

Mario Viola de Azevedo Cunha

# Market Integration Through Data Protection

An Analysis of the Insurance and  
Financial Industries in the EU

Mario Viola de Azevedo Cunha

# Market Integration Through Data Protection

An Analysis of the Insurance and Financial  
Industries in the EU



Mario Viola de Azevedo Cunha  
Centro de Estudos e Pesquisas no Ensino  
do Direito – Rio de Janeiro State University  
Centro, Rio de Janeiro  
Rio de Janeiro  
Brazil

ISBN 978-94-007-6084-4                      ISBN 978-94-007-6085-1 (eBook)  
DOI 10.1007/978-94-007-6085-1  
Springer Dordrecht Heidelberg New York London

Library of Congress Control Number: 2013933339

© Springer Science+Business Media Dordrecht 2013

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed. Exempted from this legal reservation are brief excerpts in connection with reviews or scholarly analysis or material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. Duplication of this publication or parts thereof is permitted only under the provisions of the Copyright Law of the Publisher's location, in its current version, and permission for use must always be obtained from Springer. Permissions for use may be obtained through RightsLink at the Copyright Clearance Center. Violations are liable to prosecution under the respective Copyright Law.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

While the advice and information in this book are believed to be true and accurate at the date of publication, neither the authors nor the editors nor the publisher can accept any legal responsibility for any errors or omissions that may be made. The publisher makes no warranty, express or implied, with respect to the material contained herein.

Printed on acid-free paper

Springer is part of Springer Science+Business Media ([www.springer.com](http://www.springer.com))

# Market Integration Through Data Protection

# Law, Governance and Technology Series

---

VOLUME 9

---

## *Series Editors:*

POMPEU CASANOVAS, *Institute of Law and Technology, UAB, Spain*

GIOVANNI SARTOR, *University of Bologna (Faculty of Law -CIRSFID)  
and European University Institute of Florence, Italy*

## *Scientific Advisory Board:*

GIANMARIA AJANI, *University of Turin, Italy*; KEVIN ASHLEY, *University of Pittsburgh, USA*; KATIE ATKINSON, *University of Liverpool, UK*; TREVOR J.M. BENCH-CAPON, *University of Liverpool, UK*; V. RICHARDS BENJAMINS, *Telefonica, Spain*; GUIDO BOELLA, *Università degli Studi di Torino, Italy*; JOOST BREUKER, *Universiteit van Amsterdam, The Netherlands*; DANIELE BOURCIER, *CERSA, France*; TOM BRUCE, *Cornell University, USA*; NURIA CASELLAS, *Institute of Law and Technology, UAB, Spain*; CRISTIANO CASTELFRANCHI, *ISTC-CNR, Italy*; JACK G. CONRAD, *Thomson Reuters, USA*; ROSARIA CONTE, *ISTC-CNR, Italy*; FRANCESCO CONTINI, *IRSIG-CNR, Italy*; JESÚS CONTRERAS, *ISOCO, Spain*; JOHN DAVIES, *British Telecommunications plc, UK*; JOHN DOMINGUE, *The Open University, UK*; JAIME DELGADO, *Universitat Politècnica de Catalunya, Spain*; MARCO FABRI, *IRSIG-CNR, Italy*; DIETER FENSEL, *University of Innsbruck, Austria*; ENRICO FRANCESCONI, *ITTIG - CNR, Italy*; FERNANDO GALINDO, *Universidad de Zaragoza, Spain*; ALDO GANGEMI, *ISTC-CNR, Italy*; MICHAEL GENESERETH, *Stanford University, USA*; ASUNCIÓN GÓMEZ-PÉREZ, *Universidad Politécnica de Madrid, Spain*; THOMAS F. GORDON, *Fraunhofer FOKUS, Germany*; GUIDO GOVERNATORI, *NICTA, Australia*; GRAHAM GREENLEAF, *The University of New South Wales, Australia*; MARKO GROBELNIK, *Josef Stefan Institute, Slovenia*; JAMES HENDLER, *Rensselaer Polytechnic Institute, USA*; RINKE HOEKSTRA, *Universiteit van Amsterdam, The Netherlands*; ETHAN KATSH, *University of Massachusetts Amherst, USA*; MARC LAURITSEN, *Capstone Practice Systems, Inc., USA*; RONALD LEENES, *Tilburg Institute for Law, Technology, and Society, Tilburg University, The Netherlands*; PHILIP LIETH, *Queen's University Belfast, UK*; ARNO LODDER, *VU University Amsterdam, The Netherlands*; JOSÉ MANUEL LÓPEZ COBO, *Playence, Austria*; PIERRE MAZZEGA, *LMTG - UMR5563 CNRS/IRD/UPS, France*; MARIE-FRANCINE MOENS, *Katholieke Universiteit Leuven, Belgium*; PABLO NORIEGA, *IIIA-CSIC, Spain*; ANJA OSKAMP, *Open Universiteit, The Netherlands*; SASCHA OSSOWSKI, *Universidad Rey Juan Carlos, Spain*; UGO PAGALLO, *Università degli Studi di Torino, Italy*; MONICA PALMIRANI, *Università di Bologna, Italy*; ABDUL PALIWALA, *University of Warwick, UK*; ENRIC PLAZA, *IIIA-CSIC, Spain*; MARTA POBLET, *Institute of Law and Technology, UAB, Spain*; DANIEL POULIN, *University of Montreal, Canada*; HENRY PRAKKEN, *Universiteit Utrecht and The University of Groningen, The Netherlands*; HAIBIN QI, *Huazhong University of Science and Technology, P.R. China*; DORY REILING, *Amsterdam District Court, The Netherlands*; PIER CARLO ROSSI, *Italy*; EDWINA L. RISSLAND, *University of Massachusetts, Amherst, USA*; COLIN RULE, *University of Massachusetts, USA*; MARCO SCHORLEMMER, *IIIA-CSIC, Spain*; CARLES SIERRA, *IIIA-CSIC, Spain*; MIGEL ANGEL SICILIA, *Universidad de Alcalá, Spain*; RONALD W. STAUDT, *Chicago-Kent College of Law, USA*; RUDI STUDER, *Karlsruhe Institute of Technology, Germany*; DANIELA TISCORNIA, *ITTIG-CNR, Italy*; JOAN-JOSEP VALLBÉ, *Universitat de Barcelona, Spain*; TOM VAN ENGENS, *Universiteit van Amsterdam, The Netherlands*; FABIO VITALI, *Università di Bologna, Italy*; MARY-ANNE WILLIAMS, *The University of Technology, Sydney, Australia*; RADBOUD WINKELS, *University of Amsterdam, The Netherlands*; ADAM WYNER, *University of Liverpool, UK*; HAJIME YOSHINO, *Meiji Gakuin University, Japan*; JOHN ZELENKOW, *University of Victoria, Australia*

For further volumes:

<http://www.springer.com/series/8808>

*To my wife Danielle and to my son Lorenzo,  
for making me feel special every single day  
of my life.*

# Book Abstract

In the context of the continuous advance of information technologies and biomedicine, and of the creation of economic blocs, this book is devoted to the analysis of the role data protection plays in the integration of markets, with a special emphasis on financial and insurance services. Moreover, it is also concerned with the identification of differences in the data protection systems of EU member states and with the development of common standards and principles of data protection, keeping in mind the need to establish a high level of data protection without unnecessarily constraining the flow of information.

The book is divided into four parts. The first one deals with the evolution of the right to privacy, focusing on the last few decades, taking into account the development of new technologies. In this part, an analysis of the European framework of data protection and of its developed standards is carried out. Then, in the second part, the interaction between data protection and the industries selected as case studies, namely insurance, banking and credit reporting, is discussed. This discussion concentrates on specific issues, such as generalisation and discrimination, adverse selection and the processing of sensitive and genetic data, which are the main issues that affect the processing of personal data in these industries.

The focus of the third part is the analysis of the legislation of three EU member states (France, Italy and UK). In order to perform this comparative exercise, some important issues are taken into account: the concepts of personal, data protection principles, the role of the data protection authorities, the role of the data protection officer, data subjects' rights, the processing of sensitive data, and the experience of the case studies in processing data. Moreover, issues related to the specific member states are also considered.

Finally and subsequently to the comparative analysis, some recommendations are proposed for updating EU legislation on data protection, so as to reduce the barriers to the establishment of an internal market, mainly for financial and insurance services.

# Acknowledgements

To write this book I received the help of many people and I owe a significant intellectual debt to all of them. I am particularly indebted to my supervisor at the European University Institute, Prof. Giovanni Sartor, who gave me support and guidance. I am also indebted to Prof. Andrew Murray—my external co-supervisor, who helped me greatly when I was a visiting researcher at the London School of Economics and Political Science and later helped me to understand the ‘Common Law System’ and the issues regarding consent. Another important person in my research is Prof. Jacques Ziller, who ‘convinced’ me to embrace the topic I discuss in this book.

Others from academia and elsewhere have helped me in my research. They are: Justice Luiz Fux from the Brazilian Supreme Court, Prof. Gustavo Tepedino, Prof. Nilo Batista and Prof. Carlos Edison do Rêgo Monteiro Filho from Rio de Janeiro State University, Prof. Luiz Edson Fachin from Paraná Federal University, Prof. Christopher Millard from Queen Mary–University of London, Prof. Yves Pouillet from University of Namur, Prof. Hans Micklitz from the European University Institute, Alfonso Sciocco from the European Economic and Social Committee; Ricardo Sanchini from the *Garante per la protezione dei dati personali* (Italy); David Reynolds and Richard Ansell from the UK Information Commissioner; Anne-Christine Lacoste, Bénédicte Havelange, Delphine Harou, Eva Dimovné Kerestes, Giovanni Buttarelli, Isabelle Chatelier, Herke Kranenborg, Hielke Hijmans, Katarzyna Cuadrat Grzybowska, Laurent Beslay, Maria Verónica Pérez Asinari, Martine Blondou, Michaël Vanfleteren, Nathalie Vandelle, Peter Hustinx, Rosa Barceló, Sylvie Picard, Xanthi Kapsosideri and Zsuzsanna Belenyessy from the European Data Protection Supervisor, Aurélie Banck, Céline Bonneau, Florence Raynal and Marie Leroux from the *Commission Nationale de l’Informatique et des Libertés* (France); Athena Bourka from the Hellenic Data Protection Authority; Manuel Garcia Sanchez from the *Agencia Española de Protección de Datos*; César Alonso Iriarte and José Manuel de Frutos Gomes from the European Commission; Juan Antonio Travieso from the *Dirección Nacional de Protección de Datos Personales* (Argentina); and Stefano Barbaroto and Chiara Stolfi from *Associazione Nazionale fra le Imprese Assicuratrici* (Italy).



I would like to say a special thanks to *Fundação Escola Nacional de Seguros* (Brazilian National School of Insurance) and to Capes Foundation (Brazilian Ministry of Education) for having provided the necessary financial support for the completion of this research.

I would also like to acknowledge and thank Benjamin Farrand and Mike Wiesmeier for their valuable proofreading assistance which helped to make the text much more readable. However, any mistake and lack of clarity remains entirely my fault.

The Ph.D.—the period during which I have written a great part of this book—however, is not just a matter of work, and one of the most valuable experiences I have had during my stay in Florence are the friendships I have developed. These friends are: from the EUI (sorry if I forgot someone), Norberto Andrade, Ida Federica Pugliese, Adriana Bessa, Alessandro Chechi, Samantha Ribeiro, Timo Hiller, Lucas Lixinski, Lúcio Feteira, Marco Botta, Rozeta Karova, Vassilis Tzevelekos, Edurne Iraizoz, Claire Staath, Jonathan Murray Bright, Evaldo Xavier Gomes, Marcílio Toscano Franca Filho, Alessandra Franca, Alessandra Becucci, William Baugniet, Devina Saha, Ana Espírito Santo, Hélder Ferreira do Vale, Rashad Ibadov, Igor Medina de Souza, Fabiano Corrêa, Bruno Boto, Pedro Lomba, Domingos Paiva de Almeida and Alessandra Vannini; from Florence (outside of the EUI community), Gabriele Mazzota, Isabella Mariani, Mike Wiesmeier, Donatella Costantini (*in memorium*) and all the guys from Palestra Fiodan. I am also thankful to older friends from Brazil, who have always supported this life project. They include Sergio Duque Estrada, Elisabeth de Santiago, Therezinha Vollú, Antônio Francisco Alves Neto, Fernando Freeland Neves, Fábio Falles, Paulo de Almeida Santos, Leonardo d'Almeida Girão, Rafael Viola and Danilo Doneda (actually, Danilo and I became friends—and partners in many projects—while I was in Florence). All of them, my old and not-so-old friends, have contributed in different ways to my PhD and to this book.

I would also like to say a special thanks to all teachers of the Language Centre of the European University Institute, who are always available, both to review papers and clarify any doubts we may have regarding a specific language. The ones that I had the pleasure to have as teachers are: Edurne Iraizoz, Camilla Salvi, Nicky Owtran, Nicki Hargreaves, Sylvain Capelli, Cecilia Picchi, Annarita Zacchi, Phil Jakes and Eleonore Eckmann.

A special thanks goes also to the administrative staff of the EUI, especially to Alessandro Coccioli, Natasha Tsigler, Saverio Bertaccini, Antonio Corretto, Siobhán Gallagher and Françoise Thauvin, who have always tried to make things easier for me. The same gratitude goes to the team of the *mensa* (both in Badia and Schifanoia): Antonella, Fiamma, Loredana, Cinzia, Paola, Guia, Lorena, who have made my life in the EUI more 'tasteful' and pleasant.

Now, more than ever, I recognise the importance of family in my life, and in the period that I was in Florence (where I wrote this book), apart from my wife, I am very thankful to my cousins Márcia and João and to their daughters Gabriella and Giovanna, for providing me with family support. I am also enormously indebted to

my uncles and aunts, Sergio, Sônia, Silvio, Paulo, Dora, Elaine, for giving to me—and to my whole family—the necessary support in the most difficult moments of our lives. I am sure that I will never be able to pay back what you have done for us. I would also like to say a special thanks to my grandmother Conchetta, who has always predicted good things for me.

Finally, my deepest gratitude goes to my mother, Suely, and to my brother and sister, Breno and Kamille, who are the most beautiful example of a family one could have. I love you so much!!!

# Introduction

*We should not judge a man's merit by his great qualities,  
but by the use he makes of them.*

François VI, Duc de La Rochefoucauld, Prince de Marcillac  
(1613–1680)<sup>1</sup>

The study of privacy opens to the researcher the possibility to deal with a number of interesting and complex issues. Questions regarding unlawful and abusive interferences in private and family life, and violation of honour and reputation are just a few examples of how privacy raises the debate. Amongst all the issues involving the right to privacy, the one that, in my opinion, currently creates more challenges for the law is the protection of personal data. The continuous advance of information technologies and biomedicine has not only made the collection of personal data more rapid, but has also opened the possibility for the collection of new kinds of personal data, such as biometric and genetic data.

Furthermore, the creation of economic blocs, which increases trade between member states, intensifies the flow of personal data, making it necessary to establish a uniform trade environment in order to guarantee the protection of personal data within the bloc, avoiding different levels of protection between member states. Such different levels of protection could create barriers to the free movement of goods and services that use personal information as an important raw material for their activities.<sup>2</sup>

---

<sup>1</sup>La Rochefoucauld, François. *La Rochefoucauld Collected Maxims and other reflections—New translations with parallel French text*. Translated by E.H. Blackmore; A.M. Blackmore and Francine Giguère. Oxford World's Classics. Oxford University Press, 2007. P. 119.

<sup>2</sup>Doneda, Danilo; Viola de Azevedo Cunha, Mario. *Data Protection as a Trade Resource in Mercosur: A Data Protection Framework as an Integrative Tool*. In Franca Filho, Marcilio Toscano; Lixinski, Lucas and Olmos Giupponi, Maria Belen (editors), *The Law of Mercosur*. Oxford: Hart Publishing, 2010. P. 366.

Therefore, a data protection framework would be of interest not only to those countries that feel the need to protect their citizens from the effects of abusive use of their personal information, but also to regional blocs of countries that, in addition to protecting their citizens' interests, would be keen to make their laws regarding data protection compatible and even interchangeable, in order to render transactions involving the transfer of personal data as 'noise-free' as possible.<sup>3</sup>

The European Union (hereinafter EU) adopted a model of data protection that pursues this balance, stimulating the free movement of services and goods, without restricting individuals' fundamental rights, mainly the right to privacy and data protection.<sup>4</sup> The approach used in the EU model is the one of harmonisation of member states' laws in this specific area. However, as will be shown in this book, there are still significant differences in the way member states have implemented the Directives in this field, leaving open room for more harmonisation at the EU level.

In fact, privacy and data protection are no longer to be seen "as a barrier to international communications and trade, but as a necessary condition without which individuals will not use the public networks for commercial transactions."<sup>5</sup>

In this context, this book is devoted to the analysis of the role data protection plays in the integration of markets, with a special emphasis on financial and insurance services. Moreover, it is also concerned with the identification of differences in the data protection systems of EU member states and with the development of common standards and principles of data protection, keeping in mind the need to establish a high level of data protection without creating unnecessary constraints for the flow of information.

The book is divided into four parts. The first one deals with the evolution of the right to privacy, focusing on the last few decades, taking into account the development of new technologies. In this part an analysis of the European framework of data protection and of its developed standards is carried out. Then, in the second part, the interaction between data protection and the industries selected as case studies, namely insurance, banking and credit reporting, is discussed. This discussion concentrates on specific issues, such as generalisation and discrimination, adverse selection and the processing of sensitive and genetic data, which are the main issues that affect the processing of personal data in these industries.

The focus of the third part is the analysis of three EU member states' legislation (France, Italy and UK). In order to perform this comparative exercise, some important issues are taken into account: the concepts of personal and anonymous data, data protection principles, the role of the data protection authorities, the role

---

<sup>3</sup>Ibid. P. 367.

<sup>4</sup>Jentzsch, Nicola. *Financial Privacy: An International Comparison of Credit Reporting Systems*. 2nd ed. Berlin: Springer, 2007. P. 119. "Data protection is one of the few fields, where the EU proved to be more successful in exporting its standards than the U.S. One of the reasons is the demanding "extraterritorial principle" in the EU Directive. According to this principle, personal data on Europeans should be only exported to countries that provide adequate data protection."

<sup>5</sup>Bennett, Colin; Raddb, Charles D. *The governance of privacy—Policy Instruments in Global Perspective*. Cambridge: MIT Press, 2006. P. 92.

of the data protection officer, data subjects' rights, the processing of sensitive data, the processing of genetic data and the experience of the case studies in processing data. Moreover, issues related to the specific member states are also considered. The issues analysed in this part are the ones dealt with by the respective Member States differently from what is provided for by Directive 95/46/EC.

Finally and subsequently to the comparative analysis, some recommendations are proposed for updating EU legislation on data protection, so as to reduce the barriers to the establishment of an internal market, mainly for financial and insurance services. The book concludes by emphasising the important role that data protection can play in the process of market integration.

Despite the fact that research in the field of data protection and market integration has seen important development in recent years,<sup>6</sup> the impact the former has on the latter is still a rather unexplored area of research and analysis, continually evolving and demanding new legal answers and frameworks. Following this rather poor state of the art, the impact of data protection on the integration of markets remains a subject of significant ambiguity and controversy. Moreover, there has not been sufficiently deep discussion about the constraints that different implementations of communitarian<sup>7</sup> legislation by member states of a regional bloc can create for the integration of specific markets, namely the financial and insurance ones. Therefore, we need to consider how data protection rules should be applied, how they should evolve in a progressively globalised world, and what new solutions may reduce barriers to market integration.

---

<sup>6</sup>See, for instance, the 'Law and Financial Markets Project', of the London School of Economics and Political Science (LSE), led by Prof. Roger McCormick, focusing on the interaction between law and financial markets, and the 'Comparative Research Project on Self-Regulation', of the European University Institute (EUI), coordinated by Prof. Fabrizio Cafaggi, aiming at identifying the legal framework applicable to self-regulation in different systems, in the areas of media, internet, advertising and financial markets. None of these projects, however, take the approach proposed here, either from the viewpoint of a comparative analysis between two integration processes or from the one related to the role data protection can play for the integration of markets, especially of financial and insurance services. For more information about these two projects see <http://www.lse.ac.uk/collections/law/projects/lfm.htm> and <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Cafaggi/self-reg2.pdf>. Accessed 7 January 2011. Other interesting research projects are the one carried out by the Project Group 'Restatement of European Insurance Contract Law', coordinated by Prof. Helmut Heiss of the University of Zurich and the one developed by the Scuola Superiore Sant'anna (Pisa, Italy), entitled Insurance law between market development and individual protection' and coordinated by Prof. Gagliardi. Again, the former only analyses issues exclusively related to insurance law and not other fields of law that could have an impact over the integration of the insurance market and the latter analyses the interaction between insurance law and tort law in a European perspective, without analysing the consequences in a cross-border environment—and focusing only on tort law. For more details about these projects see <http://aida-portugal.org/pdf/bc18d3af669a52ac20f164d7c9681d5d.pdf> and <http://www.lider-lab.sssup.it/lider/research/research-lines.html#>. Accessed 11 January 2011.

<sup>7</sup>The term 'communitarian' is used here to refer to legislation produced at the regional level.

# Contents

- Introduction** ..... xvii
- 1 The Protection of Personal Data: Evolution and Standards in Europe** ..... 1
  - 1.1 The Right to Privacy: From the “Right to Be Let Alone” to Data Protection ..... 1
  - 1.2 Council of Europe Convention 108/1981 ..... 13
  - 1.3 The European Union Data Protection Framework..... 16
    - 1.3.1 Directive 95/46/EC ..... 16
    - 1.3.2 Regulation 45/2001 ..... 35
    - 1.3.3 Council Framework Decision 2008/977/JHA ..... 38
  - 1.4 Chapter Conclusion ..... 44
- 2 Data Protection and the Insurance, Banking and Credit Reporting Industries**..... 45
  - 2.1 The Processing of Personal Data by Insurance Companies, Banks and Credit Information Suppliers ..... 47
    - 2.1.1 Risk Analysis and Adverse Selection ..... 53
    - 2.1.2 Generalisation and Discrimination ..... 56
    - 2.1.3 The Processing of Sensitive Data ..... 60
  - 2.2 Genetic Predictive Tests and the Insurance Industry ..... 65
    - 2.2.1 The Concept of Genetic Data and its Distinction from Other Health Data ..... 65
    - 2.2.2 Claims for the Use of Genetic Data: Are They Enough to Legitimise It? ..... 68
    - 2.2.3 The Future of Genetic Data Processing Within the Insurance Industry ..... 75
  - 2.3 Chapter Conclusion ..... 79

### 3 Data Protection Systems in the European

<b>Union: The French Experience</b> .....	81
3.1 The Data Protection Authority: Enforcement Powers, Labels and General Authorisations.....	81
3.2 The Concept of Personal Data.....	85
3.3 The Processing of Sensitive Data .....	86
3.4 Data Subjects' Rights .....	87
3.5 The Processing of Personal Data by the Case Studies.....	89
3.5.1 The Banking Sector.....	89
3.5.2 The Credit Information Suppliers.....	92
3.5.3 The Insurance Industry .....	95
3.6 Other Relevant Issues .....	98
3.6.1 The Data Protection Officer .....	98
3.7 Chapter Conclusion .....	98

### 4 Data Protection Systems in the European

<b>Union: The UK Experience</b> .....	101
4.1 The Data Protection Authority: The Role of the UK Information Commissioner .....	102
4.2 The Concept of Personal Data.....	106
4.3 The Processing of Sensitive Data .....	111
4.4 Data Subjects' Rights: The Rights of Preventing a Processing Likely to Cause Damage or Distress and the Obtaining of Records Under the Data Subject's Right to Access.....	112
4.5 The Processing of Personal Data by the Case Studies.....	114
4.5.1 The Banking Sector.....	114
4.5.2 The Credit Information Suppliers.....	119
4.5.3 The Insurance Industry .....	125
4.6 Other Relevant Issues .....	137
4.6.1 Data Protection Principles: The Necessity Test and Data Minimisation .....	137
4.6.2 The Scope of Consent .....	138
4.6.3 The Data Protection Officer .....	140
4.7 Chapter Conclusion .....	140

### 5 Data Protection Systems in the European

<b>Union: The Italian Experience</b> .....	143
5.1 The Data Protection Authority .....	144
5.2 The Concept of Personal Data.....	144
5.3 Data Subjects' Rights .....	146
5.4 The Processing of Sensitive Data .....	147
5.4.1 The Processing of Genetic Data.....	152

5.5	The Processing of Personal Data by the Case Studies.....	156
5.5.1	The Banking Sector .....	156
5.5.2	The Credit Information Suppliers .....	162
5.5.3	The Insurance Industry .....	170
5.6	Other Relevant Issues .....	178
5.6.1	Data Protection Principles: Necessity, Data Minimisation and Privacy by Design .....	178
5.6.2	Codes of Conduct .....	181
5.7	Chapter Conclusion .....	182
<b>6</b>	<b>The Differences Between the Selected Member States and the Recommendations for a Further Harmonisation in the Post Lisbon Era .....</b>	<b>185</b>
6.1	A ‘New’ Concept of Personal Data .....	187
6.2	Should We Still Rely on Consent? .....	191
6.3	The Compulsoriness of the Data Protection Officer .....	197
6.4	Towards a Mutual Recognition System for Data Protection .....	198
6.5	Codes of Conduct as a Supplement of the Data Protection Legislation .....	200
6.6	Chapter Conclusion .....	202
<b>Conclusion</b>	.....	<b>203</b>
References	.....	206



# Chapter 1

## The Protection of Personal Data: Evolution and Standards in Europe

This chapter deals with the evolution of the right to privacy, focusing on the last few decades, taking into account the development of new technologies and the threats security issues pose to privacy. It starts by giving an overview of the discussions on the right to privacy and to data protection, presenting a brief distinction between the European and the North American approach to that subject. Then, it concentrates on the European Framework of Data Protection, both at the Council of Europe and at the European Union levels, analysing its main legal instruments, with particular emphasis on Directive 95/46/EC because it is the one which applies to the processings of personal data carried out by the case studies of this book. Regarding this latter Directive, the book focuses on the legal grounds for data processing, on storage and data transfer issues—including the adequacy procedure—and on institutional and regulatory bodies.

### 1.1 The Right to Privacy: From the “Right to Be Let Alone” to Data Protection<sup>1</sup>

The need to protect privacy started to be discussed only at the end of the nineteenth century, an important example being the famous article “The right to privacy”, written by Louis Brandeis and Samuel Warren.<sup>2</sup> In this article the authors dealt with many aspects of the right to privacy, including what is now called ‘informational

---

<sup>1</sup> Some portions of this section were included in an article written by the author and Danilo Doneda. Doneda, Danilo; Viola de Azevedo Cunha, Mario. Data protection as a trade resource in Mercosur: a data protection framework as an integrative tool. *Op. cit.*

<sup>2</sup> Brandeis, Louis; Warren, Samuel. The Right to Privacy. *Harvard Law Review*. Vol. IV, December 15, 1890, No. 5. Available at [http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy\\_brand\\_warr2.html](http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html). Accessed 5 January 2010.