# European Data Protection: Is a Reconceptualization Possible?

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# GPDR: General Continuity with Directive

- Draft Regulation is **very similar** to the **current DP Framework**.
- Indeed Blume and Svanberg (2013) state, it is

> *"in many essential areas – such as the rules on data processing, transfers of data to third (non-EU) countries and its scope of application – just an adjusted version (and in regards to many central provisions a copy) of Directive 95/46."*

# Core Substantive Problems Remain Unaddressed

- The **current substance** of DP is **badly flawed**.

> *"the current … architecture creates an overly bureaucratic regulatory environment which often appears illogical and disproportionately burdensome and prescriptive."* (Blume and Svanberg, 2013)

> European DP *"is a shotgun remedy against an incompletely conceptualized problem. It is an emotional, rather than rational reaction to feelings of discomfort with expanding data flows."* (Bergkamp, 2002)

# What is at the Root of the Problem?

- **Broad** meaning given to key **terms** –
  - **personal data:** *"any information relating to an identified or identifiable natural person"*
  - **sensitive personal data**: *"data revealing racial or ethnic origin, political opinions, religious or philosophical belief …"*
- **Peremptory** nature **rules** can compound difficulty:
  - General **ban** on processing **sensitive data**
  - **Information notification** to data subjects
  - Requirements of **consent** for "non-essential" **cookies**
  - etc.

# A High Level of Protection is Not Achieved

- Effective protection is very limited due to **wide-spread non-compliance** with relevant standards.
- At least in part this is related to the framework's **lack of legibility.**

*"Outsiders might enjoy the data protection reform as 'a comedy about a corpse', but for insiders – European data subjects – it feels more like a zombie horror movie. We see data protection bodies moving all around, but they do not provide us with real protection. The fundamental fallacies featuring in data protection law lead to the conclusion that, as it stands, data protection law is dead."* (Koops, 2014)

# Five Elements of a New Conceptualization

1. Better definition of the **mischiefs** DP counters.
2. A law of **narrower scope** based on the above.
3. More open acknowledgment of **rights conflict**.
4. More carefully delineated **peremptory rules**.
5. Greatly increased and more effective **enforcement activity**.

# Narrowing of DP: Historic Supports

- **OECD Privacy Guidelines 1980:**

> *"personal data … which, because of the manner in which they are processed, or because of the nature or the context in which they are used, pose a risk to privacy and individual liberties."*

- **Early European Data Protection Law**
  - **Council of Europe Convention 1981** ("*data file*")
  - **Iceland Data Protection Act 1981** ("*private affairs*")

# Narrowing of DP: Some Modern Supports

- **Sweden, Personal Data Act Amendment 2007**

> *"The provisions … need not be applied when processing personal data that is not included in or intended to be included in a collection of personal data which has been structured in order to evidently facilitate search for or compilation of personal data.*
>
> *Processing referred to in the first paragraph must not be conducted if it entails a violation of the integrity/privacy of the data subject."*

- **United Kingdom, *Durant* (2003)**

> *"information that affects his privacy, whether in his personal or family life, business or professional capacity."* (at 28)

# Conclusions

- **Reconceptualization** is very **unlikely under** the **GDPR**.
- Nevertheless, it remains both **pressing** and **possible**.
- A **narrowing** of the DP's **scope** seems particularly urgent.
- If this is coupled with **effective enforcement**, this would not result in a loss to individual **privacy and integrity.**