

Available online at www.sciencedirect.com

SciVerse ScienceDirect

www.compseconline.com/publications/prodclaw.htm

**Computer Law
&
Security Review**

Will the European Commission be able to standardise legal technology design without a legal method?

Matthias Pocs

Universität Kassel, Kassel, Germany

ABSTRACT

Keywords:

Privacy impact assessment
PIA
Prior checking
Automated individual decision
Technical standardisation
Technology design
Legal compatibility
Fundamental rights

Privacy by Design (PbD) is a kind of precautionary legal technology design. It takes opportunities for fundamental rights without creating risks for them. Now the EU Commission “promised” to implement PbD with Art. 23(4) of its proposal of a General Data Protection Regulation. It suggests setting up a committee that can define technical standards for PbD. However the Commission did not keep its promise. Should it be left to the IT security experts who sit in the committee but do not have the legal expertise, to decide on our privacy or, by using overly detailed specifications, to prevent businesses from marketing innovative products? This paper asserts that the Commission’s implementation of PbD is not acceptable as it stands and makes positive contributions for the work of a future PbD committee so that the Commission can keep its promise to introduce precautionary legal technology design.

© 2012 Matthias Pocs. Published by Elsevier Ltd. All rights reserved.

1. Introduction

If one implements the principle of Privacy by Design (PbD) correctly it promotes protection of fundamental rights by means of technology design. It is also sensible to implement this legal technology design on the level of the EU. However this will only succeed if one bridges the gap between law and technology. Such a bridge is needed in order to check whether a PbD standard really promotes the law. In addition the PbD standards have to address technology designers because they are the only ones who can implement them.

Art. 23(4) of the regulation proposal¹ does not correctly implement the principle of PbD because it lacks a method of legal technology design. If one searches the regulation proposal for such a method, one finds the legal notion of Privacy Impact Assessment (as “Data Protection Impact Assessment” in Art. 33) which comes closest to such a legal method. PIA allows for consideration of data protection prior to deploying risky technology. Its main advantage is that it

specifies prior checking according to Art. 20 of the DPD by requiring a procedure for the acceptance of technology applications. However PIA does not actually require a method of legal technology design. Another reason why the EU Commission’s proposal did not implement PbD correctly relates to the addressee of PbD. It obliges technology users (“controller”) who can at best choose and adjust the technology, but not technology producers who can really design the technology.

This paper makes no comment on whether or not the proposed regulation is sensible in total but only makes comments on the correct implementation of the principle of PbD. The draft-DPR and its Art. 23 only serve as examples for a future regulation. In the future PbD could also be implemented in a directive or alone in a separate legal instrument. Concerning the implementation of the principle of PbD this paper falls back on the experience that the German Project Group Constitutionally Compatible Technology Design (“Projektgruppe verfassungsverträgliche Technikgestaltung” (provet))

¹ EU Commission, COM(2012) 11 final, 25.1.2012; unless otherwise specified, Articles refer to articles of the draft-DPR; on the draft-DPR *Hornung* (2012) *Zeitschrift für Datenschutz* 99.

gained with the method of “concretising legal requirements” (“*Konkretisierung rechtlicher Anforderungen*”) (KORA).

2. Protection of fundamental rights by technology design

The proposal of a Privacy-by-Design provision is rooted in the idea of promoting fundamental rights protection by technology design. As opposed to choosing and adjusting technology, this legal technology design refers to decisions about the specifications of a technical system. From the individuals’ point of view, this has two advantages. On the one hand it can avoid the very creation of predictable risks for fundamental rights. On the other it can take or even amplify the opportunities that technology applications offer. This in turn promotes the precautionary principle² of EU law.³

The approach of legal technology design offers several advantages. It helps the state to bear its “structural responsibility” (“*Strukturverantwortung*”⁴) and gives individuals technological aids for “self-protection” (“*Selbstschutz*”⁵). It helps legislators to fulfil their duty to observe technological development⁶ and to prepare the political process by showing equally effective but less intrusive alternatives. The legal technology design makes the protective precautions against function creep required by the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany)⁷ possible. The reference to technology is also necessary to comply with statutory provisions⁸ on “data avoidance.” Legal technology design makes it possible to automate partly the legal supervision which would otherwise not be effective.⁹ In Germany legal technology design is claimed with “*Systemschutz*”¹⁰ (“system protection”), “*Sozialorientierung beim Systementwurf*”¹¹ (“social

orientation during system design”) and “*Verfassungsverträgliche Technikgestaltung*”¹² (“constitutionally compatible technology design”) as well as in the EU with “Privacy by Design.”¹³

Consistently the PbD provision that the Commission suggests in Art. 23(4) promises to comply with these claims. The following section will describe the reason why legal technology design on the EU level is sensible. It will also outline the need for a method and the need for PbD to address technology producers.

First one should not standardise technology design on the regional level but on the EU level. The EU-wide technology design answers the globalisation of data flow because technology is effective worldwide. One critical factor for technology design is the technical standardisation. Thus one should bring legally promoting technological design into the international standardisation.¹⁴

The most influential players – the US¹⁵ and APEC countries¹⁶ – and also the organisations of OECD and UN do not opt for such a precautionary technology design. Only the EU can control the international standardisation to the benefit of the legal technology design. Therefore, the adoption of PbD standards on EU level could indeed make legal technology design a success. One would increase the pressure on the international standardisation because not only a regional legal system but also the law of the entire EU requires the PbD standard in question and could hence outweigh the US influence on the international standardisation. Insofar the Commission proposal is an opportunity to improve data protection. Therefore the legal technology design on the EU level is sensible and does not violate the subsidiarity principle.

Moreover, legal technology design must not be subject to a free balancing against general technical and economic aspects. The mere reference to technical standards cannot sufficiently limit the control of the economy. This can lead to a non-regulation of the law and can violate the democratic legitimisation of the legislator.¹⁷ In order to achieve real control of the law a method is necessary that does not follow the rules of the (applied) computer science(s) but the rules of legal science.

Technology design requires solving social conflicts. Solving these conflicts, that is transforming the law into reality, is in the field of technology, like in any other area of life, the

² Roßnagel in Eifert/Hoffmann-Riem (eds), ‘*Innovation, Recht und öffentliche Kommunikation*’ (Duncker und Humblot 2011) 44; Costa, (2012) 28 Computer Law and Security Review 14.

³ Art. 191 TFEU and ECJ *Artegodan GmbH et al. v EU Commission* T-74/00 et al (2002) ECR II-04945.

⁴ Roßnagel in Roßnagel (ed), ‘*Allianz von Medienrecht und Informationstechnik?*’, (Nomos 2001) 24.

⁵ Hoffmann-Riem (1998) *Archiv des öffentlichen Rechts* 534; Roßnagel (1997) *Zeitschrift für Rechtspolitik* 26; Borking (1996) *Datenschutz und Datensicherheit* 654.

⁶ BVerfGE (collection of decisions of the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany)) 112, 304 (316f); BVerfGE 90, 145 (191); Roßnagel, ‘*Rechtswissenschaftliche Technikfolgenforschung*’ (Nomos 1993) 99f.

⁷ BVerfGE 125, 260 (327); BVerfGE 65, 1 (46); to a lesser extent (concerning data security) this is also required by ECtHR *I v Finland* 2008 ECHR 20511/03.

⁸ For example § 3a of the German Data Protection Act and § 13(6) of the German Telemedia Act.

⁹ Bäumler (2004) *Datenschutz und Datensicherheit* 80 (81); Press release of the *Unabhängiges Landeszentrum für den Datenschutz* (Bizer) 28.2.2006 on Credit History; Podlech in Steinmüller (ed), ‘*Informationsrecht und Informationspolitik*’ (Oldenbourg Verlag 1976) 213.

¹⁰ Podlech in Brückner/Dalichau (eds), ‘*Beiträge zum Sozialrecht*’ (Verlag R.S. Schulz Percha 1982) 452ff; also Dix in Roßnagel (ed), ‘*Handbuch Datenschutzrecht*’ (CH Beck 2003); Roßnagel/Pfitzmann/Garstka, ‘*Modernisierungsgutachten zum BDSG*’ (German Ministry of Interior 2001) 39ff.

¹¹ Steinmüller, ‘*Informationstechnologie und Gesellschaft*’ (Wissenschaftliche Buchgesellschaft Darmstadt 1993) 570.

¹² Roßnagel/Wedde/Hammer/Pordesch, ‘*Digitalisierung der Grundrechte*’ (Westdeutscher Verlag 1990).

¹³ Article 29 Working Party (WP29), ‘*Future of Privacy*’ (WP168) paras 44ff; LRDP Kantor Ltd et al., ‘*Comparative study about data protection law*’ 20.1.2010 paras 131f; on international level: 32nd International Privacy Commissioners’ Conference, ‘*Resolution on Privacy by Design*’ 27.-29.10.2009; IPC Ontario (Cavoukian), ‘*Privacy by Design – The 7 Foundational Principles*’ 2011 Ontario; also the OECD claims to respect social values OECD, ‘*Guidelines for the Security of Information Systems and Networks*’ 1037th Council Meeting 25.7.2002 nos 5ff.

¹⁴ Roßnagel in Roßnagel (ed), ‘*Allianz von Medienrecht und Informationstechnik?*’, (Nomos 2001) 24.

¹⁵ Mankowski, (1999) *Arbeitsrecht für die Praxis* 140.

¹⁶ Bygrave, ‘*Privacy Protection in a Global Context*’ (2004) 47 *Scandinavian Studies in Law*, 319 (348).

¹⁷ Denninger, ‘*Verfassungsrechtliche Anforderungen an die Normsetzung im Umwelt- und Technikrecht*’ (Nomos 1990) 117ff; Lennartz (1989) *Datenschutz und Datensicherheit* 231 (232); Blanke (1986) *Kritische Justiz* 405 (415).

Download English Version:

<https://daneshyari.com/en/article/465515>

Download Persian Version:

<https://daneshyari.com/article/465515>

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