Judicial Training Project

Fundamental Rights In Courts and Regulation (FRICoRe)

FRICORE CASEBOOK

EFFECTIVE DATA PROTECTION AND FUNDAMENTAL RIGHTS

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The present Casebook builds upon the ReJus Casebook - Effective Justice in Data Protection. Particularly, new streams of questions have been added (particularly, in chapters 1, 3, 4,5, 7, 9). Furthermore, new developments have been considered both in EU and national caselaw.

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Introduction: A Brief Guide to the Casebook

Cross-project methodology

The FRICoRe Casebook on *Effective Data protection and fundamental rights* builds upon the collaborative venture developed in previous projects of judicial training and, more recently, in the Re-Jus project. The core element of its methodology concerns the active dialogue established between **academics and judges of various European countries** on the role of the Charter and the one of its article 47, here particularly developed in the field of data protection law. In continuity with previous projects, including Re-Jus, this collaboration combines rigorous methodologies with judicial practices, and provides the trainers with the sort of rich comparative material that should always characterize transnational trainings. Training includes not only the transfer of knowledge, but also the creation of a learning community composed of different professional skills. Like in previous experience, this casebook is due to evolve both in content and in method over time, with additional suggestions arising from its use in training events.

We firmly believe that transnational training of judges should be based on a rigorous analysis of **judicial dialogue** between national and European courts and, when existing, among national courts. In the field of data protection, such dialogue often builds upon or runs next to the activity of national administrative authorities, individually or as coordinated within the European Data Protection Board in which they are grouped. Although the administrative authorities may not refer questions to the Court of Justice, their decisions may be challenged before the courts or they may themselves bring an action before a court under the current legislation. Moreover, the Court of Justice is competent for deciding upon the validity of the Board's decisions when challenged by a natural or a legal person concerned by it under art. 263, TFEU, or when the validity question is referred by a national court pending a proceeding in which that decision needs to be applied (rec. 143, GDPR).

Like in previous projects, judicial dialogue is a key dimension of the approach followed in this Casebook. We investigate the full life cycle of a case, from its birth with the preliminary reference, to its impact in different Member States. We examine the ascendant phase and analyse how the preliminary reference is made, and whether and how it is reframed by the Advocate General and the Court. We then analyse the judgments and distinguish them according to the chosen degree of detail when they provide guidance both to the referring court and to the other courts that have to apply the judgments in the various Member States. Although the analysis does not extend to all Member States, compared with Re-Jus Casebook on Data Protection, a larger set of national caselaw has been considered in this edition.

Indeed, judicial dialogue develops both vertically and horizontally, at both national and supranational levels. Preliminary references represent the main driver of this dialogue. Linked with preliminary references procedures, horizontal interaction among national courts takes place when the principles identified by the CJEU are applied in pertinent cases, mostly in the same and sometimes in connected fields. Also depending on the type of reference enacted, the guidance

provided by the CJEU may consist in specific rules or in general principles to be applied. Very frequently the latter may consist in the principle of effectiveness or the one of equivalence, due to be balanced against the principle of national procedural autonomy.

Diverging approaches may be provoked by the same CJEU's judgement and a national vertical dialogue may emerge, involving constitutional courts, higher courts and first instance courts.

The horizontal dimension of this dialogue may be observed only indirectly when, starting from the same decision of the Court of Justice, possibly different outcomes are examined in different Member States.

Whereas by its intrinsic nature the European Data Protection Board provides an opportunity for coordination, cooperation and consistency among the national administrative authorities, the same framework does not exist for national courts. Moreover, although the 95/46/EC directive and now the General Data Protection Regulation (2016/679/EU Reg.) have provided a common legal framework for all Member States, the impact of such legislation upon national caselaw is still diversified, particularly so when the right to data protection needs to be balanced against other fundamental rights such as the right of expression and the one to information (CJEU, C-507/17, *Google CLL v. CNIL, para. 67*). The impact of the EU caselaw on delisting (*Google Spain*, C-131/12; *CG and Others*, C-136/17, *Google c. CNIL,* C-507/17) is a good example. On the one side, cross-national convergences (*e.g.,* in French, Italian and Polish decisions) may be observed when delisting is considered an adequate and proportionate remedy to strike a balance between data protection and the freedom of expression (being, *e.g.*, the right to press untouched). On the other side, in some legal systems, national judges may struggle more than their colleagues in other Member States in reconciling the right to be delisted with the rules on protection of personality rights (*e.g.,* this is the case for Poland). Furthermore, national judges may develop different approaches as regards the degree of activism expected by search engines, social networks and host providers in removing unlawful contents from the internet, although this is still a largely debated issue (see *Glawischnig-Piesczek,* C-18/18, and some applications in Italy and France in chapter 8 of this Casebook)

Comparing different stories, taking into account national specificities, enables national courts, different from the referring ones, to better anticipate the impact of EU law on the adjudication of national cases. This is why the **comparative perspective** provided by this Casebook may clarify the impact of the judgment or of a cluster of judgments addressing the same issue (for example *ex officio* power to examine unfairness of contract clauses) on the case law of Member States different from the one of the referring court. In some cases, the impact can be examined through judgments expressly referring to the CJEU's decisions; in other cases, the Casebook suggests interpretative tools to address issues discussed in national case law through the lens of the CJEU's decision. The **impact analysis** is very important for judges other than the referring one. Their effort to interpret and to adapt the judgment to their national legal context is often underestimated. While formally the CJEU judgments are binding on Member State courts, their application requires a careful analysis of which substantive and procedural rules may be affected by the judgment, in particular the application of Article 47 of the Charter and the principle of effectiveness.

Based on the methodology adopted in Re-Jus and now in Fricore, the analysis does not focus on single CJEU judgments but on **clusters of judgments** around common issues. Often, CJEU judgments touch on many questions depending upon how the preliminary references are framed, and it might be more effective to choose a subset of complementary issues and examine them in sequence across several cases, rather than to focus on a single judgment. This approach may add a bit of complexity, but it reflects the problem-solving approach, rather than the conventional doctrinal perspective. The internal coordination of chapters ensures the possibility of reconstructing the judgment across different chapters.

The casebook is complemented by a Database (https://www.fricore.eu/content/database-index) that endorses the methodological approach of judicial dialogue, giving continuity to the one established in the Re-Jus Project and integrating the whole set of materials therein developed. It is organized around EU judgments and their impact on national legal systems. Two series of national judgments are examined in the Database: those directly concerning cases brought before the CJEU within a preliminary reference procedure, and those that apply or take into consideration the CJEU case law when addressing national cases outside of a referral procedure. Hence, the database is specific, and it reflects the idea that judicial dialogue is a pillar of EU law.

We would like to encourage in training courses organized by national schools both the use of the Casebook and that of the Database, which is subject to constant updating during the course of the project, thanks to contributions coming both from the Schools of the Judiciary and from the workshops' participants.

The main issues addressed in this Casebook

Building on the Rejus Casebook on *Effective Data Protection*, the Fricore Casebook aims at examining the impact of the EU Charter of Fundamental Rights on the EU and national caselaw in the field of data protection from the perspective of the judicial dialogue occurred between the Court of Justice, national courts and, only indirectly, data protection authorities.

Largely based on EU secondary legislation (95/46/EC directive and now the GDPR), this dialogue has in fact more and more developed a fundamental right perspective based on articles 7 and 8 of the Charter (*e.g., Schrems I*, C-362/14; *Facebook Ireland Ltd, Maximillian Schrems*, C-311/18). In some cases, the dialogue incorporates the framework established upon the European Convention of Human Rights and, more particularly, upon its article 8 (*e.g.*, in *Digital Rights Ireland,* Joined Cases C-293/12 and C-594/12).

To what extent and how is the role of national judges in data protection affected by the acknowledgment of fundamental rights at EU level?

Firstly, unlike in other domains of EU law, in the field of data protection the Charter goes well beyond the acknowledgment of a fundamental right. Indeed, not only art.7 and, more particularly, art. 8 CFR establish the pillars of data protection regulation having regard to the principles of fairness, lawfulness and finality, then expanded in secondary legislation, but it also defines the

bases for an effective enforcement; more particularly, it does so when recognising, on the one hand, the right to access and the one to data rectification and, on the others, the monitoring power of an independent authority.

Secondly, once fundamental rights are at stake, art. 52, CFR, shall be applied, meaning that any limitation on the exercise of such rights must be provided for by law and respect the essence of those rights and freedoms and shall be subject to the ***principle of proportionality***, therefore made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. What is the impact of this principle on the judicial dialogue between EU and national courts in the field of data protection is widely clarified along this Casebook (see part. *Puškár*, C-73/16, ch. 8 with regard to the procedural aspects of the right to an effective remedy in data protection; *Digital Rights Ireland,* C-293/12, and C-594/12 and *LaQuadratureDuNet,* C-511/18, C-512/18; C-520/18, ch. 3 with regard to the limitation of fundamental rights in case of data processing carried out by States for the purpose of protecting public security; *Asociația de Proprietari*, C-708/18, ch. 4, with regard to the interpretation of the legal basis of the legitimate interest in the light of art. 7, 8 and 52 CFR).

Thirdly (and this is the focus of the present Casebook), being data protection regulated at EU level, another fundamental right comes into play, namely, the ***right to an effective remedy and a fair trial*** under art. 47, CFR. Although the latter is seldom explicitly recalled in EU caselaw, its relevance may not be denied in this dialogue (see, *e.g.*, *Schrems*, C-362/14; *Facebook Ireland and Schrems*, C-311/18; *Puškár*, C-73/16). The right to an effective judicial protection is more often referred to in the framework of the principle of effectiveness (*e.g.*, *Promusicae*, C-275/06; *Google v. CNIL* C-507/17; *Rijkeboer*, C-553/07; *C-40/17, Fashion ID*).

Moving from this perspective, the Casebook examines the role of fundamental rights and the one of the principles of effectiveness and proportionality in the EU and national caselaw in the field of data protection. By doing so, it aims at guiding judges and other legal experts in the application of data protection regulation through the illustration of cases in which the Court of Justice has used the fundamental right framework and the mentioned principles as tools for interpreting current legislation and defining both the balancing of rights and modes of enforcement.

More particularly, the Casebook illustrates:

a) whether and how effectiveness and proportionality have contributed to define the scope of application of data protection as regards both its territorial scope (chapter 1) and its material one (chapter 2);
b) whether and to what extent effectiveness and proportionality have shaped the balance between data protection and general interests (such as public security) calling for specific limitations to the protection of personal data (chapter 3);
c) whether and to what extent effectiveness and proportionality have contributed to define the lawfulness of processing with regard to the assessment of its legal bases and the modes in which consent can be rendered to make the data subject's protection effective (chapter 4);
d) whether and to what extent effectiveness and proportionality have shaped the balance between data protection and other fundamental rights and freedom (such as, eg, the right

to intellectual property under art. 17(2) CFR and the one to an effective remedy against its infringements under art. 47, CFR, addressed in chapter 4, or the freedom of expression and to receive or impart information under art. 11, CFR, addressed in chapter 5);

e) whether and why art. 47, the principle of effectiveness and the one of proportionality matter when judicial enforcement is made dependent upon the exhaustion of administrative enforcement procedures (chapter 6);
f) what is the impact of art. 47 and the mentioned principles upon the choice of sanctions and remedies and their application (chapter 7) and, viceversa, the impact of data protection on access to justice in cases in which personal data are needed to access to court (chapter 8);
g) whether effective protection may be improved by joint application of data protection law and consumer law in cases in which the data subject is also a consumer (chapter 9).

Compared with the Rejus Casebook on data protection, on which the Fricore elaboration is largely based, new streams of questions have been added (particularly, those under (*c*), (*d*) and (*g*)), and new developments have been considered both in EU and national caselaw.

The structure of the Casebook: some keys for reading

The Casebook is divided in nine chapters.

Chapter 1 shows how the principle of effectiveness has contributed to define the scope of application of EU data protection law in order to guarantee an effective protection of data subjects in relation with data processing occurred in the context of the activities of an establishment of the controller on the territory of the Member State and, more extensively, within a real and effective activity carried out through stable arrangements on that territory (*Google Spain,* C-131/12; *Weltimmo,* C-230/14; *Schrems I,* C-362/14; *Amazon,* C-191/15; *Holstein,* C-210/16). Taking into consideration the most recent developments, judges may be guided in the application of such principles to the case of deferencing. In this regard, in light of the principle of effective protection of data subjects, a search engine operator grants a request for de-referencing under those provisions, that operator is required to carry out that de-referencing only on the versions of the search engine corresponding to the Member States, using, where necessary, measures which effectively prevent or, at the very least, seriously discourage an internet user conducting, from one Member State, a search based on a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request (*Google c. CNIL*, C-507/17). In the CJEU's perspective, the need for an effective protection of data subject is also relevant for defining both the territorial scope of powers of administrative authorities in light of multiple places of processing across MSs (*Holstein*, C-210/16) and the duty of cooperation among those (*Weltimmo*, C-230/14) without the duty of cooperation being an obstacle to full and independent exercise of enforcement powers (*Holstein*, C-210/16). The last part of the chapters provides an up-to-date view on the CJEU's scrutiny over the Commission's decisions concerning data transfer to third countries having special regard to the role of effectiveness and proportionality of safeguards in favour of data subjects in these regards.

Chapter 2 partly builds on the analysis provided by the Rejus Casebook concerning the broad interpretation of the concept of personal data, processing and controller based (among other elements) on the principle of effective protection of data subjects (*Breyer*, C-582/14; *Google Spain,* C-131/12; *Lindqvist*, C-101/01). More recent and critical issues are addressed in the second part with regard to the cases in which multiple processors intervene and, again in light of effective judicial protection, may be found jointly liable (*Holstein*, C-210/16; and *Jehovah*, C-25/17, *Fashion ID,* C-40/17).

Charter 3 deals with the complex question concerning data retention within electronic communications and public communication networks and the role played by the Court of Justice in the annulment of Directive 2006/24 due to lack of proportionality affecting the measures therein allowed through data retention to combat serious crime (*Digital Rights Ireland,* C-293/12). Recent caselaw has indeed provided guidance on the application of the principle of proportionality, as incorporated in art. 15, dir. 2002/58, allowing for restrictions to data protection consisting in necessary, appropriate and proportionate measures within a democratic society to safeguard national security and the prevention of crime (*Schwarz*, C-291/12; *Willem*, C-446/12 to C-449/12; *Puškár*, C-73/16; *Staatssecretaris*, C-70/18; *Tele2*, C-203/15). The Court has not only contributed to define the situations of serious threat to national security, the type of personal data that may be retained, in the given circumstances, and the relevance of time limits for such retention but also the need for the adoption of pertinent decisions by competent authorities, subject to the principle of proportionality and to judicial review by courts or independent administrative authorities (*La quadrature du Net*, C-511/18, C-512/18, C-520/18).

Chapter 4 addresses the impact of fundamental rights and the one of the principles of effectiveness and proportionality in the interpretation of GDPR rules regulating the legal bases for processing (art. 6 GDPR). More particularly, the Casebook shows how proportionality has influenced the concept of legitimate interest as a legal basis for processing (*Asociatja de Proprietari,* C-708/18) and how the modes in which consent can be rendered has been affected by the need for effective protection of the data subject (*Planet49,* C-673/17; *Orange Romania,* C-61/2019).

The principle of proportionality is at the core of the analysis developed in *Chapter 5*, concerning the balance between data protection and freedom of expression, the latter including the one to publish and receive information. The caselaw developed both at EU and national level faces challenging issues in this regard: not only when it aims at ensuring that the balance ensures the preservation of the core essence of fundamental rights and freedoms, e.g. when sensitive data is processed (*GC and Others* C-136/17), but also when more controllers are involved, some of which are mere host providers. In the latter case, the balancing exercise needs to be adjusted against the exemption rule included in the 2000/31 dir. on e-commerce (art. 15) and more refined criteria need to be determined depending on the complexity of the monitoring activity expected from the controller in relation with contexts, such as social networks, in which similar contents may be easily replicated with minor divergences (*Glawischnig-Piesczek*, C-18/18).

Chapter 6 introduces the complex enforcement system of data protection, based on the two pillars of administrative and judicial enforcement. Whereas specific means for coordination and cooperation within the Union are expressly provided in the GDPR, the same does not occur for

judicial enforcement, whose mechanisms of cooperation (at civil and criminal level) are defined out of this specific Regulation (art. 81-82, TFEU). Nor the Regulation provides for specific coordination mechanisms between administrative and judicial procedures a part from establishing that the right to an effective remedy shall include judicial review of administrative authorities' decisions (art. 78, GDPR). Moving from the perspective of the CJEU and the one of the ECtHR when relevant, the Casebook examines the role of art. 47, CFR, in filling in this gap, focusing on the cases in which national procedural autonomy has conditioned access to courts upon the exhaustion of administrative procedures (*Puskàr*, C-73/16). The foundations of the duty of cooperation among administrative authorities in light of the principle of effectiveness are also presented in this chapter (*Facebook Ireland and Schrems*, C-311/18).

The choice of sanctions and remedies in the light of art. 47 CFR and the principles of effectiveness, proportionality and dissuasiveness is the subject of *Chapter 7*. Whereas the GDPR refers to article 47, CFR, when acknowledging the right to an effective remedy before the court (GDPR, rec. 141), and art. 83 states that each supervisory authority shall ensure that the imposition of administrative fines shall in each individual case be effective, proportionate and dissuasive, the same is not explicitly foreseen in respect of remedies. The latter must, however, be effective under article 78, GDPR; under art. 82, GDPR, compensation must also be effective. In all these respects the CJEU provides useful guidance on how to administer the choice of sanctions and remedies in accordance with the above mentioned general principles. Chapter 8 presents this analysis distinguishing between sanctions, corrective remedies and the right to compensation. The case of corrective remedies and, within this, the role of cancellation and delisting provide a useful example on how effectiveness and proportionality have been used in judicial dialogue at both EU and national level.

Chapter 8 introduces another view on the relation between data protection and access to justice, namely the possible limitations imposed by the former on the latter. This relation impacts upon critical challenges faced by national judges concerning, in particular: i) the admissibility of pieces of evidence concerning a breach of data protection in court; ii) the impact of the principles of proportionality and effectiveness, art. 8 and art. 47 CFR on the regulation on access to personal data which are necessary for initiating civil proceedings; iii) the use of evidence derived from unlawful processing in proceedings (*Puškár*, C-73/16; *Rīgas satiksme*, C-13/16).

Chapter 9 concludes the analysis on effective protection of data subjects taking into account the effects of the possible application of consumer law in cases in which the data subject is also a consumer and the infringement of data protection law may also be regarded through the consumer protection lens. The recent adoption of the 2020/1828/EU dir. on representative actions in the field of consumer protection makes clear that such contamination is possible and may reinforce the effectiveness of data protection. Moving from this perspective and taking into account recent developments in EU and national caselaw (e.g., *Fashion ID*, C-40/17), the Casebook examines whether and to what extent procedures and remedies provided in consumer law, such as collective actions or remedies against unfair practices or the breach of information duties may improve the effective of data and consumer protection jointly.

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