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## WHOSE PRIVACY? LOBBYING FOR THE FREE FLOW OF EUROPEAN PERSONAL DATA

Jockum Hildén  
University of Helsinki, Department of Social Research

The European institutions recently agreed on a new General Data Protection Regulation (GDPR), which will address data sharing and information privacy challenges associated with the global flow of personal data. The European Union aims to regulate beyond its territorial borders, as the Regulation will affect all businesses and organizations which collect data on EU citizens, regardless of country of origin.

For this reason, companies from all over the world have tried to influence European legislators in all stages of the legislative process. After over three years of amendments and negotiations, the European institutions finally agreed on the final text. The question is, how did the Regulation come into being and which stakeholders were effective in influencing the legislators? This paper focuses on presenting how the EU Council's amendments to the draft Regulation reflects the positions of stakeholders from a wide array of sectors that will be affected by the new law.

### Not Code as Law, but Law as a Reaction to Code

Stakeholder involvement in the European Union's legislative processes has previously been studied in relation to its contribution to the *throughput* legitimacy of EU policy (Schmidt, 2013). Throughput legitimacy refers to how institutionalized policy processes can contribute to the overall legitimacy of political institutions in addition to or in lack of policy input from the electorate.

However, the *élite pluralism* paradigm, according to which the policy processes in the EU are mostly attended by powerful interest groups (Coen, 2007), provides a striking critique against stakeholder involvement as a way to increase policy legitimacy. When legislators lack expert knowledge in policy areas, the consultative relationship between the EU institutions and stakeholders might evolve into one of dependency instead of mutual benefit.

The first draft regulation, as presented by the EU Commission in 2012, was preceded by two formal consultations on data protection, one in 2009 and one in 2011, which were open to the public. My earlier research showed that stakeholders representing

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private interests were far better represented than public interests in the consultations, which would support the elite pluralism paradigm. Private interests were expressed in 97 of 167 replies to the 2009 consultation, and in 152 of 288 replies in 2011. In other words, the majority of all replies represented private interests rather than public ones.

The data protection consultations are an example of how companies lobby EU institutions through several different associations and networks as well as in their own capacity. While structural imbalances in the participation of stakeholders in the legislative process can be a sign of biased legislation, one must also compare the documents lobbyists have provided to the different drafts by the EU institutions in order to draw conclusions on lobbying influence at all stages. The lobbying documents can hence reveal how informational privacy is constructed not only legally, but also socially, politically and technically.

New technologies have always challenged not only existing regulation but also existing social norms of privacy, on which laws are based (Tene & Polonetsky, 2013). In the case of EU law on data protection, novel technologies challenge social norms of when and what personal information can be accessed and distributed. Data that used to be known only to data subjects are now stored in the databases of private companies and public authorities. This raises several legal, political and ethical questions: Is keyword mining on an instant messaging app comparable to an actual person reading a private conversation? What is consent online? What data may be sold to third parties? The questions are hard to answer since social networks, fitness apps and smart smoke alarms lack historical equivalents, as the data they provide are significantly richer than what has previously been available (Ohm, 2010: 1725).

The constant collection of massive amounts of data from a multitude of sources has been coined *panspectric surveillance* by philosopher Manuel De Landa (1991: 180). This surveillance logic permeates most contemporary data-driven business practices and will be further intensified as the Internet of Things matures. The aim is to collect as much data as possible in order to produce *actionable intelligence* (Gandy, 2012: 125). This information may be used to identify security threats (Brown & Korff, 2009: 124), recognize customer patterns (Pridmore & Zwick, 2011: 272) and predict future behaviour (Zwick & Knott, 2009: 234; Hildebrandt, 2006: 548). Practically all sectors from e-commerce to aviation are thus part of the *panspectric diagram* (Palmås, 2011), yet this does not mean that all stakeholders participating in the surveillance of citizens in one capacity or another would have completely aligned interests. It is also through alterations of legal concepts related to informational privacy that the surveillance society evolves. This paper aims to analyze if the surveillance logics of different sectors can be found in the informational privacy concepts presented in the Council's draft legislation.

## **Data and Method**

The empirical data is composed of 85 stakeholder position papers containing suggestions on how to amend the Commission's initial draft Regulation and the Council's amended version of the Regulation. The final Regulation is a compromise between the EU institutions' versions, but the purpose of this study is to find out whether certain positions presented by lobbyists have been more willingly received by the

Council than the other EU institutions. I will thus look for key differences between the draft Regulation and the Council's version and compare the findings with the results of my earlier research on the contents of the position papers.

The results from this study provide a clearer picture of the privacy perceptions of different interest groups and their influence on the final General Data Protection Regulation. Although lobbying participation in the EU has been quite extensively researched, influence is an aspect often ignored in politics research. This paper will thus contribute to better understanding of the influence of lobbyists in the area of internet policy.

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