European Data Protection: In Good Health?

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Springer

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Preface

The informational society is in a state of constant flux. After the adoption of the Internet as a prominent channel of information (websites) and communication (e-mail, chat, IM, VOIP), we are now witnessing a transition whereby internet infrastructure is also used for storing and processing data. Cloud computing is replacing direct control of data on local devices with flexibility, scalability and accessibility from anywhere. Cloud computing however also complicates the privacy and data protection landscape because crucial concepts such as the 'data controller' and consequently their responsibilities, liabilities, duties, and the 'purpose of the processing' (which indicates what a processing is), are (further) blurred.

Next to this, we face an enormous growth of tracking, monitoring and surveillance applications. Automatic number plate recognition is not only being used to detect passing cars that are already on black-lists, but increasingly as a blanket method of collecting the number plates of all passing cars, only to be analysed afterwards in order to detect interesting or pertinent correlations. This shift from targeted to all-round monitoring is significant because it is at odds with and undermines the constitutional principle of the presumption of innocence, by actually turning it upside down. In the domain of commerce, internet users are increasingly taking for granted the free services that the internet offers, whilst ignoring the manner in which it works from the perspective of the service providers and the webmasters. The bottom line is however that if you do not pay for a service, you are not the customer, but rather the product that is actually being sold (to advertisers). The monitoring and profiling of online behaviour is the driving force in advertising, even though it may be to the detriment of human rights such as autonomy, privacy, data protection, non-discrimination, due process and dignity.

Although Europe has a significant legal data protection framework, built up around EU Directive 95/46/EC and the Charter of Fundamental Rights, the question of whether data protection and its legal framework are 'in good health' is increasingly being posed. Advanced technologies raise fundamental issues regarding key concepts of data protection and especially the relationship between the various stakeholders. Falling storage prices, increasing chips performance, the fact that technology is becoming increasingly embedded and ubiquitous, the convergence of technologies and other technological developments are broadening the scope and possibilities of

applications rapidly. Society however, is also changing, affecting the privacy and data protection landscape. The 'demand' for free services, security, convenience, governance, etc., changes the mindsets of all the stakeholders involved. Privacy is being proclaimed dead or at least worthy of dying by the captains of industry; governments and policy makers having to manoeuvre between competing and incompatible aims; and citizens and customers are considered to be indifferent.

In the year in which the plans for the revision of the Data Protection Directive will be revealed, the current volume brings together a number of chapters highlighting issues, describing and discussing practices, and offering conceptual analysis of core concepts within the domain of privacy and data protection. The chapters were written for and following up on the 4th international *Computers, Privacy and Data Protection* (CPDP2011) Conference: *In good health*?[1] The CPDP-conferences are annually held in Brussels. In 2011 the venue has been *Les Halles*, a prestigious cultural location offering facilities for both large plenary sessions, smaller interactive sessions and also small get-togethers. The conferences offer a unique format bringing together academics, (legal) practitioners, policy-makers, business representatives, data protection authorities, civil society representatives, activists and artists. They represent a multidisciplinary forum for participants with backgrounds in law, social sciences, technology, and humanities where the participants can exchange ideas, discuss current trends and issues regarding privacy and data protection, and (initiate) work towards solutions. The conference is composed of panels, side tracks, and side events, such as artistic displays related to privacy and data protection. The speakers and panellists are invited by the organisers or selected on the basis of an open call. Selected papers are published afterwards. This has already resulted into three edited volumes: *Reinventing data protection? (2009), Data Protection in a profiled world (2010)* and *Computers, privacy and data protection: an element of choice (2011)*. The present volume represents the sequel of the conference held in Brussels from 25–27 January 2011, just prior to the European Privacy Day (28 January 2011). The central theme was to what extent the current regulatory framework and practices are "in good health", and hence fit to cope with the ever changing information society in a time where the reviews of the existing legal framework both in the various EU member states as well as on the European level have become available and the renovation of the Data Protection Directive is in the works.

This book brings together a carefully selected set of papers that fit within the overall theme. Some of the chapters have first been submitted as abstracts and were peer reviewed before being presented at the "PhD evening event" of CPDP2011. They were subsequently resubmitted as full papers. Further chapters were also submitted by participants to the conference. All full papers have been peer reviewed by at least two anonymous readers, of which the comments were sent to the authors, who were required to take them into account (or reason why not). Versions were then subsequently checked for a final review. We are happy to take this opportunity to sincerely thank the reviewers who assisted us in this process: Pedro Bueso, Jean-François Blanchette, Johann Cas, Cecile De Terwangne, Els Debusser, Simone

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[1] For more information about the CPDP-conferences, see http://www.cpdpconferences.org.

Fischer-Huebner, Catherine Flick, Raphael Gellert, Gloria Gonzàlez-Fuster, Marit Hansen, Hans Hedbom, Mireille Hildebrandt, Simone van der Hof, Bert-Jaap Koops, Daniel Le Métayer, Leonardo Martucci, Charles Raab, Joseph Savirimuthu, Marc Van Lieshout and Tal Zarsky.[2]

The various contributions have been grouped into three themes. The book's first part focuses on surveillance, profiling and prediction. The information society thrives on the processing of (personal) data. This appears to be an open door, but what many people do not realise is that many data are processed unbeknownst to those involved. One can readily understand that online shops need certain data to perform contracts, but the amount of data processed prior to contracting far surpasses any need. By means of profiling, the internet users are drawn towards service providers and service offers. These profiles are based on behaviour (e.g., mouse clicks on websites), rather than on conscious data entries by those concerned. What's more, people are being monitored and profiled in public and private spaces. The resulting data is used for direct interventions, such as stopping individuals driving cars with license plate numbers found in a black-list in an ANPR system. Such data are also being used however to construct risk profiles used to predict future behaviour of both you and others. This section both describes practices in the public and private sector.

The second part of the book focuses on regulation, enforcement and security. It addresses governance issues and looks at the effectiveness and characteristics of various enforcement instruments, for example self regulation and data protection authorities. It also carves out the possibilities and difficulties of legal (law) enforcement in complex environments, for instance cloud computing and cross border police cooperation.

The third section then turns to some of the fundamental concepts in the area of privacy and data protection. It looks at trust in the context of cloud computing, highlighting that even if the data protection legal framework is suited for this environment, its opacity and complexity requires that users are able to trust service providers to behave appropriately. It also addresses the concept of personal data in addition to discussing the widely felt need for reliable electronic identities and the legal challenges in this area. Furthermore, the scope of data protection rights is scrutinized with a view of protecting individuals rather than protecting data. The prospect of using technology to enforce data protection obligations and rights (privacy by design, privacy enhancing technologies) is often coined as one way to improve the position of European citizens. As such, it is one of the pillars of the renewal of the Directive (COM (2010) 609 final). However, implementing legal provisions in computer systems is far from trivial. The final chapter is an essay on another crucial aspect in the Directive's overhaul: the right to be forgotten.

Reading the various chapters, it appears that the 'patient' needs to be cured of quite some weak spots, illnesses and malformations. European data protection is at a turning point and the new challenges are not only accentuating the existing flaws

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[2] In respect of the diversity of nationalities, disciplines, and perspectives represented in this book, the editors and the publisher have left the choices concerning the use of footnote references and/or a bibliography to the authors of the contributions.

and the anticipated difficulties, but also, more positively, the merits and the need for strong and accurate data protection practices and rules in Europe, and elsewhere. We hope that the present book will be useful and contribute to the work done to revise the European Data Protection Directive.

Serge Gutwirth
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About the Authors

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Els De Busser studied Law at Antwerp University and obtained an additional degree in Criminology and an Advanced Master's degree in European Criminology and Criminal Justice Systems from Ghent University, Belgium. From March 2001 to October 2009, she worked as a researcher and professor's assistant in the field of European Criminal Law at Ghent University, Institute for International Research on Criminal Policy where she defended her PhD entitled 'EU internal and transatlantic cooperation in criminal matters from a personal data perspective. A substantive law approach' in May 2009. In November 2009, she joined the European Criminal Law section of the Max Planck Institute in Freiburg, Germany. Her research and publications focus on international cooperation in criminal matters and data protection.

Paul De Hert is an international human rights expert. The bulk of his work is devoted, but not limited, to criminal law and technology & privacy law. At Brussels, Paul De Hert holds the chair of 'Criminal Law', 'International and European Criminal Law' and 'Historical introduction to eight major constitutional systems'. In the past he has held the chair of 'Human Rights', 'Legal theory' and 'Constitutional criminal law'. He is Director of the VUB-*Research group on Fundamental Rights and Constitutionalism* (FRC), Director of the Department of Interdisciplinary Studies of Law (Metajuridics) and core member of the internationally well-accepted VUB-*Research group Law Science Technology & Society* (LSTS) (see: www.vub.ac.be/LSTS). He also holds a position as an associated-professor in the internationally renowned Tilburg Institute for Law, Technology, and Society (TILT) at the Tilburg University (http://tilt.nl). He is member of the editorial boards of several national and international scientific journals such as the *Inter-American and European Human Rights Journal* (Intersentia), *Criminal Law & Philosophy* (Springer). He is co-editor in chief of the *Supranational Criminal Law Series* (Intersentia) and of the New Journal of European Criminal law (Intersentia).

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Open Source. Besides the privacy and surveillance topic, his research interests are the free content movement and the social implications and effects of technologies.

Serge Gutwirth is a professor of human rights, legal theory, comparative law and legal research at the Faculty of Law and Criminology of the Vrije Universiteit Brussels (VUB), where he studied law, criminology and also obtained a postgraduate degree in technology and science studies. Gutwirth founded and still chairs the VUB-research group *Law Science Technology & Society* (http://www.vub.ac.be/LSTS). He publishes widely in Dutch, French and English. Amongst his recent co-edited publications are *Safeguards in a world of ambient intelligence* (Springer 2008), *Profiling the European citizen* (Springer 2008), *Reinventing data protection?* (Springer 2009), *Data protection in a profiled world* (Springer 2010) and *Computers, privacy and data protection: an element of choice* (Springer 2011). Currently, Serge Gutwirth is particularly interested both in technical legal issues raised by technology (particularly in the field of data protection and privacy) and in more generic issues related to the articulation of law, sciences, technologies and societies.

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Tal Zarsky is a Senior Lecturer at the University of Haifa—Faculty of Law. In 2010–2011 He is a Global Hauser Fellow, at NYU Law School. His research focuses on Information Privacy, Internet Policy, Telecommunications Law and Online Commerce, Reputation and Trust. He also taught Contract and Property law. He has written and presented his work on these issues in a variety of forums, both in Israel and worldwide. In addition, he has advised various Israeli regulators and legislators on related issues. Dr. Zarsky is also a Fellow at the Information Society Project, at Yale Law School. He completed his doctorate dissertation, which focused on Data Mining in the Internet Society, at Columbia University—School of Law. Most recently, Dr. Zarsky participated, as an affiliate with the Centre for Law in the Information Society in Leiden University, in the research project "Data Mining without Discrimination", funded by the Dutch Research Council (NWO).