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# How Uninformed is the Average Data Subject? A Quest for Benchmarks in EU Personal Data Protection<sup>\*</sup>

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## Abstract

Information obligations have always been crucial in personal data protection law. Reinforcing these obligations is one of the priorities of the legislative package introduced in 2012 by the European Commission to redefine the personal data protection legal landscape of the European Union (EU). Those responsible for processing personal data (the data controllers) must imperatively convey certain pieces of information to those whose data is processed (the data subjects), and they are expected to do so in an increasingly *transparent* manner. Beyond these punctual information requirements, however, data subjects appear to always be and inevitably remain in a state of relative ignorance, as in almost constant need of further guidance. Data subjects are nowadays often depicted as unknowing consumers of online services, services which surreptitiously take away from them personal data thus conceived as a valuable asset. In light of these developments, this contribution critically investigates how EU law is envisaging data subjects in terms of knowledge. The paper reviews the birth and evolution of information obligations as an element of European personal data protection law, and asks whether thinking of data subjects as consumers is consistent with the notion of *average consumer* functioning in EU consumer law. Finally, it argues that the time might have come to openly clarify when data subjects are unlawfully misinformed, and that, in the meantime, individuals might benefit not only from accessing more *transparent* information, but also from being made more aware of the limitations of the information available to them.

## Keywords

data protection, transparency, European Union, data subject, privacy, information, average consumer

## Topic

data protection

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## ¿Hasta qué punto está desinformada la persona interesada? Una búsqueda de parámetros en la protección de datos personales de la UE

### Resumen

Las obligaciones de información siempre han sido un elemento esencial de las leyes de protección de datos personales. Reforzar estas obligaciones es una de las prioridades del paquete legislativo introducido en 2012 por la Comisión Europea para definir el panorama legal en materia de protección de datos personales de la Unión Europea (UE). Los responsables del tratamiento de datos personales (los controladores de datos) tienen que transmitir obligatoriamente determinada información a las personas de quienes se procesan estos datos (las personas interesadas) y se espera que lo hagan de forma cada vez más «transparente». Sin embargo, más allá de estos requisitos de información puntual, las personas interesadas siempre parece que se encuentran –e inevitablemente permanecen– en un estado de relativa ignorancia, casi en una necesidad constante de nuevas orientaciones. Actualmente, suelen describirse como consumidores desinformados que desconocen el funcionamiento de los servicios en línea, servicios que se apoderan subrepticamente de datos personales considerados valiosos. Teniendo en cuenta todo esto, este artículo explora críticamente la manera como la legislación de la UE concibe a las personas interesadas en términos de conocimiento, analiza el origen y la evolución de las obligaciones de información en la legislación europea sobre protección de datos personales y se pregunta si el hecho de concebir a las personas interesadas como consumidoras es consecuente con la noción de consumidor mediano que funciona en la legislación sobre consumo de la UE. En último lugar, sostiene que quizás ha llegado el momento de aclarar abiertamente cuándo las personas interesadas están ilícitamente mal informadas y señala que, mientras, podrían beneficiarse no tan solo de acceder a una información más «transparente» sino también de conocer mejor las limitaciones de la información que tienen a su disposición.

### Palabras clave

protección de datos, transparencia, Unión Europea, persona interesada, privacidad, información, consumidor medio

### Tema

protección de datos

## 1. Introduction

Individuals are not properly informed about the processing of personal data about them. This recurrent statement can hide behind its apparent simplicity many different assumptions. It can be used to justify the need for (better) laws on privacy and personal data protection, or, on the contrary, to prove their limitations or ineffectiveness. It can be presented as a problem to be tackled imposing obligations on those who process data (the data processors) or to inform those

whose data are processed (the data subjects), but it can also be viewed as proof of a persistent resistance of such data processors to provide data subjects with the full picture of what is happening to the data about them.

This contribution<sup>1</sup> investigates how data subjects are envisaged in relation to knowledge in European Union (EU) law. It looks for useful references to assess the extent to which individuals are supposed to be informed or uninformed about data processing practices concerning them, as well as to understand the conceptualisations

1. The present research has been carried out in the context of the EU-funded project *Privacy and Security Mirrors* (PRISMS).

and operationalisations of such (mis)information. To this purpose, the paper first offers a brief historical review situating the roots of the recognition of an individual's lack of knowledge at the very origins of personal data protection. This is followed by a review of information obligations of data processors and their relation to fairness and transparency. We then introduce the increasingly popular conception of data subjects as consumers, which leads to an inquiry into the possible applicability of the legal notion of *average consumer* in the context of EU data protection law.

## 2. (Forever) Informing the Data Subject

The idea that individuals must be informed when data about them is processed came to light as early as the 1960s. Historically, the surfacing of modern notions of privacy and personal data protection was precisely based on a perception of a dangerous loss of control and lack of awareness suffered by citizens due to the advent of computerisation. This feeling of disorientation and disempowerment<sup>2</sup> was eventually described as resulting from a *knowledge asymmetry* between those managing vast quantities of data and those whose data are processed.<sup>3</sup> Privacy and personal data protection were thus promoted as legal tools enabling individuals to counter loss of control over what happens to data concerning them.

### 2.1. Early recognition

When Alan F. Westin put forward his powerful vision of privacy as control over personal information,<sup>4</sup> he was indeed reacting to the realisation that computers, and especially large databases, threatened to deprive individuals of any effective oversight of the fate of data

about them when in the hands of others. In 1973, an influential report warned of the lessening of individuals' control over data in the United States (US), and proposed a set of recommendations to mitigate this problem. One of them was the general prohibition of secret record keeping systems.<sup>5</sup>

In France, since 1978 individuals have the right to be informed about any data used in automated processing practices affecting them. Since then, citizens are also entitled to receive information whenever somebody asks them for data, such as who the recipients are.<sup>6</sup> In Germany, in 1983 the German Federal Constitutional Court recognised a fundamental right to informational self-determination, and did so by emphatically noting that such right is incompatible with a society where citizens do not know who knows what about them.<sup>7</sup>

International data protection instruments have always imposed information obligations on those who process data. In 1980, the Organisation for Economic Co-operation and Development (OECD) set out in its Guidelines on the Protection of Privacy and Transborder Flows of Personal Data the *openness principle*. According to this principle, there must be 'a general policy of openness about developments, practices and policies with respect to personal data', whereby, whenever personal data are processed, individuals should be able to establish the existence and nature of such data, the main purposes of their use, who are the data controllers, and where to find them.<sup>8</sup> In the OECD Guidelines, the *openness principle* functions as a prerequisite for the *individual participation principle*, which grants individuals a right to access information about data concerning them held by others.<sup>9</sup> In addition, the *collection limitation principle* states that, as a general rule, collection of data must occur with the knowledge of the data subject.<sup>10</sup>

2. L. A. Bygrave (2002, p. 107).

3. See, notably: M. Hildebrandt and B. J. Koops (2010,).

4. A. F. Westin (1970).

5. Secretary's Advisory Committee on Automated Personal Data Systems (1973).

6. *Loi n°78-17 relative à l'informatique, aux fichiers et aux libertés du 6 janvier 1978*, see Arts. 3 and 27.

7. *Volkszählungsurteil*, BVerfGE Bd. 65, S. 1 ff. Describing this right as a right to control the use of information about oneself: J. Q. Whitman (2004, p. 1161).

8. Annex to the Recommendation of the Council of 23 September 1980: OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, § 12.

9. OECD Guidelines, § 13 and § 27.

10. *Ibid.*, § 7.

In 1981, the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108)<sup>11</sup> prescribed that everybody shall 'be enabled to establish the existence' of any automated data files containing data about them, as well as the *main purposes* of such files, and the residence, or place of business, of the file's controller.<sup>12</sup> Furthermore, individuals were entitled to obtain confirmation of whether data about them are stored by controllers, and a right to communication of the data.<sup>13</sup>

All in all, these developments describe the progressive incorporation into privacy and personal data protection laws of a certain right to know, as one of the components of a set of measures aimed at compensating a risk of loss of control over data suffered by individuals. Thus, this right to know emerges as a key to reduce 'deficits in data subjects' cognitive sovereignty'.<sup>14</sup> This right does not correlate exactly with the duty to inform of data controllers,<sup>15</sup> as it can also be addressed through other means.<sup>16</sup> Importantly, however, the perceived lack of knowledge is not remedied by privacy and personal data protection laws, as various interlinked *cognitive problems*<sup>17</sup> appear to persist and always seem to lead back to the reality of the *uninformed individual*.<sup>18</sup>

## 2.2. Existing obligations

The right to personal data protection nowadays has the status of a fundamental right of the EU. It is recognised as such by Article 8 of the EU Charter of Fundamental

Rights, a provision that, however, does not refer explicitly to any right to know, or even to any duty to inform.<sup>19</sup> Despite this formal absence, a right to receive information can be regarded as implicitly acknowledged by the statement of the Charter's Article 8 according to which personal data must be processed fairly, when read in conjunction with EU's main instrument on personal data protection, Directive 95/46/EC (the Data Protection Directive).<sup>20</sup>

The Data Protection Directive indeed sets out that personal data must be processed fairly and lawfully,<sup>21</sup> and its preamble observes that, for the processing to be fair, 'the data subject must be in a position to learn of the existence of a processing operation'.<sup>22</sup> The preamble goes on to clarify that data subjects must be given accurate and full information when data are collected, or when used in a way that could not have been anticipated at the time of collection.<sup>23</sup> Hence, Directive 95/46/EC connects the data controller's duty to inform to the requirement of fair processing.

The Directive's provisions establishing obligations to inform, namely Articles 10 and 11, corroborate this link. They mark a distinction between compulsory information (such as the controller's identity, and the purposes of the data processing) and some *further information* only required in certain cases. Such *further information* concerns the identification of the recipients of the data, and the existence of a right of access and a right to rectify, and must be given only when, having regard to the specific circumstances of the processing, it is required to guarantee fair processing.

11. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Council of Europe, Strasbourg, 28.I.1981.

12. Art. 8(a) of Convention 108.

13. *Ibid.*, Art. 8(b).

14. Bygrave, *op. cit.*, p. 111.

15. In relation to the Spanish fundamental right to personal data protection, the Spanish Constitutional Court has alluded to the existence of both a right to know and a right to be informed of the use of data and its purpose (see § 6 of Sentencia 292/2000, de 30 de noviembre de 2000).

16. For example, early national laws gave great importance to the notification of data processing practices to supervisory authorities, and to the availability of public registers, which aim generally to increase public awareness of those practices.

17. D. J. Solove (2013, p. 1888).

18. *Ibid.*, p. 1883.

19. M. C. Ruiz (2003, p. 39).

20. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, 31-50.

21. Art. 6(a) of Directive 95/46/EC.

22. Recital 38 of Directive 95/46/EC.

23. Recitals 38, 39 and 40 of Directive 95/46/EC.

These provisions on information obligations have been commonly labelled *transparency* measures,<sup>24</sup> even if Directive 95/46/EC does not use the term transparency in this context.<sup>25</sup> Accepting the labelling, transparency can be described 'a pre-condition to fair processing',<sup>26</sup> and the data controllers' duty to inform<sup>27</sup> may be depicted as a *crucial measure* to promote transparency.<sup>28</sup> Insofar as it is an element of fair processing, in any case, the data controller's duty to inform may also be accepted as an integral part of the EU fundamental right to personal data protection.

A certain right to information can moreover be regarded as derived from the recognition in Article 8 of the EU Charter of a right to access and rectify data, both presented as constitutive elements of the EU fundamental right to personal data protection. To exercise such rights, data subjects need to be aware, first, of the fact that somebody is or might be processing data about them, and, second, of the fact that they enjoy the rights in question. Awareness of both issues is thus to some extent instrumental to the exercise of their rights.

Finally, Article 8 of the EU Charter also refers to the possibility to ground the legitimacy of data processing on the consent of the data subject. This brings in another link between the right to personal data protection and information requirements, as, to be valid, consent must be *informed*. The Data Protection Directive indeed defines consent as a *freely given specific and informed indication* of the data subject's wishes signifying agreement to the processing of personal data.<sup>29</sup>

### 2.3. A need to inform more and better

Already more than a decade ago, the European Commission's first report on the implementation of the Data Protection Directive<sup>30</sup> concluded that the Directive's provisions on the data controllers' duty to inform were being put into effect across the EU in very divergent ways, and sometimes incorrectly. In 2004, European data protection authorities put under the spotlight the proliferation of inappropriate online notices, accused of often being *very long* and containing *legal terms and industry jargon*.<sup>31</sup> They called for more *readable* formats,<sup>32</sup> and expressed support for multi-layered notices, which comprise a condensed notice from which more detailed information can be reached.<sup>33</sup>

#### 2.3.1. Towards a new transparency

In 2009, the European Commission formally inaugurated the review of Directive 95/46/EC. A 2009 study sponsored by the United Kingdom's Information Commissioner's Office (ICO) corroborated that there was a problem with the Directive's information obligations, and argued that one of the main aspects of the problem was the way in which *privacy policies* were being written.<sup>34</sup> The report stressed that, according to statistics, consumers felt strongly that mechanisms in place did not help them to understand their rights.<sup>35</sup>

In 2010, the European Commission published a Communication delineating its approach to the future of EU

24. ICO (2009). *The Information Commissioner's response to the European Commission's consultation on the legal framework for the fundamental right to protection of personal data*. On transparency as an element of fairness, see: A. Kuczerawy and F. Coudert (2011) and Bygrave, *op. cit.*, pp. 58-59.
25. Actually Directive 95/46/EC never uses the term transparency, except once in the preamble, concerning the obligation of national supervisory authorities to publish annual reports (Recital 63).
26. Art. 29 Working Party (2009). *The Future of Privacy: Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data*. WP 168, p. 8.
27. EU Agency for Fundamental Rights and Council of Europe (2014). *Handbook on European Data Protection Law*. Luxembourg: Publications Office of the EU, p. 99.
28. Analysis and impact study on the implementation of Directive EC 95/46 in Member States accompanying the European Commission's *First report on the implementation of the Data Protection Directive (95/46/EC)*, Brussels, 15.5.2003, COM (2003) 265 final, p. 19.
29. Art. 2(h) of Directive 95/46/EC.
30. COM (2003) 265 final.
31. Art. 29 Working Party (2004). *Opinion 10/2004 on More Harmonised Information Provisions*. WP 100, p. 5.
32. WP 100, p. 5.
33. *Ibid.*, p. 4 and 6.
34. N. Robinson *et al.* (2009, p. 26).
35. *Ibid.*, p. 29. In another section the same study states that the interest and awareness of consumers have been demonstrated, citing another survey (p. 25).



personal data protection.<sup>36</sup> Here, transparency was presented as 'a fundamental condition for enabling individuals to exercise control over their own data and to ensure effective protection of personal data'.<sup>37</sup> The Communication advanced as a basic element of such transparency that information to data subjects must be 'easily accessible and easy to understand, and that clear and plain language is used'.<sup>38</sup> It observed that this was particularly relevant in the online environment, where privacy notices are often unclear and *non-transparent*, as allegedly proved by the results of a survey.<sup>39</sup> To tackle this problem, the European Commission announced that it would consider introducing in EU law 'a general principle of transparent processing of personal data'.<sup>40</sup>

The 2010 Communication thus set in motion a subtle change in the meaning of *transparency* as a principle of EU data protection law. Whereas transparency had been traditionally understood as a principle implied in the principle of fair processing, encompassing a series of substantive requirements applicable to the data controller's duty to inform, it started then to acquire an additional sense, primarily concerned with the form in which information is to be delivered to data subjects. A sort of new transparency was seeing the light.

Still in the name of transparency, children were portrayed as deserving special consideration, because 'they may be less aware of risks, consequences, safeguards and rights in relation to the processing of personal data',<sup>41</sup> thus requiring

specific information practices. On top of that, the European Commission warned that it might contemplate drawing up EU standard forms, or harmonised *privacy information notices*.<sup>42</sup>

In parallel to these measures targeting transparency, the 2010 Communication articulated a need to raise awareness, particularly among young people.<sup>43</sup> The boundaries between transparency and awareness-raising were rather vague: for instance, *the provision of clear information on web-sites* was depicted as pursuing both.<sup>44</sup> As a matter of fact, the European Commission appeared concerned with the proliferation of opaque privacy notices in general, also raising the question of their impact on the very possibility for individuals to give informed consent to data processing practices.<sup>45</sup>

### 2.3.2. Proposal on the table: The new transparency principle

The European Commission presented in 2012 its proposal for a General Data Protection Regulation, designed to replace Directive 95/46/EC.<sup>46</sup> According to the Explanatory Memorandum accompanying the text, it introduces a new *transparency principle*,<sup>47</sup> which is not defined. The principle primarily takes the shape of a general declaration that personal data must be 'processed lawfully, fairly and in a transparent manner in relation to the data subject'<sup>48</sup>.

The proposal has a Chapter on the Rights of the Data Subject, with a Section titled 'Transparency and modalities'. This

36. European Commission (2010), *Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A comprehensive approach on personal data protection in the European Union*. Brussels, 4.11.2010, COM(2010) 609 final.

37. COM(2010) 609 final, p. 6.

38. *Idem*.

39. *Idem*.

40. *Idem*. During the elaboration of its proposal, the European Commission received input from *many respondents* alerting of the fact that transparency was already an integral part of EU data protection (see *Annex 4 accompanying the Impact Assessment: Summary of Replies to the Public Consultation on the Commission's Communication on a Comprehensive Approach to Personal Data Protection in the European Union*, p. 56).

41. COM(2010) 609 final, p. 6.

42. *Idem*.

43. *Ibid.*, p. 8.

44. *Idem*.

45. *Idem*.

46. European Commission. *Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*. Brussels, 25.1.2012, COM(2012) 11 final.

47. *Ibid.*, p. 8, where it is presented as a *new element*.

48. Art. 5(a) of the proposed Regulation (cf. Art. 6(1)(a) of Directive 95/46/EC, stating that personal data must be *processed fairly and lawfully*).

Section opens with Article 11, on 'Transparent information and communication', foreseeing that controllers 'shall have transparent and easily accessible policies'<sup>49</sup> with regard to the processing of personal data and for the exercise of data subjects' rights',<sup>50</sup> and that any information to data subjects shall be provided 'in an intelligible form, using clear and plain language, adapted to the data subject, in particular for any information addressed specifically to a child'.<sup>51</sup> According to the proposed General Data Protection Regulation, therefore, the notion of transparent information should translate into easily accessible and (in spite of the tautology) transparent policies.

The substance of the data controller's duty to inform is drawn up in the Section 'Information and access to data', which the proposal's preamble connects to the principles of fair and transparent processing.<sup>52</sup> This section specifies the information to be given to data subjects,<sup>53</sup> extending minimum requirements to include informing about the period of storage of data, and making it compulsory to notify the existence of a right to access and to rectify,<sup>54</sup> as well as of a right to lodge a complaint to a supervisory authority.<sup>55</sup> This is to be complemented with 'any further information necessary to guarantee fair processing in respect of the data subject'.<sup>56</sup>

The European Commission also advances that it may adopt implementing acts laying down standard forms for providing information to data subjects, 'taking into account the specific

characteristics and needs of various sectors and data processing situations where necessary'.<sup>57</sup> The suggestion, however, has been publicly opposed by the Article 29 Working Party, which considers it unnecessary,<sup>58</sup> and also failed to find the support of the European Parliament.<sup>59</sup>

According to the impact assessment prepared by the European Commission before proposing its draft for the General Data Protection Regulation,<sup>60</sup> data subjects are generally unaware of the risks linked to personal data processing, and they thus fail to take appropriate measures to protect their personal data.<sup>61</sup> Of all data subjects, children are the most unaware of the risks at stake, which are however considerable, especially for them: '(i)n particular for young people', the impact assessment states, 'the disclosure of personal data can cause immense social and mental harm'.<sup>62</sup> It is not clear, however, how any increased awareness of children of the risks at stake might be capable of affecting their protection, as according to the proposed Regulation children are not to decide whether they consent or not to data processing practices. The decision is entrusted to the authorised parent or custodian.<sup>63</sup>

Globally speaking, the discussions on the draft of the General Data Protection Regulation hint towards a reinforcement of information obligations, regarding both the content of the information and formal requirements (in the spirit of the

49. *Privacy policies* appears to be used here in the sense of *privacy notice*, or texts destined to the users of services (on the meanings of the term: B. Van Alsenoy (2012, p. 4).

50. Art. 11(1) of the Proposed Regulation.

51. *Ibid.*, Art. 11(2). This provision is inspired by the 2009 Madrid Resolution on International Standards on the Protection of Personal Data and Privacy, where the *openness principle* was developed indicating that information must be provided to the data subject 'in an intelligible form, using a clear and plain language, in particular for any processing addressed specifically to minors', and by a provision proposed for a future Regulation on a Common European Sales Law, concerned with the duty to provide information when concluding distance contracts.

52. Recital (48) of the proposed Regulation.

53. For applicable exemptions, see Art. 14(5) of the Proposed Regulation.

54. *Ibid.*, Art. 14(1)(d).

55. *Ibid.*, Art. 14(1)(e).

56. *Ibid.*, Art. 14(1)(h).

57. *Ibid.*, Art. 14(8).

58. Art. 29 Working Party (2013). *Working Document 01/2013: Input on the proposed implementing acts*, WP 200, p. 6.

59. Amendment 110 of European Parliament's Resolution of 12 March 2014, P7\_TA-PROV(2014)2012.

60. European Commission, Staff Working Paper: Impact Assessment accompanying the document Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), and Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, Brussels, 25.1.2012, SEC(2012) 72 final, p. 22.

61. SEC(2012) 72 final, p. 23.

62. *Ibid.*, p. 29.

63. Art. 8 of the proposed Regulation.



new transparency). They also suggest a strengthening of the conceptual link between being informed and exercising data subject's rights. In parallel to all this emphasis on the need of individuals to be better informed, EU institutions are increasingly promoting the idea that data subjects, when disclosing personal data, shall be protected as consumers presumably trapped in a situation that very much escapes them.

### 3. A Portrait of the Data Subject as a Consumer

There is no doubt that consumers, and most notably online consumers, might also be regarded as data subjects insofar as, when consuming, they engage in communicating or making available data about them. In addition to this, however, data subjects are increasingly portrayed as being consumers whenever data about them is collected in exchange for access to free online services. This image is used to stress that free online services might not be as free as they look, because the data that is collected through them about individuals has a certain economic value.

The rationale behind the image of the data subject as a consumer is thus intrinsically tied to a depiction of users as typically uninformed and confused about the nature of the services they use, and hence misinterpreting their own behaviour. According to the impact assessment for the proposed General Data Protection Regulation, some individuals simply do not realise that many free online services rely on the processing of their personal data.<sup>64</sup> In this sense, some data subjects appear to be ill-informed to the point of misconceiving the very way in which online services function, leading them to engage in inattentive and incautious data practices.

Individuals would indeed not only be unaware of the fact that when using certain services they are celebrating in a way an

economical transaction, but also ignorant of the price they are paying for it. An increasingly pervasive mantra depicts personal data as the new currency of the digital age,<sup>65</sup> and, concomitantly, consenting to the collection of personal data is conceived of as an exchange, where access to services is traded with data that hence constitutes an asset. This mantra is sustained by research studying how individuals decide to disclose or not personal data from the perspective of behavioural economics.<sup>66</sup>

The depiction of data subjects as consumers is sometimes put forward to promote the need to reinforce the protection of users of online services, notably by resorting to safeguards and notions borrowed from consumer law.<sup>67</sup> Taking this step, nevertheless, requires a prior careful examination of how consumers are actually envisaged in consumer law.

#### 3.1. The average consumer

EU law protects consumers through different instruments, and, in some areas, is guided by the ideal of the *average consumer*. This notion originally emerged in the case law of the EU Court of Justice<sup>68</sup> in connection with the free movement of goods, labelling and misleading advertising; further delineated in cases about trademark infringement, it eventually integrated EU secondary law.<sup>69</sup> Currently, the notion is notably employed in EU law to define *misleading* commercial practices, which shall be regarded as misleading if they would mislead an average consumer.<sup>70</sup>

##### 3.1.1. Reasonably well informed, observant and circumspect

The average consumer is a theoretical figure described as reasonably well informed and reasonably observant and circumspect, even if this depiction can vary taking into account social, cultural and linguistic factors.<sup>71</sup> The average consumer is regarded as a critical consumer, as opposed to a naïf consumer who would believe, for instance, any promotional marketing tricks.<sup>72</sup>

64. SEC(2012) 72 final, p. 22.

65. Noting this trend in EU policy: E. Wauters *et al.* (2013).

66. See, for instance: A. Acquisti (2004); L. Brandimarte *et al.* (2013).

67. See: European Data Protection Supervisor (EDPS) (2014).

68. See: Case C-210/96, *Gut Springenheide and Tusky* (1998) ECR I-4657, para 31.

69. R. Incardona and C. Poncibò (2007, p. 22).

70. B. Van der Meulen and M. Van der Velde (2011, p. 421).

71. European Commission (2009). *Commission Staff Working Document: Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, Brussels, SEC(2009) 1666, pp. 25-28.

72. Case C-470/93, *Verien gegen Unwesen in Handel und Gewerbe Köln e. V. v Mars GmbH* (1995) ECR I-01923, para 24.

Reliance on the figure of the average consumer is supposed to help in striking a fair balance between the need to protect consumers and promoting free trade. By discarding the idea that consumers are, as a general rule, weak, credulous or in need of help, it is possible to refute the validity of a number of protective measures that could be perceived as unjustified trade barriers.<sup>73</sup> From this viewpoint, the birth of the average consumer has been described as a move away from a paternalistic view of consumer law.<sup>74</sup>

The average consumer test is never a statistical test. Courts and responsible authorities must always exercise their own faculty of judgement, having regard to the case law of the EU Court of Justice, to determine the typical reaction of the average consumer in a given case.<sup>75</sup> In principle, they should not need to commission any expert's report or consumer research poll.<sup>76</sup> It will ultimately always be up to courts and responsible authorities to determine the percentage of consumers misled by a measure sufficiently significant to justify prohibiting such measure,<sup>77</sup> remembering that survey results are subject to the frailties inherent in the formulation of survey questionnaires.<sup>78</sup> The notion of the average consumer as a reasonably well informed individual has been widely used in the area of food law regardless of the fact that many studies have demonstrated that an important number of consumers are unable to actually understand much of the information on food labels.<sup>79</sup>

### 3.1.2. *Actively looking for information to make the right choices*

The prototypical average consumer has an attitude that contributes to the constant improvement of

knowledge:<sup>80</sup> always ready to obtain more information to make efficient choices, always in a position to acquire available information, and to act wisely on it.<sup>81</sup> On the basis of this conception of the average consumer, the EU Court of Justice considers that it is generally preferable to provide information to consumers so they can make their own choices, instead of trying to think on their behalf.<sup>82</sup> Information appears, thus, in the context of EU consumer law as a tool placed in the hands of consumers to enable them to decide freely.<sup>83</sup>

### 3.1.3. *Not an obstacle to protect vulnerable consumers*

Taking generally as a benchmark the average consumer is not incompatible with the protection of especially vulnerable consumers. Vulnerable consumers are recognised as existing, even if they are not regarded as the norm. Where a practice specifically targets a particular group of consumers, it is desirable that the impact of the practice be assessed from the perspective of the average member of that specific group.<sup>84</sup> According to EU consumer law, individuals can be particularly vulnerable because of a mental or physical infirmity, because of their age (notably, the elderly, children and teenagers), or because of their credulity.<sup>85</sup>

The vulnerable consumer test applies when it is foreseeable that a practice will affect the economic behaviour of a group of consumers. Hence, companies are only responsible for the negative impact of their practices on vulnerable consumers if they could reasonably expect such impact, and if they fail to take steps to mitigate it.<sup>86</sup>

73. SEC(2009) 1666, p. 25.

74. Incardona and Poncibò, *op. cit.*, p. 22.

75. SEC(2009) 1666, p. 25.

76. *Ibid.*, p. 28.

77. Case C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* (2000) ECR I-00117, para 31.

78. Opinion of Advocate General Fenelly for Case C-220/98, para 29.

79. C. MacMaoláin (2007, p. 78).

80. Identifying attitude and knowledge as basic elements of the average consumer: L. González Vaqué (2005).

81. SEC(2009) 1666, p. 25.

82. Van der Meulen and Van der Velde, *op. cit.*, p. 422.

83. See, for instance, Art. 3(1) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ L 304, 22.11.2011, 18-63.

84. SEC(2009) 1666, p. 28.

85. *Ibid.*, p. 29.

86. *Ibid.*, p. 31.

### 3.2. Reconstructing the standard data subject

The described sketch of the average consumer makes visible some important frictions between this notion and the way in which the concept of data subject operates in EU law. First and foremost, it seems extremely difficult to maintain that the data subject is regarded in EU law, by default, as being well informed. On the contrary, as noted above, one of the elementary assumptions behind the emergence of personal data protection law is that individuals lack sufficient knowledge of data processing practices affecting them, or are on the verge of losing control over data. Data subjects appear to be originally and generally deprived of a satisfactory level of information. Once some pieces of information have been transmitted to them, the processing of their personal data might be regarded as fair, and they shall be able to make punctual informed decisions on whether to consent to some practices, but generally speaking they remain predominantly uninformed.

Information provided to individuals shall allow them to decide whether to consent or not,<sup>87</sup> but is not envisaged as generally contributing to making choices between data processing options. In *Deutsche Telekom*,<sup>88</sup> the EU Court of Justice had to clarify whether, when an undertaking responsible for assigning telephone numbers wishes to pass on personal data on subscribers to a company providing publicly available directories, it is necessary for the undertaking to rely on the subscriber's consent, or on the subscriber's lack of objection.<sup>89</sup> The Court of Justice, analysing Directive 2002/58/EC,<sup>90</sup> stated that its provisions do not establish a *selective right* of subscribers to decide in favour of certain providers of public directories. And the Court went on to add that when subscribers consent to their data being published in a directory with a specific purpose, assuming the *detrimental* impact of such decision,<sup>91</sup> they will 'generally not have standing to object to the publication

of the same data in another, similar directory'.<sup>92</sup>

Individuals' level of knowledge is very closely linked to their attitude towards information. Data subjects do not appear to be especially zealous to acquire more information, particularly when they are online, and might thus probably not be described as observant and circumspect. The appreciation of the eagerness of the data subject towards seeking information can affect the way in which information obligations are designed. In this context, multi-layered notices open the question of the extent to which information that is not given in a first layer, but only indirectly received or made available, has been received or made available at all. In 2012, the EU Court of Justice ruled that, in the context of distance contracts, consumer protection obligations compel to assess that where information that should be provided on a seller's website is made accessible only via a link sent to consumers, that information is neither *given* to consumers, nor *received* by them, for the purposes of EU law.<sup>93</sup>

### 3.3. A confused consumer and disoriented policy-making?

Against this background, it appears that configuring the data subject as a consumer has some important conceptual drawbacks. In the name of the alleged persistent misconceptions affecting the behaviour of online users, who seemingly indulge in using *free* online services that in reality might not be free, data subjects are pushed towards a field of law where individuals are actually portrayed as by default well informed, observant and circumspect, and thus offered somehow limited protection. This leads to a paradoxical situation in which, because they are regarded as ignorant of how the Internet functions, individuals might qualify to be treated by law as reasonably well informed subjects.

87. Expressing awareness of some data processing practices does not equal consenting to them. See, notably: Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, 9 November 2010, paras 61-64 and 88, as well as the Opinion of Advocate General Sharpston delivered on 17 June 2010, Joined Cases C-92/09 and C-93/09, para 77.

88. Case C-543/09 *Deutsche Telekom*, 5 May 2011.

89. Para 48.

90. Specifically, Art. 12(2) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.07.2002, 37-47.

91. Para 62.

92. *Idem*.

93. Case C-49/11, *Content Services Ltd v Bundesarbeitskammer*, 5 July 2012, para 37.

Similarly, the role entrusted to information in EU personal data protection law and in EU consumer law is appreciably different: whereas for the latter it can facilitate making choices between products and services, for the former it has instead other purposes (namely, contributing to fair and transparent processing, and allowing for consent). It is somehow delicate, thus, to attempt to expand on the conception of the data subject as consumer in order to configure information obligations imposed on data controllers as helping to make choices between different data processing practices.<sup>94</sup>

There are also, however, dimensions of personal data protection law that could benefit from taking into account the way in which EU law conceptualises consumers. One of them is the construal of vulnerability: it is not limited to children, but can be recognised as also affecting other groups, and is in any case something different than a mere (temporary) unawareness of risks, which is what the European Commission habitually identifies as affecting children.

More importantly, defining a standard notion of data subject in terms of information and capability to make choices appears as a necessary prerequisite to define which online practices are unlawfully misleading. It is striking that despite the significance of the data subject's right to know and of information obligations imposed on data controllers for European personal data protection, there is no clear benchmark in EU law as to the level of misinformation of data subjects to be regarded as unlawful. The current stress on the need for information provided by data controllers to be *transparent* is based on the concession that the instruments typically presented as supposedly complying with the data controllers' duty to inform (the *privacy policies* or *privacy notices* proliferating online) are commonly uninformative. In defiance of this contention, however, the legislator does not appear to be ready to directly qualify uninformative and deceptive so-called *privacy* tools as unlawful, or to provide clearer specifications as to what is always to be regarded as untransparent and unfair.

## 4. Concluding Remarks

This contribution has examined the relationship between information and the protection of individuals from the perspective of EU personal data protection. It has identified the existence of a kind of structural ignorance that is ascribed to the data subject, partially mitigated through the imposition of information obligations on data controllers. The recently reinvented notion of transparency as a set of formal demands applicable to information obligations confirms their importance in the building up of EU personal data protection. Together with this approach, the idea that data subjects shall be protected as unaware consumers of not free online services is gaining momentum.

Data subjects are more than consumers. They are the individuals to whom is granted the EU fundamental right to the protection of personal data, and it is the responsibility of the EU to respect and promote its fundamental rights. As described, the right to personal data protection brings about the need to inform individuals about what happens to their personal data, but also about the existence of their subjective rights, and, possibly, about the risks or consequences of consenting or refusing to consent to certain data processing practices.

In reality, the active exercise of this right by individuals might actually require not only the existence of a certain right to know, but also an awareness of the limitations of the information they are legally entitled to receive, as an open invitation to act very observantly and with circumspection even in the absence of satisfactory levels of information -or precisely because of such absence. Perhaps data subjects able to make better decisions online are not data subjects surrounded by more transparent *privacy* notices, but data subjects more acutely aware of the fragility of the knowledge at their disposal.

94. Which is the path followed by the EDPS in European Data Protection Supervisor (EDPS) (2014), *op. cit.* (see notably p. 34).

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