

Available online at www.sciencedirect.com

ScienceDirect

www.compseconline.com/publications/prodclaw.htmComputer Law
&
Security Review

The future of consumer data protection in the E.U. Re-thinking the “notice and consent” paradigm in the new era of predictive analytics

Alessandro Mantelero*

Department of Management and Production Engineering, Politecnico di Torino, Turin, Italy

ABSTRACT

Keywords:

Data protection
Consent
Data protection impact assessment
Big Data
Data protection authorities

The new E.U. proposal for a general data protection regulation has been introduced to give an answer to the challenges of the evolving digital environment. In some cases, these expectations could be disappointed, since the proposal is still based on the traditional main pillars of the last generation of data protection laws. In the field of consumer data protection, these pillars are the purpose specification principle, the use limitation principle and the “notice and consent” model. Nevertheless, the complexity of data processing, the power of modern analytics and the “transformative” use of personal information drastically limit the awareness of consumers, their capability to evaluate the various consequences of their choices and to give a free and informed consent.

To respond to the above, it is necessary to clarify the rationale of the “notice and consent” paradigm, looking back to its origins and assessing its effectiveness in a world of predictive analytics. From this perspective, the paper considers the historical evolution of data protection and how the fundamental issues coming from the technological and socio-economic contexts have been addressed by regulations. On the basis of this analysis, the author suggests a revision of the “notice and consent” model focused on the opt-in and proposes the adoption of a different approach when, such as in Big Data collection, the data subject cannot be totally aware of the tools of analysis and their potential output. For this reason, the author sustains the provision of a subset of rules for Big Data analytics, which is based on a multiple impact assessment of data processing, on a deeper level of control by data protection authorities, and on the different opt-out model.

© 2014 Alessandro Mantelero. Published by Elsevier Ltd. All rights reserved.

* Department of Management and Production Engineering, Politecnico di Torino, C.so Duca degli Abruzzi, 24, 10120 Torino, Italy.

E-mail address: alessandro.mantelero@polito.it.

<http://dx.doi.org/10.1016/j.clsr.2014.09.004>

0267-3649/© 2014 Alessandro Mantelero. Published by Elsevier Ltd. All rights reserved.

1. Introduction

In the last few years, the debate surrounding data protection and privacy has focused on the future wave of new regulations. Driven by the Web 2.0 environment and the economy of data,¹ private companies and governments have become even more data-centric. However, the high demand for personal information, the complexity of the new tools of analysis and the increasing numbers of sources of data collection,² have generated an environment in which the “data barons” (i.e. big companies, government agencies, intermediaries)³ have a control over digital information which is no longer counter-balanced by the user's self-determination.⁴

¹ On the economic value of personal information, see Ian Brown, ‘The economics of privacy, data protection and surveillance’ in J.M. Bauer and M. Latzer (eds.) *Research Handbook on the Economics of the Internet* (Edward Elgar 2014) (forthcoming) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2358392 accessed 27 February 2014; Joseph W. Jerome, ‘Buying and selling privacy: Big Data's Different Burdens and benefits’ (2013) 66 *Stan. L. Rev. Online* 47, 47–49; OECD, ‘Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value’ (2013). OECD Digital Economy Papers, No. 220, OECD Publishing <http://www.oecd-ilibrary.org/docserver/download/5k486qtxldmq.pdf?expires=1403110041&id=id&accname=guest&checksum=1F20BE8EB6E36BA2F7D94A175C5FB089> accessed 27 February 2014. ENISA, ‘Study on monetising privacy. An economic model for pricing personal information’ (2012) <http://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/monetising-privacy> accessed 27 February 2014. See also Howard J. Beales and Jeffrey A. Eisenach, ‘An Empirical Analysis of the Value of Information Sharing in the Market for Online Content’ (2014) Navigant Economics http://images.politico.com/global/2014/02/09/beales_eisenach_daa_study.html accessed 27 February 2014.

² See Luciano Floridi, *The 4TH Revolution. How the Infosphere is Reshaping Human Reality* (OUP 2014) 96 (“the fourth revolution has brought to light the intrinsically informational nature of human identity”).

³ See Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data. A Revolution That Will Transform How We Live, Work and Think* (John Murray 2013) 182; Federal Trade Commission, ‘Data brokers. A Call for Transparency and Accountability’ (2014) <http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf> accessed 25 June 2014. See also Alessandro Mantelero and Giuseppe Vaciago, ‘Social media and big data’ in Babak Akhgar, Francesca M. Bosco, and Andrew Staniforth (eds), *Cyber Crime and Cyber Terrorism Investigator's Handbook* (Elsevier Science 2014).

⁴ Since the articles focuses on consumer data protection, for the purposes of the article, consumer, user and data subject are considered as synonyms. On the right to informational self-determination, it is worth mentioning the influential decision adopted by the Federal German Constitutional Court (Bundesverfassungsgericht), 15 December 1983, *Neue Juristische Wochenschrift*, 1984, 419 https://www.zensus2011.de/SharedDocs/Downloads/DE/Gesetze/Volkszaehlungsurteil_1983.pdf?__blob=publicationFile&v=9 accessed 25 June 2014. See also Michael A. Froomkin, ‘The Death of Privacy?’ (2000) 52(5) *Stan. L. Rev.* 1461, 1464; Anita L. Allen, ‘Coercing Privacy’ (1999) 40 (3) *Wm. & Mary L. Rev.* 723; Paul M. Schwartz, ‘Privacy and Democracy in Cyberspace’ (1999) 52 *Vand. L. Rev.* 1690, 1661; Jerry Kang, ‘Information Privacy in Cyberspace Transactions’ (1998) 50(4) *Stan. L. Rev.* 1193, 1203; Alan F. Westin, *Privacy and Freedom* (Atheneum 1970) 330–399; Charles Fried, ‘Privacy’ (1968) 77 (3) *Yale L. J.* 475, 482–483.

Nevertheless, all the ongoing proposals for a reform of data protection regulations, both in the U.S.⁵ and Europe,⁶ are still focused on the traditional main pillars of the so called “fourth generation” of data protection laws.⁷ In the field of consumer data protection, these pillars are the purpose specification principle, the use limitation principle and the “notice and

⁵ See The White House, ‘A Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy’ (2012) <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf> accessed 25 June 2014, 47–48; The White House, ‘Executive Office of the President. Big Data: Seizing Opportunities, Preserving Values’ (2014) http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf accessed 25 June 2014, 17–21, 55–57, 60–61. See also Daniel J. Solove, ‘Introduction: Privacy Self-Management and the Consent Dilemma’ (2013) 126 *Harv. L. Rev.* 1880; Julie E. Cohen, ‘Between Truth and Power’ in Mireille Hildebrandt and Bibi van den Berg (eds), *Freedom and Property of Information: The Philosophy of Law Meets the Philosophy of Technology* (Routledge) (forthcoming) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=234645910-11 accessed 25 June 2014.

⁶ See Proposal for a regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final, Brussels, 25 January 2012 (hereinafter abbreviated as PGDPR) http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf accessed 27 February 2014; Proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), (COM(2012)0011 – C7 0025/2012–2012/0011(COD)), compromise amendments on Articles 1–29 and on Articles 30–91 (hereinafter abbreviated as PGDPR-LIBE) http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/comp_am_art_01-29/comp_am_art_01-29en.pdf and http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/comp_am_art_30-91/comp_am_art_30-91en.pdf accessed 27 February 2014. In March 2014 the LIBE text was voted and approved by the whole Parliament <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0212&language=EN> accessed 25 March 2014.

⁷ See Viktor Mayer-Schönberger, ‘Generational development of data protection in Europe’ in Philip E. Agre, Marc Rotenberg (eds), *Technology and privacy: The new landscape* (MIT Press 1997) 219–241.

Download English Version:

<https://daneshyari.com/en/article/465471>

Download Persian Version:

<https://daneshyari.com/article/465471>

[Daneshyari.com](https://daneshyari.com)