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Is criminal law an appropriate tool to protect against wrongs with of personal data?

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observation

- The regulation regulates all but one thing: will data wrongs be answered by a system of criminal sanctions or by a system of administrative sanctions or both?





Today ?

- Countries that created many 'criminal data wrongs' (crimes)
- Countries that created very few or no criminal data crimes but implemented administrative sanctions for 'administrative data wrongs'



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Examples

- Wrong 1: not notifying dpa about a processing (most)
- Wrong 2: re duty to confidentiality (A, F, Sp, L)
- Wrong 3: re processing of sensitive data (B, D, I, Sp, Sw)
- Wrong 4: re duty to security (B, D, F, I, Sp, L)





Many more wrongs in Belgium and Danmark

- 100.000 euro in Belgium when processing is unfair or lawfull/when contrary to purpose spec.princ/when data are excessive or not accurate or held excessively long



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Practical consequence

- A data wrong in Belgium can trigger action of DPA but when the DPA thinks a sanction is needed : turn to judiciary
- A data wrong in Belgium can trigger action of judiciary even without DPA



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Practical consequence (cont)

- A data wrong in the Netherlands will trigger action of DPA that can make use of its administrative sanctions



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Criteria to choose between CLS and ALS?

- Symbolic value of the CLS;
- Capacity of Law Enforcement Agencies LEA (police or DPA?)
- Effectivity (can LEA eg postpone the sanction?);
- Societal understanding of the wrongs
- Due process level needed





But wait a minute:

- how come nobody has asked me so far what criminal law actually is and where I got these criteria?
- Ok let us go into the metaphysics of criminal lawyers





Criminal law understood by criminal lawyers

- Brutishness (hard treatment aspect of CL)/Last resort

Eg. Prisons, criminal records,

- Fair attribution and establishment of responsibility (responsibility aspect of CL)

Eg PNR and blacklisting



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Criteria are eroding

- Adm sanctions brutish
- Amd sanctioning powers more elaborated
- Due process level increases
- On the other hand criminal law more instrumentalised, less unique





Golden question

- Apply all this to data protection: where does this bring us?

No CL, all CL or some CL?





thoughts

- Why did EU forget the criminal chapter?
- Forum shopping?
- Practical consequences? One stop shop?
- Future: a directive?





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Thank you!

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14