some of them could be outlined in the context of the topic. Initially, recent directives are, from the normative perspective, closed to regulations, since they contain detailed provisions. This left narrow space for Member States' manoeuvres. Besides, expenditure for the transposition of directives is out of clear and full evaluation, about which the Member States are not overtly concerned. They oppose the adoption of regulations not solely on principled grounds, but rather out of a preference for directives, which – despite their susceptibility to inefficiencies such as delayed or flawed transposition and resulting legal fragmentation – facilitate greater national discretion. While regulations offer the prospect of immediate and uniform application, some Member States appear to favour the flexibility inherent in directives, even at the cost of coherence. If the complexity of internationalisation and Europeanisation is introduced as a relevant factor – contexts in which directives are employed at an especially intensive level – consideration of whether regulations or directives constitute the appropriate legal instrument must necessarily include the requirement of legal certainty.[35]

6. Explanatory Study: Data Protection – From Directive to Regulation: Step Forward or Step Backward the Equality?

The adoption of regulations in areas initially governed by directives reflects a broader tendency within the EU to establish a more unified legislative framework – one intended to ensure a formally equal legal environment across all Member States. However, this shift has given rise to significant debate over whether such a transformation may, in practice, place Member States in an unequal position. Disparities are

33 Cherednychenko, 2023, pp. 2–6.
34 Barbic, 2004, p. 111.
35 Křepelka, 2021, pp. 793–795.

largely attributed to variations in legal culture, financial capacity, and institutional ability to integrate new rules into national legal systems.

Despite these concerns, regulations continue to be adopted, and new proposals are being prepared. Nevertheless, a consensus has yet to be reached on whether this legislative instrument is the most appropriate mechanism – and more fundamentally, whether the transformation brings more benefits than drawbacks. Although numerous studies have examined the effects of this shift with examples,[36] the present study offers an explanatory case study focused on data protection. This area is particularly illustrative, as the implications of the regulatory transformation extend well beyond the boundaries of data protection alone.

The origins of the European data-protection regime can be traced to national and international legal instruments introduced throughout the 20th century which aimed to address the evolving challenges surrounding privacy, personal data, and the increasing flow of digital information across borders. A pivotal milestone in this development was the 1980 Organisation for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.[37] While these guidelines were non-binding, they marked a significant shift in global awareness of risks associated with data processing and international data transfers. It was a clear sign that the need for a balance between the growing use of digital technology and the protection of individuals' privacy rights were recognised. OECD Guidelines also set the framework for further legislative actions.

Another significant development was the adoption of the Council of Europe's Convention 108 in 1981.[38] Convention 108 was the first legally binding international treaty designed to protect individuals' personal data and regulate its cross-border movement; therefore, it remains one of the foundation legal instruments in European data-protection history. It provided a framework for legislation on the national level, which led to adoption of national data-protection laws, aiming to ensure the security of personal information, with full respect for individuals' privacy rights.

In 1995, the EU took significant steps to strengthen privacy protection with the enactment of Directive 95/46/EC.[39] This directive aimed to address challenges posed by the increasing use of automated data processing, ensuring that individuals' personal data were processed fairly, transparently, and in compliance with stringent safeguards. The directive also sought to facilitate the free movement of personal data across EU Member States by establishing a uniform set of rules, requiring each Member State to implement national laws that met minimum standards for data protection. This approach was grounded in the recognition of privacy as a fundamental right, as enshrined in Art. 8 of the European Convention on Human Rights.

36 Křepelka, 2023, pp. 289–313; Křepelka, 2024, pp. 22–35.

37 OECD, 2002.

38 United Nations, 1948.

39 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and on the free movement of such data, Official Law Journal L 281, 23.11.1995.

Simultaneously, with technology and data practices expansion, society faced the situation in which the directive does not sufficiently address emerging challenges.[40] In response, the EU introduced Regulation (EU) 2016/679, commonly known as the General Data Protection Regulation (GDPR),[41] which came into force in 2018. The GDPR underscores an effort of the European legislatures to harmonise data-protection standards within the EU and particularly targets the need for a comprehensive framework for addressing the issue of handling personal data in the digital age. Imposing robust obligations on businesses and organisations, the GDPR established global data-protection practices, setting a legal framework for privacy protection worldwide. In short, the European data-protection regime has evolved over several decades, moving from non-binding guidelines to a robust and comprehensive regulatory framework designed to safeguard individual privacy in an increasingly interconnected and digital world.[42] We also present the relevant provisions of Directive 95/46 in the next section.

6.1. General Remarks on Data Protection Directive (Directive 95/46)

Privacy has been recognised as a fundamental right in several international documents, adopted in the aftermath of World War II. Among them, the most important are the Universal Declaration of Human Rights (UN, 1948),[43] the European Convention on Human Rights (Council of Europe, 1950),[44] and the International Covenant on Civil and Political Rights (UN, 1966).[45] Each of these documents recognised the importance of protecting individuals from abuses of power, particularly by safeguarding their personal data. It is not just the sign of shifting attention of authorities to individuals, but the sign of willingness to keep the development of measures for privacy and data protection. Reinforcing the right to privacy as a

40 The structure of the legislative package – comprising both a regulation and directive – highlights concerns regarding its overall coherence and completeness. The primary weakness lies in the significantly lower level of protection provided by the proposed directive than the regulation. This discrepancy can be analysed on several levels. Most Member States found the idea of a regulation extending into the field of criminal law enforcement unacceptable, even with appropriate safeguards. An alternative approach – a directive mirroring the regulation in substance but allowing for national flexibility – was feasible but not adopted by the Commission. As a result, inconsistencies have emerged, which are particularly problematic in light of the growing exchange of information between public and private entities (such as law enforcement, banks, telecom providers, and travel agencies). A lack of consistency at this interface risks serious practical consequences. Notably, related areas such as taxation, customs, and border control, already covered by Directive 95/46/EC, would fall under the scope of the proposed Regulation, further complicating the legal landscape. Hustinx, 2014, p. 28.

41 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), Official Journal of the European Union, L 119, 04.05.2016.

42 Uribe, 2024.

43 United Nations, 1948.

44 European Courts of Human Rights, 1950.

45 United Nations, 1966.

fundamental aspect of human dignity and freedom, international documents shaped legal frameworks or the foundation for the later development of specific privacy- and data-protection laws.

The broad use of personal data by the private sector began in earnest with the advent and rapid adoption of Information and Communication Technology (ICT) in the 1970s. This shift raised significant concerns about the potential misuse of personal data, underscoring the need for regulatory measures to safeguard individuals' privacy. In response, a series of specific regulations were introduced during the 1970s and 1980s to govern the processing of personal data. These included international instruments such as the Council of Europe Convention No. 108 (1981),[46] the OECD Privacy Guidelines (1980),[47] and national laws.[48]

However, these rules were not sufficiently harmonised at the EU level. While some Member States imposed strict controls and procedures on data processing, others had no regulations in place. This lack of uniformity created significant barriers to the development of the EU's internal market, particularly the free movement of goods, services, and people. To address this issue, the EU created the Data Protection Directive,[49] which aimed to harmonise data-protection laws across Member States. The directive was designed not only to safeguard individual privacy but also facilitate cross-border trade and ensure that data-protection standards were consistent throughout the EU, thus strengthening the internal market (the 'first pillar').[50]

The distinction between the broader right to privacy and the specific protection of personal data is clearly articulated in more recent legal texts, such as the Charter of Fundamental Rights of the European Union.[51] The charter distinguishes these two aspects by dedicating separate provisions to each: Art. 7 protects the right to respect private and family life, while Art. 8 specifically addresses the protection of personal data. This distinction highlights the growing recognition that while privacy encompasses a broad range of personal freedoms, the protection of personal data requires distinct legal safeguards owing to the increasing role of digital information in modern life.

In response to rising concerns over personal data processing, the EU focused its legislative efforts on data protection, culminating in the adoption of the Data Protection Directive. This directive was designed to regulate the processing of personal data, whether through automated means or not. Its core principle is that

46 Council of Europe, 1981.

47 OECD, 2002.

48 Among the first states that explicitly regulated data protection were France (Acts on Informatics, Files and Liberties of 1978) and UK (Data Protection Act of 1984).

49 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, Official Journal L 281, 23.11.1995. (hereinafter referred to as Data Protection Directive).

50 Robinson et al., 2009, p. 24.

51 Charter of Fundamental Rights of the European Union, 2000/C, Official Journal of the European Communities, C 364, 18.12.2000.

personal data should not be processed unless certain conditions under three fundamental categories are met: transparency, legitimate purpose, and proportionality. Transparency ensures that individuals are informed about how their data will be used and processed.[52] Legitimate purpose requires that data should be processed for a clear, lawful reason consistent with the rights of the individuals involved.[53] Proportionality ensures that the amount of data collected and its use are limited to what is necessary to fulfil the intended purpose.[54] Altogether, these principles form the foundation of the Directive, aiming to protect individuals' privacy while allowing for the responsible use of personal data. Since Directive 95/46 does not have direct effect, all Member States were obliged to transpose it into national laws, which was done by the end of 1998.

Directive 95/46 required each EU Member State to establish a supervisory authority, an independent body responsible for overseeing the implementation and enforcement of data protection regulations within the country. These authorities had several key responsibilities, including monitoring the level of data protection, advising the government on administrative measures and regulations, and initiating legal proceedings in cases of data-protection violations (Art. 28). Additionally, individuals were granted the right to lodge complaints about data-protection violations either directly with the supervisory authority or through courts, ensuring that citizens could seek redress if their data protection rights were infringed upon.

The directive significantly emphasised the transfer of personal data to third countries, which was generally restricted. According to Art. 25 of Directive 94/46, personal data could only be transferred to a third country if that country ensured an adequate level of data protection. Understandably, the decision of whether data should be transferred to a third country or not were taken considering the data-protection provided in a certain country. Speaking in legal language, the third country had to be aligned with EU law.

6.2. Crisis of the Data Protection System – Challenges of the Digital Age

Directive 95/46 was not profoundly innovative in its conceptual approach.[55] However, it has had a significant practical impact on the EU. It is widely recognised as the legal foundation for consistent data protection principles across all Member States. This framework was crucial in ensuring that privacy rights were upheld in a uniform manner, fostering greater trust in the handling of personal data across the EU.

52 Data Protection Directive, Preamble, ad 63 and Arts. 10, 11.

53 Data Protection Directive, Preamble, ad 28, 30, 33, 39, etc. In particular, Section II.

54 Data Protection Directive, Preamble, ad 40, Arts. 11, 12.

55 The definition of privacy as 'a right to be left alone' is dated in the nineteenth century, and a numerous legal documents were adopted worldwide, setting standards of personal rights.

In terms of privacy goals and principles, Directive 95/46 addressed a number of core elements that formed the basis of data-protection law, such as legitimacy,[56] purpose limitation (which encompasses data quality, purpose specification, and proportionality),[57] security and confidentiality,[58] transparency,[59] data subject participation,[60] and accountability.[61]

Though Directive 95/46 offered a widely acceptable legal framework, it was enforced in a period of significant dynamism and change in legal, technological and social contexts. The EU's legal and market landscape evolved, influencing the shift in approach of relevant figures regarding the protection of data.

The first circumstance of rethinking on the actual legal framework was the fact that the enforcement of the directive coincided with substantial enlargement of the EU. As new Member States joined, aligning their national laws and practices with the directive's provisions became increasingly complex. This expansion needed continuous efforts to harmonise data-protection standards across a more diverse and broader Union.

However, technological and social changes brought new light to the existing data-protection environment. The rise of digital technologies – such as the internet, social media, cloud computing, big data analytics, and artificial intelligence – meant that personal data was being collected, stored, and processed on an increasingly vast scale. This rapid digitalisation heightened the risk of personal-data misuse, security breaches, and unauthorised access.[62] As data became a valuable commodity, the vulnerability of individuals' personal information grew, demanding stronger safeguards and more robust enforcement mechanisms.

These technological advancements and the evolving societal landscape underscored the limitations of Directive 95/46, prompting calls for greater flexibility, stronger protections, and more comprehensive privacy laws that could keep pace with the digital age. The rules of the directive were introduced when many online services and technologies that we use today – social networking platforms, cloud computing, location-based services, and smart cards – had not yet come into existence.

The sheer scale and complexity of personal data processing have grown exponentially in recent years, making the challenges associated with protecting personal

56 Art. 7.
57 Art. 6.
58 Arts. 16–17.
59 Arts. 10 and 11.
60 Art. 12.
61 Arts. 22–23. Robinson et al., 2009, p. 8.
62 The context in which the European Data Protection Directive was established has changed significantly. Personal data have become more dynamic, with its use, purpose, and ownership constantly shifting. People in Europe are now more active in controlling their data – for example, by deciding who can access it or by allowing apps to reuse it via social media platforms. This kind of user involvement was not anticipated when the Directive was written. As a result, the Directive faced serious challenges in keeping up with rapidly evolving digital environment. Robinson et al., 2009, pp. 18–19.

data more intricate and widespread. For instance, the rise of social media has blurred lines between private and public spheres, while the vast amounts of data stored in the cloud and the growing reliance on location-based services have created new risks for individuals' privacy.[63] At the same time, modernising data protection rules is not just about safeguarding individuals' privacy; it also offers significant opportunities for the development of the digital economy. A robust, transparent, and harmonised set of data-protection rules can provide businesses with clear guidelines, build consumer trust, and foster innovation in the digital sector. In the end, a balanced approach to privacy and data protection is meant for supporting the growth of the digital economy and simultaneously ensuring that individuals' fundamental rights are respected in the digital age.

All these show that the introduction of GDPR, designed to address emerging challenges in data protection while offering more comprehensive rights and protections for individuals, was an expected, or at least inevitable, consequence.

6.3. GDPR and Its Impact on Data Protection

GDPR[64] maintains essential principles set forth by the 1995 Data Protection Directive but adapts them to a new social, technological, and even political environment. Adoption of the GDPR corresponds to the need to provide effective protection of the privacy rights in a dynamic and, hence, uncertain digital landscape. Seen from this perspective, one can observe that the GDPR puts more power in the hands of individuals, making them crucial concerning the control over their personal data. Speaking in a normative context, individuals are supplied with clearer and more accessible rights, compared to the previous legal act, which include the right to access, rectify, erase, and transfer their data (data portability). By harmonising data-protection laws across all EU Member States, the regulation establishes a more consistent approach to privacy, enabling cross-border data flows both within the EU and internationally.

Furthermore, the GDPR introduces stronger enforcement mechanisms, including the potential for significantly higher fines for non-compliance. National data-protection authorities are empowered to take decisive action, holding organisations accountable for the breaches of data-protection laws.

The regulation also establishes clearer rules for transferring personal data outside the EU, ensuring that data remains protected regardless of where it is processed or stored. This is particularly important in today's interconnected world, where data are frequently handled by companies located across the globe. Beyond strengthening

63 Official Journal of the European Union, 2011, pp. 5–6.

64 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), Official Journal L 119, 04.05.2016.

privacy within the EU, the GDPR has set a global benchmark for data protection, influencing the development of similar laws in other countries and encouraging them to adopt comparable standards.

These changes are designed to provide individuals with greater control over their personal data, facilitating easier access and management of their information. The regulation ensures that personal data remains protected – no matter where it is sent, processed, or stored – within or outside the EU. This is particularly crucial in today's interconnected world, where data is often processed across borders, especially via the internet.[65]

Although the GDPR was designed to bring more certainty and clarity to the processing of personal data, its broad scope has led to confusion in some cases. Under the regulation, data protection law applies to any operation or set of operations performed on personal data, whether automated or not. This includes activities such as collection, storage, alteration, retrieval, consultation, use, disclosure, and erasure of data. As a result, nearly any activity involving personal data, especially in today's increasingly digital world, can be considered processing.

Given this expansive definition, to identify any digital activity that would not fall under the scope of the GDPR is a challenge. Whether it is browsing a website, using an app, or engaging in online marketing, all these actions likely involve some form of personal data processing. In this sense, the GDPR has indeed become 'the law of everything applied to everyone'.[66]

Comparing the period of the legal power of the directive, the CJEU, which plays a major role in personal-data protection through its function of interpreting EU law and faces even greater challenges in making the legal framework effective. While 'the provisions of a directive must be interpreted in the light of the aims pursued by the directive and the system which it establishes', the GDPR embodies a dual-purpose approach. It seeks to achieve two seemingly contradictory goals: ensuring a high level of protection for the rights of natural persons, while also facilitating the free flow of personal data across the EU to promote the functioning of the internal market. This dual focus is central to the Regulation's design, aiming to balance individual-privacy rights with economic considerations.

However, despite this hybrid model – where both data protection and internal market objectives are intertwined – the case-law of the CJEU has consistently reinforced the primacy of protecting individuals' rights. The Court has interpreted the GDPR so as to prioritise the safeguarding of personal privacy over the free movement of data. Judicial interpretation has thus underscored that the core purpose of the regulation is to protect individuals' fundamental rights. Any limitations on data flow must be justified by privacy and security concerns.

Therefore, while the GDPR aims to promote the smooth operation of the internal market by ensuring consistency across EU Member States, this goal is secondary

65 General Data Protection Regulation (hereinafter referred to as GDPR), Art. 3.

66 Lynskey, 2023, p. 300.

when weighed against the Regulation's primary objective of protecting individual rights. The CJEU's rulings reinforce that the protection of personal data cannot be compromised in favour of economic interests, emphasising the Regulation's overarching commitment to privacy as a fundamental right.[67]

To conclude, while the intent of the regulation was to provide comprehensive protection for personal data, its all-encompassing nature means that businesses, organisations, and even individuals may find themselves navigating a complex web of compliance requirements, even for seemingly minor activities. This broad application has made the GDPR both a powerful tool for safeguarding privacy and a source of complexity for those who seek to understand the full extent of their obligations.

6.4. The GDPR – Side Effects

For the purpose of this research, a detailed analysis of the GDPR would be left aside. However, its side effects should not be overlooked. The most discussed limitation is that the GDPR imposes strict obligations on companies concerning the collection, processing, storage, and use of personal data. One of its core requirements is that businesses must obtain explicit consent from individuals before collecting or processing their personal information, which shall be freely given, in relation to specific situations, based on proper and unambiguous information. The GDPR actually set a standard for assuring the full awareness of individuals and under their control over the method and objective of data usage. To be more precise, companies are required to provide clear and transparent information to consumers about what data is being collected, how it will be used, and whether it will be shared with third parties. This transparency ensures a complete understanding of data processing and usage, empowering them with greater control over their information.

Moreover, the GDPR's data-protection requirements extend far beyond initial transactions between businesses and consumers. Companies that collect and process personal data must be equipped to handle requests from individuals, such as those who seek access to their data, corrections of inaccuracies, or the erasure of their information. Organisations are obligated to fulfil these requests within a specified timeframe, and failure to comply can lead to significant fines, underscoring the importance of data protection and consumer rights.[68]

Besides these obligations, the GDPR mandates that companies cannot retain personal data longer than necessary for the purposes for which it was originally collected. Data retention must be strictly limited, and businesses must regularly review data to ensure compliance with this principle. This means that once the data are

67 Judgment of the Court (Grand Chamber) of 16 July 2020 *Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems* Case 311/18; *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH* Case 210/16, Judgment of the Court (Second Chamber) of 29 July 2019 *Fashion ID GmbH & Co.KG v. Verbraucherzentrale NRW eV Request for a preliminary ruling from the Oberlandesgericht Düsseldorf* Case 40/17.

68 GDPR, Art. 83.

no longer needed for their original purpose, they must be securely deleted or anonymised to prevent unnecessary exposure or misuse.[69]

Yet, the GDPR has extraterritorial scope and its provisions apply not only to businesses based in the EU but also to any organisation, anywhere in the world, that collects or processes data from EU residents.[70] This global reach ensures the protection of EU citizens' privacy rights, regardless of where their data are processed, making the GDPR one of the most comprehensive global data-protection frameworks.[71]

Additionally, the limitations on data sharing under the GDPR can create significant challenges, especially for smaller firms, which must not only comply with data-protection itself but also ensure that any third parties with which they share data are fully compliant with the regulation. This responsibility imposes a substantial burden on organisations, as they are now liable for privacy violations committed by their partners, vendors, or service providers. Data controllers are required to establish contracts with third parties that stipulate compliance measures, and failure to do so can result in serious penalties.[72]

If a company shares user data externally, whether with third-party processors or other entities, it is obligated to ensure that those parties uphold the same stringent data-protection standards mandated by the GDPR. This requires maintaining thorough diligence on third-party contracts and data-processing agreements, ensuring that these parties are legally committed to safeguarding personal data in accordance with GDPR provisions.[73]

Failure to meet these compliance requirements can result in severe financial penalties. Organisations may face fines of up to €20 million or 4% of their global annual revenue, whichever is higher. These substantial penalties can have a significant impact, particularly on smaller businesses that may lack the resources to navigate complex data-protection compliance. As a result, the high cost of potential violations compels companies to adopt a far more cautious approach to data collection, processing, and sharing.[74]

Non-compliance with these measures, which could be considered strict and robust, brings substantial financial risk for companies. Requirements set in the GDPR makes data privacy management a priority in business planning. They need to implement robust policies, establish comprehensive contracts, and maintain effective monitoring systems to protect their users' privacy and their bottom line.[75]

69 GDPR, Preamble ad 39, 49, 81, 83, Art. 5(1)(e), etc.
70 Ryngaert and Taylor, 2020, p. 9.
71 GDPR, Preamble ad 101, 116, Arts. 2, 3.
72 In accordance with GDPR, Art. 2 and Art. 3. Vardanyan and Kocharyan, 2022, pp. 100–101.
73 GDPR, Art. 42.
74 GDPR, Art. 83(5).
75 Businesses prefer to contract with large web-technology providers as they are better positioned to fulfil the legal requirement. A study found that a week after GDPR implementation market concentration increased by 17 percent because websites dropped smaller vendors. Prasad, 2020, p. 2.

7. Conclusion

The GDPR stands as a prime example of a regulation with far-reaching global influence. Widely recognised as the ‘gold standard’ for privacy and data protection, it not only establishes a high bar for EU Member States but also serves as a model for countries outside the EU. For businesses within the EU, compliance with the GDPR is a legal obligation, forming the backbone of their data-protection practices and ensuring that individuals’ privacy rights are safeguarded across all member nations.

Beyond the EU, the GDPR has set a benchmark for third countries that seek to engage with EU residents or operate within the European digital market. Nevertheless, the high standard of data protection overreached boundaries of the EU market, since companies outside the EU must comply with its requirements when processing the personal data of EU citizens, regardless of where the company is based. Thus, the regulation has a global reach, influencing data protection laws worldwide. Therefore, many countries have changed their data-protection legal framework in response to GDPR standards, recognising that meeting its requirements is essential for accessing the EU market.

This global influence underscores the growing importance of data privacy and security in today’s interconnected world, where businesses and governments face increasing pressure to protect individuals’ personal information and uphold their privacy rights. However, critics of the GDPR often describe it as a form of ‘data imperialism’, arguing that it imposes EU standards for data protection on foreign jurisdictions without fully considering diverse cultural, political, and economic realities of other countries. They contend that the regulation’s extraterritorial reach extends EU influence and overlooks the unique needs and contexts of non-EU nations.

Additionally, critics highlight the significant compliance costs, particularly for businesses in developing countries. These countries often lack the financial, legal, and technical resources required to meet the GDPR’s stringent standards, placing them at a competitive disadvantage compared to businesses in wealthier, developed nations. As a result, while the GDPR aims to safeguard privacy, its broad application and high compliance costs may unintentionally exacerbate global inequalities in the digital economy.[76]

Finally, when observing the disproportionate benefits of the GDPR within the EU, it becomes clear that the principle of ‘united in diversity’ faces a significant challenge in maintaining its integrity while enforcing such a regulation. It appears that owing to its legal nature, Directive 95/46 is much closer to Aristotle’s understanding of justice: equal treatment of equals, and unequal treatment of unequals, in proportion to inequality. This approach, Aristotle argued, makes justice more permanent than law itself. Although data protection is adopted in this chapter as an illustrative case study, it must be noted that an overly formalistic approach to the principle of equality may inadvertently jeopardise diversity – a value that holds particular significance

76 Uribe, 2024.

within the normative framework of the EU. While data protection is unquestionably relevant across various policy areas, similar concerns regarding the balance between formal equality and substantive diversity may extend to broader EU legislative efforts, especially in the context of sector-specific regulations.

Law should not be perceived merely as an isolated normative act, but rather as an integral element of an already established legal order – one that ensures coherence, continuity, and legal certainty for citizens throughout the EU, and in the Member States as such.

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