Table of Contents

List of Abbreviations XX Introduction: The risk-based approach as the opposite of	iii 1			
Introduction: The risk-based approach as the opposite of	1			
Introduction: The risk-based approach as the opposite of	1			
1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	1			
the rights-based approach, or as an opportunity to analyse	T			
the links between law, regulation, and risk?	1			
1. The risk-based approach: a contradiction in terms?	1 5			
2. On the links between law and regulation	5 7			
3. On data protection as regulation	/			
4. The links between risk and regulation: the role of the	0			
proportionality principle	9			
4.1 The proportionality principle as the missing link between	0			
law/regulation and risk	9			
4.2 Defining the proportionality principle: two balancing tests	10			
associated with first minigation measures, our of our of	10			
1.2.1 Rock integration of out-of-state do.	11			
1.2.2 Troportionally as two salations seems	12			
1.2.5 160t 1. pressing sector need	13			
4.2.4 lest 2. proportionally stricte content	14			
5. Proportionality as the common root of law/regulation and risk:				
Some more resource	15			
5.1 Proportionality at the core of regulation and risk: closely				
intertwined practices	16			
5.2 Proportionality as the hallmark of regulatory law: what				
consequences for data protection.	16			
o. Approaching variations	18			
7. Structure of the argument	24			
1. Fundamental notions: Risk and regulation	26			
	26			
	27			
2.1 Etymology and meaning of the concept	27			
2.2 Risk and risk management	28			
2.3 The technique of risk and risk management	29			
2.4 Risk (management) as a matter of two balancing tests associated				
to risk mitigation measures	31			
2.5 Different methods for assessing risks	32			
2.6 Different ways to manage risks	33			
2.6.1 Risk management as an exercise in standard setting	33			

X TABLE OF CONTENTS

2.0	2 How to balance the costs and benefits	34	:
2.0	The choice of the best risk mitigation measur	es 34	:
2.0	illenges to risk management: beyond objectivity	37	,
2.7 Cn	1 Rise of risk analysis	37	7
2.7	ond risk analysis: sketching contemporary pract	ices	
		40)
	isk management	41	L
3. Regula		41	l
	fining regulation	42	2
3.2 Re	gulation and law .1 Regulation, more than an economic concept	42	2
3	.2 The characteristics of regulatory law	44	4
3.	.2 The characteristics of regulatory fav.	46	6
3.3 11	e object of regulation: harms dying the constitutive elements of regulation mo	ore in depth 48	8
3.4 St	dying the constitutive elements of regulation in	4	8
3.	.1 Standard setting	4:	8
3.			
3.	Redefining the opposition between monitor	4	9
	behaviour control types of safeguards		1
3.	The difference between enforcement and sat	cguaras	-
4. Risk a	d regulation as variations on the proportional	ity principie.	52
a grid	eye view	3	_
• D	tection as command and control regulation	5	54
2. Data pro	tection as command and control regulation	rol regulation 5	54
1. Introd	uction: data protection as command and contr	5	55
2. Data j	rotection and standard setting		
2.1 I	ata quality and legitimacy principles embody sta	co etandards	56
d	ata protection, and more in particular performan	ice otaliani as	57
2.2 A	rticle 7: data legitimacy as the first balancing test		,
2	2.1 Data legitimacy is both about the legitimac	y of the processing	57
	operation and its necessity		58
2	2.2 Data legitimacy in practice (1): presumption	,110	59
	2.3 Data legitimacy in practice (2): Heinz Hube	.,	37
2	2.4 Comparison with other views that do not s	upport	
	the existence of the first balancing test with	in data	61
	protection legislations		64
2.3	rticle 6: data quality		64
	3.1 Article 6(1)(c) as the embodiment of the se	econd balancing test	04
	3.2 Safeguard 1 = Transparency: principle of la	iwfulness, fairness	"
	and transparency + principle of purpose li	mitation	66
	3.3 Safeguard 2 = Lawfulness, fairness, and leg	gitimacy: principle	
	of lawfulness, fairness and transparency +	principle of	
	purpose limitation		66
	2.3.4 Safeguard 3 = reduction in scope: purpose	limitation, data	
	minimisation, storage limitation principle	es	67
	$\frac{1}{2}$ 5 Safeguard 4 = accuracy of the data: data ac	curacy principle	68
	3.6 Safeguard 5 = security: principle of integral	ity and confidentiality	69
2.4	Data protection, standard setting, and proportion	nality: conclusions	69

	3. For	mal saf	reguards reguards	70
			al safeguards (1): deferred control	70
	5.1	3.1.1	Advance determination and corrective intervention	70
			Advance determination in data protection: licence,	
		01212	notification/registration, and prior checking	71
		3.1.3	Advance determination as a good example as to	
		51110	why the distinction between monitoring and behaviour	
			modification is of little relevance	72
		314	Corrective intervention: the data protection	
		3.1.1	authorities' powers	73
	3.2	Form	al safeguards (2): regulation through organisation	74
	3.2	Form	al safeguards (3): beyond the Data Protection Directive	75
	3.3		Facilities v requirements	75
			Regulation by classification	75
	3 /		al safeguards (4): beyond Freund's classification:	
	3.4		subject rights	75
			Data subject rights as safeguards: formal safeguards of	
		3.4.1	deferred control	75
		312	Data subject's right to be informed (Arts 10 and 11):	
		3.4.2	advance determination	76
		2/3	Rights of access and to object: corrective intervention	76
	1 C11h		ve safeguards	78
			ls and data legitimacy	79
			imption: the main safeguard	80
		Cons		80
	3.4		Consent as a safeguard in data protection	80
			Consent as a safeguard in other fields	82
		5.2.3		
		3.4.3	and transparency	83
	F 2	Thal	egitimate interests of the data controller	83
		forcem	- · · · · · · · · · · · · · · · · · · ·	84
			ons: data protection as command and control regulation	
			roportionality principle	84
	and	a the p	Toportionality principle	
3.	Issue	s with	data protection as command and control regulation	87
	1. Int	roduct	tion: data protection and issues with command and	
			egulation	87
			sulting from the "diagnosis-prescription" aspect of	
			d and control regulation	89
	3 Iss	nes rev	volving around enforcement	92
	4 Lis	at of ch	allenges related to evolutions in data processing practices	94
	5. Co	mmar	nd and control issues at the data protection level	96
	5. 51	Ineff	iciency of the data protection core principles/congruence	96
			ertainty/lack of clarity, predictability, transparency	98
			olicity and accessibility	101
	0.0		A CONTROL OF THE PARTY OF THE P	

xii TABLE OF CONTENTS

	5.4 Enforcement	106			
	5.4.1 Under enforcement	106			
	5.4.2 Issues with advances in technology	107			
4.	Changes of regulatory models: from command and				
	ntrol to meta regulation	109			
	Introduction	109			
	The plinth of meta regulation: the "risk management agenda"	110			
	2.1 The rise of corporate governance	110			
	2.2 The role of corporate governance in the transformation of	3			
	risk and risk management: emphasis on process	111			
	2.3 Governance and the neoliberal logic of risk: responsibilisation	110			
	and risk taking	112			
	2.4 Governance and the transformation of organisational activity as				
	risk taking: from risk governance to the risk management agenda	110			
	(or risk management 2.0): the turning inside out of organisations	113			
	The risk management agenda in practice	114			
	3.1 Role of internal controls	115			
	3.1.1 Original meaning of internal controls	115			
	3.1.2 The transformation of internal controls as risk	115			
	management: the role of audit and quality control	116			
	3.2 The risk management agenda's methodologies	110			
	3.3 The values of the risk management agenda: responsibility	117			
	as a "social licence" to operate	117			
	The ISO 31000 Standard as an embodiment of the risk	119			
	management agenda	119			
	4.1 Risk management principles	120			
	4.2 Risk management framework	123			
	4.3 Risk management process	123			
	Addressing the command and control issues	120			
	5.1 Command and control shortcomings: lack of expertise	123			
	and resources5.2 Command and control as responsive regulation: deterrence				
		124			
	and compliance	125			
	. Smart regulation 6.1 Defining smart regulation	125			
	6.2 Smart regulation and data protection	127			
	From smart regulation to meta regulation	130			
	7.1 Defining meta regulation	130			
	The role of internal controls and the risk management agenda in				
	collaborative models of regulation	132			
	8.1 Risk management at the heart of collaborative models of regulation	132			
	8.2 Summarising the collaborative shifts taking place	133			
	2. Conclusion: meta regulation and data protection, towards the				
	risk-based approach	135			
	T I				

2.12.1 Internal controls: regulatory resource only—or most

2.12.2 The GDPR: a much more collaborative iteration of the

164

165

exclusively—at the internal level

risk-based approach

xiv TABLE OF CONTENTS

			2.12.3	The risk-based approach: a piecemeal implementation of		
				the risk management agenda?	168	
			2.12.4	Enforcement: enforced self-regulation and the ladder of		
				enforcement	170	
		2.13	Conclu	uding thoughts on the risk-based approach	171	
	3	The	standar	d setting oriented risk-based approach	171	
	٥.	3.1	Introd		171	
		3.2		andard setting oriented risk-based approach as a response to		
		0.2		tory failures	172	
			3.2.1	Implementation shortcomings	172	
			3.2.2	Conflicting logic(s): purpose requirement vs purposeless		
				processing, or the conflict between collection based and		
				use based risk assessment	172	
		3.3	The M	icrosoft approach	174	
			3.3.1	A use-based risk-based approach	174	
			3.3.2	A neoliberal take on risk analysis	175	
			3.3.3	From a neoliberal take on risk analysis to a deregulatory		
				approach?	176	
			3.3.4	Concluding remarks on the Microsoft risk-based approach	179	
		3.4		pragmatism: less risky risk and more optimistic approaches	180	
			3.4.1	Presenting new pragmatisms	180	
			3.4.2	New pragmatisms and the ideal of natural compliance at		
				the heart of meta regulation	183	
6.	. Risk and the risk-based approach: Between data protection risks					
				nce risks	185	
				on: various notions of risk at play	185	
				onstitutive elements of risk	187	
	3	. Def	ining a	data protection risk	188	
		3.1		omputer: the risk source	188	
		3.2	Risk f	actors, risks, and harms	189	
		3.3	Risk f	factor (1): extent of the processing: increased data quantity	189	
			3.3.1	Risk from risk factor (1): inaccuracy	190	
			3.3.2	Harms stemming from inaccuracy	190	
		3.4		factor (2): properties of the processing: opaque and	100	
				ased access to, and use of data	190	
			3.4.1	Risk (1) from risk factor (2): "dragnet effect"	191	
			3.4.2		191	
			3.4.3		101	
				over personal data	191	
			3.4.4	Harms stemming from loss of control over personal data	191	
	3.5 Risk factor (3): type of processing: new bureaucratic and mana					
			pract		193	
			3.5.1		193	
			3.5.2		194	
		3.6	Cond	cluding thoughts on the concept of a data protection risk	195	

		3.7	The N	IST Privacy Engineering and Risk Management in Federal	
				ns Framework as a risk analysis methodology embodying	106
				tion of data protection risk	196
			3.7.1		197
				methodology: three feared events	197
	4.			n of risk in the GDPR: compliance risk	
				understanding compliance risk	198
		4.2	Traces	s of the GDPR risk as compliance risk	200
		4.3		sk-based approach as "data protection on the ground": doing	202
				analysis with the CNIL methodology	202
		4.4	Other	compliance risk management methodologies	206
	5.	Coı	nclusio	n: The difference between compliance and "proper"	200
		dat	a prote	ction risk, and the logic of meta regulation	208
7.	\mathbf{T}	he ri	sk-bas	sed approach in practice: Caveats	212
	1.	Int	roducti	ion	212
	2.	Me	thodol	ogical issues	213
				criteria step: taking risks	213
		2.2	Differ	rent possibilities to assess risks	214
			2.2.1	The difference between toxicology and epidemiology	214
			2.2.2	Additional caveats surrounding the assessment of risks	218
			2.2.3		
				different possibilities of assessment	219
		2.3	Risk r	management sensu stricto (ss)	220
				management and data legitimacy	222
	3.			ry issues	223
				retion and consistency: two contradictory requirements	223
				utional or secondary risks: competing risks	227
		3.3	Ther	isk-based approach and risk-based regulation, or the risk	
		0.0		formation of the regulators themselves	228
	4	Ris		agement on the ground	230
	1			uate collection and use of data	230
		4.2		laced pretences at objectivity	231
			Com	plexity and lack of adequate expertise	233
		1.5	Ther	risk-based approach and resource efficiency: a zero-sum game?	234
				nation of efficiency	235
				w organisational mindset	235
	5			ons: meta regulation and utopia	236
C				Back to the rights/risk-based approaches, and the future of	220
			protect		239
	1			y of the findings: approaching the debate on rights/risk-based	
		ap	proach	es from a different perspective	239
	2	. Th	e risk-l	based approach and the future of data protection	248
P	ih1	ioar	aphy		253
	nde		rpiry		271