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Between Legitimacy and Lawfulness: In Search of Rationality and Consistency in EU Data Protection

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The principle of 'lawfulness' of data processing with this explicit label assigned to it in Article 5(1)(a) of the General Data Protection Regulation ('GDPR')[1] seems to be one of the least disputed principles in the EU data protection framework.[2] It sounds almost like a truism to say that once the processing relies on at least one of six grounds for data processing exhaustively enumerated in Article 6(1) GDPR – titled 'Lawfulness of Processing' – such processing shall be regarded lawful. According to Article 8(1) of the Law Enforcement Directive ('LED'),[3] in turn, 'Member States shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the [law enforcement] purposes (...) and that it is based on Union or Member State law.'[4]

Key Words: Legitimacy | lawfulness | Grounds for Data Processing | Charter of Fundamental Rights (CFR) | Secondary Law

I. Introduction

Yet, a careful look at Article 8(2) of the Charter of Fundamental Rights ('CFR' or 'Charter')[5] may cast a shadow over the content of the – seemingly straightforward – principle of 'lawfulness' enshrined in the secondary data protection legislation. Article 8(2) CFR provides that '[personal] data must be processed (...) on the basis of the consent of the person concerned or some other *legitimate* basis laid down by law'.[6] It follows that while the secondary data protection law speaks of 'lawfulness', the primary EU law mentions 'legitimacy' and connects it with the embedding in law through the phrase 'laid down by law'. This observation gives rise to two kinds of concerns, which will be explained and explored in this paper: one regarding lexical consistency, the other regarding systemic quality of the data protection legal system. Together they lead to the following questions: what is the standard of legitimacy of the processing of personal data established by Article 8(2) CFR and what expression is it given in the EU data protection legal system beyond the Charter?

This contribution will try to answer these questions. It will begin with a brief introduction of the often neglected in non-theoretical legal discourses as-

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1 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) OJ L119/1 4.5.2016 (GDPR).

2 See e.g. Lee A Bygrave, *Data Privacy Law: An International Perspective* (First edition, Oxford University Press 2014).

3 Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA OJ L119/89 4.5.2016 (LED).

4 Article 8(1) LED.

5 Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012.

6 Emphasis added.

sumption about rationality and consistency of EU legislation (Section 2). This assumption will serve as a starting point and a conceptual framework for the later analysis. Next, the paper will explain the structure of the EU data protection legal system (Section 3) and carry out a textual and systemic examination thereof identifying how the concepts of *legitimacy* and *lawfulness* are used across the primary and secondary law. Further, the paper will discuss the identified terminological discrepancies and systemic ambiguities showing that a closer look at them can contribute to enhancing conceptualisation of the fundamental right to the protection of personal data (Section 4). Building on the debate on the complex and uncertain nature of the right at issue, the paper will explain why depending on whether we acknowledge or not the distinction between *legitimacy* and *lawfulness* in the data protection legal system, the level of protection offered to the data subjects may differ (Section 5). The paper will conclude with a critical reflection on the realization of the postulate about rationality and consistency of the EU data protection legislation (Section 6).

II. The Assumption About Rationality and Conceptual Consistency

Many legal philosophers representing diverse schools of thought, have similarly held over centuries that a vital property of a legal system is the absence of inconsistency.[7] Just to name a few, Jeremy Bentham – known to privacy and data protection scholars for his (in)famous ideas on Panopticon, rather than claims regarding coherent legislative processes – considered inconsistency of legal codes 'evil' and advocated for tackling this problem by leaving the drafting of legal codes to a 'single hand'.[8] The more contemporary thinker – crucial for this paper due to his prominent account of legitimacy – Lon Fuller, mentioned failure to make rules understandable, enactment of contradictory rules and lack of congruency between rules among 'routes to disaster' for a legal system.[9]

In a similar vein, various legal theorists and logicians have been developing postulates pertaining to rationality and consistency in the law-making.[10] For instance, Manuel Atienza distinguished several levels of rationality, two of which will be addressed in this paper. The first is the linguistic rationality, which requires accessibility, clarity and precision of the legal message (the law) that is transmitted from the issuer (legislator) to the addressees.[11] The second level regards the legal system in its entirety and maintains that new laws need to be harmoniously inserted thereto in order not to erode its structure by giving rise to contradictions or creating legal gaps.[12] Therefore, this level of rationality regards the systemic quality of the legal system.[13] Both levels of rationality are commonly identified as objectives of principles of sound legislative technique.[14]

This appears to be the case in the EU. The Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation distinguishes between two types of consistency – formal and substantive. It explains that while formal consistency concerns questions of terminology, substantive consistency refers to the logic of the act as a whole.[15] It elaborates that '[c]onsistency of terminology means that the same terms are to be used to express the same concepts and that identical terms must not be used to express different concepts. (...) Any given term is therefore to be used in a uniform manner to refer to the same thing, and another term must be

7 Lars Lindahl and David Reidhav, 'Conflict of Legal Norms: Definition and Varieties.', *Logic in the Theory and Practice of Lawmaking* (2015), 87.

8 ibid. with references to Jeremy Bentham [1822] 1998, 'Codification proposal, addressed by Jeremy Bentham to all nations professing liberal opinions' in Philip Schofield and Jonathan Harris (eds) *The collected works of Jeremy Bentham – 'Legislator of the World': Writings on codification, law and education*.

9 Lon L Fuller, *The Morality of Law* (Rev ed, 15 print, Yale Univ Press 1978), 39.

10 For more about the concept of rational law-making see e.g. Jerzy Wróblewski, 'A Model of Rational Law-Making' (1979) 65 Archiv für Rechts- und Sozialphilosophie 187; Bernd Grzeszick, 'Rationality Requirements on Parliamentary Legislation Under a Democratic Rule of Law' in Klaus Meßerschmidt and A Daniel Oliver-Lalana (eds), *Rational Lawmaking under Review*, vol 3 (Springer International Publishing 2016).

11 Manuel Atienza, 'Practical Reason and Legislation' (1992) 5 Ratio Juris 269, 277. Atienza explains that the properties such as accessibility, clarity and precision of the legal message are necessary to ensure good communication between the parties, i.e. the legislator and the addressees of legal norms, which is vital for the consistent legal system, since such system is composed of an organised series of linguistic statements.

12 ibid.

13 ibid.

14 Andrzej Grabowski and Urszula Kosielińska-Grabowska, *Logic and the Directives of Legislative Technique: Some Logical Remarks on the Polish 'Principles of Legislative Technique'* (Cham: Springer International Publishing 2015), 218.

15 European Commission. Legal Service., *Joint Practical Guide of the European Parliament, the Council and the Commission for Persons Involved in the Drafting of European Union Legislation*. (Publications Office 2015), Principle 6.1.

chosen to express a different concept'.[16] The Guide further clarifies that '[t]his applies not only to the provisions of a single act, (...) but also to the provisions of related acts, in particular to implementing acts and to all other acts in the same field'.[17]

The main hypothesis of this paper follows from the above. It maintains that the distinction between *legitimacy* and *lawfulness* in the EU data protection legal system should be consistent and have a rational justification. Furthermore, one could assume that the whole system, i.e., including its primary and secondary law components, has been harmoniously constructed to be free from contradictions and legal gaps.

III. The EU Data Protection Legal System

The EU data protection legal system can be seen as a system formed by the following components: relevant provisions at the rank of the EU primary law, relevant general principles of law, data protection secondary law and other provisions governing the processing of personal data included in the EU secondary law adopted across various EU regulatory areas.

As regards the primary law, the most crucial are Article 16 of the Treaty on the Functioning of the European Union (TFEU),[18] which establishes the right to the protection of personal data[19] and gives the EU legislator mandate to lay down the rules relating to the protection of individuals with regard to the processing of personal data and the rules relating to the free movement of such data;[20] and Article 8 the Charter of Fundamental Rights, which will be explored in detail in Section IV.1.

The second component, namely the so-called general principles of law, is not unique for data protection, but plays and important role, because it encompasses, among others, the principle of respect for fundamental rights 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR]'.[21] The principles occupy the second tier (after the primary law) of the hierarchy of norms in EU law what allows them to be used to interpret the secondary laws, as well as to serve as a ground for their invalidation by the Court of Justice of the European Union (CJEU).[22]

The third component of the data protection legal system is the secondary EU law adopted on the basis of Article 16(2) TFEU, which so far consists of three EU acts, namely the already mentioned GDPR and LED, but also Data Protection Regulation for the EU Institutions and Bodies (EUDPR).[23]

Finally, the EU data protection legal system is supplemented by other legal instruments, adopted across various EU regulatory areas, based on other grounds than Article 16 TFEU, which formulate own rules on the processing of personal data – for instance the Directive on the use of Passenger Name Record (PNR) (PNR Directive)[24] adopted on the basis of Article 82(1)(d) and Article 87(2) (a) TFEU. These acts can create legal obligations to process personal data and thereby lay down basis for data processing.

The relationship between the aforementioned components should be such that the primary law and the general principles of law 'sit at the top of the hierarchy'[25] and, hence, as a rule, the secondary law must always be read in conformity with those higher-ranking norms and tested by the CJEU against them as a benchmark. However, as I will show, the right to data protection poses some challenges to this rule because of a much longer history of this right at EU secondary law level than in the Charter.[26]

16 ibid. Principle 6.2.

17 ibid. Principle 6.2.1.

18 Consolidated version of the Treaty on the Functioning of the European Union OJ C 326 26.10.2012.

19 Article 16(1) TFEU.

20 Article 16(2) TFEU.

21 Article 6(3) TEU. Fundamental rights are explicitly recognised as general principles of the Union's law in the Treaty.

22 Paul Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (5th ed, Oxford University Press 2011). In *Google Spain,* the CJEU reiterated that secondary law provisions governing the processing of personal data 'must necessarily be interpreted in the light of fundamental rights', which form integral part of the *general principles of law* and are laid down in the Charter (EU:C:2014:317, para 68).

23 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance) PE/31/2018/REV/1 OJ L 295, 21.11.2018.

24 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime OJ L 119, 4.5.2016

25 Craig and De Búrca (n 21), 109.

26 This has been acknowledged in the Explanation on Article 8 accompanying the CFR, which states that Article 8 CFR was, among others, based on the Data Protection Directive. (Explanations relating to the Charter of Fundamental Rights OJ C 303, 14.12.2007).

IV. 'Legitimacy' and 'Lawfulness' in the EU Data Protection Legal System

1. Article 8 and 52(1) of the Charter: 'Legitimate Basis Laid Down by Law' and Limitation 'Provided for by Law'

Pursuant to Article 8(1) CFR '[e]veryone has the right to the protection of personal data concerning him or her.'[27] With this formulation, this provision resembles many other fundamental rights enshrined in the Charter, including the closely related right established in Article 7 CFR, which guarantees that '[e]veryone has the right to respect for his or her private and family life, home and communications.'[28]

However, unlike Article 7, Article 8(1) CFR is followed by two additional paragraphs: Article 8(2), which stipulates that '[s]uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified'[29]; and Article 8(3), which provides that '[c]ompliance with these rules shall be subject to control by an independent authority'[30].

The division of Article 8 CFR in three paragraphs and ambiguous relations between these paragraphs have prompted intense discussions on the nature of the right to the protection of personal data.[31] While it is possible to argue for its prohibitive character and interpret Article 8(1) as prohibiting the processing of personal data and Article 8(2) and (3) as introducing exceptions to this prohibition,[32] in the scholarship, more common seems to be the permissive interpretation,[33] which requires to read Article 8 holistically with the assumption that all three paragraphs jointly lay down rules, which the processing of data must obey.[34]

The prohibitive approach implies that any processing of personal data constitutes an interference with the right to the protection of personal data, and this interpretation can be inferred from the CJEU's reasoning applied, for instance, in the *Digital Rights Ireland* case, where the Court held that 'Directive 2006/24 [Data Retention Directive] constitutes an interference with the fundamental right to the protection of personal data guaranteed by Article 8 of the Charter because it provides for the processing of personal data'.[35]

Conversely, according to the permissive conception of the right to data protection, the interference occurs only if the processing fails to comply with the rules set out in Article 8(2) and (3) CFR. In other words, as long as the processing is fair, takes place for specified purposes and on the basis of consent or other legitimate basis laid down by law, data subject has a right to access and rectify his data, and compliance with those rules is controlled by an independent authority, there is no interference with Article 8 CFR.

The point of contention regarding the prohibitive as opposed to the permissive nature of the fundamental right to the protection of personal data is further complicated by the question of the relation of Article 8 vis-à-vis Article 52 of the Charter, which lays down general rules on the scope, interpretation and limitations of rights and principles laid down by the Charter.

Article 52(1) stipulates that '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to

27 Article 8(1) CFR.

28 Article 7 CFR.

29 Article 8(2) CFR.

30 Article 8(3) CFR.

31 For the latest summary of this discussion see Plixavra Vogiatzoglou and Peggy Valcke, 'Two Decades of Article 8 CFR: A Critical Exploration of the Fundamental Right to Personal Data Protection in EU Law' in Eleni Kosta, Ronald Leenes (eds), *Research Handbook on EU Data Protection Law* (Edward Elgar Publishing 2022), 22.

32 The origins of such understanding of the right to data protection can be found in the very first data protection law in Europe, i.e. the Data Protection Act of Hesse (Hessisches Datenschutzgesetz vom 7 oktober 1970 GVBl II 300-10, published at Wiesbaden, 12 October 1970, in *Gesetz-und Verordnungsblatt für das Land Hessen*), which adopted 'the negative default rule' meaning that any processing of data amounts to an interference requiring justification. For more see e.g. Jef Ausloos, *The Right to Erasure in EU Data Protection Law* (Oxford University Press 2020), 10.

33 See e.g. Paul De Hert and Serge Gutwirth, 'Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power' in Erik Claes, Antony Duff and Serge Gutwirth (eds), *Privacy and the criminal law* (Intersentia 2006); Maria Tzanou, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance* (Hart Publishing 2017) 249; Hielke Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU*, vol 31 (Springer International Publishing 2016) 59 <http://link.springer.com/10.1007/978-3-319-34090-6> accessed 3 August 2019.

34 Gloria González Fuster and Serge Gutwirth, 'Opening up Personal Data Protection: A Conceptual Controversy' (2013) 29 Computer Law & Security Review 531, 532.

35 Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* 8 April 2014 ECLI:EU:C:2014:238, para 36.

Table 1: Steps and Results of Prohibitive and Permissive Reasoning

Conception of the nature of the right to data protection	Prohibitive	Permissive
What amounts to an interference with Art. 8 CFR?	Any processing of personal data	Processing, which fails to comply with rules set out in Art. 8(2) and (3) CFR
How can the interference be justified?	By compliance with the requirements of Art. 8(2) and (3) and meeting the standards of Art. 52(1) CFR	By meeting the standards of Art. 52(1) CFR
What is the subject of the assessment against Art. 52(1)?	The processing that takes place **on** a legitimate basis laid down by law	The processing that takes place **without** a legitimate basis laid down by law
Result of the test of Article 52(1) - 'provided for by law'	The test will always be passed	The test would be passed only if there was law exempting the processing from being based on a legitimate basis laid down by law

the principle of proportionality, limitations may be 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.'[36]

Since Article 8(2) CFR can be considered (in the prohibitive approach) a special derogative regime to the right established under Article 8(1) CFR, it can theoretically be claimed that Article 52(1) CFR should not apply to Article 8 of the Charter.[37] The Charter itself does not however seem to lend support to such an interpretation, and the CJEU also consequently evaluates interferences with Article 8 CFR through the lens of Article 52(1) CFR. Although, regrettably, it has so far refrained from clarifying the relationship between the limitation clause established by Article 52(1) CFR and – as the proponents of the prohibitive understanding of the right to data protection could put it – limitation clause arising from Article 8(2) and (3) CFR.[38]

This paper does not intend to take sides in the discussion on the conceptual dilemma regarding the nature of fundamental right to data protection but focus on the issue of legitimacy of interferences with this right. Therefore, it will primarily take account of Article 8(2) CFR demanding the processing to be 'on the basis of the consent of the person concerned or some other legitimate basis laid down by law' and on Article 52(1) CFR requiring any limitation on the exercise of the fundamental right to be 'provided for by law'. What does it mean for the processing to have a legitimate basis laid down by law and for the limitation of the right to data protection to be provided for by law? The answer to this question may depend on the adopted conceptual approach to the right to data protection.

If we employ the prohibitive approach and CJEU's reasoning from e.g. *Digital Rights Ireland,* we will arrive at the conclusion that any legislation that allows for data processing amounts to an interference with Article 8(1) CFR, but if it lays down legitimate basis for processing, the interference is justified. Therefore, since e.g., the GDPR or LED are laws and, as will be explained in the next section, they lay down bases for the processing, the interference with the right to data protection in the prohibitive conception is exonerated. This either precludes the necessity of ex-

36 Article 52(1) CFR.

37 Herke Kranenborg, 'Art 8 - Protection of Personal Data' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights - A Commentary* (Hart Publishing 2021), 281.

38 In Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR* ECLI:EU:C:2010:662 9 November 2010, the Court observed however in two consecutive paragraphs that 'Article 8(2) of the Charter thus authorises the processing of personal data if certain conditions are satisfied. It provides that personal data 'must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'.' (para 49) and 'Moreover, Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Articles 7 and 8 of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others' (para 50).

amining it against the standard of being 'provided for by law' under Article 52(1) CFR, or renders such examination irrelevant, since it will, in fact, boil down to the question whether the law is law.

The reasoning is different if the permissive approach is adopted. If the interference takes place only when the processing fails to have a 'legitimate basis laid down by law', as required per Article 8(2) CFR, it becomes necessary to examine if that interference was 'provided for by law'. Should the verification of the criterion of being 'provided for by law' lead to a conclusion that there was no law in place, exempting the processing from being on 'legitimate basis laid down by law', the discussed step of Article 52(1) CFR test will be failed, what would at the same time imply the infringement of the fundamental right to the protection of personal data. Alternatively, if there was law, which permitted processing of personal data without a 'legitimate basis laid down by law', then the test will be passed. This would, however, necessitate assessing the interference against other criteria of Article 52(1) CFR and one could possibly argue that such law infringes the essence of the right enshrined in Article 8 CFR, since it openly contradicts one of the requirements set out in Article 8(2) CFR.

The table above **(Table 1)** illustrates the steps and results of both reasonings depending on the employment of the prohibitive and permissive accounts of the right to data protection. It must be noted, however, that this examination is abstract and concerns only the formal test of whether there was law in place, which laid down legitimate basis for data processing.

The foregoing shows the complexity of interpretation of Article 8 CFR caused but the peculiar structure of this provision that gives rise to confusion regarding the right itself and possibilities of its limitation.

2. The Secondary Data Protection Legislation: 'Lawfulness of Processing'

The first sentence of Article 8(2) CFR ('data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law'[39]) is similar albeit not identical to the secondary data protection law. Article 5(1)(a) and (b) GDPR, as well as Article 4(1)(a) and (b) EUDPR, formulate and name respectively the principles of 'lawfulness, fairness and transparency' and 'purpose limitation'. In a similar manner, although without giving these qualities explicit labels, Article 4(1)(a) and (b) LED stipulate that 'Member States shall provide for personal data to be: (a) processed lawfully and fairly; [and] (b) collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes'. Vogiatzoglou and Valcke note that [t]he fact that only certain principles and rights out of the ones established in EU secondary law are included in the CFR provision raises questions regarding their interpretation'.[40] The question in this paper is whether the principle of lawfulness formulated in the secondary data protection legislation embodies what Article 8(2) CFR intended to safeguard.

The provisions formulating data protection principles in the GDPR, LED and EUDPR with respect to lawfulness only tautologically explain that personal data shall be processed 'lawfully'. They do all, however, contain a provision entitled 'Lawfulness of processing', which specifies when the processing is lawful – Article 6 GDPR, Article 8 LED and Article 5 EUDPR. The subject matter of these articles, or name of the elements they enumerate, exemplifies the lexical inconsistency within the discussed acts. Only in the GDPR three different formulations used interchangeably can be found, namely '*conditions* under which the processing of personal data is *lawful*',[41] '*legitimate basis*'[42] and '*legal grounds* for processing'.[43]

The table below **(Table 2)** compares the 'Lawfulness of processing' provisions of the GDPR, LED and EUDPR.

Before continuing the discussion on 'Lawfulness of processing' according to the GDPR, LED and EUDPR, it is worth noting that the provisions of the GDPR and EUDPR almost exactly repeat Article 7 of the Data Protection Directive (DPD)[44] and Article 5 of Regulation No 45/2001[45] respectively, which were

39 Article 8(2) CFR.

40 Vogiatzoglou and Valcke (n 24), 20.

41 Recital 10 GDPR (emphasis added).

42 Recital 40 GDPR (emphasis added).

43 Article 17(1)(b) GDPR (emphasis added).

44 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 OJ L 281, 23.11.1995.

45 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data OJ L 8, 12.1.2001.

Table 2: Lawfulness of Processing

GDPR	LED	EUDPR
Article 6	Article 8	Article 5
1. Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent (...); (b) processing is necessary for the performance of a contract (...); (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, (...). ... 3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by: (a) Union law; or (b) Member State law to which the controller is subject. The purpose of the processing shall be determined in that legal basis (...). The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.	1. Member States shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) and that it is based on Union or Member State law. 2. Member State law regulating processing within the scope of this Directive shall specify at least the objectives of processing, the personal data to be processed and the purposes of the processing.	1. Processing shall be lawful only if and to the extent that at least one of the following applies: (a) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the Union institution or body; (b) processing is necessary for compliance with a legal obligation to which the controller is subject; (c) processing is necessary for the performance of a contract (...); (d) the data subject has given consent (...); (e) processing is necessary in order to protect the vital interests of the data subject or of another natural person. 2. The basis for the processing referred to in points (a) and (b) of paragraph 1 shall be laid down in Union law.

part of distinguished sections titled 'Criteria for Making Data Processing Legitimate' in the predecessors of the GDPR and EUDPR.[46] Neither the GDPR, nor EUDPR maintained such headlines leaving room for the argument that the new secondary data protection framework wanted to break with the association of legitimacy with the bases for the processing.

If we return to the wording of Article 8(2) CFR, it is noticeable from the outset that the consent of the data subject is one, but not the exclusive legitimate basis for data processing. Article 8(2) CFR explicitly allows the processing to take place on 'other legitimate basis laid down by law'. It often seems to be taken for granted that all conditions enumerated in Article 6(1)(b) – (f) GDPR amount to those other legitimate bases for data processing in the meaning of Article 8(2) of the Charter.[47] The same could be said about conditions in Article 5(1)(a) – (c) and (e) EUDPR. This assumption is easy. It only requires reading Article 8(2) of the Charter as '[personal] data must be processed (...) on the basis of the consent of the person concerned or some other legitimate basis laid down [in Article 6 GDPR, Article 8 LED or Article 5 EUDPR].' Regardless of whether the prohibitive or permissive approach to the right to data protection is employed, there is not much room for debate left. The secondary law is the law, which lays down legitimate bases for data processing and except for the compulsory inclusion of consent it has all the freedom in their design.

There are however a few problems with this straightforward assumption. The first one is that it automatically presumes that all the bases laid down in the secondary data protection law are legitimate; or that the adjective 'legitimate' used in Article 8(2) CFR does not have any normative value.

46 Section II of Directive 95/46/EC and Section 2 of Regulation (EC) No 45/2001.

47 E.g. EDPB, Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects 8 October 201, para 1.

The other problem relates to the variety of bases for the processing laid down in the secondary data protection law, which affects its internal consistency. While Article 6(1)(b),(d) and (f) GDPR and Article 5(1)(c) and (e) EUDPR have to be considered themselves legitimate bases laid down by law in the meaning of Article 8(2) CFR, the processing envisaged in Article 6(1)(c) and (e) GDPR, Article 5(1)(a) and (b) EUDPR and in the LED requires adoption of other relevant laws. This creates a situation of a 'dual legal delegation'. The GDPR, LED and EUDPR can be considered 'intermediary' bases between the primary law and another, law which permits for the processing. One can wonder if this dual legal delegation is necessary. Possibly, the laws prescribing specific data processing (and not the secondary data protection legislation) could themselves be considered a direct realization of Article 8(2) CFR. Conversely, it can be argued that only these laws fully realize the condition of 'legitimate basis laid down by law' of Article 8(2) CFR, because they anchor the data processing operations directly in the law and provide additional requirements, which can make it legitimate. The GDPR does not only specify in what laws the '*basis* for the processing' should be laid down but it also demands that such '*legal basis*' determines the purpose of the processing.[48] Furthermore it states that the Union or the Member State law, which lays it down 'shall meet an objective of public interest and be proportionate to the legitimate aim pursued'.[49] In this way the GDPR alludes to the requirements set out in Article 52(1) CFR, making the processing on the discussed ground compatible with the standards that can justify limitation of the fundamental right to data protection.

Against this background, the processing based on the legitimate interests of the controller or a third party permitted by Article 6(1)(f) GDPR 'except where these interests are overridden by the interests or fundamental rights and freedoms of the data subject, which require protection of personal data' seems to stand on the other end of the spectrum. De Hert notes that with this ground for data processing '[w]e are miles away from the privacy logic as expressed in Article 8 of [ECHR] with its insistence on the need for restrictive interpretation of exceptions to rights, the need for a legal basis provided for by law and proportionality testing'.[50]

It is not only the legitimate interest that may rise concerns. A closer examination of Recitals 40 – 49 of the GDPR may give the impression that the drafters of the GDPR were aware of the possible doubts with regard to the conformity of the bases provided for in Article 6(1)(b)(c) and (f) GDPR with the Charter and tried to resolve them by stating explicitly that those grounds amount to 'legitimate basis laid down by law'. The formulation of Recital 40, which refers to Article 6(1)(b) GDPR is an example of a rather strenuous attempt of affirming compliance of that basis for processing with Article 8(2) CFR. Recital 40 begins with the words identical to those in Article 8(2) CFR 'personal data should be processed on the basis of the consent of the data subject concerned or some other legitimate basis, laid down by law'. However, then the recital, rather unexpectedly, assures 'including (...) the necessity for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.'[51] Furthermore, as if the drafters still felt the need for additional justification, Recital 44 repetitively explains that '[p]rocessing should be lawful where it is necessary in the context of a contract or the intention to enter into a contract.' This formulation is confusing as it conflates the lawfulness of processing, understood as ensuring that there is legitimate basis laid down for processing, with the relevance of data for specific purposes, which is characteristic for the principle of purpose limitation or data minimisation rather than lawfulness.

3. EU Law Laying Down Legitimate Basis for Data Processing: An Example of PNR

Next to the GDPR and the LED, in 2016, the PNR Directive was adopted. As was mentioned earlier in Section III, the PNR Directive does not have Article 16 TFEU as its basis, but Article 82(1)(d) and Article 87(2)(a) TFEU, which concern the judicial and police cooperation between Member States.

The PNR Directive provides for the transfer by air carriers of PNR data of passengers of extra-EU flights to the designated state institutions, namely the Pas-

48 Article 6(3) GDPR (emphasis added).

49 Article 6(3) GDPR.

50 Paul De Hert, 'Data Protection's Future without Democratic Bright Line Rules. Co-Existing with Technologies in Europe after Breyer' (2017) 3 European Data Protection Law Review 20.

51 Recital 40 GDPR.

senger Information Units (PIU), and the processing of the PNR data by Member States, as well as exchange of PNR data between Member States.[52] In this way the PNR Directive lays down basis for the processing of personal data and thereby appears to respect Article 8(2) CFR, at least in part in which this provision requires the processing to have basis laid down by law.

The example of the processing of PNR data is interesting in the context of the present discussion due to the recent scrutiny of the PNR Directive by the CJEU in the *Ligue des droits humains* case,[53] but also previous considerations of the Court regarding the draft agreement between the EU and Canada for the transfer of PNR.[54] To begin with the latter, it is worth noting that the CJEU clearly distinguished between the agreement at issue, which as an act adopted in accordance with relevant procedures ensured that 'the transfer of PNR data to Canada is based on 'some other basis' that is 'laid down by law', within the meaning of Article 8(2) of the Charter' and the legitimacy of this basis for data processing. [55] The Court contended that '[a]s regards the question whether that basis is legitimate within the meaning of that provision [Article 8(2) CFR], that issue is, in this instance, indissociable from the question whether the objective pursued by the envisaged agreement is an objective of general interest'.[56] In this way, the Court admitted that the standard formulated in Article 8(2) CFR is composed not only of the formal element demanding the processing to have a basis laid down by law, but also of the normative criterion of legitimacy of that basis.

In *Ligue des droits humains,* the Court skipped the step of assessing the PNR Directive through the lens of Article 8(2) CFR. Nevertheless, having acknowledged that the processing of personal data under the PNR Directive entails 'undeniably serious interferences' with the fundamental rights guaranteed in Articles 7 and 8 CFR,[57] the CJEU immediately embarked on the discussion whether these interferences comply with the requirements set out in Article 52(1) of the Charter. On the point concerning the criterion of being 'provided for by law', the CJEU did not limit its analysis to the mere recognition of the PNR Directive as law that gives basis for the processing but clarified that this requirement 'implies that the act which permits the interference (...) must itself define the scope of the limitation on the exercise of the right concerned'.[58] In this way the Court confirmed that the processing of personal data requires not only any legal basis, but that such basis needs to deliver relevant content. Further, the CJEU emphasised the importance of clarity and precision of rules governing the scope and application of measures, which amount to the interference with the fundamental rights and although, the Court discussed these points as a part of the test of proportionality and necessity[59] rather than under the umbrella of the 'provided by law' criterion, as the next section will show, these points are crucial in the debate on legitimacy.

V. What Does the Standard of 'Legitimate Basis Laid Down by Law' Imply?

1. Legitimacy and Lawfulness: More Than a Lexical Concern

The foregoing analysis has shown that while the primary law, which the lower-ranked law should be conform with, requires data processing to have 'legitimate basis laid down by law', the secondary data protection framework seems to be predominantly focused on formulating various bases for the processing under the headline of 'lawfulness'. One can disregard this discrepancy and contend that the principle of lawfulness in the secondary data protection legislation is what gives expression to the standard of legitimacy of the processing of personal data established by Article 8(2) of the Charter, although this would imply that legitimacy is no more than compliance with requirements of some procedural formality.

The conflation of the concepts of legitimacy and lawfulness is not uncommon in the data protection legal discourse. The illustration of the interchangeable use of terms such as 'conditions for lawful processing', 'legitimate basis' or 'legal grounds' in the GDPR shown the lack of terminological consistency

52 Article 1(1) PNR Directive.

53 Case C-817/19 *Ligue des droits humains* 21 June 2022 ECLI:EU:C:2022:491

54 Opinion 1/15 of the Court 26 July 2017 ECLI:EU:C:2017:592.

55 ibid para 147.

56 ibid.

57 Case C-817/19, para 111.

58 ibid, para 114.

59 ibid, paras 117 and 125.

within the same legal act. Part of the confusion owes potentially to the etymology of the discussed words, which both have roots in Latin 'lex'. The genitive form of '*lex'* is '*legis'*, and '*legis'* gives origins to *'legitimus*', originally translated as 'lawful'. This explains the difficulty at the level of lexical semantics, but it does not justify the negligence in shaping the data protection legal system and drafting its individual components. In this system legitimacy and lawfulness do not seem to be the same. Equating lawful processing, with the processing of data 'on the basis of consent (...) or some other legitimate basis laid down by law' would undermine of the importance of the quality of being 'legitimate' required by Article 8(2) CFR.

The insistence on this quality present throughout this paper arises from the formulation of Article 8(2) CFR and assumptions discussed in Section 2, namely that the intention of the drafters of the Charter was to protect data subjects from processing their personal data on any basis laid down by law and ensure that such basis is legitimate. This insistence finds justification also in other fields of law, such as international law, which have a rich body of scholarship on this matter, clarifying that '[l]egitimacy is a wider concept than the concept of lawfulness (...). Lawfulness is one, in 'normal' cases the most important, element or aspect, of legitimacy. However, legitimacy is more than simply lawfulness. It also includes morality or a sense of fairness or justice'.[60]

As regards fairness, it is a compulsory feature of data processing according to Article 8(2) of the Charter, which was verbatim incorporated to the secondary data protection legislation next to the principle of lawfulness. From the isolated reading of Article 5(1)(a) GDPR, Article 4(1)(a) LED and Article 4(1)(a) EUDPR it might be unclear whether fairness and lawfulness were intended as one or two principles or if they should be 'viewed through the lens of an overarching notion of fairness'.[61] However, since the secondary data protection legislation seems to ascribe a particularly narrow meaning to the concept of 'lawfulness' by using it exclusively to formulate grounds for data processing, it is possible to see its conjunction with the principle of fairness as attempt of adding some normative value to this very formalistic concept.

2. Legitimacy and the Quality of Law

Legitimacy distinguished from lawfulness on the ground of its normative value is an elusive concept, understanding of which depends on 'the conceptual map and normative commitments'[62] of those who define it. Yet, if we would come back to the roots of this word related to 'lex', they would imply that judgements regarding legitimacy should be expressed in relation to law rather than be conducted autonomously or in relation to any moral institutions or personal preferences.

In the beginning of this paper, I mentioned the views on law and the legal system of Lon Fuller. This one of the most prominent critics of legal positivism formulated several standards such as public availability, consistency, stability, non-retroactivity and clarity, which the law needs to meet to be considered legitimate.[63]

These ideas of Fuller correspond with his focus on the purpose of the law. Unlike John Austin and other legal positivists, who saw the maintenance of social order as the fundamental function of law,[64] Fuller considered law and the legal system as a tool for arranging and coordinating relations between and among various actors. Considering the role that the data protection legal system has to serve, in particular the dualistic objective it pursues, be them the protection of individuals on the one hand and facilitation of free flaw of data on the other, the ideas of Fuller appear especially useful.

3. Back to the Primary Law

The requirement of being 'provided for by law' under Article 52(1) of the Charter resembles the prerequisite of being 'in accordance with the law' formulated in Article 8(2) of the ECHR, which prescribes the requirements that need to be respected in case of an interference with the right to respect for his private

60 Rein Müllerson, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals: Comments' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer 2008).

61 Damian Clifford and Jef Ausloos, 'Data Protection and the Role of Fairness' (2018) 37 Yearbook of European Law 130, 134-135.

62 Arthur Applbaum, 'Legitimacy in a Bastard Kingdom.', 81.

63 Lon L Fuller, The Morality of Law, 39.

64 Brian Z. Tamanaha, '11Law and Society in Western Legal Theory,' in *A General Jurisprudence of Law and Society*, ed. Brian Z. Tamanaha (Oxford University Press, 2001), 0.

and family life enshrined in Article 8(1) ECHR. Yet, it is important to remember about the general principles of EU law, which pertain to the ECHR. González Fuster notes that the standard of being 'in accordance with the law' is broader than the standard of being 'provided for by law', since the first one reaches beyond the mere existence of 'some basis in law' that can justify the interference and requires certain quality of that law, including its accessibility, foreseeability and compliance with the rule of law.[65]

Despite different formulation used in the Charter than in the ECHR, Advocates General Øe and Mengozzi, in their considerations on the expression 'provided for by law' within the meaning of Article 52(1) of the Charter in relation to the rights to privacy and data protection, equated it with the requirement of the ECHR and interpretation thereof developed by the European Court of Human Rights (ECtHR).[66] Øe invited the Court to confirm the interpretation that was given earlier in *WebMindLicenses* judgement, according to which 'the requirement that any limitation on the exercise of that right must be provided for by law implies that the legal basis which permits the tax authorities to use the evidence (...) must be sufficiently clear and precise and that, by defining itself the scope of the limitation on the exercise of the right guaranteed by Article 7 of the Charter, it affords a measure of legal protection against any arbitrary interferences by those authorities'.[67] Mengozzi similarly insisted on the substantive rather than formal interpretation of the phrase 'provided for by law' and pointed out that '[a]ccording to the case-law of the ECtHR, that expression requires, in essence, that the measure in question be accessible and sufficiently foreseeable, or, in other words, that its terms be sufficiently clear to give an adequate indication as to the circumstances in which and the conditions on which it allows the authorities to resort to measures affecting their rights under the ECHR.'[68]

As was shown in the PNR case (section IV.3), the CJEU seems to, at least partly, follow the approach, which requires looking beyond only the need for a formal anchoring of data processing, and hence interference with the fundamental right to data protection in the law and taking account of the legitimacy of such law.

The question whether the Court should assess the legitimacy of the law within the test of Article 8(2) or Article 52(1) CFR, and in case of the latter, whether the evaluation should be the part of testing whether the limitation was 'provided for by law' or whether it was necessary or proportionate remains open.

VI. Conclusion

There is no mention in the GDPR, LED and EUDPR of 'legitimacy' as a principle. Article 5(1)(a) GDPR, Article 4(1)(a) LED and Article 4(1)(a) EUDPR establish the principle of lawfulness and ascribe it a rather formalistic meaning. The Charter insists, however, on legitimacy. It does it in two ways – one by explicitly demanding the processing to be carried out not only on any basis laid down by law, but on a 'legitimate' basis in Article 8(2) CFR. The other way, in which the element of legitimacy is present in the Charter, is the formulation of 'provided for by law' in Article 52(1).

In line with the case law of the CJEU, it appears that the discussed discrepancy between the Charter and the secondary data protection law can be mitigated by demanding the law, which lays down basis for data processing to be of a certain quality. In this way, the seemingly lower standard of protection by mere 'lawfulness' of data processing rather than 'legitimacy' can be eased.

To return finally to the assumption of this paper about rationality and consistency of the EU data protection legal system, it must be concluded that it leaves a lot to be desired. At the level of linguistic rationality, it is clear that this system has not been drafted by a 'single hand'. The legal message often suffers from the indiscriminate use of crucial terms and shortage of clarity and precision. As regards the level, which concerns the systemic quality of the data protection legal system, it is probably sufficient to recapitulate the problem underlying this paper: how to jointly interpret the requirements of being 'legitimate' and 'laid down by law' arising from Article 8(2) CFR, with 'provided for by law' emerging from Article 52(1) CFR and 'lawful data processing' formulated in the secondary data protection legislation.

65 Gloria Gonzalez Fuster, 'Curtailing a Right in Flux: Restrictions of the Right to Personal Data Protection' [2015] Hacia un nuevo régimen europeo de protección de datos: Towards a new European Data Protection Regime 513, 525.

66 Opinion Of Advocate General Mengozzi delivered on 8 September 2016 Opinion 1/15 ECLI:EU:C:2016:656, paras 190-193.

67 Ibid.

68 Para 193.