

Self-regulation in data protection

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After all the data breaches that companies have suffered in the past few months, businesses need to focus on regaining consumer trust in order to be able to keep collecting data, which is imperative for technological advances. It is time for companies to think about how to regain this trust, whether by being clearer about their privacy policies, or convincing the governments involved to introduce country-wide regulation in countries where there is no harmonised regulation. Instruments such as self-regulation and codes of conduct are great ways for companies to hold themselves accountable, show their compliance with privacy regulations, keep their consumers informed by clearly stating their priorities and keep up with technological changes.

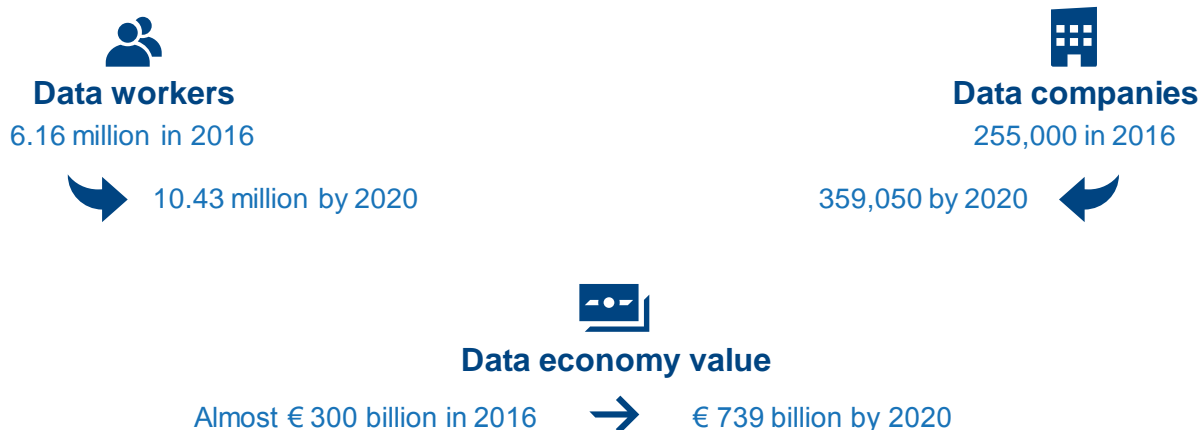
The value of data

Data is becoming an increasingly strategic asset for companies. The use of Big data technologies helps them to know more about their clients and personalise their products, allowing them to innovate faster. Data processing is giving rise to a new economy, with business models that monetise data.

The European Commission conducted a study¹ and calculated that “the overall value of the data economy grew from €247 billion in 2013 to almost €300 billion in 2016”. It estimates that the value of data amounts to nearly 2% of Europe’s GDP and is expected to rise to 4% in 2020, equivalent to €739 billion.

On the other hand, we all see the need to monitor this massive data processing in a certain way, in order for data not to be misused or stolen and we also see the need to give users more control over their data.

Figure 1 European Data Market



Source: European Market Study

1: European Commission (2017), *The European Data Market Study: Final Report* <http://datalandscape.eu/study-reports/european-data-market-study-final-report>

All over the world, countries are strengthening their regulations related to privacy, setting high protection standards in order to adapt the laws to the new digital environment. The European Union recently implemented a new regulation, the General Data Protection Regulation (GDPR), which was enforced on 25 May 2018. The GDPR is a uniform data protection regulation that applies to all EU companies and to all those doing business in the EU. This regulation sets out exactly how companies are required to manage personal data and it establishes fines up to €20 million or 4% of global annual turnover in the event of infringement.

There are other jurisdictions, like the United States, with no single public policy for data protection, but a mix of state and federal regulations, where many data protection laws and regulations are sector-specific.

Understanding Self-Regulation

Despite the adoption of all these regulations, it has become evident that to deal with the challenges of the digital era it is essential to adopt new approaches to the issue of data protection. The traditional law-making process based on national jurisdictions, with territorial courts applying local laws, is clearly insufficient in this new global environment². New concepts are necessary, as Lessig stated several years ago: “Technology Will Create New Models for Privacy Regulation”³ and “collective values should regulate the emerging technical world. Our problem is that we do not know how it should be regulated, or by whom.”⁴

Self-regulation is ‘*the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves*’⁵

There are different types of self-regulation: from pure self-regulation models to co-regulation models⁶. The pure model, where there is no public intervention aimed at imposing or fostering regulation, whether directly or indirectly⁷ is very rare. Even in countries like the United States, where pure models could exist, the aforementioned sectoral laws cover some aspects of data protection, therefore having an influence on self-regulation. In these countries, there is a higher level of participation by authorities, in order to foster the consumer protection issues that may arise and are not properly covered by pure self-regulation tools.

After the recent data breach scandals suffered by different US corporations (Facebook, Wells Fargo, Under Armour, etc.), **it has become clear that the way companies are self-regulated in the U.S. is not working satisfactorily** and consumers are starting to realise this. In the absence of federal regulation, California is moving ahead with the new California Consumer Privacy Act (CCPA). This new standard for data protection will be enforced from 1 January 2020. One risk is that if each state adopts their own version of the CCPA, the system would end up being highly inefficient and fragmented, with companies having to comply with up to 50 different laws. There are also some companies, like Microsoft, that are implementing the GDPR as their standard for self-regulation⁸.

Those who argue that self-regulation is the best option believe that it has many benefits. Firstly, it is cheaper than government regulation, since companies can individually adapt to their own needs and thus be more efficient in the implementation of their own regulations. Secondly, government regulations are not always able to keep up quickly

2 Kleinsteuber, Hans J. (2004). *The Internet between Regulation and Governance*. <https://www.osce.org/fom/13844?download=true>

3: Rosenbush, Steve (2015). “Lawrence Lessig: Technology Will Create New Models for Privacy Regulation”. *The Wall Street Journal*. <https://blogs.wsj.com/cio/2015/12/30/lawrence-lessig-how-technology-policy-will-evolve/>

4: Ratai, Balazs (2006). “Understanding Lessig: implications for European Union cyberspace policy”. *International Review of Law, Computers and Technology*. November 2006 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=905866

5: European Commission, European Parliament & Council of Ministers (2003), ‘Inter-Institutional Agreement on Better Lawmaking’, *OJC* 321, 31.12.2003, p. 1. <http://www.europarl.europa.eu/legislative-train/theme-union-of-democratic-change/file-interinstitutional-agreement-on-better-law-making>

6: van Heesen-Laclé, Zayenne D, Anne C.M. Meuwese (2007) “The legal framework for self-regulation in the Netherlands. *Utrecht Law Review* <https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.50/>

7: Cámara Nacional de la Industria Electrónica, de Telecomunicaciones y Tecnologías de la Información de Mexico. *Study on self-regulation regarding privacy and personal data protection within the information technology environment*. https://prosoft.economia.gob.mx/Imagenes/ImagenesMaster/Estudios/Prosoft/FREF_14.pdf

8: Microsoft (2018). *Safeguard individual privacy with the Microsoft Cloud*. <https://www.microsoft.com/en-us/trustcenter/Privacy/GDPR>

enough with technological changes, and they may end up hampering innovation. Thirdly, proponents argue that it can promote deliberate and efficient ways to deal with consumer privacy, since self-regulation can foster competition between companies in achieving the best privacy laws.

From self-regulation to co-regulation: Codes of Conduct

Co-regulation is a hybrid solution: “a mechanism whereby attaining the objectives laid down in a legislative act is entrusted to parties which are recognised in the field. The basic legislative act defines the framework and the extent of the co-regulation. The parties concerned are then able to conclude voluntary agreements between themselves in order to achieve the objectives of the legislative act.”⁹

In general, we find an increasing trend towards a model with regulation regarding data protection issues that includes co-regulation mechanisms. In European regulation, the GDPR encourages companies to draft codes of conduct to show compliance with GDPR guidelines and to regain consumer trust.

It is important to distinguish the codes of conduct regulated in GDPR from the internal ones that many companies are adopting, which include their vision, values and goals about different issues. Although they are meant to improve the efficiency of the business and consumer trust, these codes of conduct face some important challenges: first, they do not always comply with the law. For example, in Spain¹⁰ courts have had to clarify the obligations employers impose on workers, because management was over-reaching its powers. Second, in the specific case of consumer privacy, codes of conduct are sometimes vague, incomplete and open to interpretation, which undermines consumer trust.

Conclusion

Although pure self-regulation instruments have benefits for innovation, are cheaper and allow for more flexibility, they do not always have the consumer’s privacy as their top priority. The effective use of codes of conduct may require some type of government regulation, which can provide the credibility that helps build consumer trust. It is of course important that such regulation leaves enough flexibility to be able to adapt to innovation and change. It is still not clear what the best way to achieve this will be.

A mix of self-regulation and legislation (co-regulation model) seems more balanced than pure self-regulatory alternatives. Co-regulation provides a general regulatory framework while still maintaining some of the benefits of self-regulation. The idea is that self-regulation and codes of conduct do not always have the desired effect if they are not accompanied by legislation. This is the balance that the GDPR is trying to strike: it promotes the use of codes of conduct, while setting down regulatory rules.

9: European Union (2011) *Interinstitutional Agreement on better law-making*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A110116>

10: Del Rosal, Pedro (2018) “¿Cuándo chocan los códigos éticos o de conducta con la ley?”. *El País*. July 2, 2018. https://cincodias.elpais.com/cincodias/2018/07/02/legal/1530513592_722562.html

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