

User Empowerment, Consent and the Right to Data Portability

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Outline

- ▶ Big Data, Information/Power Asymmetries and (Intangible) Harms
- ▶ User Empowerment and Individual Control
- ▶ Consent Dilemma: opt-in or opt-out?
- ▶ Consent and Right to Data Portability

1. Big Data, Information/Power Asymmetries and (Intangible) Harms

- ▶ Big Data Implications for the relation between data subjects and data controllers
- ▶ Information Asymmetry: Black Box Society
- ▶ Power Asymmetry (in the context of data protection and fundamental rights)
- ▶ Harms: tangible and intangible

Harms arising from big data

	Solution	Types
Tangible/material harm	EU v. US collision - More targeted legislation (harm-based) or regulation on all forms of data processing	Discrimination opacity
Intangible/moral harm	Require protection. Different regulatory approaches.	<ul style="list-style-type: none">● Powerlessness● Inhibiting and chilling effect (surveillance effect; dataveillance)● Negative impact on autonomy (not harm-based)● The erosion of the ability of an individual to self present● Apprehension of future harms (subjective harm)

Source: Orla Lynskey, The Foundations of Data Protection Law (OUP, 2015)

2. User empowerment and Individual Control



- ▶ User empowerment - enhanced individual control - a bundle of rights (including consent, the most important and controversial basis for data processing)
- ▶ Basic assumption: knowledge + action
 - ▶ (1) an individual can be well informed
 - ▶ (2) she will make a rational decision on having his or her personal data processed
 - ▶ (3) on the basis of a cost-benefit analysis.

3. Consent and its problems



- ▶ Consent based model
- ▶ GDPR and new legal inventions e.g. the right to data portability
- ▶ Opt-out or opt-in
 - ▶ Effectiveness of individual control
 - ▶ Cognitive (We don't know) and structural problems (We cannot assess effectively)
 - ▶ Solove: partial privacy self-management

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| <ul style="list-style-type: none">• The power and information asymmetries arising from big data jeopardise effective control• Individuals are reluctant to change default settings• Individuals are irrational when making decisions, a phenomenon what we call 'privacy paradox' | <ul style="list-style-type: none">• Burdensome: privilege or liability?• Solove: companies can get around and make opt-in meaningless and undesirable |
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4. Consent & The Right to Data Portability

▶ RDP and individual control

- ▶ RDP is a form of individual control distinct from consent

REFLECTIONS

- ▶ what forms of control are necessary and useful to protect our personal data (what to control)
- ▶ Individual control = knowledge (about what) + action (cost-benefit analysis)

▶ RDP and consent

- ▶ An instrumental role in supporting consent: RDP and withdrawal of consent
- ▶ RDP: control that goes beyond consent to data processing
 - (1) Alter the way people make decisions on data processing: whether/who v. how
 - (2) Expands the grounds for decision-making
 - (3) Making decision-making easier and more flexible
 - (4) Enhance user autonomy: avoiding data misuse v. obtaining benefits

Conclusion

- ▶ A shift of focus: protecting personal data by
 - ▶ Controlling the process of data processing (knowledge required)
 - ▶ Competition/comparison (who process personal data)
- ▶ Opt-out + RDP better than opt-in: A moderate and realistic version of (partial) self-management
- ▶ In response to big data challenges:
 - ▶ Power asymmetry - apprehension and uncertainty can be alleviated not by information (enhanced consent) , but by actions of individuals (choose who can process personal data)
 - ▶ Information asymmetry - RDP does not affect too much by information asymmetry (the black box) arising from big data analytics because individuals make decisions not entirely based on information about ethical processing.

Thank you.

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