The Essence of the Right to the Protection of Personal Data: Essence as a Normative Pivot

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Abstract

The concept of the essence of the Article 8 right to the protection of personal data has garnered much attention over the past few years. Yet, there remains a considerable lack of clarity in relation to the concept in current law and jurisprudence. There is a lack of clarity, for example, in relation to the current function of the concept of essence in the legal scheme of Article 8 as well as in relation to whether the concept of essence has a functionally distinct role in this scheme at all. This article endeavours to address this uncertainty. In this regard, the article: i) offers a novel methodology for the identification of a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8; and ii) proposes, and defends, such a description: the concept of essence as a normative pivot.

1. Introduction

The concept of the essence of EU fundamental rights appears in Article 52(1) of the Charter of Fundamental Rights of the European Union (CFREU). The Article states: ‘Any 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’.

The concept of the essence of the Article 8 right to the protection of personal data has garnered considerable interest over the past few years. Several scholars, and recently even certain EU institutions, have relied on the concept as a tool in substantive work on other matters. Others have devoted time to analysing and discussing the concept itself.

Much scholarly work dealing with the concept, however, bemoans the lack of clarity provided in current EU law. The work laments, for example, the lack of clarity in law as to precisely what role the concept plays in the legal scheme of Article 8 as well as to whether the concept has a functionally distinct role in this scheme at all.

In consequence, much work on the subject – for instance the extensive work by Brkan – turns away from trying to offer cogent descriptions of the current scope and function of the concept in law, and instead endeavours to offer normative propositions as to how the concept should be understood and used in future.

1 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, Article 52(1).
2 In terms of EU institutions’ use of the concept, see: European Data Protection Supervisor, A Preliminary Opinion on data protection and scientific research (2020) 18. The work of other scholars dealing with the concept will be discussed throughout the article. Consider as an example, however: Lorenzo Dalla Corte, ‘A Right to a Rule: On the Substance and Essence of the Fundamental Right to Personal Data Protection’ in Dara Hallinan, Ronald Leenes, Paul De Hert and Serge Gutwirth (eds.) Data Protection and Privacy: Data Protection and Democracy (Hart 2020) 27, 49-55.
3 See, for example: Maja Brkan, ‘The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU’s Constitutional Reasoning’ [2019] German Law Journal 20(6) 864, 864-883.
This article does not take issue with the excellent work by other scholars. Rather the article looks back to the law and: i) offers a novel methodology for the identification of a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8; and ii) proposes, and defends, such a description.

After offering an overview of the concept of essence in relation to Article 8 (section 2), the article outlines the novel methodology for identifying a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8 (sections 3-4). Next, the article works through the method to propose such a description: essence as a normative pivot (sections 5-7). Finally, the article addresses three objections which might be raised against this proposed description (sections 6-8).

2. An Overview of the Concept of the Essence in Relation to Article 8

The concept of essence appears in Article 52(1) of the CFREU, which states: ‘Any 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’. Article 52(1), in principle, applies in relation to all rights outlined in the CFREU which may be limited. Accordingly, it is fair to work on the base assumption that the concept is relevant in relation to the right to the protection of personal data in Article 8 of the CFREU.

The concept occupies a role with normative significance in the EU fundamental rights order. There remains discussion as to the specifics of the function of the concept. Nevertheless, certain uncontroversial observations may be made on the back of the presence and position of the concept in Article 52(1). Three such observations might be made: i) the concept relates to determinations of legitimate and illegitimate limitations on fundamental rights by the EU or EU Member States – or potentially private actors where the Charter can be argued to have horizontal direct effect; ii) within the consideration of legitimate and illegitimate infringements, the concept functions as a criterion which relates to the qualification of an infringement as illegitimate; and iii) the concept functions to delineate a set of types of illegitimate infringements of rights which are in some way unique – which differ from other illegitimate infringements which do not interfere with the essence.

On the back of these general observations, a set of three more specific observations as to the relationship between the concept of essence and the right to the protection of personal data in Article 8 might be made: i) the concept becomes relevant when the EU or an EU Member State – or potentially a private actor – engages in an act relating to the processing of personal data – either a legislative act defining legitimate data processing or an act of data processing

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4 There are observations, however, that the concept of essence has been seldom used in relation to certain rights and that it may be conceptually difficult to apply in relation to certain rights. See, for example: Martin Husovec, ‘The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter’ [2019] German Law Journal 20 840, 855.

5 This is the position taken by several data protection scholars and has particular strength given the fact the concept has been actively used in Article 8 jurisprudence. See, for example, Dalla Corte, who takes a unique position on Article 8 and the concept of essence: ‘a violation of the essence of the right to data protection...should be constructed only in cases where the functioning of the regime regulating data processing is called into question, regardless of which specific provision is infringed, but rather having regard to the functioning of the system in its entirety.’ Lorenzo Dalla Corte, ‘A Right to a Rule: On the Substance and Essence of the Fundamental Right to Personal Data Protection’ in Dara Hallinan, Ronald Leenes, Paul De Hert and Serge Gutwirth (eds.) Data Protection and Privacy: Data Protection and Democracy (Hart 2020) 27, 51-52.

6 There seems no clear reason the concept of horizontal direct effect should preclude the relevance of the concept of essence. See, for the CJEU’s recognition and discussion of the possibility of horizontal direct effect: Case C-684/16 Max-Planck Gesellschaft zur Förderung der Wissenschaften e.V. v. Tetsuji Shimizu [2018] ECLI:EU:C:2018:874, para 76.
– which constitutes an infringement of Article 8; ii) the concept then relates to the determination of the illegitimacy of the infringement consequent to the relevant act of personal data processing; and iii) the illegitimacy of the data processing infringement is of some unique form such that it should be seen as falling within the category of an infringement of the essence of Article 8 – as opposed to an illegitimate infringement which simply constitutes a ‘normal’ illegitimate infringement of Article 8.

The above paragraphs provided a set of general observations as to the function of the concept of essence in the EU fundamental rights order and a set of more specific observations as to how the concept applies to the right to the protection of personal data in Article 8 of this order. This latter set of observations, however, remain far too general to constitute a cogent, functionally distinct, description of how the concept of essence is currently used in law in relation to Article 8. Unfortunately, such a description also does not emerge self-evidently from an analysis of law and jurisprudence concerning the concept – the difficulties of drawing a description via ordinary doctrinal and jurisprudential analysis will be discussed in more detail in subsequent sections. This raises the question as to how one might go about looking for such a description. Surprisingly, there have, hitherto been few efforts at defining methodological approaches which might be of assistance in relation to this question.

In response to the lack of ready-made methodological solutions, the following sections elaborate such a methodology. The methodology consists of two parts. The first part consists of a general structure for the investigation of the function of discrete components of a legal system.

3. A Methodology for Identifying a Description 1: A general structure

This general structure builds loosely on the approach of levels of abstraction. This approach has a long history in several different disciplines. As Floridi observes in his work on the philosophy of information, for example: ‘levelism has been common currency in philosophy and science since antiquity’. The approach, however, has little extensive pedigree as a framing concept for investigations into concepts around data protection law.

The structure is founded on the following observations as to the function and make-up of legal systems. In the first instance, in line with Teubner – amongst others – legal systems can basically be considered as knowledge systems which serve to designate social phenomena in terms of legitimacy and illegitimacy. On the back of this basic observation, a subsequent observation can be made that the individual functional components of a legal system – concepts, doctrines etc. – can relate to the designation of legitimacy and illegitimacy in different ways. In this regard, I would propose that such components can be categorised into three different groups according to the proximity to which – the level of abstraction at which – they relate to specific social phenomena:

1. Components may delineate the legitimacy and illegitimacy of specific, defined, social phenomena
2. Components may specify abstract tests, applicable across contexts, for the delineation of the legitimacy and illegitimacy of social phenomena

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7 Luciano Floridi, The Philosophy of Information (Oxford University Press 2011) 47.
8 The idea of levels of abstraction has featured in certain discussions of law and the regulation of the processing of personal data, although no work, to my knowledge, has relied on the concept as the explicit basis for a methodology in defining the function of concepts around data protection law. See, for example: Václav Janeček, ‘Ownership of personal data in the Internet of Things’ [2018] Computer Law and Security Review 34(5) 1039, 1039-1052.
9 See, for example: Gunther Teubner, Recht als Autopoetisches System (Suhrkamp 1989) 45.
3. Components may function as auxiliary specifications of degrees of legitimacy or illegitimacy of social phenomena, supplemental to a primary definition via another system component

Classification of a functional component of a legal system into one of these groups, however, logically excludes the possibility to simultaneously classify the same component in any other group – e.g. an individual component of a legal system cannot both serve to define the illegitimacy of specific, defined, social phenomena and also serve to provide a test applicable across contexts to define the illegitimacy of social phenomena.  

In light of the above, a structured investigation for a description of the function of any given functional component of a legal system might proceed as follows:

1. The investigation should consider whether a description can be identified in terms of the specification of the legitimacy and illegitimacy of specific, defined, social phenomena.
2. If no cogent description can be identified at the first level of abstraction, then the investigation should proceed to consider whether a description can be identified in terms of an abstract test.
3. If no cogent description can be identified at the second level of abstraction, then the investigation should proceed to consider whether a description can be identified in terms of an auxiliary specification.

The key elements of investigation in the general structure elaborated above can already be mapped onto the case at hand: the Article 8 right to the protection of personal data constitutes the legal system in question; and the concept of essence – within the Article 8 system – is the functional component to be described. The general structure outlined above, however, still leaves considerable uncertainty as to how an investigation seeking a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8 should proceed at each level of abstraction. Accordingly, before moving forward, a further specification of the methodology is expedient.

4. A Methodology for Identifying a Description 2: A specification

The second part of the methodology thus consists of a defining a set of general boundary conditions which any cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8 must fulfil. Such general boundary conditions are relevant and applicable, in the same way, at all levels of abstraction at which a description is sought. These conditions can thus serve to further channel and structure the investigation at each level of abstraction. Thus, if there is reason to believe that these conditions cannot all be fulfilled by a description at a given level of abstraction, the investigation must proceed to the next level of abstraction. Three such boundary conditions are proposed, each of which is elaborated in more detail below.

First, any cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 must be scalable across the range of time and contexts in which the concept of essence in relation to Article 8 may potentially by used: the scalability condition.

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10 Any investigation looking for a description of the function of a component of a legal system which fails to consider the breakdown of delineatory roles outlined above, and the hierarchical and logical relationship between these roles, will face two methodological issues. First, such an investigation runs the risk of proceeding in an unstructured fashion. Second, such an investigation risks coming up with a definition which cannot logically be correct – for example, if the investigation begins at the second level of abstraction, when a definition could have been found at the first level of abstraction.
The aim of identifying such a description is to provide clarity in relation to the current legal scope and role of essence in relation to Article 8. Any description which is not scalable across potential time and use contexts – e.g. a description which merely restates existing doctrine – will thus be inadequate. Naturally, however, there are limits to the scope of time and contexts across which a description can reasonably be expected to scale. Legal concepts change due to changes in the legal system of which they are a part as well as due to changes in the social phenomena to which they refer. In this regard, a cogent, functionally distinct, concept of essence as it is used in law in relation to Article 8 should be expected to scale across time and context to the degree that the legal assumptions on which the description is based remain valid.

Second, any cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 must correspond to the use of the concept in both law and jurisprudence: the law and jurisprudence condition. In the first instance, the base line reference point for such a description must be the CFREU. Thus, any description which elaborates the concept in ways which contradict the framing of the concept of essence in the Charter will be inadequate and cannot be accepted. In turn, such a description must correspond to the way in which the concept of essence has been used across the full range of CJEU case law dealing with the right to the protection of personal data in which concept has been engaged. The CJEU is the arbiter of the specification and adaptation of the Charter and, accordingly, the way the concept of essence appears in the Court’s hermeneutics is also definitive of its current legal function.

Third, any cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 must serve to differentiate the concept, either conceptually or practically, from other legal concepts serving to delineate legitimate and illegitimate limitations on EU, or EU Member State – or private party – data processing activities in EU fundamental rights law: the unique function condition. One concept looms particularly large in this respect: proportionality. In this regard, any description which cannot be clearly differentiated from the concept of proportionality cannot be regarded as describing a functionally distinct component of EU law and cannot be accepted. This is not to say, however, that such a differentiation must exclude any relationship between the concepts of essence and proportionality. In fact, the opposite is true. The utility and clarity of any description will rise according to the degree to which it can specify the relationship between the two concepts.

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11 This is not to say that other descriptions of the concept of essence in relation to Article 8, which build on other reference points, could not also be put forward – for example normative descriptions not following the approach of the CJEU. Nor is this to say that such alternative descriptions could not be useful in understanding the concept of essence in relation to Article 8. Such descriptions however, cannot be accepted as illustrative of the current function of the concept in law in relation to Article 8. See, for example, the novel normative proposition offered by Porcedda as to how the substance of the concept of essence in relation to Article 8 might be approached: Maria Grazia Porcedda, ‘On boundaries. Finding the essence of the right to the protection of personal data’ in Ronald Leenes, Rosamunde Van Brakel, Paul De Hert and Serge Gutwirth (eds.) Privacy and Data Protection: The Internet of Bodies (Hart Publishing 2018) 277, 285-312.

12 See, for example: Charter of Fundamental Rights of the European Union [2012] OJ C326/392, Preamble.

13 Proportionality is the key concept in EU fundamental rights law dealing with limitations on rights and thus is the key concept dealing with legitimate and illegitimate infringements of rights. Accordingly, proportionality is the key concept from which essence – for this latter concept to have any functionally distinct role in EU fundamental rights law – must be differentiated. See, for example, the discussion of proportionality as a concept related to essence in Dawson et. al.’s introduction to the German Law Journal’s special issue on the concept of essence. Mark Dawson, Orla Lynsky, Elise Muir, ‘What is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ [2019] German Law Journal 20(6) 763, 772-774.
Accordingly, in line with the methodology outlined in the previous two sections, the first step in identifying a description of a cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 is: to consider whether such a description can be identified, which fulfils all three boundary conditions, at the first level of abstraction – in terms of the delineation of a specific, defined, set of illegitimate social phenomena.

5. Level of Abstraction 1: Essence as a set of specific prohibitions

Superficially, it looks feasible to provide a cogent, functionally distinct, concept of essence as it is currently used in law in relation to Article 8 in terms of the delineation of specific illegitimate social phenomena. A deeper consideration, however, reveals that any description offered at this level of abstraction will necessarily be problematic in relation to each of the three boundary conditions outlined in the previous section.

In relation to the first boundary condition – the scalability condition: any description built at this level of abstraction will be inadequate in terms of scalability across contexts. Such a description would need to be built on the back of existing specific jurisprudential clarifications as to which data processing phenomena are illegitimate by virtue of violating the essence of Article 8. Consider, in this regard, however, the fact that CJEU case law involving the concept of essence in relation to Article 8 has revolved almost exclusively around data processing in the context of state security. Accordingly, any description developed at this level of abstraction would necessarily relate solely to the state security context and suggest the concept of essence in relation to Article 8 only serves the delineation of legitimacy and illegitimacy in this context. The focus on state security in CJEU case law on essence and Article 8 to date, however, results from the specifics of the cases heard before the CJEU. The focus does not result from an exclusive doctrinal connection between the concept of essence in Article 8 and data processing for state security. In this regard, there is no reason to presume the concept of essence in Article 8 cannot, and will not, in future, play a role in other contexts involving personal data processing.

In relation to the second boundary condition – the law and jurisprudence condition: any description built at this level of abstraction will encounter two forms of problem relating to the fact that the law on the concept of essence in relation to Article 8 does not, currently, cogently describe a specific set of illegitimate social phenomena. First, the case law dealing with the concept of essence in relation to Article 8 is often confusing as to precisely when personal data processing should be regarded as illegitimate by virtue of constituting an infringement of essence. For example, in the case of Digital Rights Ireland, the CJEU suggested that technical and organisational measures may serve to prevent general data

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14 See, for example, the CJEU’s use of the concept of essence in relation to Article 8 and the state security context in: Opinion 1/15 [2017] ECLI:EU:C:2017:592, paras 148-151. The case of Coty might be argued to be an exception to this observation. The case discusses the concept of essence in relation to Article 8 – although the discussion is limited and it is not certain the discussion actually implies the relevance of the concept of essence as an analytical tool in the case. The case, however, considers how protection granted to data subjects flowing from Article 8 might impact the essence of other fundamental rights instead of considering the essence of the right to the protection of personal data itself. Case C-580/13 Coty Germany GmbH v Stadtsparkasse Magdeburg [2015] ECLI:EU:C:2015:485, paras 35-43.

15 See, for example, the contribution by Petkova and Boehm which highlights the possible relevance of the concept of essence in relation to Article 8 in the employment profiling context: Bilyana Petkova, Franziska Boehm, ‘Profiling and the Essence of the Right to Data Protection’ in Evan Selinger, Jules Polonetsky and Omer Tene (eds.) The Cambridge Handbook of Consumer Privacy (Cambridge University Press 2018) 285, 296-300.
retention policies from constituting violations of the essence of Article 8.\textsuperscript{16} It is not clear, however, why, or to what degree, such measures could aid in avoiding a violation of essence or whether such measures could serve to avoid a violation of essence in all contexts. Second, the case law itself is arguably inconsistent. For example, in the Tele2Sverige case, the Court highlighted that no violation of the essence of Article 8 existed by virtue of the fact that the content of communications data – as opposed to metadata alone – was not collected in data retention procedures.\textsuperscript{17} Yet, in the Digital Rights Ireland case, the Court made statements as to the sensitivity of metadata which appear to contradict this assertion.\textsuperscript{18}

In relation to the third boundary condition – the unique function condition: any description built at this level of abstraction will not serve to differentiate the function of the concept of the essence of Article 8 from the concept of proportionality. In no instance in which the CJEU has relied on the concept of essence in relation to Article 8 to delineate the illegitimacy of specific data processing phenomena, has the Court also then consistently indicated that the same processing could not have been found illegitimate on the basis of a proportionality evaluation alone. For example, in the case of Tele2Sverige, the Court implied that broad state powers to access citizens’ telecommunications personal data for security purposes, including the content of that data, may constitute a violation of the essence of Article 8.\textsuperscript{19} In subsequent case law concerning state mass surveillance of content – for example in the recent Schrems II case – however, the Court has chosen to highlight such activities as illegitimate simply by virtue of constituting disproportionate interference.\textsuperscript{20}

No cogent, functionally distinct, description for the concept of essence as it is currently used in law in relation to Article 8 can be identified in terms of the delineation of a specific, defined, set of illegitimate social phenomena. Accordingly, in line with the methodology outlined in sections 3 and 4, the next step is: to consider whether such a description can be

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\item[*]\textsuperscript{16} Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others [2014] ECLI:EU:C:2014:238, para 40.
\item[*]\textsuperscript{17} Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15) v Tom Watson and Others [2016] ECLI:EU:C:2016:970, para 101.
\item[*]\textsuperscript{18} The Court acknowledged of metadata, in Digital Rights Ireland, that: ‘Those data, taken as a whole, may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.’ Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others [2014] ECLI:EU:C:2014:238, para 27.
\item[*]\textsuperscript{19} Scholarship also highlights the Courts assertions in relation to the distinction between metadata and content data as lacking clear rationale. As Christofi et. al. observe: ‘What exactly justifies reaching a different outcome depending on whether what is at stake is metadata or content data?’ Athena Christofi, Valerie Verdoordt, Exploring the essence of the right to data protection and smart cities (CiTiP Working Paper, 2019) 24. Granger et. al. go further and suggest: ‘when it summarily dismisses any interference with the essence of privacy and data protection rights, the Court unfortunately reverts to an out-dated perspective, according to which the collection of metadata is less sensitive simply because it does not concern the content of communications…In certain instances, even a single communications event can reveal as much of someone’s personal circumstances as the interception of the communications content (take, for example, calling help-lines for victims of domestic violence).’ Marie-Pierre Granger, Kristina Irion, ‘The Court of Justice and the Data Retention Directive in Digital Rights Ireland: Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection’ [2014] European Law Review 6 835, 847.
\item[*]\textsuperscript{20} Joined Cases C-203/15 and C-698/15, Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department (C-698/15) v Tom Watson and Others [2016] ECLI:EU:C:2016:970, para 101.
\item[*]\textsuperscript{21} Case C-311/18, Data Protection Commissioner v Facebook Ireland Ltd, Maximillian Schrems [2020] ECLI:EU:C:2020:559, para 178-185.
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identified, which fulfils all three boundary conditions, at the second level of abstraction – in terms of an abstract test for the delineation of the legitimacy and illegitimacy of social phenomena.

6. **Level of Abstraction 2: Essence as an abstract test**

Several scholars have proposed abstract tests relevant for determining violations of the essence of the right to the protection of personal data. Lenaerts, for example, proposes: ‘As an absolute limit on limitations... the essence of [the right to the protection of personal data] defines a sphere of liberty that must always remain free from interference’. 21 Brkan is even more specific and proposes a two part test considering: i) whether an interference makes it impossible to exercise the right, or even ‘undermines the sheer existence of this right’; and ii) whether ‘there are legitimate reasons in public interest that can override such an interference’. 22 Each of these test propositions constitutes a logical approach as to how the concept of essence could be understood and used in relation to Article 8. Such propositions, however, cannot fulfill the boundary conditions outlined in section 3 for a cogent, functionally distinct, description of the concept as it is currently used in law in relation to Article 8.

Problems emerge, in particular, in relation to the second and third boundary conditions.

In relation to the first boundary condition – the scalability condition: no issues are identifiable with such test propositions. Should one take such propositions as, *prima facie*, legitimate, these proposition would – significant jurisprudential change notwithstanding – provide approaches for the identification of violations of the essence of the right to the protection of personal data which are scalable across time and contexts. There is no reason, for example, that Lenaerts’ test proposition could not be used effectively over time. There is equally no reason that Brkan’s test proposition could not be used to identify violations of the essence of Article 8 across the full range of different social contexts in which personal data are processed. That such test propositions succeed in relation to this boundary condition should be no surprise. To be scalable across time and contexts is precisely what such test propositions were designed to do.

In relation to the second boundary condition – the law and jurisprudence condition: unfortunately, such test propositions do not find explicit use or endorsement in any CJEU case law dealing with the right to the protection of personal data – or indeed in any CJEU case law dealing with the processing of personal data. This would not necessarily be a problem if support for one or more such propositions was directly implied in the reasoning of the Court in their use of the concept of essence in relation to Article 8. This, is not, however, the case. Indeed, Brkan, in her extensive efforts to identify the logic of the CJEU in dealing with the essence of the right to the protection of personal data, cannot identify any clear logical test used by the Court. Accordingly, she eventually states: ‘The Court’s case law on this issue can be depicted as a muddled maze where the final destination remains concealed due to reasoning that is full of meanders and unpredictable curves.’ 23

In relation to the third boundary condition – the unique function condition: such test propositions encounter the problem that they cannot provide a functional distinction between the concept of essence and the concept of proportionality. In this regard, the complete range

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21 Koen Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ [2019] German Law Journal 20(6) 779, 792.
22 Maja Brkan, ‘The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to its Core’ [2018] European Constitutional Law Review 14(2) 332, 363.
23 Maja Brkan, ‘The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU’s Constitutional Reasoning’ [2019] German Law Journal 20(6) 864, 865.
of phenomena which could be considered as falling within the essence of Article 8 under such propositions could also be considered as constituting disproportionate interferences with the right. As Lenaerts even observes: ‘where a measure violates the essence of a fundamental right, such a measure automatically constitutes a violation of the principle of proportionality’.²⁴ It may be argued that such test propositions differentiate the concept of essence of the right from the concept of disproportionate interference via the logic involved in reaching the conclusion of illegitimacy, rather than in the final designation of illegitimacy itself. Yet, as Tridimas et. al. argue – albeit not specifically in relation to Article 8 – any consideration of essence under such tests must eventually result from a balancing of interests equivalent to a proportionality test.²⁵

No cogent, functionally distinct, description for the concept of essence as it is currently used in law in relation to Article 8 can be identified in terms an abstract test. Accordingly, in line with the methodology outlined in sections 3 and 4, the next step is: to consider whether such a description can be identified, which fulfils all three boundary conditions, at the third level of abstraction – in terms of the concept as an auxiliary specifications of degrees of legitimacy or illegitimacy of social phenomena, supplemental to a primary definition via another system component.

7. Level of Abstraction 3: Essence as an auxiliary component

At this level of abstraction, I believe a cogent, functionally distinct, description for the concept of essence as it is currently used in law in relation to Article 8 may be proposed. This description can be conveniently broken down into three parts: i) essence functions auxiliary to the primary definition of the illegitimacy of a data processing act via the concept of proportionality; ii) essence comes into play to describe disproportionate infringements which are particularly egregious in nature; iii) the substantive boundaries of the concept of essence, however, remain radically open – the specific set of data processing phenomena to which the essence relates are yet to be fixed, the threshold of severity of infringement qualifying a breach of essence is yet to be fixed and even the conditions under which essence will be used or not – when it is clear that the concept might apply – are yet to be fixed. From this point forward, this proposed description will be referred to as: essence as a normative pivot. This description can fulfil each of the boundary conditions outlined in section 4, above.

In relation to the first boundary condition – the scalability condition: the description of essence as a normative pivot provides an approach – significant jurisprudential change notwithstanding – which can be used to describe the function of the concept of essence in relation to Article 8 which is scalable across time and context. The concept has no clear temporal limitations, which means its relevance and applicability need not diminish over time. Nor does the concept have any clear contextual limitations. This results from the fact that the concept does not relate directly to the delineation of illegitimate social phenomenon, but rather to the differentiation of relative degrees of illegitimacy. Accordingly, the definition can, in principle, encompass uses of the concept of essence in relation to Article 8 in relation to all types of acts of personal data processing across all social contexts – even acts relating

²⁴ Koen Lenaerts, ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’ [2019] German Law Journal 20(6) 779, 786.
²⁵ Takis Tridimas, Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ [2019] German Law Journal 20(6) 794, 804.
to contexts which have, hitherto, been completely unassociated with the concept of essence in relation to Article 8.26

In relation to the second boundary condition – the law and jurisprudence condition: the concept of essence as a normative pivot fits within the framing provided by Article 52 of the CFREU. It is true that the concept of essence is discussed separately from the concept of proportionality in Article 52. It is also true, however, that the relationship between the concepts is not made explicit in Article 52 and that the wording of the Article does not preclude understanding essence as functioning auxiliary to proportionality. The concept of essence as a normative pivot is also commensurate with the use of the concept of essence in relation to Article 8 in CJEU case law. The Court’s case law provides no explicit endorsement of the proposed description in relation to Article 8. There is, however, no relevant case law which cannot be accurately subsumed within the definition.27 In turn, certain case law seems to offer indirect recognition for the proposed description. For example, in the Schrems case – concerning personal data processing, albeit with specific reference to the Article 7 right to privacy – the CJEU considered questions as to the violation of essence as subsequent to – i.e. auxiliary to – questions of the violation of proportionality and then used the concept of essence to describe egregious violations of fundamental rights.28

In relation to the third boundary condition – the unique function condition: the description of essence as a normative pivot serves to distinguish the concept of essence in relation to Article 8 from all other functional components of the legal scheme of Article 8, including from proportionality. It is true the concept paints the essence as describing a sub-class of illegitimate personal data processing operations which already qualify as disproportionate. Such a conceptualisation thus serves to situate the function of essence as nested within the overarching function of proportionality. Such an approach, however, does not serve to equivocate the two concepts any more than the description of the function of individual engine parts serves to equivocate the function of those parts with the function of the engine as a whole. Rather, such an approach simply clarifies a specific hierarchical relationship which exists between the two concepts.

This section elaborated a proposal for a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8: the concept of essence as a normative pivot. This section also showed how this conceptualisation of essence can

26 Petkova and Boehm, for example, offer a case for considering certain types of profiling in the employment context as potentially violating the essence of the right to the protection of personal data. Such a context has not been considered in CJEU case law to date in relation to the essence of Article 8. Such a context could, however, be encompassed under the proposed description of essence as a normative pivot. See: Bilyana Petkova, Franziska Boehm, ‘Profiling and the Essence of the Right to Data Protection’ in Evan Selinger, Jules Polonetsky and Omer Tene (eds.) The Cambridge Handbook of Consumer Privacy (Cambridge University Press 2018) 285, 296-300.

27 Consider, for example, the CJEU’s use of the concept of essence in relation to Article 8 in Opinion 1/15. The CJEU state: ‘As for the essence of the right to the protection of personal data, enshrined in Article 8 of the Charter, the envisaged agreement limits, in Article 3, the purposes for which PNR data may be processed and lays down, in Article 9, rules intended to ensure, inter alia, the security, confidentiality and integrity of that data, and to protect it against unlawful access and processing. In those circumstances, the interferences which the envisaged agreement entails are capable of being justified by an objective of general interest of the European Union and are not liable adversely to affect the essence of the fundamental rights enshrined in [Article]…8 of the Charter.’ There is no conclusion to be drawn from this clarification that the concept of essence cannot be regarded as a sub-delineation of proportionality reserved for the categorisation of particularly egregious rights infringements which follow from the processing of personal data for PNR without adequate safeguards. Opinion 1/15 [2017] ECLI:EU:C:2017:592, para 151.

28 Case C-362/14, Maximillian Schrems v Data Protection Commissioner [2015] ECLI:EU:C:2015:650, paras 93-94.
fulfil each of the three key boundary conditions outlined previously in the article. There are, however, still objections which might be raised against this description. Three such objections are particularly worthy of discussion. In the following sections, these objections are elaborated and addressed.29

8. Objection 1: Essence as a normative pivot and doctrinally inaccurate

First, the proposed description of essence as a normative pivot might be criticised as doctrinally inaccurate. The analysis conducted to arrive at the description focused heavily on the logic and case law of Article 8. However, the right to the protection of personal data sits within a broader legal framework in which the concept of essence appears in multiple other contexts and roles. There is no indication in the CFREU that the concept of essence should necessarily be interpreted in a *sui generis* manner in relation to Article 8. Accordingly, it stands to reason that other uses of the concept of essence, in other relevant legal contexts, may also be given legal weight in terms of how the concept should be understood in relation to Article 8. There are, however, narratives as to the function of the concept of essence, which can be constructed from other relevant use contexts, which cast doubt on the accuracy of the proposed description of essence as a normative pivot in relation to Article 8. Do such narratives then serve to refute the logic of such a definition? I do not believe so.

Two such narratives deserve discussion. Both narratives assert that the concept of essence can be considered as a concept distinct from proportionality and as relating to, as Brkan puts it, an: ‘inalienable core [of fundamental rights].’ 30 In this conceptualisation, the concept of essence describes an aspect of fundamental rights which can never, under any circumstances, be interfered with. The first narrative highlights that the concept of essence in the CFREU emerges on the back of comparable concepts in national constitutional law and that these national concepts can be read to function with an ‘inalienable core’ approach. One example of such an approach is argued to be provided by the German constitutional tradition, from which the concept of essence initially emerged.31 The second narrative highlights that there is EU fundamental rights jurisprudence which explicitly recognises the concept of essence as representing an ‘inalienable core’ of fundamental rights. One example of such jurisprudence is the Opinion of AG Cruz Villalón in the case of Delvigne. In the Opinion, the AG specifically considered the concept of essence as representing a conceptual sphere in relation to which no limitation could be considered legitimate – and even attempted to outline certain substantive features of essence in relation to the right to vote under Article 39(2) CFREU.32

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29 Elaborations and responses to possible normative criticisms of the proposed description of essence as a normative pivot are not offered. The description is intended to elaborate a cogent, functionally distinct, description for the concept of essence as it is currently used in law in relation to Article 8. Accordingly, the proposed description has not been put forward as a normatively ideal description and thus need not be defended against normative criticism. Such criticisms could naturally be directed at the fact the Court employs such a description, however.

30 Maja Brkan, ‘The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU’s Constitutional Reasoning’ [2019] German Law Journal 20(6) 864, 866.

31 ‘In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden’. Grundgesetz für die Bundesrepublik Deutschland 1949 (last updated 2020), Article 19(2) See also Sébastien Van Drooghenbroeck, Cecilia Rizcallah, ‘The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?’ [2019] German Law Journal 20(6) 904, 907.

32 Opinion of Advocate General Cruz Villalón, Case C-650/13, Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Girondesparas [2015] ECLI:EU:C:2015:363 paras 115-123. The AG explicitly observed: ‘In the context of the Charter, respect for the essence of the rights recognised therein acts as an absolute, insuperable limit…In other words, failure to respect the essence of the fundamental right in question leads to that right becoming ‘unrecognisable as such’ so that it will not then be possible to refer to a ‘limitation’ of the exercise of the right but rather, purely and simply, to the ‘abolition’ of the right.’ Para 115. Somewhat
Despite the legitimacy of these competing narratives, however, both are subject to challenge. In relation to the concept of essence in Member State constitutional traditions, Tridimas et. al. observe contradictions in national case law which undermine the assertion that the concept is either completely conceptually separate from proportionality or relates to an inalienable core of fundamental rights. They highlight, for example, German case law in which the concept of essence was referenced as violated, but in which a proportionality-like balancing exercise was conducted in reaching this conclusion.\(^{33}\) In relation to EU jurisprudence, whilst there are indeed cases in which the narrative of essence as representing an ‘inalienable core’ is affirmed, there are equally many, if not more, cases in which this narrative is not affirmed. Tridimas et. al. provide an analysis of EU case law engaging the concept of essence. In this analysis, they poignantly observe that, overall, the CJEU’s engagement with the concept of essence has: ‘not been…enlightening either as regards the meaning of [essence] or its interaction with the other conditions of Article 52(1).’\(^{34}\)

Given that neither of these competing narratives is supported by irrefutable evidence, it is hard to assert that either narrative should be taken as representative of irrefutable truth regarding the function of the concept of essence in EU fundamental rights law. In this regard, it is thus equally hard to assert that either narrative should be taken as representative of irrefutable truth regarding the function of the concept of essence in relation to the right to the protection of personal data in Article 8. This is not to say that the concept of essence supported by these narratives cannot, with subsequent jurisprudential clarification, become a dominant reference point for the concept of essence in EU fundamental rights law – or even in relation to Article 8. This is not yet the case, however, and there is no guarantee this will ever be the case. As a result, there is no reason the existence of these narratives should be taken as proof that the proposed description of essence as a normative pivot in relation to Article 8 should be seen as doctrinally inaccurate.

9. Objection 2: Essence as a normative pivot as conceptually irrelevant

Second, the proposed description of essence as a normative pivot could be criticised as – even if technically accurate – depicting a concept which is conceptually irrelevant. Husovec, amongst others, highlights two different general theories describing the function of the concept of essence in EU fundamental rights law.\(^{35}\) First, the absolutist theory, which asserts that essence relates to the absolute core of a right which cannot be infringed under any circumstances – also discussed in the previous section. Second, the relative theory, which considers essence, as Tridimas et. al. put it, as: ‘not immune from affliction, but any proportionality inquiry must take on board the heightened respect that the core element of a right deserves.’\(^{36}\) The proposed description of essence as a normative pivot arguably corresponds to the relative theory. Descriptions for essence which correspond to the relative

\(^{33}\) Bundesverfassungsgericht [1967] Neue Juristische Wochenschrift 1795. Takis Tridimas, Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ [2019] German Law Journal 20(6) 794, 804.

\(^{34}\) Takis Tridimas, Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ [2019] German Law Journal 20(6) 794, 806.

\(^{35}\) Martin Husovec, ‘The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter’ [2019] 20 840, 840-841.

\(^{36}\) Takis Tridimas, Giulia Gentile, ‘The Essence of Rights: An Unreliable Boundary?’ [2019] German Law Journal 20(6) 794, 803.
theory, however, have faced the criticism that, as Dawson et. al. put it: ‘[they add] little to the traditional proportionality test whereby the degree of intrusion into a right is an inherent part of the analysis.’

Is it then the case that the conceptualisation of essence as a normative pivot depicts a concept which adds nothing to the proportionality test and is thus conceptually irrelevant? I do not believe so.

In the first instance, I would argue that the concept of essence as a normative pivot adds granularity to Article 8 proportionality analyses and thus has clear conceptual utility. None would suggest that all infringements of the right to the protection of personal data are of the same level of severity. This recognition is reflected in CJEU case law relating to Article 8. For example, the recent La Quadrature du Net case includes multiple delineations of degrees of severity of different types of infringement. Such delineations are not, however, merely jurisprudential window dressing. They play a key role in facilitating the ability of the legal scheme to subtly grasp and describe its regulatory target – and, potentially, accordingly, to offer relevant and proportionate action points in relation to this target. In this regard, the concept of essence as a normative pivot provides a doctrinal tool for communicating such delineations and must be seen to have conceptual utility.

In turn, by providing a doctrinal reference point for the separation of degrees of severity of illegitimate infringements of Article 8, the concept of essence as a normative pivot has downstream utility in channelling the behaviour of stakeholders involved in personal data processing. In the first instance, in any case in which the concept is suggested to have been violated, this will constitute a clear normative assertion by the Court that some act of personal data processing constitutes a particularly egregious infringement of Article 8. This will shape the practical reactions to the decision by stakeholders directly implicated in the case in relation to personal data processing. In turn, each Article 8 case in which the concept is relied upon will serve to further clarify the range of types of acts of data processing which may be considered as representing egregious violations of Article 8. Such systemic clarification will, in turn, channel all implicated – both directly and indirectly – parties subsequent personal data processing design choices.

The CJEU might, of course, use other terminology to serve the same function. Indeed, the CJEU has already used the concept of ‘particularly serious’ to distinguish the severity of certain problematic acts of personal data processing operations from less problematic acts – for example in the recent Privacy International case. The existence of such alternative terminology, however, does not, by itself, extinguish the utility of the role of the concept of essence as a normative pivot. In turn, use of such alternative terminology has two drawbacks in comparison to the use of the concept of essence. First, most alternative terminology which has been used relies on emphasis words – such as ‘particularly’. These emphasis words have multiple other uses in both vernacular and legal contexts. Such terminology is thus not ideal to stably convey specific connotations of severity of Article 8 infringements across cases.

37 Mark Dawson, Orla Lynsky, Elise Muir, ‘What is the Added Value of the Concept of the “Essence” of EU Fundamental Rights?’ [2019] German Law Journal 20(6) 763, 767.
38 See the multiple different forms of terminology used to differentiate the relative degrees of severity of the different forms of national security, public safety and crime prevention data processing operations addressed in the case. Joined cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net and Others v Premier minister and Others, Ordre des barreaux francophones et germanophone and Others v Conseil des ministers [2020] ECLI:EU:C:2020:791, paras 81-228.
39 Case C-623/17, Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others [2020] ECLI:EU:C:2020:790, para 71. Although significant questions do remain as to the relationship between such terms and the concept of essence in relation to Article 8.
Second, and more importantly, such alternative terminology lacks the legal pedigree bestowed upon the concept of essence by Article 52 of the CFREU.

10. Objection 3: Essence as a normative pivot as substantively incomplete

Finally, the proposed description could be criticised – even if technically accurate and conceptually useful – as depicting a concept which remains substantively vague and is therefore incomplete. The assertion of substantive vagueness is accurate. Recall the observation, in section 7, that the specific social phenomena to which the concept of essence as a normative pivot relates are yet to be fixed, the criteria determining the threshold of severity of use of the concept are yet to be fixed and even the conditions under which the concept will be used or not – when it is clear that it might apply – are not fixed. Is it then the case that such substantive vagueness renders the proposed description incomplete and problematic? I do not believe so.

In the first instance, the lack of clarity as to the substance of the concept of essence as a normative pivot does not manifest as a result of author choice between plausible alternative possible descriptions of essence in relation to Article 8. Rather, the lack of clarity manifests, as discussed in section 5, from the indeterminate nature of current CJEU case law on essence in relation to Article 8. Recall Brkan’s observation that: ‘The Court’s case law on this issue can be depicted as a muddled maze where the final destination remains concealed due to reasoning that is full of meanders and unpredictable curves.’ It is true that this lack of substantive clarity can be criticised from certain normative perspectives. This lack of clarity does not, however, suggest that the proposed definition of essence as a normative pivot depicts a concept which is incomplete in light of the current state of the law.

In turn, even a substantially vague concept of essence need not be considered conceptually or practically problematic. There is considerable uncertainty in the legal environment in which the concept of essence in relation to Article 8 functions: the function of Article 8 in the EU legal order remains uncertain; the range of acts of personal data processing Article 8 should serve to prohibit remains uncertain; and the normative ranking of such illegitimate acts remains uncertain. In such an uncertain legal context, a flexible concept of essence can be argued to be valuable in allowing the Court to: i) highlight varied types of personal data processing acts, for varied reasons, as constituting egregious disproportionate infringements of Article 8; and ii) to do so without jeopardising the internal consistency of EU fundamental rights law. In this regard, Christofi et. al. argue that flexibility in the conceptualisation of essence in relation to Article 8 is valuable in providing: ‘a principle [which enables] different, nuanced outcomes depending on the facts of a case.’

Equally, it should be noted that any conceptualisation of essence which lacks substantive clarity now, need not necessarily lack substantive clarity in future. Flexibility in legal concepts provides the space for subsequent clarification and specification through jurisprudence. In this regard, the quantity of jurisprudence concerning Article 8 is likely to grow over time. This jurisprudence will concretise the legal scope and function of the right to the protection of personal data within the EU fundamental rights system. This jurisprudence

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40 Maja Brkan, ‘The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU’s Constitutional Reasoning’ [2019] German Law Journal 20(6) 864, 865.

41 There are several works dealing with the tensions and uncertainties inherent in the Article 8 right to the protection of personal data. See, for example: Orla Lynsky, The Foundations of EU Data Protection Law (Oxford University Press 2015). 14-254.

42 Athena Christofi, Valerie Verdoodt, Exploring the essence of the right to data protection and smart cities (GTIP Working Paper, 2019) 24.
will also clarify the range of types of acts of personal data processing which should be regarded as constituting disproportionate infringements of Article 8 as well as how such disproportionate infringements should be classified in terms of severity. It seems likely that some of this case law at least will engage the concept of essence. Accordingly, there is no reason any concept of essence which is currently substantially vague should not become clearer in future.

11. Conclusion

The concept of the essence of the Article 8 right to the protection of personal data has been the subject of much consideration over the past few years. The concept has been used in substantive analyses of the bounds of legitimate personal data processing and has been a subject of study in its own right.

Many of the scholars who have relied on the concept as an analytical tool, or who have studied the concept in its own right, however, have highlighted the difficulties in elaborating a cogent, functionally distinct, description of the concept as it is currently used in law. This article aimed to address this issue.

In this regard, the article provided a novel methodology for the identification of such a description. This methodology consisted of: i) a structured approach for the identification of the function of individual components of a legal system; and ii) a set of generally applicable boundary conditions which any cogent, functionally distinct, description of the concept as it is currently used in law. This article aimed to address this issue.

Relying on this methodology, the article then proposed a cogent, functionally distinct, description of the concept of essence as it is currently used in law in relation to Article 8: essence as a normative pivot. In this description, the concept of essence functions as an auxiliary concept to the concept of proportionality used to describe particularly egregious infringements of the right to the protection of personal data. The substantive content of this concept remains, however, radically uncertain.

In conclusion, the article highlighted, and responded to, three critiques which might be raised against the proposed description. These critiques concerned: i) the doctrinal accuracy of the description; ii) the conceptual utility of the description within the proportionality analysis; and iii) the substantive completeness of the description.

Each critique was shown to be unfounded. In terms of doctrinal accuracy, there is no clear reason to doubt the description’s legitimacy. In terms of conceptual utility, the description elaborates a concept with value in facilitating the communication of different degrees of severity of disproportionate infringements of Article 8. In terms of substantive completeness, the description remains vague not because of author choice, but because of indeterminate case law.