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EU POLITICS AND THE MAKING OF THE GENERAL DATA PROTECTION REGULATION: CONSOCIATIONALISM, POLICY NETWORKS AND INSTITUTIONALISM IN THE PROCESS OF BALANCING ACTOR INTERESTS

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ABSTRACT

This thesis analyses the policy process of adoption of the General Data Protection Regulation (GDPR), replacing the EU Directive 95/46/EC, the global "golden standard" setter in the field of privacy and data protection. The GDPR was proposed in January 2012 and was adopted in April 2016 following a highly politically charged process lobbied against to an unprecedented extent by certain commercial and political interests. The policy process is looked at through the lens of consociationalism, which draws attention to the importance of national governments, policy networks, which stress non-linear policy-making dynamics, and institutionalism, which highlights the significance of institutions. On the whole, the GDPR as approved strengthened the ICT users' rights, although not to the degree originally envisaged. The study proposes that institutional factors were decisive in determining policy outcomes, either acting in coalition with different policy networks or reacting to external developments, notably the Snowden revelations in 2013. The institutional factors, amongst others, included strategic actor self-interest of preserving or even expanding their spheres of influence, sociological dimensions such as ideological adherence and diverse national and institutional cultures, and important earlier institutional and policy developments. As the thesis shows, the impact of institutional factors on the policy outcomes was particularly evident in the European Parliament's position during the process. The EP's influence demonstrates the strong political will of this institution and its overall defence of citizens' rights against lobbying by the industry. At the same time, the reform process brought around many gains to the national Data Protection Authorities at the cost of the initially foreseen Commission's remit. This thesis argues that the powers retained by these national supervisory authorities, alongside the numerous derogations following difficulties to reconcile diverse national positions, make the GDPR a tangible case of state-centrism. The Member States' sovereign decision-making concerns posed breaks to the level of Europeanisation that the GDPR could potentially bring about in this issue-area. This work makes a significant contribution to knowledge by, amongst others, offering a political science perspective in on-line privacy and data protection research dominated by other disciplines, by applying the consociationalism theory – a less explored paradigm in the EU studies as compared to other approaches – and by providing a policy process analysis of the newly adopted data protection instrument with global rules-shaping significance.

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This work is dedicated to

the CENTRALITY of the RIGHT TO PRIVACY in our lives

And to the EU –

the extraordinary journey it has been taking Europe on

for six decades

“People have always had private conversations.
Why do we have to sacrify that
now that we live in a world which has
electronics?”

Phil Zimmerman (“father of encryption”), 2015

“We must find a way

to preserve the right of all Europeans to a private and dignified life

where their preferences, conversations and whereabouts

are not systematically broadcast in cyberspace”

Joaquín Almunia (the former Vice-President
of the European Commission), 2012

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AUTHOR’S DECLARATION

I declare that all the material contained in this thesis is my own work

LIST OF ABBREVIATIONS

ACTA – Anti-Counterfeiting Trade Agreement

ALDE – Group of the Alliance of Liberals and Democrats for Europe

BEUC – Bureau Européen des Unions de Consommateurs

CALEA – Communications Assistance for Law Enforcement Act

CEO – Corporate Europe Observatory

CJEU – Court of Justice of the European Union

COREPER – Committee of Permanent Representatives

DAPIX – Working Party on Information Exchange and Data Protection

DG – Directorate General of the European Commission

DPA – Data Protection Authority

DPI – Deep Packet Inspection

DRD – Data Retention Directive

EC – European Community

ECHR – European Convention on Human Rights

ECR – European Conservatives and Reformists Group

ECtHR – European Court of Human Rights

EDC – European Data Coalition

EDPB – European Data Protection Board

EDPS – European Data Protection Supervisor

EDRi – European Digital Rights Initiative

EEC – European Economic Community

EIF – European Internet Forum

EMPL – Committee on Employment and Social Affairs

ENISA – European Network and Information Security Agency

EP – European Parliament

EPP – Group of the European People's Party (Christian Democrats)

EU – European Union

EUCFR – The Charter of Fundamental Rights of the European Union

FISA – Foreign Intelligence Surveillance Act

FRA – The European Union Agency for Fundamental Rights

FTC – The Federal Trade Commission

GATS – General Agreement on Trade in Services

GCHQ – Government Communications Headquarters

GDPR – General Data Protection Regulation

GPS – Global Positioning System

GUE/NGL – Confederal Group of the European United Left - Nordic Green Left

ICDP – Industry Coalition for Data Protection

ICT – Information and communication technologies

IMCO – Committee on the Internal Market and Consumer Protection

ISP – Internet service provider

ITRE – Committee on Industry, Research and Energy

JHA – Justice and Home Affairs

JURI – Committee on Legal Affairs

LIBE – Committee on Civil Liberties, Justice and Home Affairs

MEP – Member of the European Parliament

MS – Member State

NSA – National Security Agency

OECD – The Organisation for Economic Co-operation and Development

PATRIOT Act - Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act

PNR – Passenger Name Record

S&D – Group of the Progressive Alliance of Socialists and Democrats

TFEU – Treaty on the Functioning of the European Union

TFTP – Terrorist Finance Tracking Program

The Greens/EFA – Group of the Greens/European Free Alliance

TiSA – Trade in Services Agreement

TTIP – Transatlantic Trade and Investment Partnership

UN – United Nations

WP29 – Article 29 (of the Directive 95/46/EC) Working Party

WTO – World Trade Organisation

CHAPTER I

Introduction

1.1 Introduction

This thesis is dedicated to analyse the policy process of adoption of the Regulation 2016/679[1] or General Data Protection Regulation (thereafter GDPR), which can be termed the EU biggest legislative dossier of recent years both in size and in terms of political tensions surrounding it, not the least because of the EU's global role, in the words of Hijmans (2016), "as a constitutional guardian of Internet privacy and data protection". The GDPR deliberations took place between January 2012, when the European Commission (thereafter the Commission) tabled the proposal (Commission, 2012e), and its finalisation by the European Parliament (thereafter EP) and the Council of Ministers of the European Union (thereafter the Council) in April 2016. It has entered the EU policy-making history as a proposal that attracted unprecedented amount of lobbying, as quite likely "the longest EU [law] on the statute book" (Buttarelli, 2015), and as a central piece of the EU data protection reform package that has pioneered comprehensive enactment of fundamental rights since the entry into force of the EU Charter of Fundamental Rights (thereafter EUCFR) in 2009 (FRA, 2013:104). Moreover, the vote on the GDPR in the EP plenary in 2014 has seen a rare circa 95% majority in favour of the data protection reform proposals (Commission, 2014a). As evidence of the significance, complexity and tensions surrounding it, some aspects of the making of the GDPR prompted the production of two

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC (General Data Protection Regulation).

documentaries[2]. This reform has been a landmark development and, despite a lot of pressures, has gone far beyond a mere upgrade to an earlier law:

> "Is this law ground-breaking? Absolutely. Europe has created the notions of a 'right to be forgotten' and of 'data portability', and created fines for data breaches that are on a scale equivalent to fines for antitrust violations. No other region has done that before" (Phil Lee of Fieldfisher quoted in Gibbs, 2016).

> "This is the most significant development in data protection that Europe, possibly the world, has seen over the past 20 years" (Phil Lee of Fieldfisher quoted in Gibbs, 2015).

Threats to privacy and personal data in relation to the advancing media and communication technologies are not new issues, but go back as far as to the nineteenth century (Gutwirth, 2002:5; Batra, 2008: 45-46). Persons profiling deriving from private enterprise intrusions and state surveillance have been known for more than 150 years. Nevertheless, the beginning of the electronic era in the second half of the twentieth century, bringing along digital data storage and processing facilities, endangered privacy and data security to unprecedented extent (Marquis, 2003:226-248). Electronic communication channels have been subject to continuous governmental and corporate monitoring for decades (Chadwick, 2006:257-288). The latest advances of ICT technologies enable ubiquitous tracking devices as well as instantaneous processing and transmission of collected personal information. In the cyberspace, all activities are constantly registered in order to harvest information about users, which is used in various ways, including trading it. Data-mining and digital intelligence have become enormous thriving industries (e.g. Chadwick, 2006:257-288; Lyon, 2003; Van Dijk, 2012:18, 122-126; Batra, 2008:43-122) and a fundamental layer in the contemporary economy, where personal data is perceived as a

[2] Peter Brem's "Privacy for Sale" of 2013 and David Bernet's "Democracy" of 2015.

"core asset" by the commercial entities (OECD, 2011:3-50; Edwards and Howells, 2003:207-222). Such state of play was termed by Clarke (1988) as the age of dataveillance.

From the Internet users' perspective, behavioural and predictive analytics, broadly practised by businesses, mean unanticipated secondary usage of personal information, making individuals hardly in control of their own data (Naughton, 2013; Van Dijk, 2012:122-126; Batra, 2008:91-122). The current trend of promotion of Big Data as an economic driver and a high degree of opacity in data processing operations pose serious challenges for privacy and other fundamental rights (González Fuster and Scherrer, 2015:5). Risks to privacy have not ceased to be one of the greatest concerns among Internet users for decades now (Tapscott, 1996c:274; Eurobarometer, 2015).

The potential loss of control over personal information due to advancing electronics did not remain unnoticed in the policy-making circles. Since around the 1970s, countries around the world started adopting data protection laws. The EU regional data protection instrument – the Directive 95/46/EC[3] – stipulated in 1995 had become the most influential law internationally. Currently, the European privacy protection model, encompassing mandatory rules ("hard law"), is rated as the most rigorous and comprehensive one globally (Farrell, 2008:386-395; Prins, 2006:170-173; Goldsmith and Wu, 2006:173-177). It is therefore not surprising that, considering this background, the process of replacement of the above Directive with the GDPR – an even more comprehensive legislation[4] – caused so many tensions between different interests, as will be analysed in this thesis.

[3] 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.

[4] The final version of the GDPR is made of 99 Articles and 173 recitals as compared to 34 Articles in the Directive.

However, controversially to its reputation of the golden standard setter in privacy protection, Europe is not immune from state surveillance practices undermining its citizens' rights. The so-called Snowden revelations in 2013 and later revealed not only extensive interception of communications by the US secret services, but also exposed involvement of some EU countries. Europe has a long history in spying on communications. While the Snowden revelations helped enhance privacy and data protection promoting policy debates and, in addition, had some impact on the GDPR deliberations, not long afterwards a series of terrorist attacks in Europe since January 2015 paved the way to reinstate national security and surveillance agendas. Somewhat oddly, the revived EU Passenger Name Record (thereafter PNR) Directive was adopted in the EP on the same day of the finalisation of the data protection reform in April 2016. That is, the EU policy course aimed at protecting people's fundamental right to privacy does not prevent privacy undermining state surveillance measures such as the PNR from coming into being simultaneously.

Finally, and most centrally to the academic inquiry in this study, the GDPR needs to be looked at as part of the overall EU politics.

> "Whereas the 'EU' or 'Brussels' appears as one monolithic institution from outside, it is in fact a plethora of differing institutions with different prerogatives and priorities, and this applies internally to these institutions also" (Sean Kelly, MEP and ITRE rapporteur, 2014).

> "European governance possesses some distinctive characteristics. It is a polycentric system, which is split into multiple, overlapping arenas that are characterised by loose coupling. Moreover, the organising principle of political relations is consensual, relying heavily on interaction and communication between its entities" (Princen and Knodt, 2003:204).

Although "their influence has been constrained by EU-level actors and by the strong institutional framework that shapes interactions between" them, in the EU, Member States

(thereafter MSs) remain dominant actors in the decision-making processes (Princen and Knodt, 2003:203-204). The state-centric perspective chosen as the basis for this research was tangibly reflected in the GDPR case study. Integration and MSs sovereignty-related aspects have strongly shaped the course and the outcomes of the GDPR stipulation process. While the passage from a Directive to a Regulation – a directly applicable set of rules – did introduce a greater degree of harmonisation, at the same time, the abundance of derogations left a lot of issues heavily within the realm of national discretions. Similarly, the Commission's aspiration to gain more powers in the EU data protection governance was unsuccessful as was the proposal for a more streamlined and centralised enforcement mechanism in the form of one-stop-shop which was modified to ensure that individual Data Protection Authorities (thereafter DPAs) retain their powers within their jurisdictions.

> "We are very actively engaged with [DPAs] across Europe. If anyone has interacted with that regulatory community you come to understand they have a sovereign interest in protecting the privacy of citizens in the respective [MSs] they represent. That was never going to go away with GDPR" (Keith Enright, legal director for privacy at Google, quoted in Macrae, 2016).

Overall, while the GDPR after a very intense political process was a mixed outcome for the various stakeholders, with, for instance, some wins and losses for both ICT users' rights as well as business interests, this study finds that the DPAs can be viewed as actors with most gains from the reform in terms of their power base. Interestingly, this DPAs' "star hour" was made even more prominent by some Court of Justice of the European Union (thereafter CJEU) rulings in 2015, i.e. in concomitance with the data protection reform, giving a favourable explanation of the DPAs' powers already under the existing law. In one of those judgements in October 2015 (*Schrems v Data Protection Commissioner*) the CJEU stated that the national DPAs can question the compliance of transfers of personal data to third countries with the EU law, despite existing EU-level adequacy decisions on

the data protection regime in those countries,. The above is related to another key finding of this thesis – the significance of the institutional factors in the policy process, which were more decisive in shaping the GDPR than such factors as lobbying. For example, amongst others, the EP was instrumental in defending many pro-privacy provisions in this law, including the earlier-mentioned unprecedented level of fines. Its strong stance on the GDPR was determined by a number of variables of its internal institutional dynamics, ranging from institutional legitimacy building to the ideological views of the MEPs in steering positions, and many others.

In the remaining part, this chapter outlines the aims and methods of this research.

1.2 Aims and contribution to knowledge

This thesis aims to explore the interplay of various interests that intersect in the EU Privacy and Data Protection *policy process*. It investigates which political, economic and social forces, how, why and to which extent determine the course of the policy process and policy outcomes, i.e. the actual degree of balance between the conflicting or concurring goals and values of different stakeholders (e.g. state, industry and citizens). The purpose of this thesis is therefore *not normative* (how the policy process *should* work), but analytical and explanatory (how the policy process *actually* worked). Some normative discussion is, however, inevitable (for instance, in the contextual background part) to inform this research.

The policy process remains an under-researched area in the media and communications studies, whilst communication policy research that has sound theoretical foundations is rather scarce (Just and Puppis, 2011:22-24). Scholars working in the area of the EU media policy “do not often provide a systematic analysis of the actual process of EU media

policy-making as such" and a wider application of political science is desirable as it "can help to explain EU decision-making in the area of media" (Van den Bulck and Donders 2014:19). The dominant approaches, such as ideological[5] or technological[6], for example, leave significant research gaps. Also, it would be too reductionist to think that policy-makers embrace the preferences of powerful interests by default, hence the understanding of the "institutional fabric" generating different contexts is required (Galperin, 2004).

At the same time, more studies into information privacy that would be embedded in the discipline of political science are also still needed. Privacy matters have been mostly addressed within the realms of sociology, law, or computer science, and journalism and civil-rights advocacy outside the academia, while privacy "is an issue of political theory, of public policy-making, of political behaviour, of public administration, of comparative politics, and of international relations" as much as it is a legal or technological one (Bennett and Raab, 2006: xv- xx).

The main objectives of this research are:

- To examine the nature and explain the source of conflict among different EU policies related to on-line privacy issues as reflected, for instance, in the policies on data protection, digital economy and data retention;

- To analyse how far the interests of citizens with regards to privacy and data protection on the Internet are likely to influence the EU policy-making process;

[5] In this paradigm explanation of policy choices is centred on prior beliefs and established ideas (Galperin, 2004).
[6] This approach draws on technological change as the main determinant of a policy course (Galperin, 2004).

- To examine the power dynamics in the decision-making process between the various stakeholders; and lastly

- To examine how the preferences of different stakeholders are reflected in the EU Privacy and Data Protection policy debates and proposals.

The research aims have resulted in the following ***research questions***:

1) What EU policy process dimensions and which actors can be identified in the debate that surrounded the formulation of the GDPR between January 2012 and April 2016 (i.e. between the tabling of the proposals by the Commission and the final adoption of this law)?

2) What were the interests and the strategies of the policy stakeholders and why were they trying to influence the EU data protection review?

3) How were the interests of the various stakeholders balanced and why (what determined the outcomes of the GDPR drafting process)?

This thesis makes a significant ***contribution to knowledge.*** **In particular, it:**

- **Provides a prompt, comprehensive and systematic scholarly exploration of the recent policy process of the stipulation of the GDPR that will constitute the main European Union-level privacy and data protection legislation.** This study is based on the originally conducted empirical research (document analysis and interviews) in turn informed by a contextual background specifically developed for this work.
- **Considers the implications for the different interests of EU policy in this core area of Internet governance which, given the historical significance of the EU**

in the field of privacy, will determine respective policy developments not only within the EU, but also beyond the EU.

- **Aligns political science approaches that have been used for the study of the EU with the specific (and currently high-profile) on-line privacy and data protection issue-area, and applies an originally constructed analytical framework to explain the policy process of adoption of the GDPR.** Consociationalism, one of the theories that forms this framework as a macro-level tool, while very applicable to the EU politics[7], is featuring in academic research somewhat less as compared to other theories in the EU studies.
- **In doing the above, the thesis advances (EU) communication policy studies.**

1.3 Analytical framework and research methods

Communication policy research belongs to the realm of social science studies, which "consists of the disciplined and systematic study of society and its institutions" (Hansen *et al*, 1998:11). Scholarly enquiries into communication policy should be based on a combination of theoretical and empirical approaches (Just and Puppis, 2011:16-17). This field of studies overlaps with a range of disciplines, such as philosophy, law, economics, political science or other (Hansen *et al*, 1998:11-12; Just and Puppis, 2011:2).

Communication policy research looks into the broader dynamics of the approaches of public authorities towards "the structure and organisation of communication systems" and the management of change of such systems, examining also "the ways in which policies are generated and implemented", including their impact on "the field of communication as

[7] The EU political system encompasses all properties of a consociational polity: shared decision-making power, consensus-seeking and accommodationist politics, proportional representation, the veto right of the MSs and their high degree of autonomy, etc. Thus, "[p]aradoxically, consociational theory may be more relevant to the EU than to the states for which it was originally developed" (Andersen *et al*, 2001:37).

a whole" (Hansen *et al*, 1998: 67, 87). Therefore, it requires a more profound level of investigation into "historical evolution, policy debate, lobbying, policy formulation" as well as "a contextualisation of the emergence of ideas, technologies and policies" (Hansen *et al*, 1998:67). Policy is a greatly nuanced realm, which does not necessarily consist of coherent statements or strategies, or they may be not visible, may have unforeseen consequences, may be contradictory across different sectors of the same policy area or across different institutions (Hansen *et al*, 1998:67-68). Policy-making is constituted of a complex interplay of forces, and different clues to it will derive from different documents, statements by the officials and institutions or other sources of information "as well as looking into the relationship between interested parties, connections between events and the context within which all this takes place" (Hansen *et al*, 1998: 68, 87). In addition to this, the context of communication policy processes has been increasingly acquiring an international character and strongly affected by the technological convergence underway (Just and Puppis, 2011:16).

Considering the complexity of policy-making, the related research should comprise a comprehensive study of the relevant literature on historical developments concerning the researched issue, as well as political, social, economic or other dimensions together with an analysis of a wide range of documents produced by the public institutions, and lastly, where possible, the interviewing of policy actors. The collected data are to be explored referring to an analytical theoretical framework to enable the insight into essential processes and relationships (Hansen *et al*, 1998:87-88).

This thesis blends three analytical strands – *consociationalism, policy networks and new institutionalism* as its analytical framework. The analytical framework is developed in Chapter III. The combination of these approaches enables a multi-level analysis (macro,

meso and micro), necessary for an investigation of a policy process. The EU is taken as a unit of analysis. This study examines the policy process at the supranational level and focuses on the time span from the release of the Commission's GDPR draft proposal in January 2012 till the adoption of the law in spring 2016. Some preceding developments and processes are occasionally looked into only to draw a clearer contextual picture.

The empirical part is designed as a case study of the policy process that underpinned the formulation of the GDPR. A case study is understood as "a very detailed enquiry into a single example of a political process, organisation or collectivity seen as a political unit in its own right" (Versluis *et al*, 2011:88). Case studies attract criticism regarding their deficiency to produce generalisable knowledge. At the same time, reliability of generalisation in any social science enquiry can be questioned due to its interpretive nature. Case studies offer different kind of value and knowledge than generalisation (Thomas, 2011). Their purpose is deductive rather than inductive. In particular,

> "[A case study] permits a deeper understanding of causal processes, the explication of general explanatory theory, and the development of hypotheses regarding difficult-to-observe phenomena. Much of our understanding of politics and political processes comes from case studies of individual presidents, senators, representatives, mayors, judges, statutes, campaigns, treaties, policy initiatives, and wars" (Buttolph Johnson, Reynolds and Mycoff, 2008c:154)

Two common policy research methods – document analysis and interviews – are deployed here. These methods used together allow for the necessary triangulation of data (Van den Bulck, 2011:221). The empirical research is based on document analysis, as the main research method, and interviews as a complementary fieldwork method.

Document analysis

“A document is ‘any symbolic representation that can be recorded or retrieved for analysis’” (Altheide, 1996:2 cited in Karppinen and Moe, 2011:180) and “remains not produced or generated by the researcher” (Syvertsen, 2004a:215 cited in Karppinen and Moe, 2011:180). Documentary sources – reports published by public bodies, official and unofficial records, statistical reports, private papers – are often a “major source of data in social research” (Finnegan, 2006:138). They do not embed “neutral asocial” self-evident data *per se*, as their selection and interpretation are determined “not only by practical constraints like access and timing, but also by the researcher’s aims and viewpoint” (Finnegan, 2006:139).

Both primary and secondary sources, relevant to the topic under investigation, are important in order to conduct thorough research. However, primary sources are of particular significance as “the basic and original data for study” (Finnegan, 2006:142).

> “[P]olicy documents and other official documents represent reliable sources of factual information about policy processes, whereas secondary sources are useful for establishing the background and the importance of events and for evaluating the process after the manifest events” (Karppinen and Moe, 2011:181).

Conventionally, materials that are regarded as primary sources are those that were produced “by the people directly involved and at a time contemporary or near contemporary with the period being investigated” constituting “the basic and original material for providing the researcher’s raw evidence” (Finnegan, 2006:142). Secondary sources are “somewhat removed from the actual events” by being brought into being at some later time and by containing judgement and interpretation of the “material to be found in primary sources” (Finnegan, 2006:142). In other words, they provide “information *about* primary sources” (Finnegan, 2006:150, original emphasis).

A researcher “can look at how organisations have documented their activities, strategies and decisions”, i.e. various official records offer a vast pool of sources of data (Deacon *et al*, 2010:14). Sources that can be categorised as documents, where ideas and actions are recorded, include a wide variety of formats and materials, apart from those written and printed (Deacon *et al*, 2010:14-15, 41). All these forms can be used as primary sources and are important in information gathering for research (Finnegan 2006:138-143). One of main situations “where research may centre mainly or wholly around the analysis of available documentation” occurs when “access to people or situations we wish to study is restricted or denied” (Deacon *et al*, 2010:16, 41). “Direct access is a particular problem when research focuses on key centres of control over communications”, in which cases “researchers have to fall back on information and commentary available in the public domain” and these can be useful in tracking the structures of power (Deacon *et al*, 2010:17).

Referring to materials as sources of evidence the criteria of authenticity, credibility and representativeness must be considered (Deacon *et al*, 2010:30-33). Documents come into being in particular political, social, cultural, historical or administrative contexts, by which they are shaped, i.e. conditions, in which they are embedded and produced, generate various pressures or possibilities. In interpreting their sources of information, scholars should beware of potential omissions, hidden agendas, inconsistencies, manipulated definitions and rhetoric to grasp implicit meanings, apart from direct messages at the surface (Deacon *et al*, 2010: 21, 34; Finnegan, 2006:139, 143-145, 149).

But even though “analyses of documents may give only limited information on the intentions and motives of political actors, they can often help us understand the process of creating political definitions and meanings and thus clarify the policy process” (Karppinen

and Moe, 2011:189). “Documents can also be considered important statements intended to communicate political actions” (Karppinen and Moe, 2011:185). Traditionally, in policy analysis documents are used as sources documenting a process, assuming that they “somehow reflect the interests or actions of their authors or in some other way represent the facts of the policy process they refer to” enabling to “uncover political interests or forces and determinants behind policy developments” (Karppinen and Moe, 2011:185).

For this study, document research has been carried out through an analysis of several hundreds of textual documents, most of them from official sources. They included formal documents produced by the relevant institutional players and other stakeholders, such as draft proposals of the law, positions, opinions, press releases, transcripts of speeches, direct quotations from the media sources, and others. Some “leaked” documents have been also available. Besides, a vast pool of audio and video materials have also been examined, e.g. recordings from the meetings, press briefings and other events, providing considerable primary data. A very valuable source of data during this research has proved to be recordings from the conference panels and the notes from attended conferences, where important policy-related statements were made by the stakeholders, many of which have not been available in other sources, as this was still an on-going process.

Interviews

The second research method is interviews. “An interview is an encounter between a researcher and a respondent, where the respondent’s answers provide the raw data” (Harrison and Deicke, 2001:90).

While in policy research accounts given by the actual political elites, i.e. the actual political figures exercising “high influence on the outcome of events or policies” in a

certain research area (Pierce, 2008:118) play an important role, in the context of academic research the notion of *elite* is not limited to these, and "elite status depends not on their role in society but on their access to information that can help answer a given research question" (Manheim, Rich and Willnat, 2002c:320-321, original emphasis). Therefore, while people targeted by academic policy research "*are* often persons of political, social, or economic importance, they need not be" (Manheim, Rich and Willnat, 2002c:321, original emphasis). Rather, "in qualitative research, all interviewees are regarded as 'experts', that is, they have information in which […] researchers are interested" (Harrison and Deicke, 2001:98). As respondents in political research usually (and at times uniquely) possess knowledge about some specific aspects of the subject of study, each conversant requires an individualised treatment, i.e. a different set of questions (Manheim, Rich and Willnat, 2002c:320-321; Harrison and Deicke, 2001:98).

"In Politics research, the most widely-used type of interview – especially in elite interviews – is the **semi-structured interview**" based on "a limited number of topic-related questions and, pre-determined, alternative **supplementary questions** (which question further aspects of the answer received)" (Pierce, 2008:118, original emphasis). These interviews unfold in a conversational ("question-and-discussion") mode, where the roles of interviewer and interviewee may interchange (Pierce, 2008:118).

> "[I]n elite interviewing, the researcher is interested in learning what the respondent perceives as important and relevant to the research and lets the respondent's observations suggest what questions should be asked in order to gain useful information. The interviewer is concerned with discovering facts and patterns rather than with measuring preselected phenomena" (Manheim, Rich and Willnat, 2002c:321).

“Qualitative researchers tend to ask open questions” where open, lengthy answers are sought, “concerned with why and how, beliefs, opinions, forecasts and narratives”, etc. (Pierce, 2008:118).

Similarly to dealing with documents, interviews as sources of information are not immune from biases and various shortcomings. The accounts provided by the respondents may not be objective, offer a distorted or very narrow perspective of the events, contain deliberate or unintentional omissions, thus compromising the scientific validity of the obtained data. Hence, conclusions should be based on comparison of accounts from different respondents as well as other sources, and be theoretically grounded (Manheim, Rich and Willnat, 2002c:321-323).

However, despite the above limitations, elite interviews may be a valuable part of policy research.

> “Many important research questions in political science can be answered only if we can learn how certain individuals or types of individuals think and act. For example, whereas we can always speculate about reasons for the passage of a specific piece of legislation, we can learn the actual reasons only by finding out what the legislators thought” (Manheim, Rich and Willnat, 2002c:320).

Interviews potentially allow access to information about political processes that is unavailable elsewhere, but is very useful for a greater understanding of documentary materials, events or personalities and related contexts. (Harrison and Deicke, 2001:90-94; Pierce, 2008:119-120).

For the fieldwork undertaken for this study, 19 interviews were conducted with policy stakeholders and most of the interviews took place in Brussels. The number of interviews exceeded the initial expectations of potential access to the interviewees, especially as far as institutional actors are concerned, and included almost all categories of stakeholders

(presented in Chapter V). A very rich, multi-faceted body of data has been gained through this part of fieldwork. Many similar points were spontaneously made by the interviewees coming from different realms of interests, indicating validity of those data. The interviews were conducted in the semi-structured mode and the set of questions in each case was individually-tailored, due to the differing background of the interviewees and specific aspects of the process that needed to be addressed. The interviews lasted between 30 minutes and 1 hour and 30 minutes, and were performed face-to-face. The respondents requested full anonymity. All views expressed during the interviews must be regarded as made in personal capacity and not representing any official positions of the respective institutions. Access to the interviewees was gained mainly via publicly available contact information, such as organisational personnel charts or contact lists, and through encounters while attending relevant events such as conferences. Some experts were referred to by previous interviewees. Some interview requests were declined or remained unreplied, but only a few. Audio recording of the conversations was permitted in several cases, but only for a possibility of later review and reflection. In other cases, notes were being taken during the sessions. The interviews were conducted between 2014 and 2016. There were some follow-up meetings. While, as explained above, subject to variations in each case, the interviewees were asked to comment upon the following main themes with regard to the GDPR policy process:

- interaction with other actors (institutional and non-institutional);
- internal dynamics within institutions and/or other fora;
- factors that were having an impact on the course and outcomes of the process;
- actor interests, strategies, constraints and position formation;
- reasons behind or meanings of certain identified controversies, issues and significant developments.

The list of interviews is provided in the Annex.

1.4 The structure of this thesis

Next Chapter II constitutes the contextual background for this thesis. It covers the concept of privacy and the issues arising from the on-line business models. It also discusses Internet governance, the US and EU privacy protection regimes as competing paradigms, and state surveillance. This Chapter provides an understanding of the issues underlying the tensions between different interests in on-line privacy protection-related policy processes. Chapter III presents the analytical framework of this study, where the features of the EU political system drawing on the chosen theoretical strands (consociationalism, policy networks and new institutionalism) are explained. It also includes a discussion on what interests are likely to succeed in the EU policy process. Chapter IV provides an analysis of the stages of the GDPR stipulation process. It maps the main legislative developments and identifies the major areas of tensions between different interests. It explores the shifts in the balance between civic and business interests as well as between the interests and powers of decision-making actors. Chapter V maps the different levels of policy process, the stakeholder constellation, their interests, assets and constraints, as well as strategies. This Chapter offers a more in-depth analysis of the actors' motivations, and how they were channelled into the GDPR adoption process in order to explain the processes behind the developments discussed in Chapter IV. Chapter VI examines some specific factors that shaped the adoption of the GDPR identified during this study and explains what impact they had on the process and why. This discussion is necessary to gain a better insight into the specific context pertinent to this policy dossier and to make links between some of the actors' behaviour and the related developments in the process that Chapters IV and V address respectively. The implications of the choice of instrument (directly applicable Regulation), the impact of the Snowden revelations, lobbying, some examples of domestic

politics, time dimension, and the role of the CJEU are looked into. The findings of the research are synthesised and the main conclusions are presented in the final Chapter VII.

CHAPTER II

The state of privacy in the data-driven environment

2.1 Introduction

This chapter aims to set out the contextual background for the EU data protection reform. The first section (2.2) engages in a conceptual discussion regarding the place of privacy in the technology-saturated environment of the twenty-first century. It juxtaposes the political economy of the Internet that relies on the monetisation of personal data with the notion of privacy as a fundamental right. Section 2.3 looks into the specific privacy-related issues arising from the current uses of available digital technologies deployed for commercial surveillance. Section 2.4 covers in broad terms the on-going debates on the feasibility of Internet regulation and related privacy protection implications in the context of the Internet governance. It explains that harms to privacy on-line are not technologically inevitable, but are the result of corporate and political decisions. Section 2.5 elaborates on the tensions in the field of privacy and data protection deriving from the different privacy protection regimes and philosophies between the USA and the EU, and, especially, from the EU global prevalence in setting privacy protection standards, which strongly affect the US tech industry that dominates the global digital market. Finally, Section 2.6 focuses on the Snowden revelations of mass surveillance that began in 2013 and that had a significant impact on the process of the EU data protection reform (discussed in detail in Section 6.3). This section analyses the impact of state surveillance on privacy and other citizen rights as well as the EU response to the Snowden revelations. This contextual chapter informs the analysis in the empirical Chapters IV, V, VI and VII.

2.2 The concept of privacy versus the political economy of the Internet

Despite the difficulty of framing the concept precisely (Tapscott, 1996c:272), "privacy" is of enormous societal importance.

> "Privacy is [...] an emotional and psychological need, the need to be left alone so that a person can reformulate and re-create himself without anyone noticing the process. It is this creative aspect of privacy, the inner state of mind that allows a person to think about, tinker with, and re-create [her] his personality, which is important not only to an individual but to society" (Batra, 2008:75).

> "In Western democratic societies, privacy is the concept that embodies individual freedom. As such, privacy touches the foundations of our project of society. It is the reason privacy has an impact on a whole range of situations" (Gutwirth, 2002:113).

Privacy is understood as "the ability to regulate the flow of information about self. When regulation is tight, there is privacy" (Deighton, 2003:138). Privacy consists of several dimensions – corporeal, informational, relational, etc. – that refer to various societal situations (Edwards and Howells, 2003:214; Nicoll and Prins, 2003:289; Braman, 2006:126; Van Dijk, 2012:121-122). Corporeal or physical privacy comprises the body and its closest surroundings (also known as spatial privacy). Relational privacy is perceived as "the right to select contacts without observation and intrusion" (Van Dijk, 2012:122). Informational privacy is "the right to selective disclosure", i.e. the control the individuals have over their own "personal data and over the information or decisions based on these data" (Van Dijk, 2012:122). "Data protection" originates in the latter (Van Dijk, 2012:121-122). While informational and relational aspects of privacy have been primarily affected by the use of the ICT, bodily privacy has been more and more co-opted into the cyberspace as well through various technological developments, such as DNA tests, body scanners, digitised biometrics, electronically administered health records, CCTV, drones, etc. These allow turning the characteristics of physical body and physical space into data that can be

collected, processed and exchanged, as it is the case with the Internet of Things and wearable fitness technology, for instance. While for long time data protection was viewed as a subset of the broader right to privacy, current academic debates have started distinguishing the two concepts, especially in the light of institutionalisation of the right to protection of personal data as an autonomous right in the EUCFR, Lisbon Treaty and earlier in the Convention 108 of the Council of Europe of 1981. At the same time, it is recognised that these two rights remain closely intertwined and overlapping (Gellert and Gutwirth, 2013; González Fuster, 2014), for which reason the emerging separation between privacy and data protection does not have an impact on the analytical perspective of this study that will rely on the two concepts as interchangeable terms.

In continental Europe, the concept of privacy as a right matured in the nineteenth century when privacy related laws started emerging (e.g. in France and Germany), linking the need to protect it to the notion of personality rights and individual autonomy, that is human dignity (or honour) in a broader sense, perceived as fundamental values. The creation of explicit legal protections was prompted by evolving means of communications – liberalisation and growth of the press, and later photography and other technologies (Lindsay and Ricketson, 2010:133-136). Anonymity is deemed to be an essential condition in many circumstances to enable one's private life, and protection of privacy to a great extent depends on whether a person's interactions on-line can remain anonymous (Nicoll *et al*, 2003; Van Dijk, 2012:128).

Gradually, apart from national law and constitutions, the right to privacy has been enshrined in a series of international documents (see box.1), designed to establish and harmonise the universally accepted human rights and fundamental freedoms.

Box. 1. Some of the main documents establishing international protection of the right to privacy and/or personal data protection

Universal Declaration of Human Rights 1948;

European Convention on Human Rights 1950;

International Covenant on Civil and Political Rights 1966;

OECD Privacy Protection Guidelines 1980, 2011, 2013;

Council of Europe Convention 108 (for the Protection of Individuals with regard to Automatic Processing of Personal Data) 1981;

EU Charter of Fundamental Rights 2000.

Source: Author's compilation

The EUCFR formulates the right to privacy in the Article 7 as "everyone has the right to respect for his or her private and family life, home and communications" (EUCFR, 2000). "There is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice" (UN, 2014:3). The right to privacy is also "an enabler for other democratic institutions and rights" (Irion and Luchetta, 2013:31; see also Section 2.6). It is the "the most comprehensive of rights, and the right most valued by civilized man" (Brandeis, 1928 cited in Brown and Marsden, 2013c:48). Nonetheless, it has to be noted, that the right to privacy is not absolute and is limited by other social needs and rights, with which it competes, including security, the freedom of expression, and economic efficiency. (Van Dijk, 2012:127, 131; Batra, 2008:44). The latter is linked to in particular the "interests-based" approach to the protection of privacy that has been developing in Western societies with common law tradition, e.g. England, USA and Australia, in parallel to the continental

"rights-based" approach situated in the civil law system. The "interests-based" approach resulted in a fragmented legal privacy protection landscape and a market-led self-regulation mechanism practised to address privacy-related issues. Countries with this tradition lean towards lesser governmental intervention in the regulation of the economy in general. Consequently, such jurisdictions treat the disclosure and use of personal information for commercial purposes, e.g. direct marketing, more liberally (Lindsay and Ricketson, 2010:136-144). The political economy of the Internet embodied the shift towards this paradigm. Monetisation of personal identity has been a consequence of the wider process of commodification of information, communication and the media (Mosco, 2005:170; Braman, 2006:13-15). Information, its processing and flows in the late twentieth century began to be treated as "services" that in economic terms act as products and can be exchanged, i.e. traded alike material goods (Braman, 2006:13-15). Overall, in the modern economies information and communication flows turned from being only one of the economic layers into being the predominant economic activity, more important than physical artefacts. This new kind of economy has been vehicled through ICT networks (Van Dijk, 2012:69). Threats to privacy derive from this wider context of the political economy in the cyberspace that led, for instance, to the use of tracking software by commercial entities, e.g. Internet service providers. Customers profiling through gathering, packaging and sharing information on their choices on the Internet can be understood as another stage of commodification of content and audiences (Mosco, 2005:170-171). Conceptualisation of information, including personal, as a commodity and a policy shift away from public good, societal function and value paradigm of the role of communication, when "messages are exchanged in the process of building and sustaining community" (Braman, 2006:14), coincided with digitisation which enabled precise measurement and monitoring of each information transaction to help the delivery of

targeted audience to advertisers (Mosco, 2005:157-158). This translated into an aggressive push towards “personalised web”, independently from user preferences (Hoofnagle *et al*, 2012), demanding more and more access to personal information needed to customise products and services. While some favour the benefits of customisation (Acquisti, 2010:7-11; Privacy Laws & Business, 2015a), one of its critics Morozov (2013) points out the emergence of the “solutionism” culture or the exaggerated urge to solve problems before they are even formulated and most likely to a far greater extent than needed, imposed by the Internet companies. In more economic terms, “solutionism” refers to creating and selling goods of questionable necessity or utility to the consumer and the society at large (Morozov, 2013). Moreover, web content-tailoring, when content is diverged through filtering based on individual profiles, can actually disadvantage users, preventing them from access to certain types of information (alternatives) or making such access very difficult (Roosendaal, 2013: 145,148,152). Pariser (2011) termed this “the filter bubble”. While even the effectiveness of targeted advertising is still questionable, the massive data collection may affect data subjects (individuals concerned) in numerous ways (Roosendaal, 2013: 150-151), as Sections 2.3 and 2.6 elaborate. Big data economy created and strengthened informational power asymmetries (EDPS, 2014d).

The users’ attitudes proved to encompass a paradox. While seriously being concerned about the privacy risks on-line, at the same time they have demonstrated readiness to give up personal information in exchange to minimal of even nihil benefits (CNIL, 2013b:15). The phenomenon of self-exposure on social media is to illustrate such behaviour (Irion and Luchetta, 2013:35-36). “Serious questions arise, however, about the extent to which consumers are truly aware of what data they are sharing, how and with whom, and to what use they will be put” (UN, 2014:6; see also Sections 2.3 and 2.6). This in addition combines with the factor that the digital economy largely, although not exclusively, draws

on so-called “free” services. Such business models deploy behavioural economics that emerged in the 1970s and looked into how something positioned or depicted as “free” may drive irrational economic behaviour, when the reality of the costs of the “free” being built into prices of something else the consumers directly or indirectly will ultimately pay for, is overlooked. The psychological effect of “free” determines people’s irrational choices (Anderson, 2010:63-66). The “freeconomics” is based on “cross-subsidies”, i.e. “shifting money around from product to product, from person to person, between now and later, or into non-monetary markets and back out again” (Anderson, 2010:20). This means that at some point the user of “free” products and services will find themselves paying for them in one form or another in the overall cycle of exchange of goods and services. For example, the access to free content supported by advertising will result in paying for more expensive goods, for which the advertising was needed (Anderson, 2010:20, 25). It is one of the on-line business models that encompass the three-party or two-sided market, where one customer class subsidises another. “In each case, the costs are distributed and/or hidden enough to make the primary goods feel free to consumers” (Anderson, 2010:25).

Therefore, the claim that personal data are being exchanged for “free” services is half-true and paying with personal data means paying twice for the same product or service. But as for many Internet companies maximisation of participation in the on-line platforms they run is “the matter of death and life” (Van Dijk, 2012:98), the public is encountering a strong encouragement to release their personal information for what is offered as more convenient (“smart”) life. Although even privacy-preserving data-mining exists, these technologies are not much spoken about as they “imply a shifting of cost and revenues between data holders and data subjects” (Acquisti, 2013). Conversely, the voices coming from the biggest beneficiaries of data business, such as Google and Facebook, have been attempting a push of a new ideology that dismisses or even deviates the value of

privacy and people's individual prerogative of constructing their identities (Finley, 2014). Among many arguments that can be made to contrast the view that privacy has become an irrelevant social value, such standpoint can be juxtaposed with a comment by a reader of a BBC article, saying:

> "So what's wrong with being gay? Nothing. Now. Not in this country. Fifty years ago, you'd have gone to jail for it.
>
> In Austria at the start of the 20th century there was nothing wrong with being Jewish. 40 years later it carried the death penalty.
>
> People have the right to a certain level of privacy, because who knows what the future may bring?" (JonnyBoy, on-line comment in Cellan-Jones, 2014).

Although these are not yet without pitfalls themselves[8], the popularity of various services that offer privacy enhancing features of some kind, such as private messaging platforms WhatsApp, Snapchat, or "anti-social" or secretive apps, reveal the tendency of longing for more private communication on-line and a lifestyle with more possibilities to remain unnoticed, when the need is (Gittleson, 2014; BBC, 2014c; Fitzgerald, 2014). The importance of privacy, therefore, is not vanished. Some studies also show that users would pay a fee for more control over their data and opt for more privacy-friendly products when they have such choice (Irion and Luchetta, 2013:35-36). At the time of writing this work (2013-2016), a certain shift of paradigm has been tangible in terms of the public's propensity to give away their personal information that exploded in particular in the decade of the rise of social networking. A number of comments have been emerging, pointing out

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[8] Such private messaging is mainly offered by small start-ups, some of which have been purchased later by large Internet companies with poor user privacy-related reputation. This was the case with WhatsApp's acquisition by Facebook in 2014 (Rawlinson, 2014) and Blink's by Yahoo! in 2014 (Fitzgerald, 2014). In the latter case Blink's services were ceased after the acquisition. Besides, data privacy and data handling by the companies offering these apps are not without issues, either. For example, Snapchat, one of the most popular of such services, has been subject of several breaches and charges of misrepresentations of how the product actually worked in terms of advertised ephemerality of communications (FTC, 2014; Olivarez-Giles, 2014). Failings in dealing with user personal information is a broader problem concerning almost the entire apps industry (Rice, 2013; ICO, 2014).

the crest of such attitude and that availability of personal data is about to decline and to become more expensive in terms of users personal input (BBC, 2014c; Ward, 2014; Kobie, 2015). However, more personal data will be generated through other sources, i.e. through more and more devices being connected to the Internet (see Section 2.3.1).

Furthermore, given the enormous significance the Internet has acquired in the society, a discourse has been emerging regarding the conceptualisation of the medium itself. Is it a human right and should be treated as a public utility or is it a business to be driven by market forces and to function as an oligopoly, as it is now? (Siegelbaum, 2014).

“Despite the specific challenges posed by the increasing use of digital technologies, it is essential to ensure that fundamental rights are promoted and protected on-line in the same way and to the same extent as in the offline world” (FRA, no date). The arrival of such now primitive technologies as an analogue photo camera contributed to the notion of privacy becoming enshrined in law. The arrival of gadgets that include “an embedded camera, microphone, GPS, mini-screens and a touchpad […] with access to the Internet” (CNIL, 2013a), should thus be an indicator of the need for a sound progression, rather than regression of privacy safeguards.

2.3 What endangers privacy on-line

2.3.1 Main changes in the technology and privacy landscape since mid-1990s

The time span of roughly two decades between the drafting of the previous major EU data protection instrument in the first half of the 1990s – the Directive 95/46/EC – and the recent data protection reform 2012-2016 encompasses enormous changes in communication technology, its diffusion and uses. At the time of adoption of the earlier legislation in 1995, the Internet uptake in Europe amounted to less than 1%. In 2012, when

the proposals of the reform were published, there were 250 million daily Internet users in the EU (Commission, 2012a; Commission, 2012b). Not only this. A whole range of new devices, services and applications has emerged leading to an exponential growth in data-rich transactions. These novelties include e-commerce, e-government, e-banking, electronic signatures, smart payment and customer loyalty cards, the “apps” industry, widespread use of search engines and Internet browsers, social media, GPS, smart mobile telephony or other mobile platforms with direct Internet connections, CCTV, digitised biometrics, cloud computing, “fitness tech”, smart household appliances, etc. As it can be seen, administrative, business and personal communication has largely shifted onto digital systems. In addition, the on-line and off-line lives have been steadily merging, referring to the above-mentioned CCTV, fitness data, location registering applications, amongst others, as well as various physical movement trackers or even facial recognition used, for example, by retailers (Hudson, 2013b; Datoo, 2014). The fact and extent of being monitored often remains unknown to the involved individuals, like it was in the case of smartphone trackers placed on the street bins in central London (Miller, 2013). Such environment is only expected to evolve further, with increasing transmission of personal data over networks as well as its storage and processing at remote locations (servers). Accordingly, it has posed a lot of risks to the safety of personal information and requires adequate safeguards (EDPS, 2014e:5). Besides, the longer-term effects of so much personal data generated through pervasive use of technology and of these data being available to often random parties, unknown to data subjects, are yet to be uncovered. Social media, for instance, can exemplify how the use of technological innovations may lead to unpredictable outcomes. People “think they are engaging in personal conversations but actually they are public” (Van Dijk, 2012:185). A study established that “if on Facebook you share posts with friends of friends, an average of over 150,000 people can

read it" (Hudson, 2013a). Another research found out, that users' religion, political leanings, race, sexuality and even intelligence can be fairly accurately inferred through an analysis of the "likes" on Facebook. Moreover, the same is applicable "to all digital records - from browser histories to search queries" (BBC, 2013a). Under the EU data protection Directive 95/46/EC, such characteristics as race, religion, political views and sexuality are treated as highly sensitive personal data, granted even stricter protections than other types of personal information. Not less alarmingly, in June 2014 Facebook was reported of having "conducted a psychology experiment on nearly 700,000 users without their knowledge. The test saw Facebook 'manipulate' news feeds to control which emotional expressions the users were exposed to" (BBC, 2014k). While the breach of ethics in this case was heatedly debated, it is also disturbing that the experiment carried out in 2012 emerged only in 2014, i.e. two years later. During this time Facebook was free to do whatever it wished with the findings of the study. Also, the fact emerged only because it was published as an academic study. Facebook, reportedly used by about half of world's Internet users (Hope, 2015), may not necessarily publicise all such activities and they may remain beyond control and scrutiny. Tracking and profiling of web users by Facebook that do not even have an account with it also emerged in some studies (Roosendaal, 2013:133-138,148; Acar *et al*, 2015). In the meantime, many people perceive social networking platforms such as Facebook as "just the latest extension of the Internet" (GSMIS, 2013).

In recent years, breaches of private information stored in digital databases or circulating around digital networks escalated to such levels that they have been making daily headlines. The sources of these disclosures of personal data vary, including human errors, negligence, indiscretion of malicious insiders as well as hacking[9] (Batra, 2008:74; OECD,

[9] An unauthorized access of a device, platform or system in order to obtain or alter information.

2011:38; Big Brother Watch, 2014; BBC, 2014b; Tufnell, 2014; Smith, 2016). Hacking, for instance, has been affecting networks in such an exponential manner that was commented upon by some as “a new normal” (Lee, 2014). Only between autumn 2013 and spring 2014 several of the most popular digital consumer platforms faced cyber-attacks or uncovered vulnerabilities. These cases, amongst others, involved Adobe (BBC, 2013g), Facebook, Google, Yahoo, Twitter, LinkedIn (BBC, 2013h), US retailer Target (BBC, 2014f) and eBay (Kelion, 2014b), summing up as exposure of details as sensitive as names, email addresses and encrypted passwords, physical addresses, phone numbers and dates of birth, credit card information of several hundreds of millions of users. While not even the largest players, with bespoke IT security forces, can guarantee a 100% security (Kelion, 2014a), smaller firms often lack the very resources and expertise to exercise adequate measures needed for data protection (Tufnell, 2014). Along with these problems, there are many issues affecting users’ rights, related to the use of technologies preventing people from shielding themselves from the collection of their personal information in the pursuit of commercial monitoring. This is discussed in the next subsection.

2.3.2 Commercial surveillance and how it is aided by technology

As earlier covered in Section 2.2, the commercial value of information is immense for the Internet economy and personal data have become a core asset for on-line businesses. Often obtaining such data is the main purpose why on-line services are provided. Normally personal data are collected and processed not only to optimise companies’ own services but are also sold to other businesses (Edwards and Howells, 200:207-222; Batra, 2008:100, OECD, 2011). All actions performed by users on the Internet leave a so-called “digital footprint” allowing constant tracking of on-line activities. The enormous amounts of personal information collected and stored by business entities often comprise real names,

age, marital and financial status, off-line contact details and e-mail addresses, individual lifestyle patterns, and so forth (Edwards and Howells, 2003:207-222; Van Dijk, 2012:4, 18, 122-127). The currently available technologies enable almost instantaneous processing, linking and transmission of vast volumes of data, that is they allow data-mining – production and trade of the newly inferred information from the originally available (Chadwick, 2006:257-288; Van Dijk, 2012:121-122). In most cases, information can be gathered "invisibly" through monitoring on-line activities without users' awareness and consent. This is covered in more detail bellow.

One pervasive way to perform on-line tracking is "cookies" – a technology of placing small text files on the Internet users' devices (Edwards and Howells, 2003:216-218, 234-235; Van Dijk, 2012:124-126; Batra, 2008:99). "Cookies" contain a string of numbers acting as unique identifiers of a concrete computer. Commonly, distinction is made between first-party "cookies", issued by the visited website, and third-party "cookies", installed by companies that have no relationship with the visitors of a given website. The latter are usually used to track users across different websites, so the majority of this type of "cookies" derive from web advertising firms seeking on-line profiling for the sake of targeted marketing. The placement of third-party "cookies" is allowed by most websites (Hoofnagle *et al*, 2012:275-276, 279-281). Some technical means (e.g. blockage or deletion of "cookies") are available for users, but commercial actors are known to engage in covert collection of information through digital interfaces, even when their users opt out of data sharing with other parties. For instance, a developer GoldenShores Technologies running the Brightest Flashlight app on Android devices was caught sharing details, such as ID and location data, from all users with ad networks without informing the users about this practice and regardless of whether they agreed or not. This incident involved tens of millions of Android users (BBC, 2013i). In another case a user detected personal data leaks

through a LG Smart TV portal that persisted even in opt-out mode. Not only the family's TV content preferences where monitored, but even the children's names were identified and sent to the LG servers, i.e. travelled through the Internet backbone (Kelion, 2013). A very important circumstance in this case was that the user who detected private information leakage from his home through a "smart-tech" item is, in fact, a worker in the IT sphere, possessing certain expertise that enabled him to read the technical data on his smart device. This implies that "average" users in most cases would very likely remain unaware of such breaches while using their devices.

As an extensive study by Hoofnagle *et al* (2012) shows, a number of new methods, adopted by advertisers in recent years, that are more difficult for users to detect and avoid, have been identified. These technologies, known as ETags, Flash "cookies", HTML5 local storage, and Evercookies, are significantly more persistent than standard HTTP "cookies", as they are based on respawning tracking mechanisms, in order to resist user attempts to delete or block "cookies" or other unique identifiers. Consequently, users can be tracked even when a browser is set for the private mode (Hoofnagle *et al*, 2012: 277, 281-290).

Another category of tracking technique, called digital fingerprinting, uniquely identifies users by recording specific attributes on a device that constitute browser configuration. As such mechanism is enacted on servers, it is rather difficult for users to trace. To avoid it, they would have to disable such key functionalities of websites as JavaScript and Adobe's Flash (Acar *et al*, 2014). An on-line tracking company BlueCava was reported in 2010 as having fingerprinted 200 million devices and aiming "to have catalogued one billion of the world's [then] estimated 10 billion devices" within the following year "to sell this information to advertisers" (Angwin and Valentino-Devries, 2010).

One more common practice is that popular sites are designed in a way that sensitive and identifiable personal information entered by users is directly leaked to third-party aggregators, despite statements in privacy policies of those website about not sharing data with such third parties. It also occurs that “third-party tracking sites disguise themselves as first parties”, rendering “consumers’ attempts to block third-party cookies ineffective”, because, as a result, they are not recognised as such but instead as first-party “cookies” (Hoofnagle *et al*, 2012:280-281).

The application of the above described methods means that individuals can be uniquely and continuously tracked even if they have taken “reasonable steps to avoid on-line profiling” (Hoofnagle *et al*, 2012: 283). This empirical evidence reveals that users’ choices are persistently and pervasively invalidated by the commercial players involved in targeted marketing. On-line tracking, driven by behavioural advertising, is “the offer you cannot refuse”: consumers’ preferences are overridden in most sophisticated ways, enabled by bespoke technologies (Hoofnagle *et al*, 2012: 278, 290-295). Tracking related intrusions concern not only individual users and their devices but also extend to unauthorised interferences with the policies and operation of other commercial players. In one such case it was discovered that the e-mail addresses of LinkedIn users were exposed through an add-on tool Sell Hack on the Chrome browser. The company who created and ran this extension commented that it was aiding marketing professionals, and doing “the heavy lifting and complicated computing to save you time” without doing anything wrong to LinkedIn (BBC, 2014d). Third-party extensions or apps, often can upload private information kept on social networks without notice and explicit consent (BBC, 2014d). In another of such cases, Google has been sanctioned by the US federal and state authorities and has seen a lawsuit filed against the company in the UK for bypassing privacy settings of Safari browser (BBC, 2015c). This browser is set by default to automatically reject

tracking “cookies”. “But Google got around this block by adding code to some of its adverts to make Safari think that the user had made an exception for its cookie if they interacted with the ad” allowing “the firm to track people’s web-use habits even if they had not given it permission to do so” (BBC, 2012a). To continue the list, the Microsoft’s browser Internet Explorer has also been subject of circumventions of its privacy design, offered to the users. This browser by default blocked any third-party “cookies” from the sites if a machine-readable privacy policy was not detected. As it was discovered by some researchers, thousands of websites were overcoming this barrier by posting fake machine-readable policies, thus “misrepresenting their privacy practices […] misleading users and rendering privacy protection tools ineffective” (Leon *et al*, 2010 cited in Hoofnagle *et al*, 2012:291-292).

Another technology that raises privacy concerns is the use of the Deep Packet Inspection (DPI) by the ISPs. This is when the inspection of the data packages travelling over the Internet is not limited to the reading of the IP addresses (headers), necessary to route packets (i.e. for the transportation and delivery of messages), but involves the examination of the content and application data, that enables insights into users’ web activities, compromising their privacy expectations. Namely, this “may encompass interception, collection, observation, analysis and storage of application-level data” (Cooper, 2011:145). This technology can be used to address network congestion and security threats. It can also help to examine how networks are being used to carry out appropriate upgrades. At the same time, and most importantly, “DPI is among a set of tools that can provide ISPs with the new revenue streams, whether by funnelling data about users to advertisers, selling expedited delivery to content providers or levying extra fees on heavy network users” (Cooper, 2011:140). E-mail providers such as Google and Yahoo! have been criticised for keyword-scanning e-mail messages. While the firms claim this is being done to tackle

spam and viruses, they admit that the same process is being used to target their users with tailored advertising (BBC, 2011; BBC, 2013c).

Apart from advertisers and Internet businesses, there are other industries interested in having less restrictions on data-sharing and more access to it. These are pharmaceutical companies, insurers and retailers, for instance, seeking to exploit what is called Big Data (Datoo, 2014; Wall, 2014; Batra, 2008:44). Recently, in the UK, for example, the government's scheme to create a national health care database that would grant access to commercial actors has challenged the longstanding institution of patient confidentiality (Ramesh, 2014a). The scheme was later scrapped due to the public outcry related to data protection issues.

The stress by the industry is on the use of aggregated anonymised or pseudonymised data that, allegedly, are disconnected from identifiable real persons. However, it is more and more questioned whether anonymity of digital data can be really assured, as a number of methods are known that allow easy identification of real people and matching them with their profiles by cross-linking various personal information available from different sources (Ohm, 2010; Hoofnagle *et al*, 2012:292-3; Roosendaal, 2013:99-153; Burn-Murdoch, 2013; Ramesh, 2014b; Rutkin, 2015). This can be as far-reaching as combining on-line and off-line data (Roosendaal, 2013:143-146). Presently, there is far more investment directed into development of technologies enabling fusion of data than into privacy-enhancing methods allowing "to obscure personally identifiable information within large data sets […] re-identification is becoming more powerful than de-identification" (White House, 2014b:54).

2.3.3 How commercial surveillance affects the Internet users

Advancements in data processing software allow most sophisticated analysis of personal information producing a whole new tier of digital intelligence, which is secondary or inferred information obtained through behavioural and predictive analytics. These technologies and methods are able to provide insights into even as private and sensitive sides of one's life as the fact of pregnancy, sexuality, religious beliefs, or health conditions, through analysis of individual digital data (Naughton, 2013; see also Subsection 2.3.1). "New, non-obvious, unexpectedly powerful uses of data" are enabled by Big Data technologies (White House, 2014b:54). Personal information "may end up being shared with or passed to persons or companies who were never contemplated by the data subjects when the information was originally collected" (Edwards and Howells, 2003:209). Therefore, "it is increasingly difficult for individuals to understand and make choices related to the uses of their personal data" (OECD, 2011:5). Apart from serious ethical questions deriving from the notion that privacy is a matter of human dignity and from here the need was to have it established as a fundamental right, various forms of tracking and profiling may have a number of tangible consequences in the off-line life. This may affect the employability of concerned individuals and their access to social and financial services (such as insurance or loans), or expose them to fraud, etc. Moreover, decisions about persons, without their knowledge, can be made referring to the incorrectly inferred or recorded information (Deighton, 2003:137-139; Batra, 2008:91-122; Edwards and Howells, 2003:208-222; Van Dijk, 2012:122-126; Naughton, 2013; Kelion, 2015). In most cases the information processing is automated (OECD, 2011), deploying algorithm computing, without involving individuals concerned or checking that information. This poses a substantial risk that unfair conclusions about persons can be drawn (Edwards and Howells, 2003:208-222; Van Dijk, 2012:122-126; Batra, 2008:91-122). As explained by Lyon (2003; 2007c:99-108, 115-117), who laid foundations for surveillance studies,

profiling inevitably leads to social sorting and discriminatory treatment of categorised individuals or groups. In the meantime, people categorisation is a widespread practice, seeking customisation of services and products, in order to maximise commercial gains (Edwards and Howells, 2003:208-222; Van Dijk, 2012:122-126; Batra, 2008:91-122).

Risks to privacy are one of the greatest concerns among Internet users, according to a number of surveys (e.g. Eurobarometer, 2011; Eurobarometer, 2015; GSMA, 2014; Symantec, 2015). In addressing the need "to mitigate the privacy risks to individuals posed by monitoring, unanticipated secondary usage, and data security breaches" (OECD, 2011:5) such elements as operators' accountability, data minimisation, purpose limitation, privacy-by-design, explicit informed consent, breach notification, and others, are articulated in the policy debates. While many safeguards had been already enshrined in the EU law, they needed to be upgraded in the light of the proliferated use of advanced technologies that have made control over one's personal data very difficult. The GDPR was aimed at delivering such an upgrade.

2.4 How privacy and data protection on-line is affected by Internet governance issues

2.4.1 Internet governance and the implications for the data protection on-line

The Internet operates as a network of networks where data are transmitted in small packages. The emergence of the Internet and its exponential growth posed a new regulatory frontier and a number of challenges to centralised models of control. Primarily, it represented "a major disruption in the way we regulate communication and information technology" (Mueller, 2010:4). Digital convergence brought together different media forms onto this new platform. Press, telephony, broadcasting and postal correspondence, previously were regulated with different approaches. As the Internet embraced all these forms of communication, the distinction between public and private as well as between

mass and interpersonal communication has blurred, bringing along various regulatory perplexities (Van Dijk, 2012:153). Privacy is one of the dimensions directly affected by this dynamics, as the secrecy of telephone and mail communications, perceived as private and interpersonal, traditionally was protected as a value and a right (Van Dijk, 2012: 153). This societal institution of communication privacy contrasts with how potentially many parties may gain access to monitoring of private communication on the Internet.

There are other challenges, too. As the Internet, due to its architecture, has made the scope of communication global, "any attempt to impose a jurisdictional overlay on it requires additional (costly) interventions" (Mueller, 2010:4). Besides, the sheer volume of transactions and distributed decentralised control puts pressures on the traditional governmental processes in responding to this rapidly evolving environment (Mueller, 2010: 4-5). At a certain stage, these novelties even prompted the idea of non-regulable Internet (or cyber-libertarianism), that was seen as a dawning of a new era of liberalisation from the centralised governmental control (Goldsmith and Wu, 2006: 11-27). Such paradigm, though, proved to be a short-lived fallacy. "There has been a counter-revolution, as states and other incumbent powers have fought back against these disruptions and innovations, asserting their sovereignty and coming up with new ways to border or regulate the Internet" (Mueller, 2010: 4). While networked governance, attributed to the Internet, may be seen by some as undermining the traditional hierarchical authority (Mueller, 2010: 31-48), it should not be overlooked, that governments can network, too, and "create their own networked organisations and avail themselves of the capabilities of networking to defend and advance their own interests" (Mueller, 2010: 48). States are not static entities. States are transformative and adaptive, and can draw on various sources of capacity to cope with domestic and external changes. Most importantly, states themselves are catalysts of those changes (Weiss, 1998). Morozov (2011) reminds us

that governments are not excluded from taking advantage of what the new medium embeds. In fact, electronic networks provide them with another platform through which control is exercised, enabling citizen surveillance (as covered in Section 2.6). In some cases, the Internet can facilitate, not hinder, enforcement of the territorial law (Goldsmith and Wu, 2006:10). It is also worth remembering that citizens' access to the Internet, the technologies involved (e.g. fiber, satellite or wireless) as well as the conditions within which service suppliers operate, all significantly rely on political decisions such as the rolling out of communications infrastructure that requires costly investments (BBC, 2014j). It also has to do with the management of such scarce resources as radio frequencies, among a vast number of other factors. Looking further into this point, the very inception of the Internet was actually fostered and financed by governments and the technology was born in the late 1960s as a pursuit of a military asset (Brown and Halter 2010:281-291), alike many other communication systems or technologies (e.g. see Harford, 2016). Although since then the medium has become available to billions of users that engage with it in most mundane ways, the original purpose of the creation of the Internet is still present in the speculations on the cyber-war (Van Dijk, 2012:101) as well as in the debates surrounding surveillance (see Section 2.6). The fact that the creation of the Internet was subsidised by the government and intended for defence purposes, and that it is still subsidised by public money in a lot of cases, contrasts with the ideas about "cyber freedom" and its immunity from regulation.

Global Internet regulation can be enacted through various methods, such as treaties, like in the case of cybercrime convention, WTO governed trade disputes, like in the case of web gambling, regional pressure drawing on the market power, like in the case of the EU privacy rules, and Internet technical architecture, like in the case of the US dominated ICANN. (Goldsmith and Wu, 2006: 176). The latter, also known as "Code as a law"

concept, was most famously developed by Lessig (e.g. 2006). The preferences of the "code-writers" – the actors that are engaged in the engineering of the technical architecture of the cyberspace – determine the way the Internet operates. The "code-writers", however, fall under the authority of other actors that have the decision-making power within their jurisdictional competence. Thus, they can impose their preferences on the "code-writers". This perspective is particularly important in discussing data protection on-line. "Privacy harm is no technical inevitability; it is a matter of deliberate design by governments and corporations" (Van Dijk, 2012:297) pursued instead of implementation of the "privacy-by-design"[10]. Although some technological boundaries exist, what is regulated and in which ways is ultimately a matter of political will (Tambini, Leonardi and Marsden, 2008:14-16). "The Internet is the product of state and corporate governance choices, not solely the result of the choices made by the scientists and engineers who designed it" (Mansell, 2012:156) and even in such a complex environment as the cyberspace and the context of global economy, i.e. acknowledging more distributed power dynamics, the governments still hold the ultimate decision-making power and are able to exercise it, when they consider it needed (Drezner, 2007:91-118). Indeed, the Internet did not emerge as all-privacy-unfriendly and was gradually shaped as a privacy undermining environment (Harper, 2011:129-134). Such features as the use of "cookies" or DPI, e-mail scanning or facial recognition, to make some examples, were all introduced at a certain point with commercial or political goals. "Technological changes do not *determine* social interactions, but they do have distinctive effects that are derived from the way their unique capabilities interact with the interests of specific actors and the institutional environment" (Bendrath and Mueller, 2011:1143, original emphasis).

[10] Privacy-by-design is a concept of "building privacy and data protection up front, into the design specifications and architecture of information and communication systems and technologies, in order to facilitate compliance with privacy and data protection principles" (EDPS, Privacy by design).

Although, as covered above, the ungovernability of the Internet is an outdated orthodoxy, the debate around privacy issues on the web is heavily fuelled by scepticism promoted by commercial actors, such as American Internet giants and also some Silicon Valley-inspired European companies, depicting regulatory attempts as pointless or even harmful, and a privacy-poor Internet environment as the reality that needs to be accepted (BBC, 2012b; Brown and Marsden, 2013c:62; Cellan-Jones, 2014). However, the behaviour of the Internet firms is inconsistent with their narrative that the way the medium operates cannot or should not be altered. As Goldsmith and Wu wrote (2006:1-10), Yahoo!, for example, had a controversy with the French authorities over the Nazi content on their website in the late 1990s. The American firm initially rejected the demands to remove hate speech content from the French version of the website. They claimed that France had no jurisdictional power (i.e. the Internet is global), that it was not technically possible to differentiate between the visitors of the website from different countries, and that they valued the freedom of speech. Soon, it turned out, that the French version of the website was managed through the servers located in Europe, allowing France to exercise certain authority. Besides, it became evident that Yahoo! could effectively screen out up to 90 percent of French users. What is more, not long afterwards, in sharp contrast to their earlier statements about the impossibility of geographical screening, the company started delivering geographically-targeted advertising. Finally, the previously stated Yahoo!'s attachment to the values of free speech and democratic freedoms were not an obstacle to collaborate with the Chinese government a few years later in censoring the access of Chinese citizens to on-line content. It also complied with the Chinese authorities' demand to help identify the sender of an anti-governmental memorandum. The journalist, who did so using a Yahoo! e-mail account, was sent to prison for ten years. Yahoo! (in contrast with their earlier attitude towards the French demands) commented, that they had to follow

the local law (Goldsmith and Wu, 2006:1-10). Google is another American company with a similar Chinese track record (Amnesty International, 2006; Lessig, 2006:61-80). The firm's response to the CJEU ruling in spring 2014 imposing the so-called "right-to-be-forgotten"[11], i.e. the references to unfeasibility, harm to innovation and democratic freedoms (Cellan-Jones, 2014; BBC, 2014h; Toobin, 2014) resonates with the above-described Yahoo!'s case pre-dated by more than a decade. Companies themselves show that there is nothing inevitably inherent about the way the web functions, by "adding or subtracting at least one feature per week" (Morozov, 2013:20).

2.4.2 How privacy protection on-line can be enacted

Overall, a sound privacy protection on-line requires a complex approach that would encompass self-regulation, legal protection, technical measures and privacy-by-design (Van Dijk, 2012:127-136;163-170; Edwards and Howells, 2003:222-244).

Self-regulation, or the prerogative to shape behaviour granted to private actors, would be a desirable mode of privacy governance in that it could save regulatory and enforcement costs and is associated with efficiency. Yet, in practice the evidence has shown that self-regulation is unlikely to work on its own (Koops *et al*, 2006:123-126; Gellman and Dixon, 2011) and generates market failures (Mansell, 2012:150). There will hardly be any market force in an unregulated market to balance the commercial pursuit to collect as much personal data as possible (Deighton, 2003:137). For instance, controversially, the long-standing poor consumer confidence in e-commerce due to privacy risks (Edwards and Howells, 2003:207-248) did not prove to be a market force for businesses to acquire more

[11] More precisely, the Court ruled in favour of the right to de-listing from a search engine's results (judgement *Google Spain SL*), which in essence concurs with the logic of the "right-to-be-forgotten" in the GDPR (Article 17). "The-right-to-be-forgotten" is not, however, a new right in the EU, but just a new name of an old right to erasure (or deletion) that has been upgraded (Zanfir, 2013). The right to erasure (of personal data) has been already enshrined in the Directive 95/46/EC that the GDPR is replacing. The CJEU ruled in May 2014 based on this right to erasure present in the Directive 95/46/EC. This right does exist in some forms even in the USA (at state level) as well as in various forms in other jurisdictions.

privacy respectful attitudes. Self-regulation often lacks “proper procedures for oversight, and enforcement, and amount to little more than declarations of good will” (Tambini, Leonardi and Marsden, 2008:4). As it was discussed in detail in Subsection 2.3.2, most companies demonstrate no motivation to respect Internet users’ privacy and related choices made by them. Similarly, this tendency can be very tangibly seen in the response by many websites to the so-called “cookie law” (Directive 2009/136/EC) – an EU attempt to grant the users more control over tracking, obliging websites to obtain consent for the placement of “cookies”. The most common “cookie message” reads as “by using our services/website you agree to our use of cookies”, offering the visitor a “take-it-or-leave-it” option. The following dismissive responses to this law can also be found:

> “Annoying message about cookies: Like 90% of websites, we use cookies to help us improve the site, and to help you click around. These are small files that are stored on your computer. EU regulations mean we have to point this out, hence the annoying pop-up, which will only appear on this visit. Happy to continue?” (www.londonist.com).

While “cookies” are no technical necessity, most sites are crafted in the way that they simply do not function if cookies are disabled (Edwards and Howells, 2003:235). Privacy policies can be mentioned as well to make yet another example of the commercial companies’ attitudes. Privacy statements are often bogus, deliberately containing significant omissions or misleading wording (Garfinkel and Spafford, 2002:231; Hoofnagle *et al*, 2012:291-292), or they are formulated in a hardly intelligible to “an average user” legalistic language, extended across several dozens of pages (Brown and Marsden, 2013c:53-54; Crain, 2015). The issues behind the “notice and consent” principle, on which the use of privacy policies is based, has been recently acknowledged at the highest political levels even in such “laissez-faire” countries as the USA and the UK (White House, 2014a: xi, 38; UK Parliament, 2014).

As it was covered in the Subsection 2.3.2, the **technical solutions** currently available to the Internet users to manage their personal information on-line, such as browser privacy settings or deletion of browsing histories, are annulled by aggressive commercial surveillance practices, enabled by powerful technological tools. Another limitation of the technical self-regulation by users is that it requires a fair degree of "digital literacy". In the meantime, many Internet users lack technical skills, e.g. are unable to identify a "cookie" (Lyon, 2007c:189). **Privacy-by-design** and the opt-in (as opposed to opt-out) mechanism are deemed to provide the best privacy protection for users (Van Dijk, 2012:128-129; Batra, 2008).

Besides, **legal protection** – a set of certain prescriptive legally enforceable rules – is necessary to ensure effective privacy protection (Edwards and Howells, 2003:243). As discussed in Subsection 2.3.2, and earlier in this section, a real consumer choice is not possible without regulatory interventions. The policy-makers' role is very important in protecting choices, made by web users, from technical circumvention (Hoofnagle *et al*, 2012:278-279). "There is widespread evidence that consumers favour legislation for privacy protection" rather than self-regulation (Tapscott, 1996c:279-280).

However, legal privacy protection is often contested by definitional uncertainties or ambiguities, resulting in grey areas or gaps that enable various data misuses and abuses (Cooper, 2011; Poullet and Dinant, 2010, 65-68). There are many cases when definitions have been manipulated in order to create loopholes or legitimise access to data (Cellan-Jones, 2014; BBC, 2014i). Social media have been subject to particularly curious interpretations. An American court determined that social media encompasses a "digital landlord", in order to sanction the law enforcement access to social media accounts of some individuals accused of benefit fraud (Miller, 2014). Definitional clarity is important for an efficient implementation of privacy protection legislation. In the face of fast-paced

technological change and convergence, another important property of future-proof regulatory norms on-line is the technological neutrality (Van Dijk, 2012:131, 166, 168). Finally, at the present privacy protection also suffers from internationally inconsistent approaches (Farrell, 2008c:386-95; Van Dijk, 2012:131, 164-170), as is the theme of the next section. Despite the various challenges, legal and regulatory efforts do have a significant impact. For instance, such efforts by the US regulators were successful in reducing certain types of spam to up to 80% (BBC, 2015e).

2.5 The EU and the US privacy protection regimes: the origin of Silicon Valley lobbying against the GDPR

Although far from being flawless or uncontroversial in itself, the EU data protection regulation is rated as the most advanced privacy safeguards in the global context (Van Dijk, 2012:131, 165-166; Edwards and Howells, 2003:233-234). In the Internet-related environment, the implementation of the EU privacy protection policy has to deal with the pressures coming from the US paradigm of market self-regulation – predominant in the cyberspace. These challenges are augmented by the commercial dominance of the American on-line giants in the digital marketplace, holding also a huge market share in Europe. The co-existence of these competing concepts, especially given their settlement in the two most powerful international players – the EU and the USA, determines a lax privacy protection regime worldwide, while globally-established rules are needed for efficient privacy protection, alike for a number of other issue-areas on-line (Drezner, 2007:91-118). However, the influence of the political and economic power of the EU and its promulgated strict privacy and data protection principles create, to a certain extent, the effect of "global privacy law", according to many analysts (e.g. Farrell, 2008c:386-395; Prins, 2006:170-173; Goldsmith and Wu, 2006:173-177).

While in the EU privacy is viewed as a fundamental right, broadly established in constitutions (Prins, 2006:173; Movius and Krup, 2009:169-179), in the US privacy protection is often treated as a matter of consumer rights in the context of commercial transactions, being merely one of the interests that strongly competes with others (Schwartz and Solove, 2013:1-5), with no explicit constitutional guarantees (Movius and Krup, 2009:174). The above approaches are reflected in the application of different methods to regulate privacy and data flows. In the EU, privacy protection is enacted through prescriptive legal rules. In the meantime, in the USA industry self-regulation prevails (Prins, 2006:171; Movius and Krup, 2009:169-179). The American privacy law is a rather fragmented system of legal acts, that addresses specific misuses of personal data or its processing in specific situations (Braman, 2006:126-138; Prins, 2006:171; Schwartz and Solove, 2013:1-5). It does not offer a comprehensive system of safeguards for this domain as a whole (Braman, 2006: 126-138). The norms regulating privacy issues originate from multiple federal agencies dealing with certain industries or activities of their competence (Braman, 2006: 127). In contrast, the European privacy protection draws on comprehensive, technology neutral, dynamic measures, comprising all aspects of data collection and usage, established in related Union-level legal instruments (Van Dijk, 2012:165; Edwards and Howells, 2003:233; Schwartz and Solove, 2013:1-5). As it can be seen, the EU and the US approaches towards privacy and data protection are significantly divergent in their conceptual perception, mechanism and scope. The two actors are each other's biggest trade partners. As a result, the digital economies of both markets are affected by the regulatory spill-over and the underlying disjunctions create a high degree of tensions in the processes of the international political economy (Movius and Krup, 2009: 169-171). These tensions are not an isolated phenomenon in the transatlantic relations and seem to be embedded in a much broader context. The EU can be seen as an agent exporting

regulatory models that encompass and promote European norms, values and ideas (Petiteville, 2003: 125-157). Although the "European identity" is a rather contested concept, some common values and ideals present in the political culture of the EU countries can be identified (Buonanno and Nugent, 2013:246). In general, in Europe the role of public authorities has tended to be more extensive in addressing societal needs than in the USA that typically has favoured the role of private actors to tackle societal challenges (Movius and Krup, 2009:171). In response to globalisation, for instance, most European governments are more in favour of strong regulation than the USA, whose stance is basically free-market led (Petiteville, 2003:131). Most EU MSs remain Welfare State-oriented and see a need of a strong regulatory protection in some economic sectors (e.g. agriculture, environmental protection, genetically modified food, etc.) "to escape the harsh effects of globalisation" (Petiteville, 2003:131). The audiovisual sector is one of the cases where European governments succeeded in resisting the US pressure of regulatory liberalisation through the WTO, justifying their audiovisual policy on the grounds of "cultural exception" (Burri, 2014:479-492). Human rights, democracy and the rule of law are also the areas where values between the EU and the USA differ (Petiteville, 2003:132,134; Richter and Albrecht, 2013). The Europeans and the Americans have very different feelings regarding hate speech and whether it has to be regulated, for example (Goldsmith and Wu, 2006:1-10; Farago, 2013; Rawlinson, 2015a). In Europe individual rights are closely linked to extensive social rights guaranteed through state regulatory intervention (Petiteville, 2003:132). In the field of consumer protection, for example, the European rules are more demanding than those American (DePillis, 2013), as a result. In afore-described ways Europe represents an agent of "meanings other than strictly economic norms" (Petiteville, 2003: 134), in contrast to the American market-oriented political mindset. To make an example, such a value clash was strongly expressed in the

EU commitment in promoting the Kyoto Protocol, encompassing environmental protection principles, while the USA opted out of this international agreement in the pursuit of economic interest (Petiteville, 2003: 131, 134). In the attempt to secure fundamental rights of citizens, Europe tends "to privilege privacy protection at the expense of data access to information and economic efficiency" (Movius and Krup, 2009:178). This constitutes the so-called "cultural gap" between the two sides of the Atlantic (Cellan-Jones, 2014; Richter and Albrecht, 2013) that sometimes even acquires a form of strongly expressed antagonism (Eger, 2014), despite the fact that the EU and the USA are long-term strategic partners and are both attributed to the so-perceived Western culture. It is also worth mentioning, that historically the USA was born as an act of liberalisation from the centralised and at the time oppressive European rule, determining the pursuit of divergence from what is perceived as "European" in constructing society (Goldsmith and Wu, 2006:176-177).

As far as trade is concerned, the EU has been accused of protectionism on various occasions for imposing its rules in trade agreements with third countries, or in relation to its regulatory actions. Data protection is one of such instances (Princen, 2003:150; Recode, 2015). Divergent EU-US views "feed permanent transatlantic misunderstandings and even 'transatlantic trade wars'" in some areas (Petiteville, 2003:131).

Privacy protection is one of the areas where the EU-US cultural gap is most strongly pronounced (Richter and Albrecht, 2013; Cellan-Jones, 2014). The past experience with the Nazis and with the communism in many European countries determined the public's sentiment towards privacy in this continent, and enshrining it as a civil right that preconditions democracy (Melik, 2012; Movius and Krup, 2009:172). Therefore, the embedment of important civil safeguards around privacy and establishing a system "in balance between the citizen and the corporate sphere and the government" are given a lot

of significance (Jeff Chester of the Centre for Digital Democracy, quoted in Melik, 2012). In this regard, a strong stance on privacy protection, in line with other human rights, can be understood as a matter of European identity. But it was also a question of status quo in the international context, allowing Europe counter-weigh the US dominance in the global governance of the Internet domain names (Prins, 2006:170; Goldsmith and Wu, 2006:173-177; Traynor, 2014). “There is a global competition for regulatory prevalence [...] The Europeans and the Americans have been racing against each other to adopt legislation or regulations for their market, which as a result forces or inspires third countries […] to adapt to those rules” (Thomas Tindemans of Hill & Knowlton Strategies, quoted in Hakim and Lipton, 2013).

> “Attempts to harmonise U.S. and EU privacy law by turning EU privacy law into a U.S.-style approach, or vice versa, are unlikely to succeed. Both the United States and European Union are deeply committed to their respective approaches. While policymakers and scholars have been trying for nearly two decades to bring U.S. and EU privacy law closer together, the new EU Proposed Data Protection Regulation could push the United States and European Union even further apart” (Schwartz and Solove, 2013:5).

Provisions on data protection are included into co-operation agreements with many third countries (Farrell, 2008c:386-395) along with other “European” values and norms exported in this way. This works as a form of soft diplomacy that creates grounds for Europe to compete with the USA for global leadership (Petiteville, 2003:134). European data protection rules are one of the most tangible instances of export of the EU values and norms through regulatory standards. Global dominance in this issue-area is attributed to the EU by many commentators (Farrell, 2008c:386-395; Prins, 2006:170-173; Goldsmith and Wu, 2006:173-177; Jeff Chester of the Centre for Digital Democracy, quoted in Melik, 2012; De Hert and Papakonstantinou, 2016:194; etc.). The USA has attempted to influence the development of privacy regulations in other regions, but many countries, such as the

members of APEC or Canada, find it in their own interests to align themselves with the European style approach (Brown and Marsden, 2013c:60; CNIL, 2013a). The EU is perceived as a creator of the global privacy rules. In promulgating more stringent data protection standards internationally, its market power, enhanced by its institutional framework and technical expertise in this field, underpins the spurring of what is known as the "race-to-the-top" (Princen, 2003:142-157; Goldsmith and Wu, 2006:173-177; Brown and Marsden, 2013c:54), or the "Brussels effect", referring to the bespoke term coined by Anu Bradford (2012). The regulatory "race-to-the-top" defines the process when an actor (e.g. a country or a multinational corporation) improves their standards as the result of another actor's measures, related to the access to or operation in a certain market, provided the latter possesses assets enabling them to impose such measures (Princen, 2003:142-143; Goldsmith and Wu, 2006:173-177). It may also occur, that tailoring a product or a service to a specific market, where higher standards are demanded, is not feasible or is less cost effective than adjustment across the whole trade operation. This happened in the case of the American firm Microsoft, when the EU's requirements concerning the Microsoft's dot-Net Passport resulted in the modification of the product globally (Goldsmith and Wu, 2006:174-176). The EU law, thus, was applied far beyond its jurisdiction.

Although the EU data protection Directive 95/46/EC, perceived as an axis of the EU data protection law package, was primarily adopted aiming to harmonise data protection legislation internally, it has a lot of external ramifications in regulating data flows (Princen, 2003:149). It comprehensively covers all actors operating in the EU market, independently from their origin (Goldsmith and Wu, 2006:175; Directive 95/46/EC, Article 4). It foresees that the DPAs established at the national level with the adoption of the Directive are required to ban transfers of personal data to third countries where the level of protection is not adequate, in order to prevent personal data from being transferred to countries with

weaker data protection regimes, that would enable circumvention of European requirements. The Directive established that the adequacy of a third country's data protection standards is monitored and approved by the Commission, a regulatory committee of MSs representatives and a working party formed of representatives from national DPAs (WP29) (Princen, 2003:149; Directive 95/46/EC, Articles 31 and 29). As the Directive was adopted, the USA was among the countries where data protection did not meet the adequacy level imposed by the EU, in particular, as far as predominantly self-regulated private sector was concerned, that also lacked a sound supervision mechanism. The Federal Trade Commission (FTC), which had some powers to supervise data protection as part of its general oversight of "unfair and deceptive" commercial practices, that included compliance with the self-regulatory codes, did not pay much attention to data protection until the mid-1990s (Princen, 2003:149).

Therefore, the Directive significantly affected the operation of the US companies that relied on the commercial exchange of personal information with European counterparts and was unwelcomed by the former, with some actors even calling for a trade dispute within the WTO. The dispute-level response, however, hardly seemed a reasonable strategy, as there was an exception for the privacy protection in the General Agreement on Trade in Services (GATS) (Princen, 2003: 150). In order to mitigate the arisen controversies, talks began on what was later stipulated as the "Safe Harbour" agreement[12] between the EU and the USA in July 2000 (Princen, 2003: 150-151; Commission, 2000). The purpose of the agreement was to put in place a scheme under which the US firms would satisfy adequacy requirements, imposed by the Directive (Princen, 2003: 150-151). As the Commission demanded active oversight by the US public authorities, in order to

[12] Replaced by the new so-called Privacy Shield agreement in 2016 (Commission, 2016a) pursuant to the CJEU 2015 ruling invalidating the Safe Harbour agreement on the grounds of US surveillance of the global communications (see next Section 2.6).

enact enforcement of the agreement, a stronger role was appointed to the US FTC. However, as the Safe Harbour agreement was based on the voluntary self-certification by businesses, thus remaining self-regulatory in character, and lacking a proper oversight, it was deemed to be a rather inefficient attempt to reconcile the disjunctions between the US and the EU privacy protection regimes (Drezner, 2007:91-118). Nevertheless, the agreement introduced some more stringent standards as compared to most US legislation (Princen, 2003:151-152).

As the discussion in this section shows, the European data protection policy pursued since the 1990s has had a disruptive effect on the American ICT businesses. Apart from data transfers rules, within Europe national DPAs, installed by the Directive 95/46/EC, have taken enforcement actions in relation to the breaches of the EU privacy law by the US firms on numerous occasions (e.g. BBC 2012a; BBC 2012b; BBC, 2013k). The Commission's data protection reform proposals of 2012 were designed to align privacy protection with the enormous advancements in the ICT and data flows since the adoption of the previous data protection legislation. As in the 1990s, this was an unwelcome development for the American data exploiting businesses, resulting in unprecedented lobbying activity from the Silicon Valley and the US government against the pending upgrade of the European privacy rules. Along with a series of new rules, the GDPR was also introducing a broader territorial reach than the Directive that was applied to the non-EU operators if they had an establishment in the EU or made use of equipment in the EU to process personal data. The GDPR stipulates that it would be applicable to operators even without an establishment in the EU, if their activities (e.g. services) are directed at data subjects in the EU, or if they monitor the behaviour of persons within the EU (Article 3, GDPR final, 2016). In early 2013, a US official warned that this EU reform could cause a US-EU trade war (Farivar, 2013). To circumvent the existing and forthcoming EU data

protection laws, the USA has been pushing for bans on localisation requirements and on any restrictions on data flows in the context of e-commerce in the two trade negotiations – on the now-defunct bilateral Transatlantic Trade and Investment Partnership (TTIP) and on the multilateral draft Trade in Services Agreement (TiSA) that constitutes an update to the GATS. These circumvention attempts have been disguised under the principle of regulatory "interoperability" and provisions on cross-border data flows (Bendrath, 2014).

As it was discussed, the EU data protection policy is part of the contest for international influence between the EU and the USA. The EU privacy protection policy has tangible external projections, alongside internal goals, determining the presence of external stakeholders in the policy process. Due to these implications, the US tech firms and the US government were very active in the GDPR talks and lobbied for more US-like, that is less stringent provisions (see Sections 5.9, 5.10 and 6.5).

2.6 State surveillance, the Snowden revelations and the EU responses

2.6.1 Security, surveillance and fundamental rights

The time of the EU data protection reform process 2012-2016 coincided with the timing of one major development that left important implications touching upon international relations, the democratic norms of Western societies, and global communications in general. In early June 2013, the world media started publishing documents leaked by a former NSA contractor Edward Snowden uncovering extensive mass surveillance practices that mainly centred on the US and the UK intelligence agencies – NSA and GCHQ, respectively. Amongst other, the revelations uncovered spying on millions of Europeans, including top officials and diplomatic personnel carried out by the US intelligence services (Oltermann, 2013b; Hecking and Schultz, 2013; BBC, 2013e, BBC, 2013f; Shane, 2013; Siddique and Holpuch, 2013). The public and political outrage erupted due to reportedly

bulk interception of communications carried out through direct tapping into the global digital infrastructure and "the development of covert relationships with telecommunications companies" (Borger, 2013). Working "around national laws intended to restrict the surveillance power of intelligence agencies" was also revealed by the reports (Borger, 2013). Some of the unveiled documents, however, did not leave a number of European governments without blemish, either (to name but a few – British, French, German, Swedish and Spanish) (Borger, 2013; EP, 2013b).

The above needs to be discussed more profoundly in this study, as Snowden leaks became virtually inseparable from the debates surrounding the GDPR adoption process. These revelations turned communications privacy into a high profile political issue. The revelations also had a certain impact on the process of adoption of the GDPR, as presented in detail in Section 6.3. Nevertheless, as the discussion below illuminates, the case of whistleblowing by E. Snowden only reiterates an old phenomenon of governmental surveillance via the means of communications and its ever-expanding scope and capabilities. The history and landscape of surveillance in Europe, covered in this section, create a very controversial setting for the EU reputation of creator of the strongest privacy protection norms, presented in the previous section. This controversy provides one of the rationales of why these revelations, although sensitivising the data protection question in the political agenda, had only a limited effect on the course of the EU data protection reform, affecting mainly just Chapter V on international transfers of personal data in the GDPR (see Section 6.3).

In a broad sense, surveillance can be defined as "the focused, systematic and routine attention to personal details for purposes of influence, management, protection or direction" and "it usually involves relations of power in which watchers are privileged"

(Lyon, 2007c:14, 15). State surveillance exists in a variety of forms, ranging from all sorts of registers and databases, to monitoring of physical movements via CCTV, mobile communications, GPS or other systems, to digitised biometrics or tracking internet activities, amongst others. The technology available in the twenty-first century enhances the state surveillance capability, making it possible to swiftly exchange, combine and process various types of data. Various elements of surveillance operating in parallel have a cumulative effect (EDRi, 2012a).

As it derives from the case law of the European Court of Human Rights (thereafter ECtHR), “the mere storing of personal information, irrespective of its possible future use” entails “interference with the right to privacy” (Goemans and Dumortier, 2003:173-174). A similar stance was reinstated in the UN report on untargeted collection of communications data in the wake of the Snowden revelations. Besides, the report noted that many countries lack adequate oversight and accountability frameworks (UN, 2014: 9-10, 15-16), “instead allowing the collection of data for one legitimate aim, but subsequent use for others” (UN, 2014: 9). The issues emerging from such a state of play can be demonstrated through some incidents which occurred in Britain. In one case, police forces uploaded up to 18 million photos, including of people never charged, to a searchable facial recognition database without Home Office approval, without informing the Biometrics Commissioner and “despite a court ruling it could be unlawful” (Hopkins and Morris, 2015). The above-mentioned UN document also stated that mass retention of data, exercised by many governments for surveillance purposes was “neither necessary nor proportionate” (UN, 2014: 9). Necessity and proportionality as well as effectiveness are the principles under which security measures that limit fundamental rights are understood to be legal according to the norms of a democratic society (EDRi, 2012a). Therefore, any restrictions of rights can only be applied as exceptional measures and such dynamics must not be reversed (UN,

2014: 8-9). “Mass or ‘bulk’ surveillance programmes may thus be deemed to be arbitrary, even if they serve a legitimate aim and have been adopted on the basis of an accessible legal regime” (UN, 2014: 9). Surveillance-related legislation and regulations tend to be adopted hastily and the programmes are often run in secrecy, hence, falling beyond legal or democratic scrutiny and protections (Hills, 2006:196, 204, 210, 212-3, EDRi, 2012a). Publication of how the powers gained under such acts are exercised in many cases is subject to prosecution, and disclosures are prevented on “national security” grounds (Hills, 2006:207, 210, 212; BBC, 2013b; BBC, 2014a). Some facts become public only thanks to leaks (Hills, 2006:210), such as the recent E. Snowden leaks or the efforts of the Wikileaks and others. The condition of mass surveillance does affect “law abiding citizens”, which was historically as well as recently admitted by the authorities (Hills, 2006:200; Chadwick, 2006:282). In a recent case in Britain, the police requested information about one person from a telecoms company, but 1000 users’ data were sent to them by mistake. The police took a few months to even report the error and then a few months more to rectify this incident (BBC, 2014o). In the UK, dozens of serious errors based on access to communications data that led to wrongful implications in serious crime investigations, including property searches and arrests in 2014 and 2015, were reported (IOCCO, 2015; IOCCO, 2016). Even when communication content is not looked at, the aggregation of “metadata”, i.e. information about communicational patterns, “may give an insight into an individual’s behaviour, social relationships, private preferences and identity that go beyond even that conveyed by accessing the content of a private communication” (UN, 2014:7).

Interference of surveillance with the right to privacy extends to its effects on other rights and democratic institutions, such as presumption of innocence, the confidentiality of communications, freedom of expression, freedom of assembly and association, freedom of information, etc. (UN, 2014:5; EP, 2014c; UN, 2015). It may turn individuals into police

informants without their knowledge and consent (Trottier, 2012). “Justice is easily overturned or obscured in new surveillance systems” (Lyon, 2007c:193).

In the meantime, there has been a radical increase in surveillance measures in recent decades (EDRi, 2012a). Surveillance programmes are frequently justified by governments on “national security” grounds, in particular – the risks posed by terrorism (UN, 2014:8). The limits of the reach of such programmes were tangibly relaxed following terror acts in New York in September 2001, which served as a pretext to deploy new surveillance technologies and measures in many countries that “may have been in development for some considerable time” (Lyon, 2007c:112). “9/11 did not introduce the surveillance society; it served to reinforce strongly some already existing trends” (Lyon, 2007c:195). In fact, surveillance of communications has very historical roots, reaching at least the days of the advent of the telegraph in the late nineteenth century (Hills, 2006) – the technology that significantly facilitated exchange of messages if compared with the earlier times (McMullan, 2015). European governments held control of telecommunications and the international treaties establishing transcontinental interconnections foresaw also the power reserved by them to stop or examine telegraph messages for “national security” reasons (Hills, 2006:196-8). But even earlier, in the eighteenth century, the principle of secrecy in correspondence was already challenged by surveillance of postal networks (Powers, 2015). The incremental state control over communications, including bans on the use of coded language and emergence of secret systems of monitoring, was first prompted by instability between the late nineteenth century and the first half of the twentieth century, marked by multiple wars, in which the European countries were involved. Similarly to contemporary times, the governments thought to overcome the limitations of their own direct reach of censorship by delegating related tasks to private companies providing the transmission of messages (Hills, 2006:196-201, 211). Soon, however, the scope of censorship went beyond

its wholly "national security" purpose directed to both external and internal enemies to progress towards commercial espionage. Since 1938, a commercial section added to the British Government Communications Headquarters (GCHQ), formed in 1920, engaged in interception and decryption of commercial telegrams sent by large foreign trade companies (Hills, 2006:199-200).

While for some time the British were both politically and technologically more advanced in terms of surveillance, since around the Second World War the USA had started taking part in various international intelligence alliances encompassing interception of communications. A steady cooperation between the British and American intelligence agencies commenced in 1941. After the War such cooperation was extended to comprise Canada, Australia and New Zealand to form the group known now as the Five Eyes (Corera, 2016). Alongside, bespoke domestic structures were being developed through establishment of the regulatory basis[13] and various bodies in the USA, including the NSA in 1952. The advancing or emergence of new technologies such as telephony, computing or satellites, were only making governmental surveillance more pervasive and sophisticated. For example, computers enabled much more efficient processing of intercepted communications in finding specific words. Interception was now targeting government, business and civilian realms, to gain militarily, politically, or economically valuable information both domestically and internationally. The Watergate scandal in 1974 disclosed unauthorized surveillance on citizens in the USA in the 1970s (Hills, 2006:200-205). The "Echelon" that began in the 1970s is known as one of the programmes managed by the American NSA and the British GCHQ and also involving dozens of so-called Western democracies. It was designed to monitor the channels of global electronic

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[13] Such regulations of the later decades such as CALEA of 1994 (Chadwick, 2006:287), PATRIOT Act of 2001 (Braman, 2006:133-135) and the 2008 amendments to FISA of 1978 (Hastings, 2013a), meant almost unrestricted access by the American government agencies to the communication flows.

communications, including the Internet, for a variety of purposes, including gaining intelligence on international trade negotiations and diplomatic communications[14] (Chadwick, 2006:282; EP, 2014f). In mid-1990s, another similar development was the EU Enfopol project in cooperation with the USA and subsequently some other countries, under which creation of an international telecommunications tapping network was started. These plans were negotiated between the governments of the then 15 EU countries, avoiding accountability to European institutions or broader consideration at the national level (Hills, 2006:204).

Surveillance has not been limited to capturing electronic data and aggregation of all kinds of available information on citizens, e.g. located in commercial and public sources with consumer, health-care, employment or other data, started being practiced by the authorities (Lyon, 2007c:8, 18, 107, 184, 186). Social media with their personal data-based business model (covered in Sections 2.2 and 2.3) brought along an unprecedented potential for data-mining and monitoring of population, be it private firms or public authorities (Morozov, 2013:187-188), as personal information submitted through social media in one context is easily exploited in another (Trottier, 2012c). Monitoring capabilities of states have been amplified through a "delegation of law enforcement and quasi-judicial responsibilities to Internet intermediaries under the guise of 'self-regulation' or 'cooperation'" (EDRi, 2011:5). The governments' reliance "on the private sector to conduct and facilitate digital surveillance" has been growing (UN, 2014:14). This tendency of access to and use of data "for purposes beyond those for which it was collected represents a substantial weakening of traditional data protections" (Cate *et al*, 2012:198 cited in UN, 2014:9). Due to their incremental exploitation of commercial databases, security agencies constitute actors with

[14] "In 1992, Echelon was intercepting an estimated 2 million messages per hour", with the capability to "capture almost every phone call, fax, email and telex message anywhere in the world" (Hills, 2006: 203). In the 1990s, spying even on humanitarian NGOs within this programme emerged (Hills, 2006: 204).

"significant opposition to privacy rules" that cover private entities (Brown and Marsden, 2013c: 60-61). Business firms respond to state surveillance with a spectrum of attitudes ranging from opposition to it (ETNO, 2005; ISPA 2014; ISPA 2015; BBC, 2013b) to treating it as another source of income (Morozov, 2013:187-188). Many telecoms companies in Britain allegedly had been doing much more than what was legally required in assisting intelligence agencies with mass interception of communications (Ball, 2013). Moreover, there are Western companies producing surveillance technologies and selling them to governments around the world (FIDH, 2014). According to Amnesty International, "the trade in spyware used by governments is now a market worth about £3bn ($5bn) a year" (BBC, 2014n). Both the businesses and military environment played an equal role in developing and diffusing privacy-invasive technologies (Harper, 2011). There is a complex interplay of interests and the political economy of securitisation benefits "the military–industrial complex of security, defence, IT manufacturing and service industries" (Hills, 2006:213).

However, many communications companies that do not favour surveillance began publishing "transparency" reports on government user data requests (Gabbatt, 2013). The major US tech companies, following the allegations of the NSA having the backdoor to their users' data brought up in the Snowden leaks, started putting pressure on the US authorities to reform surveillance. Such allegations have been detrimental to their business (Gustin, 2013; BBC, 2013j; BBC, 2014g; Kleinman, 2014; see also Section 6.3). In their effort to tackle the damaged consumer trust, a number of Internet market leaders committed to a greater use of encryption. This development was very unwelcomed by the authorities on the both sides of the Atlantic (Gershman, 2014; BBC, 2015d), who soon played the terrorism threat card to strike back, calling US technology firms "command and control" network for terrorist organisations (Wakefield, 2014b). In the meantime, banning

encryption would be a problem for governments, as such actions would "limit public trust in the use of the internet for e-commerce and are therefore contrary to their economic objectives" (Hills, 2006:212). In spring 2015, another UN report was presented (UN, 2015), this time specifically addressing the role of encryption and anonymity in the digital age with regard to the rights to freedom of opinion and expression, determining that they are crucial preconditions to meaningfully exercise such rights and, therefore, must be protected and not restricted.

Another tendency in the recent decades has been the blurring of the conventional divisions between criminal law enforcement and intelligence, as well as domestic and foreign threats. This has been aided through an ever-broadening definition of what is treated as "terrorism" (Hills, 2006:207-8, 212-3), a rhetoric of "extremism" and "radicalism" (Luke, 2011:31) that "could even include peaceful civil disobedience" (Chadwick, 2006:278). "[S]haring of data between law enforcement agencies, intelligence bodies and other State organs" is problematic "because surveillance measures that may be necessary and proportionate for one legitimate aim may not be so for the purposes of another" (UN, 2014:9).

As surveillance was increasing, the opposition to it, both in Europe and in the USA, was strengthening, too, for its detriment to human rights and civil liberties. (Hills, 2006:206-209). However, the 9/11 attacks in the USA and later some terror acts in Europe dismissed some of such public moods (Hills, 2006:206, 210-211). In 2006, the EU adopted the Data Retention Directive (Directive 2006/24/EC; thereafter DRD), which was invalidated in 2014 by the CJEU (judgement *Digital Rights Ireland and others*) as exceeding the principle of proportionality and seriously interfering with the rights to privacy and data protection. Some European governments were advancing proposals for a lengthy traffic

data retention policy at the EU level since the late 1990s (Hills, 2006:206, 209). In the light of the terror acts of the 2000s, the US administration pressed for such laws in Europe, too, while in the USA data retention had been rejected by Congress in the 1990s (Hills, 2006:207). Besides, Passenger Name Record (PNR) and Terrorist Finance Tracking Program (TFTP) agreements, to gather air passengers' data and monitor financial transactions, respectively, were installed between the EU and the USA.

The difference between the interference with communication flows by public authorities in the era of the telegraph and today mainly consists of "the invasiveness of current technologies and the international institutionalization of surveillance" (Hills, 2006:196). Today it is multi-faceted, continuous and networked (Lyon, 2007c:175).

2.6.2 The EU response to the spying scandal

The reports about the US bulk spying operations on the European citizens as well as European top national and supranational officials spurred tensions in the EU-US relations. Apart from a diplomatic row (Croft and Mohammed, 2013; Oltermann, 2013b; Crowley, 2014) some other developments followed in Europe in the aftermath of the Snowden revelations. The EP, in its approval of the whistleblowing, nominated Edward Snowden for the top human rights award (BBC, 2013d) and in 2015 called on the EU MSs to grant him protection "in recognition of his status as whistleblower and international human rights defender" (EP, 2015). Although in a non-binding capacity, this EU institution also called in its resolutions in 2013 and in 2014 for the suspension of the EU-US data sharing agreements TFTP, PNR and Safe Harbour (EP, 2013b; EP, 2013c; EP, 2014c). The latter contained an exception to adhere to the provisions of the agreement on national security grounds (Commission, 2000). Such public climate resulted in the invalidation of the EU 2006 communications traffic DRD, adopted in the 9/11 aftermath, by the CJEU in spring

2014. Another CJEU judgment in October 2015 (*Schrems v Data Protection Commissioner*) invalidated the Safe Harbour agreement based on these revelations, as mentioned in the previous section, in support to the Facebook user Maximillian Schrems who, in the light of these revelations, argued that "the law and practice of the United States do not offer sufficient protection against surveillance by the public authorities of the data transferred to that country" (CJEU, 2015). The so-called "Umbrella agreement" on the protection of personal data in the field of EU-US transfers for the purposes of law enforcement cooperation, negotiated between 2011-2015 and finalised in 2016, also gained more political importance (Commission, 2016b).

To mention some reactions at the national level, in June 2014 the German government cancelled its contract with Verizon, the second-biggest US telecoms firm that had been providing network infrastructure for some key communications interfaces of the German government. The step was prompted, *inter alia*, by the allegations of eavesdropping on Chancellor Angela Merkel's mobile phone and the US government's failure to accommodate the Germany's demands for a "no-spy" agreement (Reuters, 2014b). A few months earlier, the German Chancellor had also advanced the initiative of creating a European communications network where emails and other data would not pass through the United States and where high standards of data protection would be maintained (Reuters, 2014a).

However, the spying scandal did not change in essence the surveillance landscape in Europe. Although DRD was invalidated, some MSs swiftly adopted national data laws, allowing them to continue communications data retention and monitoring (BBC, 2014l). While the EP nominated the whistleblower E. Snowden for a human rights award, none of the EU governments provided him with protection against prosecution in the USA. Finally, after the attack on a French newspaper in Paris in January 2015 and a series of other

terrorism-related incidents in the EU shortly afterwards, state surveillance policies and counter-terrorism discourse, after being weakened for some time in the immediate aftermath of the Snowden affair, returned with a new force in Europe, calling for new data tracking laws, with demands in Britain, for instance, to gain access not only to metadata, like under previous measures, but also to the actual content of communications (BBC, 2015a). As mentioned in the Introduction and Section 5.3, the EU PNR Directive was revived and became law at the same time with the GDPR.

Apart from afore-mentioned developments, the EU-US relations did not change in essence, either. As some commented, much different outcomes should not have been expected, as in the longer and broader perspective the importance of economic and strategic partnership with the USA creates significant pressures and makes pragmatism prevail over outrage (Hewitt, 2013a; Hewitt, 2013b). Moreover, "almost all governments conduct surveillance or espionage operations against other countries whose activities matter to them" in any sense (Marcus, 2013). Allies covertly collecting information on each other is no novelty in world politics, either (Marcus, 2013). As covered earlier, Europe, with its highly developed surveillance infrastructure and operations, is no exception. Already in 2014 and in 2015 Germany, that in 2013 protested "spying on friends" (see above), found itself at the centre of spying allegations on France, the Commission, US top officials and the European aviation firm Airbus (Oltermann, 2014; Hill, 2015). "What differs is the scope and scale of these operations. This depends upon the motivation and resources available". The USA with its technical capabilities is positioned as having "a much longer reach than most" (Marcus, 2013).

It is thus reasonable to say that, rather than anything else, the allegations of the US large-scale espionage contributed to the resurface of the old issue of the technological gap

between the two sides of the Atlantic (Mörth, 2003; Michalis, 2007c:101-118, 129-131) and drew attention to the threat coming from dependency on foreign ICT resources in Europe. The Snowden revelations shed a different light onto the dominance of the American companies in the digital market while falling under the jurisdiction of the PATRIOT Act or similar US laws. As a matter of fact, a few months earlier, in January 2013, the late Caspar Bowden, renown privacy expert and advocate, warned about the 2008 amendments to FISA and how that combined with the oligopoly of the American companies in provision of cloud services: “What this legislation means is that the US has been able to mine any foreign data in US Clouds since 2008, and nobody noticed” (quoted in Hastings, 2013a).

The discussion in this section demonstrates that citizen interests compete not only with commercial but also with the state interests in advancing national security agendas. Besides, communications surveillance by business and state actors are overlapping realms. The debates surrounding the Snowden revelations were an important contextual dimension during the GDPR adoption process (see Section 6.3). Further, surveillance-related considerations directly link to some concrete provisions in the GDPR – the Article 48 dubbed anti-FISA clause and some of the derogations in the Article 23(1), such as on the national security grounds. Mass surveillance exercised by states both internationally and domestically suggests a neo-realist paradigm embedding state-centric view in the power landscape. The neo-realist paradigm focuses on state power and security issues in explaining the world politics. States seek to increase their power in relation to other state and non-state actors (Baldwin, 1993:5-8; Brown and Ainley, 2009:45-48). Although the routes in achieving so may vary, overall, states manage to maintain their power and ultimately are the most important actors of the international system (Drezner, 2007). For its state-centric perspective in the study of international relations, the neo-realism is congruent

with the state-centric theories of the EU integration (Rosamond, 2000:148-156), one of which is the consociationalism used in this thesis for a macro-level analysis (see Sections 3.2 and 3.3).

2.7 Conclusions

This chapter aimed to explain the context of the case study of this thesis – the process of adoption of the GDPR. It demonstrated the importance of privacy, as a civic freedom and human right. Due to the salience of the digital economy, and its prevalent business model that is based on the monetisation of personal information, related interests have been attempting to erode the notion of privacy as an important societal dimension. The current state of play is marked by significant asymmetries of power between different players, such as data subjects and data controllers and processors in the era of Big Data, emerged from the economic model of the Internet that has led to the collection and storage of enormous amounts of data by the commercial operators. Individuals have been disadvantaged by these informational power asymmetries. While this has been enabled by technology, the technology *does not* intrinsically create such societal dynamics. Privacy issues on-line were determined by the political decisions related to the construction of this medium. The governments' interest in surveillance generates further tensions and has been increasingly converging with the commercial preferences in seeking as much access to personal data as possible. This is applicable to the EU as well, which, however, competes with the USA in promoting the "rights-based" approach (in which privacy, as a fundamental right, overrides mere economic interests) versus the "interest-based" approach (in which the right to privacy is only one of many competing interests), respectively, determining the consistent US efforts to lobby against the European privacy protection

policies. All the above is directly related to the concrete provisions of the GDPR and the process of their formulation researched in this study.

CHAPTER III

The EU policy-making process through the lens of consociationalism, policy networks and new institutionalism approaches

3.1 Introduction

This chapter formulates the analytical framework of this study. Section 3.2 introduces the main features of the EU as a political system and explains the choice of the theoretical strands applied in this thesis: the state-centric consociationalism, which draws attention to the importance of national governments, policy networks, which stress non-linear policy-making dynamics, and institutionalism, which highlights the significance of formal and informal institutions. These strands are presented in detail in Sections 3.3, 3.4 and 3.5, respectively. Finally, this chapter concludes with a discussion on the interplay of interests in the EU and what policy outcomes can be expected whilst links to the theories presented in the previous sections are also made (Section 3.6). It argues that each policy dossier is context-dependant and the related policy process requires a disaggregated analysis.

3.2 A brief introduction into the EU politics

What today functions as the European Union stemmed from a six-country economic partnership which emerged in the aftermath of the World War II. The European Coal and Steel Community and a few years later the European Economic Community (EEC) as well as the European Atomic Energy Community (Euratom)[15] were established by the founding members Belgium, The Netherlands, Luxemburg, Italy, Germany and France that signed the respective agreements in 1951 and 1957. After a series of subsequent Treaties (see

[15] Initially, however, Political and Defence Communities were foreseen, too, but the processes of creation of these two Communities were unsuccessful (see Section 6.4).

table 1) and enlargements in the following decades (in 1973, 1981, 1986, 1995, 2004, 2007 and 2013), the EU acquired its current architecture of an intensely integrated system comprising 28 sovereign European states. The name from the EEC to the European Union was changed in 1993 (Official EU website, no date).

Table 1. The EU founding and functioning Treaties

Treaty of Lisbon	Signed: 13 December 2007 Entered into force: 1 December 2009 Purpose: to make the EU more democratic, more efficient and better able to address global problems, such as climate change, with one voice. Main changes: more power for the European Parliament, change of voting procedures in the Council, citizens' initiative, a permanent president of the European Council, a new High Representative for Foreign Affairs, a new EU diplomatic service. The Lisbon treaty clarifies which powers: belong to the EU belong to EU member countries are shared.
Treaty of Nice	Signed: 26 February 2001 Entered into force: 1 February 2003 Purpose: to reform the institutions so that the EU could function efficiently after reaching 25 member countries. Main changes: methods for changing the composition of the Commission and redefining the voting system in the Council.
Treaty of Amsterdam	Signed: 2 October 1997 Entered into force: 1 May 1999 Purpose: To reform the EU institutions in preparation for the arrival of future member countries. Main changes: amendment, renumbering and consolidation of EU and EEC treaties. More transparent decision-making (increased use of the co-decision voting procedure).

Treaty on European Union - Maastricht Treaty	Signed: 7 February 1992 Entered into force: 1 November 1993 Purpose: to prepare for European Monetary Union and introduce elements of a political union (citizenship, common foreign and internal affairs policy). Main changes: establishment of the European Union and introduction of the co-decision procedure, giving Parliament more say in decision-making. New forms of cooperation between EU governments – for example on defence and justice and home affairs.
Single European Act	Signed: 17 February 1986 (Luxembourg) / 28 February 1986 (The Hague) Entered into force: 1 July 1987 Purpose: to reform the institutions in preparation for Portugal and Spain's membership and speed up decision-making in preparation for the single market. Main changes: extension of qualified majority voting in the Council (making it harder for a single country to veto proposed legislation), creation of the cooperation and assent procedures, giving Parliament more influence.
Merger Treaty - Brussels Treaty	Signed: 8 April 1965 Entered into force: 1 July 1967 Purpose: to streamline the European institutions. Main changes: creation of a single Commission and a single Council to serve the then three European Communities (EEC, Euratom, ECSC). Repealed by the Treaty of Amsterdam.
Treaties of Rome: EEC and EURATOM treaties	Signed: 25 March 1957 Entered into force: 1 January 1958 Purpose: to set up the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). Main changes: extension of European integration to include general economic cooperation.
Treaty establishing the European Coal and Steel Community	Signed: 18 April 1951 Entered into force: 23 July 1952 Expired: 23 July 2002 Purpose: to create interdependence in coal and steel so that one country could no longer mobilise its armed forces without others knowing. This

	eased distrust and tensions after WWII. The ECSC treaty expired in 2002.

Source: Official EU website, no date – adapted original text.

The EU has long moved from originally mainly economic cooperation in a few sectors to expand into a wide range of policy areas (Versluis *et al*, 2011:13). Particularly, the EU decision-making increased in scope, volume and depth in the 1990s and with the stipulation of the Maastricht (1992) and Amsterdam (1997) Treaties (Andersen and Eliassen, 2001:3-4). It is a highly complex Union, constantly evolving and underpinned by multiple dimensions of political process, making it unprecedented by any other political system. Its institutional design can be defined as "a new form of governance" (Wallace, 1997:14-16), where continuous changes are undergoing, reconfiguring "the role of the central institutions, the forms of authority and the areas affected by EU policies" (Andersen and Eliassen, 2001:14). The EU's status of agency can be characterised as hybrid (Versluis *et al*, 2011:13) or intermediate (Lijphart, 2012:33), presenting a particularly puzzling case for analysts of political science. As a voluntary Treaty-based formation of sovereign countries, it has features of an international organisation. But it also has some distinct elements of a supranational organisation in that the EU law in a number of areas has supremacy over the national law of its members (Lijphart, 2012: 33) and that it is governed by several supranational institutions, such as the Commission, the EP, the Council of Ministers, the European Council, the CJEU, and others. At the same time, it cannot fully qualify as a supranational organisation, for the power of its governing institutions is deemed to be limited in that respect (Taylor, 1990a:109-122). It also would be an atypical international organisation in terms of the high degree of integration between its states. The governance of the EU builds on the *acquis communautaire*, i.e. a system of shared legal and political features, norms, formalised rules and routinised practices as well

as such key state-building elements as citizenship, common currency and monetary policy, common market, etc. (Shaw and Wiener, 2000:64). However, "while the EU does much of what states do, it does far from everything they do" and lacks many of the power resources, symbols and attributes of a modern state, such as armed forces, police or customs services (Menon, 2008:216, 220). Attempted approaches applied to the EU include "an incipient federal state" (Lijphart, 2012: 33), "a quasi-federal polity" (Peterson, 2009: 107), "a uniquely successful experiment in transgovernmental governance" (Peterson, 2009: 113), etc. "The EU […] is neither a traditional international organisation nor a state" (Menon, 2008:219) or "is simultaneously both 'near-state' and antithetical to stateness" (Shaw and Wiener, 2000:64). It implies that the EU needs to be studied as a system "in its own right" and, given its issue and institutional complexity, not any one conceptual framework or general theory can offer a comprehensive understanding of its functioning and underlying processes (Moravcsik, 1995:612; Ackrill *et al*, 2013:882; Van den Bulck and Donders, 2014:19-35; Falkner, 2012).

Actors participating in the policy-making processes "operate 'wearing different hats', in different political channels and in changing coalitions" (Andersen and Eliassen, 2001:14) where one stakeholder's adherence "to different (even opposing) views and positions" is not excluded and their influence "may depend on the specific issue at hand" (Van den Bulck and Donders, 2014: 31) or the specific phase in the policy process. For instance, the Commission can be seen at times as a policy venue where stakeholders file complaints, but as well as a policy-broker in the bargaining between different coalitions and as an "actor in its own right" in other situations (Van den Bulck and Donders, 2014: 32). "Every institution is very powerful and influential at certain moments and very much a spectator at other moments" (EDRi, 2012b:1). The degree of EU integration is uneven between different policy spheres (Richardson, 2012). The power struggles and competition between

different players occur in the context of “a delicate balance of power between and within multiple levels, institutions and actors” (Carboni, 2009:6 cited in Van den Bulck and Donders, 2014:30). Several decision-making levels can be identified as history-making (super-system), policy-setting (systematic) and policy-shaping (technical or sub-systemic) (Andersen and Eliassen, 2001:9,15,16). The first dimension is associated with the alterations of the Union’s core institutional design and scope, such as Treaty revisions, major strategic decisions made by the European Council or the CJEU’s rulings related to the EU functioning. The second comprise the day-to-day legislation where policy-setting powers are shared between institutions[16]. The third level involves activities of the EU and national civil servants, committees and working groups, private experts and other interested private actors, participating in the process of drafting of policy proposal and implementation of the adopted acts (Andersen and Eliassen, 2001:9,15,16). The changes at one level feed into other levels. For instance, the Lisbon revision of the functioning of the EU (2007) was consequential to the procedure of the adoption of the GDPR in that the entire area of justice fell under the remit of the Community method, i.e. making the EP enjoy a co-legislator role. On the other hand, the sub-systemic level also affects the other decision-making levels, as many policy proposals emerge bottom-up (e.g. see Michalowitz, 2004c:65; Andersen *et al*, 2001:26, 34).

As this chapter will elaborate in the following sections, the interplay between the EU, national and even subnational levels is dynamic and cannot be clearly cut. This produces non-linear, distributed power dynamics – one of the main analytical lines that the analysis in this thesis builds on.

[16] As in the case of the ordinary legislative procedure of stipulation of the GDPR.

Another analytical line deployed here is the existence of both formal and informal factors that have an impact on the ultimate balance of power among the actors in a concrete issue-area, the course of the policy process and the outcomes.

In examining the GDPR adoption process, this work applies a blend of three analytical strands – consociationalism, policy networks and new institutionalism, presented in this chapter as its analytical framework.

The state-centric consociationalism is taken here as a macro theory, to set out the broad main features of the EU politics. The choice of a state-centric paradigm was determined by the very constitutional arrangement of the EU: the reforms to the EU (and previously EC) Treaties are negotiated and adopted by the so-called Intergovernmental Conferences (European Council, no date). The powers of the supranational institutions are defined in the Treaties and can be altered by the EU MSs through Treaty reforms. The essential directions of the EU development are decided by the European Council – the summit of the MSs' heads of state and government. Thus, overall, the Union can be seen as "a tool of existing states", with the real political power residing in its parts (Menon, 2008:213, 215-6). Despite the gradual growth of the EU-level policy competences, its MSs' sovereignty and autonomy are simultaneously being secured (Rosamond, 2000:150). An immediate example is the introduction of the new Article 50 of the Lisbon Treaty on the European Union, explicitly enshrining the (previously implicitly perceived) right of withdrawal from the Treaties and the procedure thereof, which was indeed invoked by the UK in 2017 pursuant to the national referendum on splitting from the EU in 2016. While the political mastery of the supranational-level institutions on some remarkable instances may have expanded their powers as well as taken the integration further than it was envisaged by the original arrangements, under the current EU institutional set-up the national governments

nevertheless remain crucial players (Falkner, 2012). Although functional integration seems to inevitably bring along also a degree of socialisation and some sense of European identity (Mörth, 2003), at the same time, the non-vanishing Euroscepticism and the recent rise of nationalism in Europe (BBC, 2014q; BBC, 2016d; BBC, 2016e) places the empirical reality far from the neo-functionalist vision of ever-weakening relevance of a nation-state as regional economic cooperation advances[17]. The lack of a strong common transnational European identity (as also evidenced by the failure of ratification of the EU Constitutional Treaty in some MSs in 2005) does not meet the federalist – another influential school of thinking on the EU integration – feature of a tangible nearing to reconciliation of regional differences (Taylor, 1990b:180). The predominantly consensus-based EU-level decision-making (Buonanno and Nugent, 2013:91-94) with the search for the lowest common denominator in order to accommodate the persisting segmental differences also diverges from the reinforcement of the common interest as in federalism, but reflects consociational characteristics (Taylor, 1990b:180-181). "Paradoxically, consociational theory may be more relevant to the EU than to the states for which it was originally developed" (Andersen *et al*, 2001:37) and has been unduly marginalised in the theoretical debates on the EU (Rosamond, 2000:148). As a state-centric concept, in the EU studies consociationalism is close to the liberal intergovernmentalist perspective, that, as an integration theory, "refers to the supremacy of national governments in the integration process over supranational and other actors" (Dinan, 2000:297). Consociationalism, that allows a view of the EU as a polity, is, however, better suited for an EU-level policy analysis than the liberal intergovernmentalism that draws on the regime theory (treating the integration between the EU MSs as a form of an international regime) and is more focused

[17] The very creator of the neo-functionalist theory, Ernst Haas, referred to his theory as obsolete in some of his works (e.g. Haas, 1975; Haas, 2001).

on the national governments as the level of analysis. Chryssochoou (e.g. 1997; 2009) proposed to interpret the model of the EU integration as a "confederal consociation" to capture both the preservation of self-rule by the composing units and the collective governance (i.e. the elements of transnational political integration or "stateness").

This thesis takes a view that the national element is predominant in the EU policy processes, but the analytical framework in this research builds on the moderate state-centrism, implying co-existence of various dimensions, none of which can be neglected in the analysis. Supranational actors are important in everyday decision-making, since the MSs have delegated significant powers to them (Menon, 2008:219). "European institutions […] are increasingly displacing national institutions as the principal loci of policy change", but as the "EU directives are 'soft' law allowing considerable discretion to implementing officials" (Sabatier, 1998:121), the EU is "heavily reliant on these latter to ensure the implementation of its laws" (Menon, 2008:216). The study of the "European policy should pay attention to the formal and informal rationale of governmental action at the EU level, which ultimately often largely determines the course (and success or failure) of the policy process" (Versluis *et al*, 2011:13). This was very tangible with the GDPR which was strongly affected by the MSs agendas, as Chapters IV, V, VI and VII present. Some statistics produced by a study established that 69,3% of the analysed final EU Conciliation Committee[18] texts in the period 1993-2009 were close to the original position of the Council, 30,1% were reflecting more the EP view, and 0,6 % were close to both (Mariotto and Franchino, 2011). While the Council's preferences prevail in the above figures, they also indicate that the EP's role in influencing legislation, that amounts here to roughly

[18] The last stage of the ordinary legislative procedure to reconcile the differences between the EP and the Council positions. This phase is not always reached, since the agreement on majority of legislative files is usually found at earlier stages.

30%, can also be significant. Returning to the earlier highlighted EU complexity and the limitations that any single theoretical approach will suffer from for that reason, a more systematic explanation of the European project is only possible moving away from an "'either/or' orientation to a 'both/and' perspective" (Checkel, 2001:38).

The other two theoretical approaches deployed here – policy networks and new institutionalism – are useful tools in developing a more profound exploration of a given policy process, as they allow us "to explain elements or particular slices of the EU polity" (Rosamond, 2000:148), i.e. they help to deconstruct the middle- and micro-level. Policy networking is thought to be one of the main features of the EU policy-making and cannot be omitted in the endeavour to understand the GDPR stipulation because of the presence of concrete structures in the form of epistemic communities, advocacy coalitions and lobbying platforms that were active in this process. The new institutionalism – a leading theory in the recent EU studies – offers very important insights into the motivations of individual actors, the impact of a number of variables on the process and the overall setting in which it unfolds. While the three main strands of new institutionalism are also understood as overlapping, the analytical perspectives coming from all of them - the impact of rules and strategic behaviour of the actors of the *rational choice institutionalism*, path dependencies and the temporal dimension of the *historical institutionalism*, and finally the role of ideologies, policy styles, identities, personal beliefs, etc., of the *sociological institutionalism* – are indispensable in explaining the factors that have been shaping the process researched in this thesis.

3.3 Consociationalism – the EU as a state-centric polity

The model of consociational democracy was developed and theorised by Arend Lijphart, whose focus on the clues underpinning political stability in divided societies moved further

than the mainstream pluralist approaches (Chryssochoou, 2009:75-76). His book published in 1968 conveyed a new perspective to the works on comparative government (Taylor, 1990b:172).

Consociationalism – a particular form of democracy – emerged in some plural societies that succeeded in installing and maintaining a stable democratic government, despite significant social divisions and political differences, which typically impede political stability (Lijphart, 1977:1). Plural societies are those encompassing nearly separate subsocieties with sharp divergence between them related to "religious, ideological, linguistic, cultural, ethnic, or racial lines" and "with their own political parties, interest groups, and media of communication" (Lijphart, 2012:31). Consociationalism, although to different extent, applies to the democracies in Austria, Belgium, the Netherlands, Switzerland, Canada and a number of other countries, where the above-mentioned cross-cutting cleavages are present (Lijphart, 1977). "Consociational forms may range from a relatively loose confederation of groups and states to federal arrangements with a recognized structure" (Apter, 1966:24 cited in Chryssochoou, 2009:75) and may draw on a variety of governing institutions configurations (Lijphart, 1977:25-36).

Consociational governance is constructed as a compound political association of collectivities, with the Latin origin of the term "consociation" indicating association in fellowship (Chryssochoou, 2009: 74-75). It therefore draws on shared power among the subunits as well as evenly distributed central authority in order to avoid any form of hegemonic control. The segments of such composite polities maintain their autonomy and are interlinked between them on the basis of some kind of consensual relationship, designed as equal partnership. As a result, such political collectivity functions as a complex entity that does not entirely fulfil the characteristics of conventional status of

sovereignty of its own and has a weaker governmental apparatus as well as less expressed national identity (Chryssochoou, 2009:74-76). Consociation is enacted through cooperation of elites, i.e. political leaders of the different segments, in the form of grand coalition, which is "the primary distinguishing feature of consociational democracy" (Lijphart, 1977: 1, 25). Here, the elites adopt coalescent style of leadership, in contrast to adversarial, majoritarian model of political culture, e.g. adopted in Britain and the USA, more suitable to homogeneous societies (Lijphart, 1977:25-31; Lijphart, 2012:9-29). Elite interaction in consociational systems is driven by informal, unwritten rules of the game (Chryssochoou, 2009:75). Thus, the political stability in such fragmented societies relies on the rival elites' readiness to overcome the divisive intergroup factors that may cause political immobility or lead to conflicts (Chryssochoou, 2009:75-77). "Voluntary, rational, purposive, and contractual" approach to cooperation between the elites is a particularly important dimension in consociatonal democracy (Lijphart, 1977:103). Another aspect of the dynamics of the consociational political system is that "the leaders are faced continually with the dilemma of acting to preserve the general system whilst at the same time seeking to protect and further the interests of the groups which they represent" (Taylor, 1990b:174). From here derives the consensus based decision-making model of such systems of governance, embedding politics of compromise and accommodation of different interests that translate into acceptance of a minimal common denominator. Policy outcomes reflect negotiated agreements achieved by the means of elite bargaining (Chryssochoou, 2009:75-77). The above-discussed grand coalitions may be settled in various ways in different governing systems – "as a grand coalition cabinet in a parliamentary system, a 'grand' council or committee with important advisory functions, or a grand coalition of a president and other top officeholders in a presidential system" (Lijphart, 1977:25).

Along with a grand coalition, there are other three defining properties of consociational democracy. The first is the mutual veto, "which serves as an additional protection of vital minority interests". The second is the principal of proportionality in "political representation, civil service appointments, and allocation of public funds". The third one is the earlier mentioned "high degree of autonomy for each segment to run its own internal affairs" (Lijphart, 1977:25). The interests and associations of segmental groups tend to be more inwardly oriented "than overlapping with those of members of other groups in the same state" (Taylor, 1990b:173).

Consociational systems draw on legitimacy through "inclusiveness and the broadening of ultimate consent to government" (Chryssochoou, 2009:76). However, as reached by elites, "outside the realm of citizen participation in the affairs of the polity" consociational outcomes may seem contested by less democratic process through which they are achieved Chryssochoou, 2009:77). In a less positive connotation, elite coalitions are referred to as "a cartel of elites" (Chryssochoou, 2009: 76-77), suggesting their conspiracy "to promote their own interests even when these conflict with those of the segments which they nominally serve" (Taylor, 1990b:177).

Nevertheless, it can be argued that in plural societies "consociational democracy […] is the best kind of democracy that can realistically be expected" (Lijphart, 1977: 48). Also, in all kinds of democratic regimes certain degree of elite predominance is the norm. "Equal power and participation by all citizens" remains a hardly feasible theoretical ideal, with which the elitism of consociational democracy should not be contrasted (Lijphart, 1977: 50). Moreover, through empirical studies more participation has been observed at all levels in consociationally organised societies (Lijphart, 1977: 50).

The concept of consociationalism is relevant in the theory of international integration as well. Namely, it can be applied to the case of regional integration in Europe embodied by the development of the European Communities (Taylor, 1990b:172-173) that at a later stage evolved into the EU (see Section 3.2). It is a compound, multi-layered polity (Chryssochoou, 2009:80). Apart from being multi-ethnic, it is heterogeneous in numerous ways. Its MSs represent diverse political economies, with a spectrum of welfare and regulatory systems ranging from social democracies, e.g. Germany, France, Italy, Sweden, Finland and other, to Britain's Anglo-American model, that applies light regulatory approach, low taxation levels, particularly for businesses, and relies on the market (Taylor, 2003:99-134). The EU countries also have established different political systems at national level as well as institutional arrangements at subnational level and "relationships between the state and civil society, which is expressed in the way the state intervenes at the local level and the way problem definitions and policy expectations are converted into general political rules" (Heinelt and Smith, 1996c:4). For example, the UK and Greece are unitary states, France and the Netherlands - unitary-decentralised states, Italy and Spain function as regionalised states, Germany as a federal state, etc. (Heinelt and Smith, 1996c:4).

These culturally distinct and politically organised units have formed a voluntary treaty-based association, where they have retained the right of withdrawal. Besides, they neither lose "their sense of forming collective national identities" nor resign "their individual sovereignty to higher central authority" (Chryssochoou, 2009:78-79). The states have also reserved the right of veto, when their vital interests might be affected (Taylor, 1990b:179). Nevertheless, a coalescent style of leadership has been adopted in the EU decision-making. The Council of Ministers and the European Council that both would qualify as grand coalitions in accordance with consociational logic, work in the mode of political

accommodation and cooperation (Chryssochoou, 2009:80-83). The principle of consensus in the main EU institutions in legislating helps to preserve stability. When the majority vote procedure is applied, the outcome of outvoting is agreed in advance with the dissenting states (Taylor, 2003:111-112). As progress towards integration depends on the convergence of the MSs preferences, agreements are often reached on the basis of the lowest common denominator. (Chryssochoou, 2009:81). National preferences are determined by domestic political economies (Drezner, 2007:64), but can also be driven by "geo-political and ideological motivations where economic preferences are diffuse, uncertain or weak" (Moravcsik, 1995:612). Accommodation of "the divergent expectations of the subunits" clearly reflects "the consociational principle of segmental autonomy" (Chryssochoou, 2009:79). Thus, decision-making in the EU should be seen as polycentric[19]. "State participation in the joint exercise of power" is institutionalised (Chryssochoou, 2009: 82). The EU does not threaten the sovereignty of its composing parts, but as it was evolving, a "less rigid understanding of sovereign statehood" or less "compact polity" emerged in the "'mixed' system of shared governance which comprises both consensus and majority rule and is designed to bridge the tensions arising from a strict interpretation of the sovereignty principle as exclusive domestic jurisdiction" (Chryssochoou, 2009: 79). Concurring with the consociational perspective, the integration process in the EU is non-linear (Chryssochoou, 2009: 83). For instance, the principle of subsidiarity indicates two-ways dynamics, i.e. "protection of national autonomy against excessive centralization, and the extension of European legislative competences" (Chryssochoou, 2009: 85). In the light of pre-Brexit[20] debates Jean-Claude Juncker, the Commission President, had articulated the importance of observance of this principle and

[19] Some even note that vertically and horizontally dispersed decision-making power in the EU has resulted in a phenomenon of leadership deficit (Hayward, 2008).
[20] The so-called Brexit was the name for the UK EU exit referendum of June 2016 that resulted in the vote for leaving the EU.

that the EU should refrain from interfering too much in the "domains where [MSs] [...] are better placed to take action" (quoted in BBC, 2016a). The EU data protection reform was, too, subject to the subsidiarity test (e.g. see Commission, 2012d; EESC, 2012; COR, 2012).

Regional integration could be seen by the political elites of segments

> "as providing a means by which their power base could be consolidated; not only would their capacity for rewarding as far as was necessary the collective interests of the distinct segments be enhanced, but their capacity to influence the definition of such interests would also be increased. This lends support to the view that integration tends to reinforce rather than weaken the nation-state" (Taylor, 1990b:177).

This can also be explained in such way:

> "[T]he EC does not diffuse the domestic influence of the executive; it centralizes it. Rather than 'domesticating' the international system, the EC 'internationalizes' domestic politics. While cooperation may limit the *external* ability of executives, it simultaneously confers greater domestic influence" (Moravcsik, 1994:3 cited in Chryssochoou, 2009:81, original emphasis).

The last US President Barack Obama recently, while urging against Britain's split from the EU, stated: "[T]he UK is at its best when it's helping to lead a strong European Union. It leverages UK power to be part of the EU. I don't think the EU moderates British influence in the world, it magnifies it" (quoted in BBC, 2016b).

Such dynamics reaches even deeper than the flows between the national and supranational levels. Subnational level actors also strategically use the EU and even international-level fora to strengthen their domestic powers through transnational harmonisation of rules (Newman, 2007; Newman, 2011). For example, in the case of the adoption of the Directive 95/46/EC, data protection issues were brought to the supranational agenda by the national DPAs that managed at the same time to contain the degree of harmonisation by preventing

the creation of a centralised EU-level regulator. National authorities strengthened their positions through a European-level law, simultaneously preserving their domestic powers (Newman, 2007). The non-linearity of the EU integration and polycentric decision-making was also clearly reflected in the CJEU judgement on Safe Harbour in 2015 (*Schrems v Data Protection Commissioner*) that held that national DPAs have the power to examine the compliance of transfers of personal data to third countries with the EU law regardless the existence of a related Commission adequacy decision. It was nevertheless pointed out that only the CJEU alone has the power to decide regarding the validity of an EU-level act, i.e. a Commission decision itself (CJEU, 2015).

The integration in the EU is a symbiotic process between the interests of collectivity (the EU as such) and its parts (Chryssochoou, 2009:82-83). One of the collective interests holding the Union together is related to international implications. According to the consociational theory, in the face of external pressures and vulnerability in the international arena, the states benefit from being in association and are inclined to resolve internal tensions in order to be less exposed to the external threats. This holds the system together and underlies the acceptance of a “cartel of elites as a management coalition” (Taylor, 1990b:181). At the same time, territorial integration is not occurring, as far as decision-making is concerned, “state governments retain exclusive control over ‘constitutional’ reform” (Chryssochoou, 2009: 82-83). To maintain their territorial political authority the elites of subunits tend to favour vertical integration. Horizontal integration and the potential “emergence of a transnational civic identity” is undesired by the elites, as it would enhance the legitimacy of the supranational sphere, and would undermine their domestic influence as a consequence (Chryssochoou, 2009: 81). This is, for instance, reflected in the discussion in Subsection 6.6.1 where the emergence of the EUCFR is touched upon.

As it was covered in the above paragraphs, the EU political system encompasses all properties of a consociational polity. Consociational analogy is meaningful for an analysis of the EU policy process in that it suggests distributed non-linear power flow among its actors and explains the purposiveness of the informal principle of consensus-seeking and (the EU style of) accommodationist politics. These initial macro-level insights into policy-making will be now examined more in-depth through policy networks and new institutionalist perspectives in the following sections.

3.4 Policy networks: non-linear power dynamics and lobbying and "reverse" lobbying

The policy networks debate is grounded in the argument that in the modern societies political decision-making is not limited to formal politico-institutional arrangements and the analysis of contemporary policy processes should also take into account the existence of informal political infrastructures that are complex actor constellations with resource interdependencies "formed between different interests within the public service and elsewhere" and are coordinated through bargaining and political exchange (Heinelt and Smith, 1996c: 2-3). Each actor of such a "cluster" has a "'stake' in a given […] policy sector and the capacity to help determine policy success or failure" (Peterson and Bomberg, 1999:8 cited in Peterson, 2009:105). A range of different participants, including some representing private or non-governmental institutions, are involved in the making and delivery of public policies (Peterson, 2009:105). They gain access points to the policy process through informal networks (Jönsson and Elgström, 2004:3). Network analysis focuses on interaction between different organisations – "contacts, ties and connections", i.e. examines relational data (Jönsson and Strömvik, 2004:15). Interorganisational relations are enacted through interpersonal links, that is through "certain individuals occupying certain roles in the constituent organisations", rather than through organisations in their

entirety as participants (Jönsson and Strömvik, 2004:15). Thus, personal relationships that are built as a result of frequent interaction within the context of organisational contacts are at the core of networks. They function as informal self-organising structures that are coordinated horizontally and, relatively speaking, lack hierarchy. Informal dynamics and the interpersonal dimension of interaction generate mutual trust and efficient exchange of information as well as render networks adaptable (Jönsson and Strömvik, 2004:15-16). "Whereas formal channels tend to be ineffective when information is sensitive or politically charged, informal channels facilitate the free flow of information" (Jönsson and Strömvik, 2004:16; this is in line with some remarks made in Section 5.6 on the EDPS regarding suitability of formal avenues in certain situations). Policy networks may be of more permanent, coherent character, encompassing consistent values, known as "epistemic communities", or of rather temporary character, as issue-based coalitions of heterogeneous actors, organised around a specific matter and acting as "advocacy coalitions". Both types are present in EU negotiation (Jönsson and Elgström, 2004:3-4). "An epistemic community is a network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area" (Haas, 1992:3). Advocacy coalitions are "composed of actors from various governmental and private organisations" (Sabatier, 1998:103). Most of them, apart from interest group leaders, are likely to include "agency officials, legislators from multiple levels of government, applied researchers, and perhaps even a few journalists" (Sabatier, 1998:103, 107-8, 121).

The need for central decision-making authorities to engage with policy networks in the policy formulation process arose as it was inferred that the latter might have an important impact on the success or failure of a particular policy in its implementation phase. Networks function as societal sub-systems and for that reason represent a force with a

potential of resistance to the imposed rules. Therefore, negotiation and coordination of policy proposals across policy networks tend to lead to more successful policy outcomes and win-win situations (Kjær, 2004:34-49). Governance through networks is particularly relevant in interest group politics, i.e. where opposing interests exist (Kjær, 2004:48).

The policy networking is thought to be the most distinct feature of the EU governance (Bache and George, 2006:29-39). "The process of informal influence in the EU policy process – in other words, lobbying – is one of the most researched topics at the European scene" (Versluis *et al*, 2011: 47). Brussels, the so-perceived EU administrative capital, is known to be "the most lobbied city after Washington", which can be expected due to the abundant amount of regulatory output formulated here (Versluis *et al*, 2011: 47). However, lobbying is not limited to the activities of the NGOs, industry and business lobbies or foreign governments. All types of actors at various levels in the EU, including parliamentarians, national and subnational governments, national and EU-level civil servants, and others, engage in policy networking in order to promote their ideas and advocate "a certain course of action (policy) that will ultimately serve their own interests to increase their power, in terms of money, influence, or knowledge" (Versluis *et al*, 2011:231).

Abundance of informal structures can be seen both as a condition and a consequence of the complexity and fluidity of the formal EU framework, characterised by "diffuse and overlapping competencies and responsibilities" (Jönsson and Strömvik, 2004:17). As the EU is "a system of governance in its own right", the macro-level theories of European *integration* fail to embrace the whole complexity of the EU politics and are not able, or even do not aim, to explain the process of *policy-making* and how certain policy outcomes are produced by the EU system (Peterson, 2009:110-111, 116, original emphasis). Network

analysis is a useful tool as it provides sub-systemic meso-level insights into decision-making and as such it complements the macro-theories of politics. In the EU, depending on the policy sector, power may be more concentrated at the sub-systemic level in some cases and less in other (Peterson, 2009:116-117). Policy network analysis is especially congruent with those institutionalists outlooks of the EU where the focus is on ultimate policy choices, for which the EU institutions largely share their authority (Peterson, 2009:110). Thus, extensive policy networking in the EU is related to its decentralised decision-making and non-linear policy-making dynamics, and its functioning as "a consensus-driven type of political system" where the "ability to 'pre-cook' decisions in the stages 'before the hammer falls' […] is fundamental to the reaching of agreement between the MSs, EU institutions, and other organised interests" (Versluis *et al*, 2011:133). "Informal EU networks allow for wide and flexible participation, reduce frictions and produce results that the formal system would not be able to achieve" (Jönsson and Strömvik, 2004:16 referring to Middlemas, 1995: xvi). Actors within the EU constantly deal with the need to prevent or overcome potential gridlocks that may cause impassiveness in policy-making, making the politics problem-solving oriented. The EU's "capacity for agency" to a significant extent derives from policy networks that are "results-driven" (Peterson, 2009:110).

European transnational networks also emerged as Europeanisation of national policy processes, where the goals and interests of a wide diversity of actors at national level moved beyond national political space. Participation in informal networks is related to mediation between different spheres, such as political and economic and domestic and international (Jönsson and Strömvik, 2004: 17-19). Policy negotiations in the EU consist of systematic interactions between official entities, such as supranational institutions and MSs, and unofficial, non-state bodies. Apart from intergovernmental deliberations, these processes involve transgovernmental relations at the level of governmental sub-units as

well as transnational interactions between non-state actors (Jönsson and Elgström, 2004:3). The latter lobbying groups represent business interests in the form of cross-sectoral organisations, sectoral organisations or, in some cases, individual companies, public interests, such as environmental or consumer groups, territorial interests, or others. The mechanism of the EU policy-making process provides plenty of access points to these groups and some of them have accrued significant political resources (Jönsson and Strömvik, 2004:18). Green Cowles (1998:108-125) points out the emergence of mobilised interests of large multinational businesses as "new politically powerful actors" and "one of the most important developments [...] in the Brussels policy making process" (Green Cowles, 1998:108). Their agenda-setting strategies are directed at major EU institutions, targeting specific officials within the Commission, the Council, the EP and the media. They tend to be focused on specific EU issue-areas, act through "organised, well-financed lobbying schemes" and beyond the conventional interests representation forms such as industry associations that are also present in the EU political process (Green Cowles, 1998:108-125; Coen and Richardson, 2009:5-6). "The rise of direct lobbying and […] the emergence of fluid issue-based coalitions" has transformed "the logic of collective action" (Coen and Richardson, 2009:3). The arrival of NGOs and societal interests has also been part of such change, amplifying the spectrum of actors involved in lobbying activities (Coen and Richardson, 2009:5-6). One of the EU institutions' motivations for engagement in intensive policy networking is strategic and can be termed as "reverse lobbying" activity. For example, the "deliberate networking strategy" that involves informal sectoral links and building coalitions with various subnational and transnational groups pursued by the Commission is aimed at putting pressure on such actors as governments, business associations or others, to advance its policies (Jönsson and Strömvik, 2004:17). The Commission, that is known to function as the hub of different policy networks seeks

> “to secure support for ideas by the early stages of a policy cycle. After all, the extent to which the Commission is successful in including the [MSs], parliamentarians and lobbyists in its shaping process, conditions to a large extent the degree of opposition that the policy will receive at the decision-making stage. Then, the Commission is dependent upon the Council and the MEPs to approve its plans” (Versluis *et al*, 2011:134).

Besides, the EU being a modern system of governance, much of its policy-making is extremely technical (Peterson, 2009:105-106). But in stipulating the EU-level regulations, the Union “relies heavily on assets and expertise held at the national level, including in the private sector” (Peterson, 2009:108). Therefore, the concept of policy networks is increasingly indispensable in understanding the EU policy-making environment (Peterson, 2009:108-109). From the perspective of policy formulation and implementation at the technical level the sheer amount and arcane system of supposedly apolitical working groups and committees play a prominent role. These, however, are not the venues of only technical work, but also where agreements can be brokered to “move the policy agenda forward” as well as influence exerted (Peterson, 2009:107).

Controversies and infighting between the actors involved in the shaping of the EU policies –MSs, institutions, experts and lobbying groups – commonly take place in the process, each interested party “attempting to shape the final EU law to their liking”. This may involve even big expensive PR campaigns, deploying the media, “aiming to evoke emotional response from consumers”, for instance (Versluis *et al*, 2011:136-137). While the industry in such cases is typically more resourced than their opponents, in particular if compared to civil society representatives, the latter still have some strategies, such as position papers, resolutions, letters, issuing press releases or holding conferences that sometimes can be quite successful to influence “opinions within national governments” (Versluis *et al*, 2011:136-137). Battles for influence also include

> “attempts to build high firewalls around policies in a given sector so that they cannot be altered or undone by actors from another sector. One consequence is that EU policy networks tend to be discrete, distinct, and largely disconnected from one another, even when they preside over policies that are clearly connected […] Most have diverse membership, extending to public and private, political and administrative, and ‘European’ and national (and international and subnational) actors” (Peterson, 2009:106).

Policies are affected by the internal rivalry between separate services, like in the case of Directorate-Generals (thereafter DG) within the Commission. A new policy proposal text drafted by the team of the *chef de dossier* is then subject to amendments and re-drafting in the process of “‘inter-service consultation’ within and across the different [DGs]”, before being approved by the Commissioner in charge and finally by the College of Commissioners. This can be a very lengthy process, in particular if conflicting positions emerge. The inter-service consultation procedure is also supposed to guarantee coordination of policies in different fields (Versluis *et al*, 2011:137, 167). Therefore, policy networks underpin the emergence of proliferous centres of influence and control alongside “overtly political decision-makers such as the college of Commissioners, Council of Ministers, or EP” (Peterson, 2009:106-107).

The EU networks are not “entirely ‘flat’” and there have been observed the presence and significant role of “so-called *linking-pin organisations*, which occupy central positions in terms of being reachable from, and able to reach, most other organisations in the network and may serve as brokers and communications channels” (Jönsson and Strömvik, 2004:18, original emphasis). Such quality is attributed to the Commission, which is thought to have a steering role amongst multiple interest representations orbiting around it during the process of policy negotiations. The EP is another emerging important linking-pin in policy networking often deemed to be “the most accessible counterpart” for NGOs, “at least on issues of lesser weight” (Jönsson and Strömvik, 2004:18-19). “Through networking and

coalition building it has proved capable of influencing policy-making in several issue areas" (Jönsson and Strömvik, 2004:19). A "process manager" quality would also apply to the Council's Secretariat (Jönsson and Strömvik, 2004:26). Further, "the relative bargaining assets and weaknesses of states *vis-à-vis* other actors" need to be considered.

> "Government representatives tend to occupy central positions in policy networks and cannot be neglected or bypassed by other actors when negotiating an issue. In addition, the state still has a certain advantage in the collection and assemblage of information. On the other hand, states are territorially bound, whereas their business and NGO counterparts are transnational in character [...] states also have lengthy decision processes, whereas many of their counterparts can make speedy decisions, unrestrained by public opinion or constitutional checks and balances" (Jönsson and Strömvik, 2004:20).

Conclusively, in the policy networks analysis view the EU outcomes should not be seen as wholly determined by the classical EU actors, although their power is not denied (Peterson, 2009:116). According to the proponents of this concept, it is reasonable to reject "the dichotomy between 'intergovernmental' and 'supranational governance' since virtually 'no [EU] administrative action can be developed without national administrative authorities being associated with it" (Azoulay, 2002:128 in Peterson, 2009:117). In that policy networks approach concurs with the consociational reasoning, presented in the previous section, replicating its idea of diffuse non-linear power dynamics, consensus-seeking and the non-ceasing significance of the national level, despite intensifying integration.

A more profound understanding of negotiations in the EU requires investigation of informal structures alongside formal ones (Jönsson and Strömvik, 2004:26). In addition to the points touched upon within the context of policy networks, the neo-institutional theory in the next section offers an even more comprehensive grasp of the interplay between the formal and informal factors in the EU politics.

3.5 New institutionalism: formal and informal factors in the policy-making process

The formation of political institutions derives from the need to direct individual behaviour towards collective purposes (Peters, 2012:3). “An institution transcends individuals to involve groups of individuals in some sort of patterned interactions that are predictable, based upon specified relationships among the actors” (Peters, 2012:19). The features of an institution include certain stability over time, capability to affect individual behaviour and perceived shared values among the members of the institution (Peters, 2012:128-129). New institutionalism draws attention to the role of “informal patterns of structured interaction between groups as institutions themselves”, that exist along with formal institutions (Bache *et al*, 2011:22). In the contemporary society, “institution” is a multi-faceted concept “used to refer to social phenomena at many different levels – informal codes of conduct, written contracts, complex organisations”, all of which can be equally powerful (Lowndes and Roberts, 2013:3, 5). Institutions may have either constraining or empowering effects on human action. Rules, both legal and social, prevent some actions from being otherwise pursued. (Aspinwall and Schneider, 2001:3). On the other hand, institutions may empower directly through such mechanisms as laws and rights, and indirectly through informal norms such as gender stereotypes, privileges deriving from nepotism or patronage, narrative accounts legitimising authority of certain actors with regard to others, etc. (Lowndes and Roberts, 2013:201-202). “Equally, shared cultural and cognitive-based understandings may promote common action, whereas different understandings may act as a constraint” (Aspinwall and Schneider, 2001:3). New institutionalism argues that formal institutions are not neutral arenas, as their rules and structures favour the access to the political process of some societal groups over others (Bache *et al*, 2011:23), “while also having the potential to inform the bottom-up institutional building of those who seek to resist such constraints” (Lowndes and Roberts,

2013:201-202). Although institutions shape actors' behaviour, at the same time, they are social constructs, emerging from human interaction. This means that institutions and individuals are mutually constitutive in terms of power and agency. "Individuals are not simply constrained by institutions, they are also responsible for the crafting of these same constraints" and "creatively engaged in the enactment of institutions" (Lowndes and Roberts, 2013:104). Rules and practices may be interpreted or resisted, eventually generating institutional change (Lowndes and Roberts, 2013:104-105). "Newly created institutions […] open up avenues which could not have been pursued earlier" (Aspinwall and Schneider, 2001:3).

New institutionalism investigates the impact of institutions on political decisions and policy choices, believing that "most political action of real consequence for society occurs within institutions, or is heavily influenced by institutions, so it is crucial to understand how these bodies act and how they influence the behaviour of individuals working within them" (Peters, 2012: 185). For neo-institutionalists, institutions are important structural elements of a polity (Peters, 2012:128-129). Political life is centred on institutions. They are the variables "that matter more than anything else" in explaining political decisions in most direct manner and "they are also the factors that themselves require explanation" (Peters, 2012:184). According to this school of political science "something about institutions – their values, their rules, their incentives, or the patterns of interactions of the individuals within them" – condition decisions made by governing authorities (Peters, 2012:184).

There are three main strands in new institutionalist research: rational choice, historical and sociological. Although it is acknowledged that many aspects of analysis deployed by proponents of these separate trends converge, they offer different insights about *how*

institutions affect outcomes, interpreting them as intervening or independent variables (Aspinwall and Schneider, 2001:18; Checkel, 2001:20-21; Lowndes and Roberts, 2013:28-40). These perspectives will be now discussed in the context of EU politics.

Since around the 1990s, new institutionalism has become a mainstream approach in the European studies. The related works have been addressing the relative power of institutional actors, bargaining complexities between the EU actors from various levels and the role of norms and socialisation in the process of European integration (Aspinwall and Schneider, 2001:6). "In the EU, formal institutions include administrative rules, legislative procedures and the voting rights attributed to diverse collective actors" (Aspinwall and Schneider, 2001:3). As the previous section on policy networks already demonstrated, informal rules in the EU politics also saliently come into play. Institutionalist analysis reveals many more forms of informal institutions within the EU policy process, suggesting that it should be regarded as a very complex interplay between formal and informal practices.

In *rationalist reasoning* on the EU the basic assumption is "that actors in all relevant decision-making arenas behave strategically to reach their preferred outcome" (Aspinwall and Schneider, 2001:7). Institutions can become "autonomous political actors in their own right" (Bache *et al*, 2011:23) and have their own agendas (Aspinwall and Schneider, 2001:4-5). They are driven by self-interest (Schmidt, 2001:144) and compete for influence (Aspinwall and Schneider, 2001:9). Therefore, even actors formally known as "non-political", e.g. civil servants or courts, do not necessarily remain "apolitical" (Peterson 1995: 74; e.g. see the empirical discussion in Sections 5.2, 5.5, 5.6, 6.2 and 6.4). In asserting themselves, actors may rely on various strategies and power resources, from taking advantage of disagreement among other players, to framing issues in a certain

policy realm so that it results in application of different procedures and reconfiguration of power between decision-makers, etc. (Falkner, 2012). Many researchers have observed the phenomenon of “norm entrepreneurism” actively enacted by the Commission and the CJEU that have “constructed a European competence in important ways, through rulings, proposals and alliances with actors at various levels across the EU” (Aspinwall and Schneider, 2001:4-5; e.g. see the analysis in Section 6.4 on the CJEU regarding this “norm entrepreneurism” in the field of fundamental rights). For instance, the Commission in striving “both to legitimise itself and to create a demand for European-level public goods” that would not have been created without the supranational agency, actively seeks to identify new issues, propose solutions and establish alliances (Aspinwall and Schneider, 2001:4-5). “The legitimacy of institutions depends […] on the capacity to engender and maintain the belief that they are the most appropriate ones for the functions entrusted to them” (Majone, 1997:161). In terms of the strategic interests of the CJEU, several scholars argued that its decision-making does not occur without taking “[MSs’] possible reactions into account”, i.e. can be seen as political (Aspinwall and Schneider, 2001:8; see Section 6.4). Although designed as an independent institution, implementation of its judgements “ultimately depends on the goodwill of the [MSs] and of their courts” (Peterson and Shackleton, 2012:386).

But from the MSs’ perspective, an increasing supranational agency is likely to be unwelcome (Aspinwall and Schneider, 2001:4-5). As a way to hinder the integrationist strategies of the supranational institutions, MSs may recourse to the use of domestic institutions and attempt to gain more bargaining weight and obtain a different agreement through a “referendum game”, i.e. hailing unfavourable popular sentiment towards advancing integration during the negotiations within the European Council (Aspinwall and Schneider, 2001:9; see Subsection 6.6.1 regarding the impact of the Brexit agendas on the

GDPR talks). Similarly, national governments tend to favour enactment of the EU policy oversight through “federated transgovernmental networks of national regulators”, such as the WP29 or equivalent institutions in other sectors, as a governance alternative to the top-down control structures, i.e. excessive delegation to the supranational level, which is frequently undesired due to sovereignty concerns and national politics (Newman, 2011:190, 192). This was very prominent with the GDPR and the reconfiguration of powers between the Commission and the DPAs as discussed in Subsection 4.5.4, Sections 5.2, 5.5 and Chapter VII). Another example pertaining to the national governments’ quest for balancing out the progressing integration and supranational influence was the introduction in 1987 of the so-called **“**comitology**”** procedures, i.e. the rules on the implementation of EU regulatory measures, through which the Council representing governments has gained significant “gatekeeping” power, enabling, at least to some extent, MSs control over some Commission’s policy proposals (Aspinwall and Schneider, 2001:8; Checkel, 2001:36-37). Some insights from the research into the EU institutional setting nevertheless suggest that in the committees the Commission remains one of the most influential actors (Dehousse, 2003) whose remit of discretion arguably has expanded with the new comitology rules and the introduction of delegated acts with the Lisbon Treaty (Vihar, 2013). How changes in institutional rules affect the relative power of actors, like in the above cases, is the main focus in the rational choice institutionalists analysis. A major development here was the introduction of the co-decision procedure[21], notably increasing the powers of the EP (Rosamond, 2013:90-93). Apart from the EP itself, this was quite a game changer for some actors such as civil society groups and new policy issues articulated by them. “In fact, human rights pressure groups have begun utilising the EP as a means for generating […] the sort of normative pressure-from-below” (Checkel, 2001:34).

[21] now ordinary legislative procedure that was also applied to the GDPR.

For rationalists, institutions are intervening outcome variables that shape the process of European collaboration and power distribution. When reforms are imminent, they raise actors' concerns about potential shifts in power balance (Aspinwall and Schneider, 2001:4). A relatively minor policy change at the EU level may, however, entail a major change for specific actors, e.g. specific countries (Sabatier, 1998:121). The rational choice institutionalist perspective has direct links with the state-centric theories on the EU (Rosamond, 2000: 148-156), among which the consociationalism discussed in Section 3.3.

The rationalist reasoning is challenged as incomplete for their attention mostly paid to the formal rules, while power dynamics and possible policy outcomes are much more nuanced due to existing informal practices. For example, a well-known informal norm of consensus-seeking in the Council poses limits to the Commission's formal institutional powers. Policy proposals are greatly shaped by the intergovernmental bargaining in the Council and its Presidencies (Schmidt, 2001: 125 – 146). This is very relevant to the GDPR process as recounted in the following empirical Chapters.

Informal institutions are taken more into account in the *historical institutionalism*. In this view, formation of preferences and strategic choices are conditioned by institutional context, i.e. by previous institutional commitments (Aspinwall and Schneider, 2001: 10). This creates the effect of "path dependency" – "a powerful cycle of self-reinforcing activity" (Lowndes and Roberts, 2013: 39). Past decisions have an impact on the interstate negotiations. "European integration is a cumulative process, where prior decisions form a basis upon which new decisions are made" (Aspinwall and Schneider, 2001: 10, 12). Even in the liberal intergovernmentalist vision, where the European integration is interpreted as rather loose, it is recognised that major decision-making in the EU does "not take place in anarchy, but accept[s] previous agreements (and the societal adaptation to them) as a new

status quo", i.e. "each bargain is recursive, influenced by past bargains and influencing future ones" (Moravcsik, 1995: 612). Consequently, enduring structural arrangements may render the institutional framework not in pace with social changes and may privilege some actors over others as well as certain types of policy over others (Aspinwall and Schneider, 2001: 10-12). Over time, historical evolution of institutions will not necessarily be efficient, and they will not always emerge as a result of neutral bargaining. In the historical institutionalism's depiction, institutions may have effects of both intervening and independent variables (Checkel, 2001: 20-21). Institutional structures, both formal and informal, may be challenged and may be changed when the context changes or new actors emerge (Katzenbach, 2012: 124, 129).

Sociological institutionalism proposes that cultural and cognitive patterns also have strong implications in the integration process. The impact of actors' values, beliefs and identities may manifest itself "along professional lines, where groups of professionals from different EU [MSs] begin to respond in similar ways to proposed or agreed policies; it may occur along organisational lines; it may occur along national lines" or other (Aspinwall and Schneider, 2001: 14), constituting a collective power base (Lowndes and Roberts, 2013: 105). For instance, this applies to epistemic communities, discussed in the previous section on policy networks.

Distinct institutional cultures have been observed within various EU bodies and their units, with reference frequently made to the diverse administrative conventions existing across the Commission's DGs (Rosamond, 2013: 89-93). However, formation of organisational identities is not an absolute determinant in shaping individual preferences, as it competes with other identities. The different national cultural traditions across the EU states that have translated into varied modes of economic, industrial and state-society relations in

each country, determine actors' diverse responses and expectations related to supranational policies. Apart from different stances brought into the interstate bargaining within the Council (Aspinwall and Schneider, 2001: 13; e.g. see Section 5.4), this is also a factor when the Commission's policies are designed. Despite this institution formally being independent from the MSs, national governments try to access the shaping of EU policies through co-nationals – officials and seconded national experts – employed within the Commission administration (Versluis *et al*, 2011: 137-138). "Even though members of the Commission were strictly forbidden from seeking or receiving instructions from their national governments, governments were always anxious to get their people into key positions where they felt their interests could best be served" (Taylor, 2003: 112). Hence, the depiction of the Commission as "a foreign bureaucracy", i.e. an outside force with opposing interests that could be imposed on the MSs, in particular promoted by Eurosceptics, is distorted and not sophisticated enough for the analysis of policy process and influences (Taylor, 2003: 112). "Intergovernmentalism starts in the cabinets. They are mini-Councils within the Commission" (Peterson, 1995: 74). In addition, some studies claim that even more than by national adherence, the Commission officials' preferences are formed by their partisan orientation (Hooghe, 2001: 152-173). On the other hand, literature on the European integration indicates socialisation, emerging from interactions at the EU-level as well, which arguably has a certain degree of impact on the formation of identities and interests (Checkel, 2001: 20-35). For instance, the members of the Committee of the Permanent Representatives (thereafter COREPER) are said to be subject to implicit dual loyalties. The instructions from their governments are supplemented by a motivation of "making the system work". Permanent Representatives develop shared goals and values and, driven by their commitment to achieve results, their interaction shifts from "hard bargaining" towards more consensual politics, that is it encompasses elements of

Europeanisation (Andersen *et al*, 2001: 33-4). An official of a Permanent Representation in Brussels has pointed out that the COREPER happens to be labelled by their domestic administration as the "Committee of Permanent Traitors" (Joerges and Neyer, 1997: 291). The different GDPR talks dynamics among Justice and Home Affairs (thereafter JHA) Counsellors working at the Permanent Representations as compared to the working group-level, made of delegates most of whom reside and work in their home countries between the meetings, were indeed spontaneously mentioned at an interview (see Section 5.4). "The EU's institutional system generates multiple identities, the importance of which cannot be discounted in EU policy debates. Virtually all actors in EU policy-making must balance or at least reconcile different identities" (Peterson and Shackleton, 2012: 396). The effects of institutions for sociological institutionalists are deep reaching, not limited to simply constraining actors' behaviour. As such, they are interpreted as independent variables (Checkel, 2001: 20-21).

Overall, comprehensively taking into account various aspects of new institutionalist analysis, the EU supranational institutions can be interpreted as semi-autonomous. Deviating from the principal-agent dynamics, in which societal principals delegate power to governing agents, they managed to acquire a significant scope of competence and pursue their own agendas. At the same time, they encounter a wide range of constraints affecting their actions (Cram, 1997: 154-176). The EU institutions assume a collective responsibility for EU policies and are greatly interdependent. As they interact in a competing or even conflicting manner, the EU policies are shaped by interinstitutional cleavages as much as by intergovernmental disagreements (Peterson and Shackleton, 2012: 386-387, 396-398).

As it can be seen from the discussion in this section, new institutionalism, in line with the consociational and policy networks concepts covered in the previous sections, reproduces

the ideas of power-sharing and non-linear policy process dynamics among the EU actors. However, it additionally devices the analysis of the EU policy-making with the perspective of the vast pool of informal ("soft") factors, capable to alter the outcomes expected on the basis of formal rules. These factors – institutions – may have the effects of leverages within the power distribution established by formal procedures and even be drivers of certain policy initiatives in some cases. Institutional analysis allows both micro- and macro-level analysis, i.e. both a sophisticated investigation of an individual actor's incentives as well as a fuller understanding of general structural arrangements of the whole system of actors and their interactions in the EU.

3.6 What is the balance of interests likely to be in the EU decision-making? The rationale for the empirical analysis

A number of contrasting propositions related to the potential prevalence of interests in the EU policies emerge from the theories that constitute the analytical framework in this work.

The interpretations of consociational systems that put the emphasis on the "cartel of elites" argument are sometimes associated with the EU project at large, depicting it as "conspiracy of elites and big business – in alliance with governments – against the interests of the mass of the people" (Taylor, 1990b: 177). The perception of the EU consociation as elite-dominated and the ambiguity of the processes of the interstate and interinstitutional bargaining gave the rise to the EU "democratic deficit" discourse (Chryssochoou, 2009: 81; Crisp, 2015). These debates have been also enhanced by the emergence of the EU regulatory state: the mode of governance which tends to be based on rule-making rather than on engagement with the redistribution of resources. This way of governance resulted in the growth of so-termed technocratic decision-making. Policy solutions formulated by technical experts are seen by some as not transparent and, hence, leading to the

“democratic deficit” (Majone, 1997). From the straightforward majoritarian democracy perspective, functional European integration triggers so-perceived legitimacy gaps (Rittberger and Schimmelfennig, 2007: 228-9). As to the realm of policy-networking, there have been claims about the Commission’s linkage with “big business” and its importance in the current EU policy-making (Green Cowles, 1998: 113). Apart from the involvement of the big European business, the abundant presence of the American firms including ICT giants is observed in the EU policy process shaping “the US-EU trade and investment agenda” (Green Cowles, 1998: 108-125). As explained in the first four sections of Chapter II, these stakeholders advance commercially-driven preferences and seek relaxation of the high EU regulatory standards in the sphere of privacy and data protection. Finally, according to some neo-institutional analyses of the EU politics, non-market interests are likely to be marginalised due to “the market orientation of European policy, and the existence of producer and consumer directorates with shared competence over policy” (Aspinwall and Schneider, 2001: 11). In other words, the EU regulatory output will tend to be “market-making” rather than “market-shaping” (correcting), with stronger regulatory means used to protect market interests and weaker intervention tools to promote non-economic interests, as it seems to be the case in the European governance of communications (Michalis, 2007c: 10-16, 290, 294, 300).

Nevertheless, diverse arguments can be found in all the three theoretical dimensions employed in this study. Other existing interpretations of consociationalism propose that it is one of the most developed inclusive models of the democratic system, overcoming the flaws of majoritarian systems, which may lead to continuous inclusion and exclusion of some groups (Reilly, 2012). The elements of the regulatory state, such as independent regulatory bodies or commissions with delegated powers, create the effect of dispersed, shared power landscape with a more limited remit of competence of individual actors. As

this embeds pluralist characteristics, the regulatory state is thought to be a favourable mode of governance for the articulation and enforcement of post-industrial values, among which civil rights and consumer protection. Task delegation to regulators aims at efficiency and correction of market failures. The decision-making based on expertise and problem-solving is associated with a "positive-sum game", which, when the right solutions are found, grants certain gains to all stakeholders (as opposed to the majoritarian "zero-sum", i.e. some lose as some others win). That said, a number of control mechanisms can be applied to oversee the discretion deployed by the agents of the regulatory state (Majone, 1997). Furthermore, the overall argument of the EU "democratic deficit" is countered by some researchers, in that it "has reached constitutional maturity" (Moravcsik, 2005), on the whole "redresses rather than creates biases in political representation, deliberation and output" (Moravcsik, 2002) and compares favourably with such perceived "model democracies" as the USA and Switzerland (Zweifel, 2002). From the policy networks perspective, data protection is an area where the EU possesses particularly sound technical expertise (Princen, 2003: 142-157). The related epistemic community – the network of the DPAs – is thought to have a significant potential to influence the EU privacy and data protection policy (Newman, 2007; Brown and Marsden, 2013c:61). In terms of the institutional eco-system, in parallel with the development of market policies, there has been a process of institutionalisation of the human rights in the EU (Rittberger and Schimmelfennig, 2007). This process culminated in the creation of the specific EU-level constitutional legally-binding basis for protection of the fundamental rights, including privacy and data protection, through such instruments as the Lisbon Treaty and the EUCFR (EDPS, 2008; see Section 6.7). This means an existence of a competing path dependency to that of market orientation of European policy.

As it was already articulated in Section 2.5, there have been various instances when EU policies were not wholly market-oriented. Young and Wallace (2000) note that major political, economic and societal changes in the 1980s and 1990s led to incremental consideration of non-economic interests in the EU policies. This tendency was driven by concerns raised by the waves of Euroscepticism, but also by the changing actor landscape altered by the enlargements that increased the number of NGOs and governments advocating for promotion of civic interests. Moreover, with time and gained experience, public policy has been progressing towards more balanced rules. Young and Wallace argue that, even though they are usually less-resourced or insufficiently engaged in the policy process, civic interests often have a significant impact on policy in the EU, and the interactional patterns "between institutions, actors and ideas in the EU regulatory process facilitates" consideration of civic interests. A variety of policy actors (including the Commission, the EP and the CJEU or MSs governments) happen at times to articulate non-economic considerations. The authors suggest that, even when these preferences do not prevail, they are present in the policy outcomes, rebutting "[t]he presumption of much of the literature on regulation […] that producer interests tend to predominate" (Young and Wallace, 2000: 2), and "the allegations that market liberalisation would lead to lower standards" observing instead "a tendency towards higher and tougher standards" (Young and Wallace, 2000: 9,17). A major Brussels-based consumer protection organisation BEUC commented favourably regarding the Consumer Rights Directive (2011/83/EU) adopted in the recent years in the EU and introducing a range of new protections for consumers, especially when shopping on-line: "[i]n these days of discussions as to what the EU does for citizens, this Consumer Rights Directive is a fine example of how consumer laws have improved and continue to improve across the EU" (BEUC, 2014). Among other prominent cases, the number portability legislation (Directive 2002/22/EU)

and rejection of the Anti-Counterfeiting Trade Agreement (thereafter ACTA) by the EP can be mentioned. The Directive 2002/22/EU enabled mobile phone users to change their service provider, while retaining their original numbers, charge free, aiming at better consumer choice and competition. The ACTA, an international treaty aiming to fight copyright infringements, including on-line, was rejected by the EP in 2012 as a result of an unprecedented pressure by thousands of EU citizens. The provisions of the agreement were thought to have a serious effect on the individual rights (EP, 2012b).

Policy outcomes are hardly *a priori* definable (Young and Wallace, 2000). “Policy-making processes may end up heading in unexpected and unpredictable directions” (Ackrill *et al*, 2013: 882). Relationships between interest groups and public decision-making authorities vary between different policy fields, therefore a profound analysis requires a disaggregated approach to the policy process and case-by-case investigation (Peterson, 2009: 107). In other words, each policy dossier needs an individual analysis of variables that shape the resulting balance of interests. Michalowitz thinks that lobbying actors are only likely to succeed “if they are in line with politicians or institutions driving the issue” (2004c: 270). Having analysed several case studies, some of which concern the IT sector, including instances when the EU was legislating on privacy-related issues, she concludes that “[p]redominantly, the presence of a political will determine the outcome of a policy decision” and overall lobbying “does not seem to matter” (Michalowitz, 2004c: 269). The reasons of its weak impact, however, may differ. But, in general terms, weak impact is due to the fact that lobbyists are representing very narrow interests that are very contrasting among themselves in the overall input, while the decision-makers have their own motivations in making certain policy choices and face procedural and political constraints (Michalowitz, 2004c:61-71, 269, 276; see Sections 5.3, 5.9, 5.10, 6.3, 6.5, 6.7 and Chapter

VII). It would be too reductionist to think that policy-makers embrace the preferences of powerful interests by default (Galperin, 2004).

> "Therefore, in order to understand why certain stakeholders are consistently favoured over others, why certain governments are capable of passing reforms and others are not, or why diffused interests are represented in some cases and not others, it is necessary to examine the institutional fabric that underlies the making of information and communication policies" (Galperin, 2004: 163).

Along with a given institutional framework, time and context are important determinants of policy outcomes: the success of exactly the same ideas and political brokering in the different contexts will vary. The contexts of policy processes include both formal and informal institutions. In some situations, issues present in the political agenda may not result in a policy decision due to a range of technical and political reasons. In other situations, unforeseen ("focusing") events may catalyse change (Kingdon, 1995c; Ackrill *et al*, 2013).[22]

The context of the EU data protection reform builds on a number of significant institutional and normative developments of the past two decades, apart from the earlier mentioned impact of the Lisbon Treaty adopted in 2007. The package of the EU privacy protection instruments – Directive 95/46/EC and subsequent sector specific laws – offers an "internationally unprecedented level of privacy protection" (Newman, 2007: 123). According to Newman, it has been an important factor, that a comprehensive data protection regime in Europe was constructed "prior to the information technology revolution of the late 1990s", making consumer information within Europe "much less readily available" if compared to the USA (Newman, 2007: 124). The instalment of data privacy rules has been enhanced by the institutionalisation of the administrative network –

[22] The process of the GDPR adoption has been indeed marked by some unforeseen focusing events, such as the Snowden revelations that began in 2013 (see Sections 2.6 and 6.3) and the two rulings of the CJEU in spring 2014 related to the invalidation of the DRD and on the "right-to-be-forgotten" (See section 6.4). These events contributed to making the draft GDPR a "high profile" policy dossier.

the WP29 of the DPAs – deriving from the provisions of the Directive 95/46/EC (Newman, 2007: 134-137). Since mid-2000s this policy area at the EU level is also overseen by such bodies as the European Data Protection Supervisor (thereafter EDPS), European Network and Information Security Agency (thereafter ENISA) and The European Union Agency for Fundamental Rights (thereafter FRA)[23]. In 2005 the field of data protection was transferred from the Commission DG responsible for the internal market to the DG competent in the area of justice, including the fundamental rights. Furthermore, according to some comments, the judiciary and regulatory activity of the current years in the EU can be perceived as the "climate of data protection enforcement", which is "coupled with an increasing awareness by consumers of their rights" (Robert Bond of Speechly Bircham quoted in BBC, 2014m).

Another contextual line encompasses the emergence of the digital economy as the core layer of the contemporary economy along with the entry of a new type of economic actors, such as search engines, apps developers, social networks, digital advertisers, cloud computing providers, and others, drawing on data-intensive business models, into the stakeholder constellation. The time of the reform coincided with the economic recession, when economic goals are likely to be given priority and the preferences of economic actors may gain more relevance. Digital economy and the creation of the Digital Single Market are among the core priorities of the current EU policies. Modern privacy protection regulation endeavours "to reconcile the fundamental but competing values of privacy and free flows of information" (Prins, 2006: 171).

[23] The EDPS started work in 2004 and supervises how personal data are being handled in the EU public institutions. It also advises the EU institutions on the privacy and data protection matters when new EU laws are drafted (see Section 5.6). ENISA has been operating since 2005 and some privacy and data protection issues fall under the remit of its competence in the context of the networks and information security in the EU. FRA has been functioning since 2007 and monitors the rights to privacy and data protection along with implementation of other EU fundamental rights. Besides, some specific personal data processing-related issues within health sector are dealt with also by the European Medicine Agency, founded in 1995.

Further, this reform represented multiple power shifts, one of which was the replacement of a Directive by a Regulation – a directly applicable law – that meant decreasing national competence in this field as well as greater adjustment costs for national administrations. Harmonisation of different data protection systems in the MSs, that the move from a Directive to a Regulation embedded, encompassed accommodation of varying national sensibilities.

The empirical part now presents the analysis of the process of adoption of the GDPR in the following Chapters.

3.7 Conclusions

The discussion of the EU politics in this Chapter demonstrated that actors from multiple levels of the EU governance (supranational institutions, national and subnational administrations and regulators, as well as private and civil society actors, and often various foreign players) need to be taken into account. All these actors bring their own agendas into the concrete policy process and seek influence. The polycentric power landscape of the EU political system creates multiple venues and opportunities for the actors to advance their interests, and the predominantly consensual decision-making constitutes a possibility for accommodation of wider ranging preferences. Which interests will succeed more in each policy dossier depends on the context of each concrete policy process, which needs to be investigated on a case-by-case basis. The context consists of formal and informal structures that will play out differently for various actors in each case. To analyse the impact of these structures this study makes recourse to the concepts of *policy networks* and *new institutionalism*. The national and supranational levels act as countervailing powers, i.e. the power dynamics is non-linear in the EU. However, on the whole, the current EU institutional set-up locates more power at the national level: the EU, seen as a

consociational political system, does not threaten the sovereignty of its composing parts – the MSs. Therefore, the analysis of the adoption of the GDPR is carried out from the perspective of moderate state-centrism in this thesis. Table 2 below summarises the above-explained analytical framework.

Table 2. The summary of the analytical framework of this thesis

<table>
<tr><td rowspan="2">NON-LINEAR POWER DYNAMICS</td><td colspan="2">CONSOCIATIONALISM
STATE-CENTRICITY
High degree of MSs autonomy, shared decision-making power, cross-cutting cleavages, governing by grand coalition, consensus seeking and accommodationist politics, proportional representation, MSs veto right</td><td rowspan="2">FORMAL AND INFORMAL INSTITUTIONS</td></tr>
<tr><td>POLICY NETWORKS
Advocacy coalitions
Epistemic communities
Lobbying and “reverse lobbying” (all actors lobby themselves)
Policy flows exchange between national and supranational levels and their interdependency</td><td>NEW INSTITUTIONALISM
Rational choice – strategic behaviour, power contest, actors driven by self-assertion
Historical – the impact of previous policy decisions on the subsequent ones (“path dependencies”); significance of historical policy processes and temporal context
Sociological – institutional and national contexts; the impact of identities, ideologies, cultures, etc.</td></tr>
</table>

Source: Author’s compilation

CHAPTER IV

The GDPR policy process: infusing a more risk-based approach and decentralising the proposed governance model

4.1 Introduction

As mentioned in the introductory Chapter I, the GDPR has been one of the most intense EU legislative processes of the recent years. It was referred to as "a very difficult file" by most interviewees during the fieldwork conducted for this thesis, who noted its technical complexity. This is also a framework legislation that builds basis for all other related laws, such as the review of the e-privacy Directive 2002/58/EC and the Regulation 45/2001 outlining processing of personal data by the EU institutions, the EU PNR Directive, trade agreements, etc.

> "All of a sudden, this file became so big and so important, politically very charged, for all very different reasons. In terms of technology development and public awareness, it became very clear that privacy and data protection are not niche, but suddenly it turned out that this Regulation amounts to essentially the main regulation of on-line businesses and on-line interactions for the coming years […] On top of that, a lot of pressure from the business side because of "Big Data" […] And then Snowden and his revelations which concern a slightly different angle: intelligence, public security, etc. But, of course, it just showed that NSA and GCHQ just would not have any data if it was not for the big private companies gathering that data. All of a sudden, people realised that there is really probably something that should be done" (interview with EU official A, 29 January 2015, Brussels).

The pressure on this file only grew in spring 2014, as, following the Snowden revelations in 2013, the EP voted with an overwhelming majority on its first reading position (EP, 2014b) and the CJEU adopted its rulings invalidating the DRD and in favour of the so-called "right-to-be-forgotten", highlighting the salience of the privacy and data protection issue-area at the highest political decision-making level. In autumn 2015, another landmark

CJEU ruling followed invalidating the Safe Harbour agreement. There were also calls from the European Council for “the timely adoption of a strong EU General Data Protection framework” in October 2013 and June 2014 (European Council, 2013: 4; European Council, 2014: 2). In September 2014, a joint declaration of 16 EU national parliaments demanded to speed up the reform (Barbière, 2014). Nevertheless, the stipulation of the GDPR has taken about twice as long as originally planned, i.e. to be finalised before the EU elections of May 2014. This was determined by a vast number of variables, some of which of more (such as shifts in the spheres of competence) and others of less political nature (such as existing rules and procedures). In addition, some of these factors are directly related to the privacy and data protection issue-area (e.g. in balancing fundamental rights and economic interests), while others are unrelated to it and originate in the broader context of the EU politics (i.e. in the integration processes), but have an impact on shaping this specific policy area. This and the following chapters aim to provide an analysis of the interplay of these various reasons and how they summed up together in the policy outcomes. Section 4.2 presents the content of the EU data protection reform that was designed a set of strict rules and introduced a number of innovations. Section 4.3 discusses the process of the negotiations, indicating the main challenges encountered by the co-legislators and the political tensions around them. Section 4.4 analyses the shift towards a more risk-based approach in the balance between the user and business interests in the course of the reform. Section 4.5 is dedicated to explain how the interests of the national and supranational institutional actors were positioned during the process, identifying the main areas of tensions. It mainly focuses on the process of decentralisation of the EU data protection governance model as compared to a more centralised model in the Commission’s draft proposals of 2012.

4.2. The GDPR draft proposal and the features of the reform

The uneasy process of adoption of the GDPR commenced in January 2012, when, following related public consultations held between 2009 and 2011 (Commission, 2009-2011), the Commission released its draft proposals for a comprehensive EU data protection reform, consisting of two instruments: a Regulation "setting out a general EU framework for data protection" to replace Directive 95/46/EC – the earlier "central legislative instrument for the protection of personal data in Europe" – and a Directive "setting out rules on the protection of personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities" to replace Framework Decision 2008/977/JHA (Commission, 2012a)[24]. As it is stated in the accompanying documents, the provisions of the Directive 95/46/EC necessitated being updated and modernised in the light of technological progress and globalisation that have been unfolding since the adoption of the above Directive and an ever-increasing amount of personal information collected as well as emerged new ways of its uses. It is also noted in these documents that while personal data have become a very important asset for a lot of businesses, on-line services enjoy poor consumer trust (Commission, 2012a; Commission, 2012b; Commission, 2012c). Further, the Directive 95/46/EC was implemented inconsistently across the MSs, resulting in divergent enforcement of the rules. Therefore, the reform was aiming to strengthen the rights of individuals as well as to simplify the regulatory environment for businesses and other organisations, at the same time devising the DPAs with a more robust enforcement mechanism and better coordination across the EU (Commission, 2012a; Commission, 2012b; Commission, 2012c).

The key novelties in comparison with the Directive 95/46/EC were the following:

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[24] This thesis focuses only on the GDPR and the further analysis engages only with this policy file. While the reform was launched as "the package" containing these two instruments and the policy-makers were aiming to deliver a package approach, the two policy dossiers, however, evolved as two separate processes. The complexity and the utmost importance of the GDPR alone for the EU and the global data protection *acquis* requires an in-depth study on its own and indeed required all the resources available for this research project.

- Introduction of the **explicit** consent[25] requirement (Article 4 (8));
- Easily **intelligible** for users **privacy policies**, presented in clear and plain language, etc. (Article 11);
- Introduction of so-called **“right-to-be-forgotten”**, so that users can request deletion of personal data in order to help them tackle data protection risks on-line (Article 17), encompassing in essence an upgrade to the existent right to erasure;
- **Easier access to** data subject’s **own data** (Articles 14 and 15);
- Introduction of the **right to data portability**, i.e. establishing the users’ right to request a copy of and transfer their personal data from one service provider to another (Article 18). This innovation extends in essence the consumer rights of changing service providers already existing in other sectors, such as telecommunications or banking;
- Introduction of the “**right not to be subject to** a measure based on **profiling**”, upgrading the provisions on automated individual decisions under the previous instrument (Article 20);
- Introduction of the principles of **‘privacy by design and default’**, entailing a controller’s obligation to implement “appropriate technical and organisational measures and procedures” so that “the protection of the rights of the data subject” is ensured by default and that processing of personal data is not carried out beyond the extent “necessary for each specific purpose […] and [personal data] are especially not collected or retained beyond the minimum necessary for those purposes […] In particular […] that by default personal data are not made accessible to an indefinite number of individuals” (Article 23);

[25] Understood as “based either on a statement or on a clear affirmative action by the person concerned and is freely given” (Commission, 2012a).

- Introduction of the **data breaches notification** obligation that must be enacted without undue delay (Articles 31 and 32), extending on to all businesses and organisations breach notification rules already applied in the electronic communications sector;
- Introduction of **data protection impact assessments** and **data protection officers** requirements (Articles 33 and 35(1) respectively), increasing **responsibility and accountability** criteria for personal data processors;
- Improvement of **administrative and judicial remedies** in cases of violation of data protection rules (Chapter VIII), including tougher administrative sanctions, with fines to amount to "up to 1 000 000 EUR or, in case of an enterprise up to 2 % of its annual worldwide turnover, whichever is higher" (Article 79);
- An upgrade of the WP29 to the **European Data Protection Board** (EDPB) with the EDPS to provide the secretariat for this body (Section 3 of Chapter VII of the GDPR);
- Introduction of a **"one-stop-shop" system**, for data controllers operating in several MSs to have to deal with only **one single DPA (termed "the lead authority")** of the country of their main establishment (Chapters VI and VII of the GDPR);
- Elimination of the general personal data processing operations notification requirement for organisations.

As later discussed in Section 4.4, overall, the Commission's GDPR draft proposal (Commission, 2012e) was largely seen as advancing pro-privacy policy. A strong impetus to reform the EU data protection legislation came from the earlier mentioned (Section 3.6) institutional change in the Lisbon Treaty that eliminated the pillar system, constitutionalised the fundamental rights and created a specific horizontal legal base for personal data protection – the Article 16 of the TFEU. Based on these developments, the

European Council in the so-called Stockholm Programme setting out the strategic policy priorities for the period between 2010 and 2014 in the Area of Freedom, Security and Justice (adopted in the late 2009), where a strong emphasis was placed on the citizens' rights to privacy and data protection in the age of information society, invited the Commission to prepare proposals for the reforms (European Council, 2009). These reforms have also been long called for by other institutional actors, such as the WP29, the EDPS and the EP (The Register, 2007; WP29, 2009; Bigo *et al*, 2011: 63-65). Another important factor was that data protection reform was deemed to be a key enabler of the creation of the Digital Single Market, for which more harmonisation and consumer trust were essential.

4.3 The process of the co-legislators deliberations

After the tabling of the Commission's draft proposal in 2012 (Commission, 2012e), the EP's and the Council's[26] first reading positions were due in line with the ordinary legislative procedure to which the GDPR was subject to, to reach the trilogue phase[27], when the inter-institutional negotiations on the file took place.

About a year after the Commission's drafts were presented, the referral EP Civil Liberties, Justice and Home Affairs committee (LIBE) published its draft report (LIBE, 2013a) on the proposed GDPR text in January 2013. The opinions of other relevant EP committees were subsequently submitted between January and March 2013, including the Committee on the Internal Market and Consumer Protection (IMCO, 2013), the Committee on Industry, Research and Energy (ITRE, 2013), the Committee on Employment and Social Affairs (EMPL, 2013) and the Committee on Legal Affairs Committee (JURI, 2013).

[26] The analysis of the GDPR deliberations process within each of these institutions is offered in Sections 5.2, 5.3 and 5.4, respectively.

[27] A phase of the EU legislative process when the three institutions seek an interinstitutional compromise on a given dossier's text in a series of informal meetings.

Another committee, of the Economic and Monetary Affairs, declined to give its opinion. The vote on the compromise text in the responsible LIBE committee, originally scheduled in April 2013, was postponed several times due to enormous amount of amendments (almost 4000) tabled through the committees (LIBE, 2013b; LIBE, 2013c) and later in the light of the Snowden leaks in the world media in early June 2013 (LIBE, 2013d). The vote in the LIBE, which was key for the file to progress in the EP, finally occurred in October 2013 (LIBE, 2013e) and the report on the GDPR was presented to the plenary a month later (LIBE, 2013f). The EP adopted its version of the GDPR, containing 207 compromise amendments to the Commission text (some of which are discussed below in this chapter and later in other chapters), in March 2014 (EP, 2014b). Around a half of the modifications were made in the articles and the other half in the recitals (that are supplementary in interpreting the actual provisions and do not have legal power).

The Council, the other co-legislator, engaged with this file at a different pace and the MSs compromise text was finally reached in June 2015 (Latvian Presidency Note, 2015f), making it possible for the trilogue to begin (see Section 4.5 for the most contentious issues). Although this file was always included in the JHA Council – in every single meeting since 2012, like hardly in the case of any other file – for long MSs were only asking for clarifications, not really engaging with the text. There was some breaking point in 2013, following the Snowden revelations, and later the votes endorsing the data protection reform in the EP LIBE committee in October 2013 as well as in the EP plenary in March 2014[28], when MSs understood that they had to do something about it (interview with EU official C, 23 February 2015, Brussels; see more discussion on this in Section 6.2 and also 5.4). The first Presidency who actively engaged with the GDPR file was the Irish

[28] Both of these votes in the EP enjoyed a rare 95% majority (Commission, 2013b; Commission, 2014a) sending a strong political signal of support for data protection reform proposals.

Presidency (in the first half of 2013), presumably because of the importance of the digital economy to the country (see Subsection 4.5.4) (interview with EU official B, 13 February 2015, Brussels). The data protection reform was named as a “key priority” by this Presidency (Bowcott, 2013; Reding, 2013a). The Irish government organised 30 meetings for GDPR discussions during its six months[29]. Despite pushing hard for an agreement on the first four Chapters (a partial general approach), this Presidency faced significant difficulties and did not manage to achieve it (interview with EU official C, 23 February 2015, Brussels). The Lithuanian Presidency in the second half of 2013 that focused on the one-stop-shop also encountered a set-back. The Council Legal Service intervened towards the end of this Presidency’s term objecting in its opinion the one-stop-shop principle as allegedly posing various issues of “proximity” between the DPAs and citizens, which made it incompatible with the rights of individuals related to an effective judicial remedy provided for in the EUCFR and the ECHR (Council Legal Service, 2013; Council, 2014; EDPS, 2014c:3-5). Some partial general approach was reached by the Greek Presidency during the first half of 2014 on Chapter V regulating international transfers of personal data (Greek Presidency Note, 2014). In the second half of the 2014, the file progressed further in the Council, as the Italian Presidency managed to achieve two general approaches: on Chapter IV (controllers[30] and processors[31]) in October 2014 (Italian Presidency Note, 2014a) and on public sector and Chapter IX (specific processing situations) in December 2014 (Italian Presidency Note, 2014e). Another partial general approach endorsing Chapters VI and VII on the one-stop-shop mechanism (Latvian

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[29] The Commissioner Viviane Reding speaking at a press conference in June 2013 praised the remarkable commitment of this presidency as “tremendous efforts … invested in the data protection reform” (Reding, 2013a).

[30] “‘controller’ means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data” (Article 4(7), GDPR final).

[31] “‘processor’ means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller” (Article 4(8), GDPR final).

Presidency Note, 2015c) and Chapter II on the principles for processing of personal data (Latvian Presidency Note, 2015d) was reached by the Latvian presidency in March 2015 prior to reaching a full general approach in June 2015 under the same Presidency (Latvian Presidency Note, 2015f).

The process of the reform seemed to particularly undergo a crisis around the end of 2013 and the beginning of 2014, as the progress of this dossier in the Council seemed to have entered a deadlock with no tangible agreement accomplished by the ministers two years after the reform had started in 2012. The then Justice Commissioner Viviane Reding commented in December 2013 that the process was apparently moving backwards and, despite her well-known insistence on a swift adoption of the reform, this could not be pursued at any cost if the ideas are very divergent, defining the latest developments in the Council around the one-stop-shop mechanism as making it "an empty shell" (Reding, 2013b; the one-stop-shop issue is discussed in detail in Subsection 4.5.4). It became obvious that the data protection reform would not be completed by the 2014 EP elections and the time of its completion became unclear (CPDP, 2014). The implications of the imminent elections were another slowdown in the process while the old legislature would be going out and the new one would be coming in and new commissioners would take office. The EDPS repeatedly urged the Council for a quick progress with the reform (EDPS, 2014b; EDPS, 2014c; EDPS, 2014g; EDPS, 2014h) "to thwart the attempts serving political and economic interests to restrict the fundamental rights to privacy and data protection", making an appeal to the new German government to take the lead (EDPS, 2014b)[32]. In the meantime, the Google's privacy counsel speculated on his personal blog that the EU data protection reform had collapsed and "the old draft is dead" (Fleischer,

[32] While there were some changes in the GDPR talks' dynamics with the arrival of the new government in Germany, it was, however, still far from undertaking a facilitator's role in the process, as is seen in Subsections 4.5.3, 4.5.4 and in particular 6.5.2.

2014). The above developments make the intensity of political tensions around the GDPR self-evident.

The worst scenario – that the new legislature would have dropped the previous work done by the EP on this dossier and would have started from scratch, posing another delay with also uncertain consequences for the content of this draft law – did not happen, however, and the GDPR file was immediately on the new LIBE committee's agenda at one of its first meetings in July 2014, taking the previous legislature's resolution of March 2014 as the basis (LIBE, 2014). On the other hand, around the same time there was another breaking point in the Council's work, when the progress on the file, while still not with the due speed in the view of most stakeholders, relatively accelerated, although it took another year for the MSs to fine-tune their general approach. "The real work, i.e. the debate to find compromise, had started in the Council since June 2014" (interview with EU official C, 23 February 2015, Brussels). Around the end of 2014 and the beginning of 2015 "the time had come, simply, when this file had to be closed" (interview with national Ministry of Justice official, 18 March 2015). This was also the time when Germany and France finally managed to find a compromise on the one-stop-shop (discussed in Subsection 4.5.4).

In the mid-2015, when the trilogue finally took off, the negotiators of the three institutions found themselves under a lot of pressure to find a compromise within 6 months (see Section 6.7). This, however, proved to be a very successful phase of the process, especially if compared with the previous several-year-long difficulties, and the political agreement on the GDPR text was reached in December 2015. The formal adoption of this law was finalised in April 2016 after the votes in the Council and in the EP plenary. The merged positions of the two institutions were commented upon as a good compromise (McNamee, 2015; interview with EP source B, 4 February 2016, Brussels; interview with EP source C, 8 February 2016, Brussels). The Luxembourgish Presidency's (of the second half of 2015)

merit in the fruitful outcome of the trilogue negotiations was emphasised (EDRi, 2016c). It put a lot of effort in closing the file and was very organised and more willing to compromise (interview with Permanent Representation official B, 3 February 2016, Brussels; interview with EP source C, 8 February 2016, Brussels). There was also a rare ideological alignment between the head-negotiators, as both the EP rapporteur and the Luxembourgish Justice minister were representing Green parties. Concessions were made by both co-legislators. For instance, while the Council's position on breach notification provisions prevailed, the sanctions resulted closer to what was envisaged by the EP.

The overview of the co-legislators deliberations dynamics in this section has shown a different outcome both time- and content-wise between the two institutions in the pre-trilogue stage. Both actors faced significant challenges. While the EP was under pressure due to the amount of amendments and the nearing elections (see more in Section 5.3), the Council negotiations were marked by the protracted difficulty to find an agreement (see the more detailed analysis in Section 5.4). A more detailed analysis of the factors that shaped the process and the outcomes is offered in the remaining part of this Chapter and the further Chapters V and VI. These two chapters will also look into the political and economic interests that played a role and were highlighted here, and that were already preliminary explained in Chapter II to lay down the contextual background for this study.

4.4 The process of balancing user and business interests

Although with certain concerns and criticism, overall the Commission's 2012 reform proposal was perceived as granting more control to the ICT users over their privacy and personal data and was welcomed by the civil rights and consumer organisations (e.g. BEUC, 2012a; BEUC, 2012b; ORG, 2013a; EDRi, 2012c). Conversely, the industry response, although favouring some elements (such as harmonisation and one-stop-shop

system), depicted the proposals “if enacted in the present draft form” as detrimental to businesses as they would stifle innovation in Europe, “cause substantial loss in revenues […] limit opportunities for new market entrants, strongly increase administrative costs and create legal uncertainty” (ICDP, 2012:1-2).

The EDPS, while noting many points for improvement, commented positively on the overall approach in the solutions offered in the draft GDPR as fulfilling in essence the expectations related to the creation of an ambitious and robust data protection system in the EU (EDPS, 2012a; EDPS, 2012b; EDPS, 2012c; EDPS, 2014g). The GDPR, as envisaged by the Commission in the documents presented in 2012, also seemed in line with the EP stance on the data protection reform in the phase of preparation, reflected in its resolution of 2011 in which this institution called for strong safeguards for data subjects' rights and more accountability for data controllers and processors (EP, 2011b): “the European Commission has proposed on the basis of what the Parliament has demanded for” (Jan P. Albrecht, EP rapporteur for the GDPR, quoted in Nielsen, 2013a). However, as the GDPR started passing through the competent EP committees between 2012 and 2013, the alterations to the Commission's text proposed by them raised concerns that the data protection provisions in this law may end up being weaker than under the Directive 95/46/EC, which it was meant to upgrade (Privacy International, 2013). The amendments tabled in the Parliament later summed up as almost 4000, a lot of which were pro-business (Section 6.3 looks further into this). The EP rapporteur noted that such developments were at odds with the EP promises to strengthen the data protection standards articulated by the same legislature in its 2011 resolution (Jan P. Albrecht, EP rapporteur for the GDPR, quoted in Nielsen, 2013a). The privacy advocacy groups indicated as some of the major areas of harm to the citizen rights the attempts to weaken the provisions on consent, profiling, purpose limitation, “legitimate interest”, and the proposals to introduce a new

definition of "pseudonymous data" (Privacy International, 2013). The subsequent 207 compromise amendments adopted in the EP resulted, in their view, in some "improvements to the Commission's initial proposal" as well as "critical gaps that undermine the strength of the overall proposal" (Access Now, 2013). The EP modifications offering better "protections and controls on data portability, explicit consent, privacy by design and by default, and the proposed higher fines for violation of the law[33] were commented upon as gains, while warning against the permission given to companies "to engage in profiling [...] as long as that data is 'pseudonymous' " and to process data without data subjects' consent "if it is within their [companies'] 'legitimate interest' ", including sharing collected personal information with third parties (Access Now, 2013). Despite these disappointments by the civil society with the outcome of the deliberations in the EP, the position taken by this institution did not seem to meet the industry expectations of making the new data protection rules less strict, either. It was referred to as a "missed opportunity" and alarming in a number of negative feedbacks published by these stakeholders (e.g. ICDP, 2013a; ICDP, 2013b; ICDP, 2013c).

The Council's revisions of the GDPR text constituted a domain of serious concerns for privacy campaigners with the early output of this co-legislator. The compromise text emerged from the discussions on some parts of this dossier held during the Irish Presidency in the first half of 2013 revealed that the MSs had been taking pro-business orientation (Irish Presidency Note, 2013a; Irish Presidency Note, 2013b)[34]. The Council proposals narrowed down the territorial scope, relaxed provisions on consent, data breach notifications and processing of anonymous data, defined social networking and non-

[33] The EP proposed to raise the fines to "up to 100 000 000 EUR or up to 5% of the annual worldwide turnover in case of an enterprise, whichever is higher" (EP, 2014b).
[34] The Council signalled its intention to introduce a more risk-based approach already at the conclusion of the Cypriot Presidency at the end of 2012 (Council, 2012).

commercial on-line activities by individuals as a “household activity” to exempt from the Regulation, extended the “legitimate interest” basis to include, inter alia, direct marketing purposes, emphasised that the right to data protection is a qualified right that competes with other fundamental rights, such as the freedom to conduct a business, etc. In general, the version of the first four chapters of the GDPR elaborated by the Irish Presidency promoted a more self-regulatory, risk-based approach as opposed to the more prescriptive framework featuring in the Commission and EP versions. Such a self-regulatory approach was largely in line with the industry demands expressed in some statements (ICDP, 2013b). Citizen rights defenders equalled the direction taken in the Council to utterly undermining the EU privacy reform (Davies, 2013). During her intervention at the Justice Council meeting in June 2013 the Justice Commissioner Viviane Reding called on the EP and the Council “to resist, alongside the Commission, all attempts by those who are still trying to weaken data protection standards in Europe” and pointed out that the level of protection enshrined in the Directive 95/46/EC will be “the absolute red line below which” the Commission would not go (Reding, 2013a). The direction taken by the Council seemingly did not change, as, according to the rights organisations, further developments in the Council’s re-drafting of the proposed text undermined the fundamental safeguards even more (EDRi, 2015a). As the Council was nearing to the achievement of its pre-trilogue position in spring 2015, the tendencies present in its amendments prompted the civil society representatives to send a letter to the Commission in which they hailed the reassurance on the promise to maintain at least the Directive 95/46/EC level standards as a red line (EDRi, 2015b). The finalised General Approach adopted by the MSs in June 2015 significantly diverged from the Commission’s original proposal, weakening its provisions. Viviane Reding, who, no longer a Commissioner at the time, took a MEP seat after the EP 2014 elections, published an article in response to the GDPR version proposed by the

Council. She noted that "several parts of the proposed legislation" had been emptied from their substance, consumers had been disempowered and that the new data protection rules were potentially heading below the level of Directive 95/46/EC dating "back from the Digital Stone Age" (Reding, 2015). The BEUC sent a letter to the MSs ambassadors to the EU in June 2015 prior to the Council JHA meeting expressing the concern "that in some important cases the direction taken in Council deviates from the original purpose of the reform and the principles that should be guiding it" (BEUC, 2015a:2). Although at the beginning of the trilogue all the three institutions seemingly agreed on the Directive 95/46/EC level being a red line that should not be trespassed, what constitutes "the Directive 95/46/EC level" became ambiguous at that stage, referring to the EP rapporteur Jan P. Albrecht's comments, suggesting that each institution had its own interpretation of what was actually already below the standards of that Directive (Greens/EFA, 2015).

However, one of the most "sticking points" as the trilogue commenced seemed to be the proposals for endorsement of the "incompatible further processing" in the Council text[35], containing, amongst other, such additions to some of the Articles:

> "further processing of personal data for archiving purposes in the public interest or scientific, statistical or historical purposes shall in accordance with Article 83 not be considered incompatible with the initial purposes;" (Article 5(1(b)), Principles relating to personal data processing);
>
> "further processing by the same controller for incompatible purposes on grounds of legitimate interests of that controller or a third party shall be lawful if these interests override the interests of the data subject." (Article 6(4), Lawfulness of processing).

The BEUC commented:

> "Article 6.4, which allows for personal data to be processed for purposes that are incompatible with those that justified the initial collection of the data, based on the

[35] Not all MSs, however, were comfortable with these amendments, stating their conflict with the EUCFR and the Directive 95/46/EC standards (Latvian Presidency Note, 2015e:102, footnote 178).

> shaky legal grounds of "legitimate interests of the data controller or a third party", would basically render the whole Regulation void of any meaning. This is absolutely unacceptable" (BEUC, 2015a:4).

The issue of "incompatible further processing" featured as one of the key concerns in the WP29 intervention during the trilogue process, who stated that:

> "it should be possible for controllers to process personal data for purposes that are not **incompatible**, provided there is a legal basis. Further processing for archiving, scientific, statistical and historical research purposes should also remain possible and can be considered as a not incompatible purpose. However, **enabling controllers to process data for a purpose that is incompatible is not allowed under the current EU framework as it directly violates one of the corner stone principles of data protection, the purpose limitation principle. Undermining this principle would mean a lowering of the level currently provided by Directive 95/46, which should not be accepted**" (WP29, 2015a, emphasis added).

Other most contested areas in the approaches of the institutions during the trilogue negotiations were related to provisions on consent to the processing of personal data, data minimisation principle, privacy policies, the duties of controllers and processors[36], "sanctions and clarification of the scope of the two instruments" (LIBE, 2015b).

The possibility of "incompatible further processing" did not remain in the post-trilogue GDPR text. Overall, the compromise text adopted by the co-legislators was commented upon as strengthening data subjects' rights, although far from what was initially envisaged (EDRi, 2015d; BEUC, 2015a; Buttarelli, 2016), the rules on consent, profiling and "legitimate interest" being among major weaknesses.

> "The GDPR sets an overall positive precedent for data protection standards across the EU. It provides a mostly harmonised, directly applicable set of rules to be uniformly enforced across the EU, which will benefit individuals and businesses alike. This legislation introduces the welcome concept of data protection by design and by default, the aim of which is to promote a privacy-friendly approach to the development of new services" (Access Now, 2016).

[36] "on a harmonised way to demand for some controllers and processors at least, the appointment for a data protection officer, which the Council leaves up to the MSs" (LIBE, 2015b).

The business side reacted to the outcome of the GDPR stipulation as disappointing, criticising the lack of harmonisation, simplification, modernisation, and, in particular, "crippling sanctions and unjustified liability regime overhaul" (EDC, 2015c; see more in Section 5.9).

This section reiterated the alterations in the balance between civic and economic interests in the process of drafting of the GDPR. While the proposals of the two supranational institutions – the Commission and the EP - were more aligned with the data subjects' interests, the Council approach to the new EU data protection rules was closer to the business interests. Other actors, such as the EDPS and the WP29 – important advisory bodies – were also taking part in the debate, advocating for strong data protection safeguards (see more in Sections 5.5 and 5.6). Although not as strong as originally designed in many aspects, the GDPR policy process resulted in a stronger data protection regime as compared to the previous one in the EU, which, as earlier mentioned in the Chapter I, has been a landmark progression in privacy and data protection. The following Chapters V and VI explain the formation of preferences of the actors involved in the process, their impact on it and the dynamics of interactions with each other.

4.5 The process of balancing national, supranational and institutional interests

4.5.1 Directive or Regulation?

Apart from the battle between the user and business preferences, divergence of interests between various institutional actors and national and supranational levels in a number of areas was also clearly evident in the process of the GDPR negotiations. Firstly, the choice of an instrument – a Regulation instead of a Directive – was a factor that a number of MSs still did not favour long after the beginning of negotiations. The note of the Irish Presidency reporting on the state of play of the GDPR file in the Council around a year and

a half after the Commission's proposal stated that eight countries (Belgium, the Czech Republic, Denmark, Estonia, Hungary, Sweden, Slovenia and the UK) preferred to replace the existing Directive with a new Directive. At that stage, converting the proposal for a Regulation into a Directive was left as an open option at a later instance and subject to further discussions among the MSs in the Presidency's document (Irish Presidency Note, 2013a:3). Although later the ministers agreed to stipulate a Regulation, the Council's General Approach text contained a staggering amount of flexibility clauses granting the national governments many possibilities to implement the new rules in their own ways (Latvian Presidency Note, 2015e), which is what Directives allow for. As these derogations were maintained in the final post-trilogue text, the supposed to be Regulation was thus heavily "directivised" and the initial goal of harmonisation substantially diluted[37]. Both the civil society groups and businesses were not in favour of such an outcome, since they were expecting more legal certainty post-reform (EDRi, 2015e; EDC, 2015c; EDRi, 2016d; Macrae, 2016). As it thus can be seen, the governments' preference formation is a separate realm of interests which may at times be in unison with the other stakeholders' interests, but not necessarily always will. The derogations also meant more post-reform rules-shaping located with the DPAs that would have to clarify the aspects left undefined in the GDPR. The context of this outcome is very complex: it stems from multiple issue-areas as well as from broader EU politics. It is analysed in more detail in Sections 5.4 and 6.2, with relevant points also touched upon in Subsection 4.5.3, and Sections 5.7 and 6.6.

4.5.2 Delegated and implementing acts

[37] There are almost 50 opening clauses in the GDPR.

Another contest of decision-making power emerged in such element of the GDPR as delegated and implementing acts[38]. There were a vast number of such acts in the Commission's draft. Most of them, and in particular the delegated acts, were deleted in the Council's version. The EP, in the meantime, either deleted many of them or proposed to task the EDPB with issuing guidance in many cases and to oblige the Commission to request an opinion from the EDPB prior to the adoption of such acts in some other cases (see the comparative table of the GDPR texts at EDPS, 2015c). While the Commission in its response to the EP position agreed to varying degree with the changes proposed by this legislator as "in line with the policy objectives pursued by the Commission", four of the ten amendments indicated as unacceptable were related to the reduction of the Commission empowerment in the implementation phase through the delegated and implementing acts (Commission, 2014b). Although the Commission did not welcome the elimination of many of these acts, other stakeholders, similarly to the Council and the EP, were critical of the amount of the delegated and implementing acts, too. The EDPS in their opinion also pointed out that "the extent to which essential legal provisions" were "left to delegated powers" was problematic, suggesting that "several of these empowerments should be reconsidered" (2012d). The BEUC expressed similar concerns, indicating in addition that the excessive amount of these acts would delay the enactment of the GDPR, and expressed a preference for all institutions to be involved in shaping certain elements (2012b:37). Commercial and industry players also urged for fewer delegated and implementing acts as their high number was making the exact rights and obligations unsure (EuroChambres, 2012:1-2). Along the lines of the other actors who were critical of the powers delegated to

[38] That are post-legislative implementing measures, most of which adopted by the Commission in the so-called comitology system, pursuant to the Articles 290 and 291 TFEU. While often these acts are of technical nature, they do, however, encompass decision-making and might involve important political choices. Delegated and implementing acts may have a significant impact on how a law is applied in practice.

the Commission in the draft proposal, the European Economic and Social Committee (thereafter EESC) and the Committee of Regions did not welcome these excessively delegated powers either as compromising the GDPR in terms of legal certainty and decision-making transparency, among other issues (EESC, 2012; COR, 2012). In addition, the EESC noted that locating formulation of many of the post-legislative measures within the national DPAs' and the EDPB remit (as was proposed by the EP, too, and as was eventually enshrined in the finalised GDPR in the Article 70) rather than granting these competences to the Commission "would reinforce implementation of the principles of subsidiarity" (EESC, 2012). As discussed in Section 3.3, the principle of subsidiarity represents one of the key features of the EU as a consociation, i.e. as a state-centric political system. Besides, the analysis in this subsection reflecting the decision-making power contest links to the rational choice institutionalism. The discussion here informs the analysis in Sections 5.2, 5.5 and 6.2.

4.5.3 Public sector controversy

Whether the national public sector should be covered by the GDPR represented one of the most difficult issues to surmount during the revisions of this dossier by the Council, contributing to the length of the process.

> "The question whether and how to deal with **processing of personal data by the public sector** in the draft General Data Protection Regulation (GDPR) is one of **particular sensitivity and importance to delegations**. It was already debated at the JHA Informal Ministerial Meeting in Nicosia in July 2012 and at the JHA Council meetings in October and December 2012. At the latter Council meeting it was decided that the question as to whether and how the Regulation could provide flexibility for the Member States' public sector, would be decided following completion of the first examination of the text of the GDPR. More recently, at the informal Ministerial Meeting in Milan on 9 July 2014 an overall majority of Member States supported a Regulation as legal instrument, but the need to provide Member States with sufficient leeway to determine the data protection requirements applicable to the public sector was equally emphasised" (Italian Presidency Note, 2014e:2, emphasis added).

A major controversy around the public sector emerged with the proposal of the German delegation for the GDPR not to apply to this sphere. In Germany, data protection law makes distinction between public and private sector, and there are even two different regional level systems of DPAs for each sphere (Lexology, 2010). However, a number of MSs felt uncomfortable to exclude the processing by the public sector and advanced a range of arguments and concerns. To mention some, Ireland and similarly Luxembourg pointed out the erosion of a meaningful distinction between the activities in the public and private spheres due to the privatisation and the reality of many of public sector services being provided by private actors on behalf of public institutions (General Secretariat Note, 2014:5, 32). Luxembourg besides noted the technical difficulty to make such differentiation, as "the public sector is defined differently in each [MS]" and that the consistency, transparency, and legal certainty of this instrument would be undermined "taking a step back from the 1995 Directive" (General Secretariat Note, 2014:32). Furthermore, public administration was comprised in the EU Treaties and the internal market *acquis* both in general as well as in terms of data flows and data protection issues. The CJEU interpretation of the Directive 95/46/EC did "not make a distinction between public and private sectors" either (General Secretariat Note, 2014:30, 31). In particular, in the light of the EUCFR having become part of the EU legal system, Luxembourg and Spain insisted that some flexibility in shaping data protection rules in the public sector could be conceded to the MSs only if they were obliged to adhere to and maintain at least certain minimal common guarantees such as general basic data protection principles and safeguards, enshrined in the GDPR (General Secretariat Note, 2014:8-10, 32). France repeatedly expressed a preference for the GDPR to cover public sector data, favouring, for instance, the EP view with regard to the social welfare activities, indicating the broadness of remit of this subsector as well (General Secretariat Note, 2014:17, 22).

Moreover, exclusion of the public sector seemed unlikely to be acceptable either to the EP (General Secretariat Note, 2014: 30), or to the Commission:

> "The Commission […] argues that EU citizens are entitled to expect similar levels of data protection in the public sector in Member States, given that the fundamental right to data protection does not differentiate between the public and private sector. Another argument from the Commission is that harmonisation in this area is also necessary as cross-border exchange of data is increasing between public authorities. Indeed, if authorities in different Member States applied different data protection standards this could constitute an obstacle to the exchange of information between those authorities. However, the free movement of data as required by Article 16 TFEU would be ensured by the free movement clause in Article 1(3) of the draft Regulation" (Italian Presidency Note, 2014c:5).

Although initially the German proposal was taken into consideration and was discussed, eventually, while still adding certain derogations to the GDPR text, a more contained leeway was given to the MSs in the Council approach to the issue of the public sector formed during the Italian presidency (Italian Presidency Note, 2014b; Italian Presidency Note, 2014e). "That was not so easy for us Germans to accept, but we have done it", said Thomas de Maizière, the German Minister of Interior, regarding the public sector clause (quoted in Stupp, 2015).

The outcome of the discussions on the public sector in the GDPR deliberations in the Council is an interesting case reflecting such feature of the consociational paradigm as shared decision-making power. Due to Germany's economic power and the biggest share held where proportional representation procedures are applied in the EU, including the majority voting in the Council, the country's hegemonic dominance, or at least a considerable political power in Europe is often speculated upon[39]. However, as it was seen

[39] Although these speculations are often challenged, based on the absence of comparable military resources to those of UK and France, and Germany's own reluctance to actually undertake a role of a hegemon in Europe (Schwarzer and Lang, 2012; Beddoes, 2013; Bulmer and Paterson, 2013; Gros, 2015).

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in this case, even very influential MSs may find it difficult to impose their preferences without finding coalitions with other MSs or support of the EU institutions. The German attempt to export their own governance model by excluding the public sector from the GDPR, in order to preserve domestic rules and avoid adjustment costs, overall was not successful, although important concessions were gained. The discussion in this Subsection complements the analysis in Sections 5.4, 5.6, 6.2 and Subsection 6.6.2.

4.5.4 One-stop-shop: sovereign decision-making concerns trump governance innovation and Europeanisation

Another of the most contentious issues proved to be the one-stop-shop system proposal (outlined in Section 4.2), one of the central pillars of the reform, aimed at consistent application of the GDPR in the Union, more legal certainty as well as less administrative burden for businesses. The one-stop-shop idea in the Commission draft was indeed welcomed by the companies. This part of the GDPR was among the "sticking points" during the deliberations in the EP and caused one of the major deadlocks during the MSs negotiations, having required three years to overcome. While the Commission proposal left a series of "technical" ambiguities of how this system would actually work in practice (Hustinx, 2014:39) that puzzled the co-legislators, there were also obstacles of clearly political nature, related to the reluctance of various actors to share or delegate their authority, resulting in alteration of the initial one-stop-shop model, as it will be discussed below.

The one-stop-shop was the focus of the Lithuanian Presidency (held in the second half of 2013) that was making efforts to reach a partial general approach on some essential elements of this aspect of the GDPR. Although in autumn 2013 the Council in general endorsed the idea of the creation of such a mechanism, the Presidency's documents reveal

a very unsolid common ground in the MSs positions and indicate a number of perplexities and reservations related to the configuration of territoriality of the supervision and its implications for the competency boundaries among separate national DPAs as well as proximity between data subjects and their rights protection. The model proposed by the Commission was thought to be detrimental for the individuals (e.g. Lithuanian Presidency Note, 2013a; Lithuanian Presidency Note, 2013c). These concerns were largely in unison with strong criticism of the Commission version expressed by some national DPAs (e.g. French CNIL, 2012). Some MSs (e.g. Germany) were concerned about the need to enforce decisions of another MS deriving from the transfer of powers to the lead DPA and that it potentially was raising constitutional issues (Note from delegations, 2013). Other MSs (e.g. France) saw as unjustified the removal of the participation of the local DPAs in the decision-making in certain situations where data processing and enforcement measures concerned their jurisdiction (French delegation Note, 2013). The countries' concerns related to the shifts in decision-making powers are reflected in the following excerpts from the Council documents:

> "The one-stop-shop mechanism, as initially proposed by the Commission, covered only the situation of processing in the context of the activities of an establishment of the same controller or processor established on the territory of different Member States. Member States have expressed a clear wish that their data protection authorities could also have legal standing to act – on their territory – in cases where processing which physically takes place outside their territory affects their data subjects" (Lithuanian Presidency Note, 2013b:3).

> "All delegations seemed to agree that at any rate the establishment of such a rule could not lead to the exercise of investigative powers by the DPA of one authority in the territory of another Member State" (Note from delegations, 2013:41, footnote 1).

> "[A] number of delegations […] opposed to any concentration of corrective powers in the hands of the main establishment authority, notwithstanding the strong cooperation and consistency mechanism provided for in the draft Regulation" (Lithuanian Presidency Note, 2013c:6).

The progress of already complex discussions on the one-stop-shop was hampered by the intervention of the Council Legal Service that, as earlier mentioned, challenged the legal compatibility of "the overall mechanism of a one-stop-shop, as presented in the [...] [Lithuanian] Presidency papers" with the EUCFR and ECHR in terms of the criteria of „proximity" and effective judicial remedy (Council Legal Service, 2013).

The Legal Service objections were taken into account, as dictated by the procedural rules, and the Council one-stop-shop model took a shape of a compromise hybrid version that foresaw the application of this principle only "in important cross-border cases" a year later during the Italian Presidency (Italian Presidency Note, 2014d; Council, 2014) and the General Approach on this component was finalised soon afterwards by the Latvian Presidency in March 2015.

Such stakeholders as privacy advocates and the EDPS countered the assertions of the Council Legal Service as depicting the one-stop-shop mechanism unduly negatively and were particularly concerned about the slow-down this intervention caused to the process (interview with privacy advocacy organisation representative, 10 July 2014, London; EDPS, 2014c:3-5). The one-stop-shop design elaborated by the Council also disappointed the business stakeholders, as becoming too cumbersome and as leaving too much power to individual DPAs (other than the lead authority) to influence the decision-making (Essers, 2014; ICDP, 2015).

Not the least factor in the controversies that surrounded the discussions on the one-stop-shop was the "on the ground" reality that the way individual DPAs had been operating and their regulatory output was rather divergent in the different MSs. This in particular was related to the Irish DPA that, while employing a significantly smaller number of staff than many of its peers in the larger countries, found itself overseeing quite a few foreign tech companies, including some of the biggest ones, such as Google, Facebook, Apple,

LinkedIn, Microsoft, and others, attracted to the country by its favourable tax regime. The Irish DPA, besides, had a reputation of having a less stringent approach to the supervision of those companies, as compared to its counterparts. That spurred speculations about the potential forum-shopping under the proposed model in the Commission draft whereby companies could choose to locate in MSs with weaker oversight practices, and a number of countries (e.g. UK, France, Germany, Belgium) were objecting the prospect of their domestic DPAs losing the power to supervise the activities of those companies in their respective countries (De Souza, 2013; Mirani, 2014).

Various proposals were tabled in seeking to strike the right balance between the exclusive decision-making powers that can be conferred on the lead authority and the involvement of the "local" DPA in the process. The French co-decision proposal, which envisaged involvement of all DPAs (French delegation Note, 2013) and the German proposal to create a true one-stop-shop in the form of an independent (EU-level) data protection super-agency, did not enjoy support (De Souza, 2013). Eventually, following earlier suggestions of some MSs (e.g. Belgium, Germany, Italy, Poland and Portugal), a stance of "granting the EDPB the power to take legally-binding decisions in the context of the consistency mechanism and do away with the proposed Commission power to intervene" was enshrined[40] (Lithuanian Presidency Note, 2013c:41, footnote 79; EDPS, 2015c:391, 405, Articles 64 and 68). "It was argued that the DPAs should have the same independence vis-à-vis the Commission, as vis-à-vis the Member States' authorities" (Lithuanian Presidency Note, 2013c:41, footnote 79). This development met a strong opposition from the Commission, who insisted on the EDPB legally-binding powers being illegal, as "only the Commission can take decisions that are binding on the Member States" under the Treaties

[40] The Commission had assigned itself ultimate decision-making powers under the consistency mechanism in the original GDPR proposal (see Section 5.2).

(Commission, 2013a). The GDPR political process resulted in the EDPB acquisition of the legal personality introduced by the Council and legally-binding capacity of its decisions in case of disagreement between the DPAs. The post-trilogue one-stop-shop design emerged as improved as compared to the complicated Council proposal, with local DPAs obtaining more weight than in the Commission version (see more in Section 5.6 on the DPAs).

The one-stop-shop as proposed by the Commission quickly ran into trouble with the MSs, since it was viewed by many governments as setting a very dangerous precedent. They really were cautious about it, "because if such a scheme would have been agreed and would turn out to be successful at the EU level", then it potentially could be extended into other areas as well (interview with EU official A, 1 February 2016, Brussels). Seemingly, for many governments at present "this was going to be a little bit too much Europe" (interview with EU official A, 1 February 2016, Brussels). It took a while for some governments to be able to accept the idea of the EDPB perceived as a creation of a new EU structure (interview with national Ministry of Justice official, 18 March 2015). The current Justice Commissioner Věra Jourová reportedly stated that the GDPR would become "a model of governance for other areas of EU law" (Privacy Laws & Business, 2015c). In the meantime, the idea of "one-stop-shops" in general, e.g. setting up of on-line "one-stop-shops", in order to simplify the mechanisms of operating businesses in enacting the so-called freedom to conduct business enshrined as Article 16 of the EUCFR has been promoted by the FRA (FRA, 2015). The latter two references indicate indeed a possibility that certain proposals in the GDPR might not remain of singular application limited to the data protection realm.

This section was dedicated to discuss the process of balancing of the institutional competences of various levels related to the data protection governance in the EU. It is

necessary for a comprehensive analysis of the GDPR policy process, as configuration of the institutional interests translate into concrete outcomes for non-institutional stakeholders. This section overviewed the process of re-designing of powers as proposed in the Commission's draft. The Commission's powers located in the delegated and implementing acts and in the provisions on the one-stop-shop were reduced with some gains for the DPAs in both cases within the newly established EDPB. The numerous flexibility clauses, as also in the public sector case discussed here, indicate weakening of the strength of the Regulation, as directly applicable instrument, aimed to advance the level of harmonisation in this issue area. Section 6.2 elaborates on the context of the above processes.

4.6 Conclusions

As the analysis in this chapter shows, there was a substantial reshaping of the powers conferred on various national and EU institutional actors during the process of debates on the GDPR. While the Commission and the EP were closer in their more prescriptive and more user-centred approach in line with overall expectations of the privacy advocacy groups, the Council adopted a more risk-based proposal, allowing the data controllers and processor more flexibility. The Council approach, however, was divergent from the business preferences in its one-stop-shop model and the lesser degree of harmonisation than offered by the other two institutions. The final GDPR text combined the three approaches with some elements embedding stricter and more prescriptive norms, among which the new liability regime, and others more based on the risk-based approach.

Further, the process also resulted in a tangible shift of the centre of gravity towards the national dimension and, consequently, a less centralised model of governance of this issue-area in the EU as compared to the initial proposal. This is reflected in the derogations from

the GDPR provisions inserted in the Council text, significantly reduced Commission powers in the cases of delegated and implementing acts and the introduced legally-binding capacity of the EDPB bringing together the national DPAs and the EDPS. The latter two resulted in more powers assigned to the DPAs. Similarly, individual DPAs retained their powers in the Council's proposal on the one-stop-shop, where the MSs were reluctant to concede their decision-making prerogative both vis-à-vis the Commission and the other MSs. As the EP changes to the delegated and implementing acts clauses demonstrate, where it proposed either a mandatory consultation or entirely moved the decision-making to the EDPB, this supranational institution favours a more decentralised governance model in the implementing phase.

This chapter mapped the main legislative and political developments of the GDPR adoption process and presented the major areas of tensions between various national and EU institutional actors and their interests identified during the process, reiterating the shifts in the balance of those interests. This part lays the basis for a more in-depth analysis of the stakeholder constellation, their interactions and the factors that were influencing the policy process in the following Chapters.

CHAPTER V

Explaining the contexts, motivations and policy networking of the GDPR stakeholder constellation

5.1 Introduction

Bennett and Raab (2006:219-221) map privacy the policy-making community as made of governmental institutions, regulatory bodies, technology developers and providers, privacy pressure groups and media, data controllers, and data subjects. These actors are mutually influencing each other, but the patterns of these reciprocities are likely to differ in each specific case when a policy instrument is being developed and implemented. The number of participants may also vary for each policy dossier and their interactions may range between consensus and conflict. In the constellation of actors "*distribution of power* determines outcomes" (Bennett and Raab, 2006:220, original emphasis).

> "In the political system thus portrayed, the attitudes and actions of participants contribute to the outcome as they use resources of various kinds – formal powers, money, technical expertise, publicity, and others – in complex exchanges, influences, compromises, sanctions, and shifting alliances" (Bennett and Raab, 2006:221).

These observations will be reflected in the discussion in this Chapter and are largely in line with the points made in Section 3.4 on the EU policy networks. The EU data protection and privacy policy-making system, however, is much more complex and multi-layered than the above proposed basic model. It spans from subnational, to national and supranational levels, and co-opts also international non-EU actors. Hybrid national-supranational level formations such as the WP29 add even more complexity to this constellation. This Chapter further discusses the contexts and the interests brought into the

GDPR policy process by the main actors and their impact in the shaping of the new rules. Each section is dedicated to the role of a specific actor or group of actors.

5.2 The Commission: an attempt to extend powers and the strategies in overcoming formal constraints

The Commission, as the institution that launched the data protection reform in January 2012 in its agenda-setter's capacity, is one of the most central actors in the analysis of the GDPR adoption process to which the successful stipulation of this new framework instrument was politically very important.

The Commission of both mandates (2009-2014, 2014-2019) involved with the process of adoption of the GDPR can be regarded as strong on the human rights agenda, with an incremental focus on data protection reform, closely linked to the creation of the Digital Single Market, i.e. the need for harmonisation and stimulation of consumer trust that would facilitate the growth of digital economy in Europe (Commission, 2015b). Viviane Reding, the Justice, Fundamental Rights and Citizenship Commissioner in office as the reform was launched in 2012, is a politician with a track record in promoting consumer-oriented policies, including such initiatives as the reduction of the roaming charges and the EU Consumer Rights Directive (Commission, 2007; Commission, 2011b). Günther H. Oettinger, the former Commissioner for Digital Economy and Society, has made some straightforward statements commenting on the situation when American companies establish themselves in the MSs with the least developed data protection and "suck up all the data coming from other [MSs] like a huge 'electronic vacuum cleaner', transfer the data to California, process them and sell them as a service for money" as unacceptable and that foreign companies can only do business in Europe if they observe the European rules (Oettinger, 2015). On another occasion, Commissioner Oettinger urged

for the need to establish a UN agency for data protection and data security (Wearden and Treanor, 2015). His peer Andrus Ansip with the Digital Single Market portfolio spoke up "strongly against having any kind of backdoor to" encrypted systems and for the protection of everybody's privacy (Valero, 2016). He also stated that privacy and data protection should not be seen "as holding back economic activities" (Commission, 2015b), countering a commonly advanced stance by business stakeholders (see Section 5.9).

However, the Commission is an institution involved in pursuing various policies and the tensions in trying to balance diverse policy-areas are evident as it was, for instance, in the Commission's reaction to the CJEU ruling invalidating the Safe Harbour agreement (*Schrems v Data Protection Commissioner*) when its commitment to the continuation of transatlantic data flows and the economic importance of such flows was accentuated (Commission, 2015a). The Commission had long refrained from withdrawing its adequacy decision on the Safe Harbour notwithstanding acknowledgement of its flaws in its own reports and claims of illegality by some experts long before the Snowden revelations in 2013 (EDRi, 2015c). Even after these revelations the agreement was still not ceased, but put to rather inefficient renegotiations instead.

The Commission's college decision-making structure has an impact on its overall policy output. Progressive proposals formulated by a competent DG, face the scrutiny of the College of Commissioners where they may be altered (Michalowitz, 2004c:63). This seemed to be the case with the GDPR draft proposal as well (Guarascio, 2012; ORG, 2013b). There have been cases when contrasting views on certain issues between different Commissioners are publicly expressed (Horten, 2012). Fragmentations between different DGs often result in incoherence in policy proposals and positions (Pfeifle, 2016). These

fragmentations had been having an impact on the interinstitutional negotiations on the GDPR as well:

> "The Commission is not in reality as compact as it would like to appear. It is a very opaque black box in which a number of converging, conflicting, competing interests play. [There are] tensions between the services at the political level, there is a legal service; political level of different cabinets behave in different ways, etc. [...] The problem that we see from the MSs point of view when it comes to reshaping the negotiating positions – because the Commission presents the proposal and then it will have to change it, because that is what the Council and the EP ask it to do – then we face enormous uncertainty, because one day it is black, and the next it is white. And there is a continuously developing position. The process that brings those developments is completely opaque, not readable from the outside. And, surely, you get some results that may or may not be what is at the best interest of negotiations at that point" (interview with Permanent Representation official A, 20 January 2015, Brussels).

The Commission had always been very active, putting pressure on the Council's Presidencies to reach the General Approach and posing unrealistic goals (interview with national Ministry of Justice official, 18 March 2015; interview with Permanent Representation official B, 3 February 2016, Brussels). In the meantime, though, it had taken a "hard line" to rather aggressively be inflexible on the sensitive issues to the MSs[41], deterring thus a number of delegations. The changes in the Commission after the 2014 EP elections resulted in a slightly more balanced stance in the interinstitutional dialogue (interview with EU official B, 13 February 2015, Brussels; interview with national Ministry of Justice official, 18 March 2015; interview with EP source B, 5 February 2015, Brussels).

> "The Commission, on the one hand, is trying to present solutions that the MSs could subscribe to, but at the same time [it] has particularly strong points of view which it has on the file […] linked to the fact that it is one of its priorities, and, on the other hand, that does not help with the negotiations in the Council. I would say

[41] E.g. concerning the European Data Protection Board or public sector.

> that we have spent more time arguing with the Commission than with the MSs" (interview with Permanent Representation official A, 20 January 2015, Brussels).

During the earlier stages the Commission was striving to defend its proposal while paying a lot of importance to details. During the trilogue, though, in the light of pressure to close the file, it had taken a different attitude, focusing on the essential, ideologically important aspects and taking a more abstract approach, as compared to the pre-trilogue stage of the negotiations (interview with Permanent Representation official B, 3 February 2016, Brussels). In the final stage the Commission had played a facilitating role and was strong on safeguarding that the level of data protection in the GDPR would not go below the levels of Directive 95/46/EC (interview with EP source C, 8 February 2016, Brussels; interview with EP source B, 4 February 2016, Brussels).

The Commission deployed various strategies to exert influence beyond its formal capacities. Under both Commissioners it was resorting a lot to putting pressure through the media, announcing at times unrealistic terms of finalisation of the negotiations, or announcing, together with the EP, 2015 a year of data protection (interview with national Ministry of Justice official, 18 March 2015; interview with Permanent Representation official B, 3 February 2016, Brussels). It tried to establish rapports with countries holding the Presidencies and invested a lot in liaising with them at both expert and political level to offer its "support". As having a lot of technical expertise in this issue-area, sometimes it even managed to assist the Presidencies in drafting their proposals. In doing so, it attempted to push its own perspective, regardless the ideas of the Presidency. The Commission may have a lot of influence on a weaker Presidency (interview with national Ministry of Justice official, 18 March 2015). There was a lot of liaising between the Commission and the Council Secretariat beyond formal meetings. The Commission attempted to influence the large MSs (interview with Permanent Representation official B,

3 February 2016, Brussels). Similarly, there is intense liaising with the EP. Senior Commission officials, based on their partisan adherence, tried to maintain links with their parliamentary counterparts "so that they do not deviate too much from the Commission proposal". It was a positive factor hence that the Commissioner Viviane Reding was aligned with the European People's Party[42] (thereafter EPP) in terms of her party lines (interview with EP source B, 5 February 2015, Brussels).

"It is important to note that because of its pragmatism, the Commission (and almost certainly parts of it) might favour a policy more radical than the one it proposes, which is one it thinks will be adopted" (Young and Wallace, 2000:23). The original GDPR proposal was rather radical, i.e. entailing strict rules. It therefore underwent some "watering down", but the Commission was conscious that it would (interview with national Ministry of Justice official, 18 March 2015). The Commission's and the EP's views on the reform were perceived as being quite close in essence, while the approach formed by the Council was divergent in several key aspects, e.g. making the proposal less user-centric and the rules less harmonised, as it is detailed in the previous chapter. Overall, the two co-legislators come from different perspectives: "the Parliament tends to take a more ideological, integrationist line on the big debates, whereas the Council seeks to defend [MS] prerogatives and is often held up by disagreements between the larger [MSs]" (Sean Kelly, MEP and ITRE rapporteur, 2014). The MSs will have to implement and live with the GDPR, i.e. they are placed differently as compared with the Commission and the EP (interview with EP source B, 5 February 2015, Brussels; interview with EU official C, 23 February 2015, Brussels). As Section 6.2 elaborates, the MSs behaviour is determined by the perceived realities of domestic implementation of the reform and sovereignty notions,

[42] The centre-right conservative political group in the EP, which overall was more supportive of the pro-business line during the GDPR talks (see the following section).

whereas the Commission and the EP share a general interest in seeking public support for the European integration (Young and Wallace, 2000).

Apart from modernisation of the rules, there were major institutional shifts of authority envisaged in the reform. The Commission's draft GDPR of 2012 stood out as assigning a lot of powers to this institution. One aspect where this was felt was the unusually high number of implementing and delegated acts which it would later adopt in the context of the comitology and through which it would gain significant powers (interview with Permanent Representation official B, 3 February 2016, Brussels; interview with EP source C, 8 February 2016, Brussels). As shown in Subsection 4.5.2, a wide range of actors were critical of that. Moreover, the Commission also originally assigned itself the "backstop" role, i.e. final decision-making in the one-stop-shop and consistency mechanism, in the event a concrete case agreement failed to be found in the context of the EDPB or if the Commission disagreed with the outcome (Articles 58-62, Commission, 2012e). The competences that the Commission would have gained were commented upon as unjustified and inadequately wide in general and as compared to the Directive 95/46/EC, and raising "concerns with regard to primary law and […] contrary to the system of supervisory authorities" (Hornung, 2012:80-81). At the same time, the exclusion of the revision of the Regulation 45/2001[43] that sets out data protection rules for EU institutions and agencies including the Commission from the reform was a subject of debates (LIBE, 2012:4-5; Fleming, 2013c; EDPS, 2015b), and seemed peculiar in the light of the above proposals.

However, despite its insistence (Commission, 2013a), this attempt to centralise the data protection governance by the Commission was not successful and the initially aspired for

[43] "On the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data".

powers were significantly reduced by the co-legislators in the course of deliberations, and moved to be located within the EDPB competence, representing the DPAs. The Commission, however, managed to resist an imposition of a deadline within the GDPR provisions for the upgrade of the two other data protection instruments– the Regulation 45/2001 and Directive 2002/58/EC – as was proposed by the EP[44]. Another gain was managing to secure an implementing act for adequacy decisions, as opposed to a delegated act where the EP would have had a veto right. The Council was supportive of the former option (interview with EP source B, 4 February 2016, Brussels; interview with EP source C, 8 February 2016, Brussels). The aspects of the GDPR policy process related to the political interests and the attitude of the Commission analysed in this section – the importance of this dossier for its self-legitimisation, this institution's endeavours to gain new powers through this reform and the other actors', notably the EP's and the Council's, resistance to these attempts – point to the relevance of the rational choice institutionalist approach in which policy processes are seen as a ceaseless contest of power between the actors.

5.3 The EP as a countervailing institutional power with a long history in privacy affairs

The EP, representing the EU citizens, can be viewed as the most evolving EU institution since its powers have been growing with every Treaty revision. Its impact on the EU politics and governance has been felt in various ways: from the dismissal of Santer's Commission amid the inquiry into fraud and mismanagement in 1999 (Walker, 1999), to legislative proposals that were amended or rejected in favour of civic interests in its extending role as a co-legislator (Young and Wallace, 2000:16). The new powers conferred

[44] The Commission, however, quite promptly presented the reform proposals for these two instruments in January 2017, i.e. about a year after the finalisation of the GDPR.

on the EP with the Lisbon Treaty that came into force in 2009 including endorsement of trade agreements were soon felt in the earlier mentioned rejection of the ACTA in 2012 (see Section 3.6). The US ambassador to the EU pointed out a necessity to systematically engage with this actor for its impact on the EU politics (Price, 2014).

This institution has been long active in the area of privacy protection. Since the 1970s, prior to the adoption of the Directive 95/46/EC, the EP had been repeatedly urging the Commission for the need to stipulate an EU-level data protection law (Bennett and Raab, 2006:93; Bigo *et al*, 2011:60-62). Referring to a US government document, the EP has been playing a significant role in the data protection policy debate even through non-binding means, such as resolutions, statements, opinions, as well as public hearings, "and lobbying the Council and Commission for action" (US Mission to the EU, 2009 cited in Brown and Marsden, 2013c:59). It made the case in causing significant barriers related to privacy concerns during the stipulation of PNR and TFTP agreements with the US and PNR with Canada (BBC, 2007a; BBC, 2010; BBC, 2012c; EP, 2014d).

The Chair of the responsible LIBE Committee Claude Moraes stated regarding this data protection reform that it "is not only one of the key priorities of the [LIBE] Committee but of the entire European Parliament" (LIBE, 2015a:3). The former EP President Martin Schulz has also expressed a strong stance against "technological totalitarianism" and for the need for strict data protection standards in Europe as well as inclusive and democratic distribution of the benefits of digitisation in some of his speeches (Schulz, 2016). The former EDPS Peter Hustinx appealed to the EP "as a countervailing power" in the light of the pro-business approach taken in the discussions on the GDPR within the Council (Fleming, 2012).

Despite the above discussed profile, the EP remains susceptible to various political pressures generated by certain contexts. This was the case with the revival of the EU PNR directive, rejected by the LIBE Committee in 2013, following the attacks in Paris in January 2015. While, on the one hand, this controversial instrument was adopted by the EP on the same day with the GDPR, it was nevertheless an EP's condition imposed on the Council, that the former law would be voted for only if the ministers finalised the data protection reform, i.e. strengthened data protection (Barbière, 2016). Besides, the pro-privacy camp in the EP managed to obtain some important improvements to this heavily privacy invading measure (Gotev, 2016).

There was one very significant and decisive development in the EP – the appointment of the rapporteur of the GDPR dossier. According to Viviane Reding, this figure is of extraordinary importance (speaking in Bernet, 2015). The rapporteur is behind the wheel of the intra- and interinstitutional negotiations on behalf of the EP. The Parliamentary procedures allowed the Greens to demand the steering role for the GDPR. However, as they expressed the political will to be in charge of it, the file did not go to them without a fight (interview with EP source B, 5 February 2015, Brussels). Originally, the EPP group was interested to take the lead in the GDPR deliberations with the MEP Axel Voss, who had prepared a report on the imminent data protection reform proposal in 2011 (EP, 2011a), willing to take the rapporteur's job. The implications of the turn when the Greens' MEP Jan P. Albrecht became the rapporteur, instead, are quite straightforward looking at the two MEPs' ranking by the LobbyPlag (http://www.lobbyplag.eu/map), for example, where Mr Voss tops the list of the legislators behind the highest number of privacy weakening amendments, and Mr Albrecht is the one with the most privacy strengthening amendments. In 2015, Mr Voss co-authored an article criticising restrictions on further processing of personal data for incompatible purposes, the principle of purpose limitation,

and advocating for a risk-based approach (Voss and Padova, 2015). He remained actively engaged in the GDPR debates as a shadow rapporteur from the EPP. In the meantime, the gaining of the rapporteur's post by Jan P. Albrecht, known in the EP as a data protection expert and defender, caused a backlash from the industry side and prompted more lobbying on the EP (interview with EP source B, 5 February 2015, Brussels; Bernet, 2015).

A substantial challenge in the EP was to work through the nearly 4000 amendments that made it physically impossible to be voted on one-by-one, and that could have distorted the law in an unpredictable way. In the light of the situation with the amendments, a different procedure had to be applied and the rapporteurs took time to find a compromise for each individual article in case of most articles that were "wrote completely based on the amendments after long negotiations" (interview with EP source B, 5 February 2015, Brussels). But for some chapters, e.g. on the consistency mechanism, broad architecture was discussed and the articles resulted being formulated based on that. The talks on the consistency and cooperation among the DPAs were a bit difficult, because an understanding of how the coordination across MSs and other policy fields really worked was needed. Different models, such as banking regulation and telecoms regulation, were looked at. In the end, a simpler model was decided on, limiting the Commission role and proposing the two-thirds majority vote in the EDPB. There had been long discussions on the Chapters II and III, addressing the very basic foundations, such as data subject rights, legal grounds for processing, legitimate interest and other provisions that had been evolving till the very end of negotiations. The compromise was built based on concessions from all political groups that had to put aside some of their concerns and preferences (interview with EP source B, 5 February 2015, Brussels). Among main "sticking points" during the debates in the EP were the definition of consent, legitimate interest, profiling,

one-stop-shop, and pseudonymisation (Sean Kelly, MEP and ITRE rapporteur, speaking at Interact, 2013).

Compromise seeking was not very easy, not the least because of different approaches by the negotiators: some wanted a background approach to be later worked out in the negotiations with the Council, while some others focused on details (interview with EP source C, 16 February 2015, Brussels). The Socialists and Democrats (thereafter S&D) had a particular style in negotiations of concurring in principle with everything and making no other demands apart from insisting on raising significantly the fines and imposing more control on big corporations, which they expected to be taken on board as their only requirement. In terms of other large groups and their ideologies brought to the compromise talks, the liberal-centrist group ALDE wanted an enabling environment for entrepreneurs, but rules and users' rights to be respected. The centre-right EPP and the Conservatives and Reformists (thereafter ECR) were more pro-business, especially in the light of the economic recession. But there may be a spectrum of attitudes within political groups. For example, there is a "dissenting minority" within the EPP which wants more privacy. As each file, the GDPR required majority-building. A weak coalition was found between liberals and socialists (interview with EP source C, 16 February 2015, Brussels). However, despite the remarkable challenge posed by the 4000 amendments and divergent views, the earlier mentioned perceived importance of this dossier to the EP and its institutional capacity to deliver was a consolidating factor that was reflected in the overwhelming endorsement of the GDPR in the plenary vote of March 2014.

> "I think you can get consensus on some issues, you [will not] on others, but then it is not really a stumbling block, because at the end of the day you have to put it to the vote and the majority will decide. So, the real key is to have balance to go into that vote so that major issues are clear. And then Members of Parliament can vote accordingly [...]. Obviously, the views from [the Industry Committee] which have

> been passed would conflict to some degree with the views of [the LIBE] Committee. So, at the moment we are discussing, trying to work out what are the red lines for [both] so that we can reach a compromise and progress the Regulation. Because if we do not, we are going to do a lot of damage not just to industry, to consumers, but perhaps to the image of the European Parliament as well" (Sean Kelly, MEP and ITRE rapporteur, speaking at Interact, 2013).

In the interinstitutional realm, there had been a constructive interaction between the EP and the Commission. Since the tabling of the Commission proposal in 2012 there had been a series of meetings between the EP rapporteur, shadow rapporteurs and the Data Protection unit in the Commission's DG Justice in order to get the ideas behind the draft GDPR explained for each article: why something was changed as compared to the Directive 95/46/EC, and so forth. The LIBE draft report of January 2013 was prepared based on that work (interview with EP source B, 5 February 2015, Brussels). The interinstitutional dynamics between the EP and the Council is very different with much less interaction taking place, except for Permanent Representations – more informally. Besides, when a Presidency starts, they are willing to introduce themselves (interview with EP source C, 16 February 2015, Brussels). The two co-legislators elaborate their positions independently. These positions are later negotiated to find a common formulation of a new legislation.

The EP's role in determining the outcome of the GDPR drafting was very significant in bringing the text back closer to the Commission proposal in the trilogue talks, i.e. in defending a number of stronger data protection provisions in comparison with the Council General Approach text. As will be discussed in the next section, a number of governments, however, were leaning towards a pro-fundamental rights approach and were sympathetic to the overall EP position – a factor that must have facilitated such a trilogue outcome. The EP was also key in giving prominence to this dossier in general at a critical moment with its overwhelming plenary vote in spring 2014. The process within the institution was marked by some unique circumstances such as gaining the rapporteur's post by the Greens

and the amount of amendments that had to be dealt with. Various informal factors played out as sources of empowerment for the EP such as institutional profile building or issue linkage as with the PNR Directive related to the sociological and rational choice institutionalism, respectively. Formal rules – another rational choice institutionalist dimension – provided an opportunity for a small political group to become in charge of the GDPR, although this opportunity had to be coupled with a strong political will.

5.4 Negotiating country positions: the impact of formal arrangements and informal factors in the Council GDPR talks.

Negotiations in the Council, where national governments are represented, is a very dynamic process as the cleavages between the EU MS are mostly not cumulative, but cross-cutting. The coalitions are constantly shifting depending on issues at hand (Buonanno and Nugent, 2013:65-67, 87) and there are no permanent "blocs grouped around big/small, rich/poor or north/south" (Buonanno and Nugent, 2013:87). This is also one of the drivers of consensus-seeking and the accommodationist politics, characteristic to the EU, as any MS that finds itself in a majority on one issue may be in a minority on another. "The governments […] are sensitive to one others' political situations and requirements" (Buonanno and Nugent, 2013:87). While larger MSs are often perceived as capable to enjoy more political weight, size will not always be a wholly determinant factor. For instance, Italy's role in the EU has been much less influential as compared to France; but such relatively small state as the Netherlands managed to gain a lot of influence (Buonanno and Nugent, 2013:67, 68, 88, 91). Some empirical studies on the countries' positions versus policy outcomes demonstrate that preferences of the larger states do not necessarily prevail (Hix, 2015). The ability of all MSs to influence the outcomes cannot be underestimated (Naurin and Wallace, 2008). Achievements may depend on the political

skills of concrete personalities at the negotiations table, the country's expertise in a given policy area, the salience of certain policy areas to the MSs, etc. (Buonanno and Nugent, 2013:67, 89-90). While France and Germany traditionally have been counted as two core countries with considerable influence over policy development, and the EU integration has been significantly driven by the so-called French-German axis, since the late 1990s their influence has been relatively declining, due to the enlargements and increased number of MSs participating in the decision-making, significant divergence between the two on some policy issues, and other factors (Buonanno and Nugent, 2013:67, 89-90).

The lengthy GDPR revisions process in the Council repeatedly spurred claims of lack of political will from the part of the Commission and the EP (Reding, 2014a; CPDP, 2014; CPDP, 2015). As later discussed in Section 6.2, there was a certain politically motivated reluctance from the side of the MSs to engage with this dossier more promptly at the beginning. However, the claims that slowness of the deliberations in the Council was wholly a matter of political will were countered by other actors, e.g. some DPAs and civil society representatives, who noted the complexity of the procedures that unfold across several levels, at some of which the process is more formal than in other institutional venues, and the valid concerns of the MSs related to the implementation of the law and its impact on digital economies (CPDP, 2014; comments made by a national DPA official at the 5th Annual European Data Protection and Privacy conference).

The negotiations in the Council consist of work at the technical group level, which then moves to the JHA Counsellors meetings, where the further COREPER-level meetings are prepared, and up to the Ministeral meetings that take place only a few times a year. The process across these levels progresses from extensive detailed technical-level discussions to more political decision-making, respectively (interview with Permanent Representation

official A, 20 January 2015, Brussels). In addition, some discussions also take place under the auspices of the so-called Friends of Presidency meetings that are of a more ad hoc nature.

At the Council meetings delegations present their positions quite formally, one-by-one and in their own language. The process was hence particularly slow at the Working Party on Information Exchange and Data Protection (thereafter DAPIX) level meetings. This is quite different from the way the talks take place in the EP or at the WP29 meetings, for instance, where more socialisation and more informal interaction is involved (interview with an EP source B, 5 February 2015, Brussels; comments made by national DPA official at the 5th Annual European data protection and privacy conference). The JHA Counsellors meetings in the Council's work entail, however, different dynamics, i.e. more socialisation and effectiveness, which is at times strategically used by Presidencies by relying more on meetings of this tier rather than those of working group level, in order to move the process ahead (interview with Permanent Representation official B, 3 February 2016, Brussels)[45]. Rotating Presidencies also have a certain impact on the process, as compared to one single rapporteur in the EP. Here, every six months there is a tangible shift in strategy, style and skill (interview with Permanent Representation official A, 20 January 2015, Brussels; interview with EU official A, 29 January 2015, Brussels).

One of the factors that added complexity in the formulation of the Council's position was structural institutional arrangements at the national level. In each MS, the area of data protection and its regulatory part is handled in very different ways. In most countries the Ministries of Justice were steering this dossier, but some of them were led by the

[45] This kind of meetings are easier to organise and hold, as the Counsellors reside in Brussels, there is greater informal interaction between them and only English is spoken at these meetings, as compared to most DAPIX delegates who reside in national capitals and meet only a few days a month (interview with Permanent Representation official B, 3 February 2016, Brussels).

Ministries of Interior, while Poland was represented by the Ministry of Digital Affairs[46]. This meant diverse perspectives that were very difficult to converge (interview with Permanent Representation official A, 20 January 2015, Brussels). Besides, some of the DAPIX delegations were either chaired or strongly influenced by their DPAs. Therefore, the alignment of the viewpoints across the group was ranging from very strongly data protection-oriented of the DPAs, to those of the Ministries of Justice that could be placed in the middle, and those of the Ministries of Interior - least expected to give much importance to data protection with some implications also originating in the tensions between security and privacy (interview with EU official A, 29 January 2015, Brussels).

> "The role of DAPIX was to examine the Commission's proposals in detail, but as the months of discussions turned into years, the draft text was examined in ever greater depth by [MS] delegations on an issue-by-issue basis [...] The length of the process also meant that on several occasions, DAPIX had to recalibrate discussions to take into account issues raised by the Snowden disclosures and the "right-to-be-forgotten" judgment of the [CJEU], amongst many others. DAPIX delegates [...] were often robust and resilient in representing the views of their governments and stakeholders which led to the negotiations taking much longer than originally envisaged" (John Bowman, former head of the UK delegation to DAPIX, 2015).

The primary interest of the MSs is "to preserve their own familiar rules" (Simitis, 1995:449; see also Section 6.2). At the substantive level, "MSs weigh various interests, including business, and balance positions" (interview with national Ministry of Justice official, 18 March 2015). Position formation was shaped by a general political environment, the government's priorities and the policy course pursued by the minister in office. Positions were also based on the positions of the internal institutions of each MS, related to their experience and applicability of the rules in practice (interview with Permanent Representation official B, 3 February 2016, Brussels; see also two detailed

[46] An official of the Polish Ministry for Digital Affairs made some interesting comments at the 3rd European Data Economy conference in 2017, explaining that this is a "very different Ministry", which was created aiming at a very technical, non-political mission.

country accounts in Section 6.6). To a certain degree it also depends on the data protection philosophy of the country (interview with national Ministry of Justice official, 18 March 2015). Here a certain division could be felt between the Northern and Southern European countries, the former in many cases tending to have a more business-oriented attitude, and the latter leaning towards a fundamental rights point of view (interview with EU official B, 13 February 2015, Brussels; interview with privacy advocacy organisation representative, 10 July 2014, London); with some small states and Scandinavian countries also defending data subjects' rights (interview with Permanent Representation official B, 3 February 2016, Brussels). For example, Italy's more rights-based views were in a rather stark contrast with the UK's pro-business position (interview with European consumer organisation representative, 11 December 2015, Brussels). During the trilogue, there were tensions between business-oriented and data subjects-oriented MSs regarding the risk-based approach. The states with the positions leaning towards enhancement of guarantees for data subjects found themselves congruent with the EP position (interview with Permanent Representation official B, 3 February 2016, Brussels), which can explain the relatively successful outcome of the trilogue.

But differences between the MSs agendas and their issue areas-related sensitivities were far more wide-ranging than the above aspects. To make some examples, Spain and some Scandinavian countries were concerned about the GDPR implications in terms of research and statistics; Germany, as discussed in Subsection 4.5.3, about public sector and also one-stop-shop; France being mostly concerned with one-stop-shop as were the UK and Ireland; Denmark about constitutional problems with the EDPB, etc. During the trilogue there were very hard discussions on the children consent age due to very different national civil law perspectives (interview with a Permanent Representation official B, 3 February 2016). Even the countries deemed to have similar contexts, for instance, prominent digital

economies, such as UK, Ireland and Luxembourg, had rather differing preferences or at least on some issues. While the UK was against the Regulation in favour of a Directive and was trying to delay the adoption of the GDPR, Luxembourg was advocating for maximum harmonisation and Ireland was striving to progress the adoption of the law during its Presidency. Besides, Luxembourg's position, with Greens in the government, was in principle quite close to civil society views (interview with international digital rights organisation representative, 8 December 2015, Brussels), as opposed to the UK's.

For long countries did not have clear positions on the GDPR and had very fragmented approaches. There were no steady groups to enable formation of majority (interview with national Ministry of Justice official, 18 March 2015). The so-perceived key countries Germany and France, too, took very long, about two years, to form their positions (interview with national Ministry of Justice official, 18 March 2015; interview with Permanent Representation official A, 20 January 2015, Brussels; interview with privacy advocacy organisation representative, 10 July 2014, London). The Commission, to whom this dossier was politically very important, was struggling to find allies. As Germany was not leaning to its side, the Commission was trying to gain France's support that traditionally is closer to the Commission from the perspective of citizen rights protection, but also unsuccessfully. However, it managed to achieve a more pro-active France engagement in the talks in order to counterweigh the German and British influence (interview with national Ministry of Justice official, 18 March 2015). As mentioned in Section 5.2, the progress on the Council's General Approach was hindered to some degree by a tough negotiating style pursued by the Commission towards the MSs.

The very difficult consensus-building was reflected in the multitude of reservations expressed by the delegations, which can be seen in the enormous amount of footnotes as

the General Approach was formulated (almost 650, e.g. see Latvian Presidency Note, 2015e), and which translated into numerous derogations, as highlighted in Subsection 4.5.1. Some developments that followed the interinstitutional political agreement of December 2015 also suggest that a common perspective was not found in the Council till the very last and the MSs simply accepted to move on to close the file. Austria – the only country that voted against the GDPR – could not agree with, in its view, inadequate level of data protection, which in some cases was going below the level afforded under its existing national law[47] (General Secretariat Note, 2016a; General Secretariat Note, 2016b). The Republic of Slovenia stated that data protection should primarily be treated as an individual human right and that the notions of legitimate interests of data controllers[48] in the GDPR might be constitutionally in conflict with the fundamental rights dimension. It also reiterated its position that MSs should be able to set higher data protection standards. In the meantime, the Czech Republic regretted in its statement the insufficient application of the risk-based approach (General Secretariat Note, 2016b).

The analysis in this section indicates some interesting aspects of the sociological institutionalism and their impact on the policy process and outcomes. These aspects include the specific, less socially cohere policy formulation dynamics within the Council as compared to some other EU-level institutions, the varied institutional adherence of the delegations that affected to some degree their positions during the talks, and the diverse national contexts related to the MSs law systems, political economies and data protection cultures. These dynamics are determined by formal arrangements, i.e. the formal rules that

[47] Austria indicated as unacceptable the “household exemption”, i.e. the exclusion of private activities on social media from the scope of the Regulation, the weakness of some provisions on purpose limitation, legitimate interest and further data processing in the Articles 5, 6 and 49 that disadvantage data subjects. It was also critical of the restrictions of the key principles of data protection law, such as fairness, lawfulness or proportionality, made possible under the Article 23. This Article includes, amongst others, the exceptions on the grounds of “national security”, “public security” and “public interest”.

[48] As permissible legal grounds for the processing of personal data in some situations.

underpin the process of negotiations within the Council and the patterns of governance of this issue-area domestically. The difficulty to find a solid common ground between the MSs on the GDPR links to the realms of the rational choice institutionalism as well as the state-centric approach.

5.5 DPAs – between the collective power and the preservation of domestic reign

The DPAs "were among the first independent regulatory agencies in Europe" following the passage of comprehensive national privacy laws in a number of European countries in the 1970s and 1980s, including some of the EU founding MSs, such as France, Germany, and Luxembourg (Newman, 2007:130, 132). The network of national DPAs constitutes a prominent epistemic community that is deemed to have a significant potential to influence the EU privacy and data protection policy. Between national and supranational levels these actors have been endowed with different capacities. At the national level, they exercise certain enforcement powers, while at the supranational level they have been assigned an advisory role as the WP29, which pursuant to the adoption of the GDPR has been upgraded into the EDPB, with more powers as compared to the WP29, notably the legally-binding decisions within the consistency mechanism (see Subsection 4.5.4).

Historically, the national DPAs are thought to have had a key role in the instalment of the Directive 95/46/EC, i.e. a harmonising data protection instrument in the EU *acquis*. Supranational-level action was prompted when the DPAs, in the light of potential venue-shopping for data processing operations, used their powers to prevent data exchanges with the EC countries, e.g. Belgium and Italy, were privacy laws were absent at the end of the 1980s. Apart from interference with the accomplishment of the Single Market, that

situation was also affecting the plans to launch the Schengen System[49], leading the previously reluctant Commission to undertake the drafting of the EC-wide law – the Directive 95/46/EC – to create a level playing field across all MSs. Despite the industry's efforts to stop it, the European-level privacy protection regime was adopted, requiring the presence of data protection rules and independent DPAs in all EU MSs, and expanding the regulatory powers of these agencies. Moreover, supranationally the role of national DPAs was institutionalised and cooperation consolidated by a provision establishing the WP29 composed of national regulators, which since its first meeting in 1997 has been actively involved in the process of development and enforcement of the rules as well as in evaluation of the adequacy of privacy regimes in foreign countries (Newman, 2007:123-134).

Despite their only advisory capacity in the policy process at the supranational level, the DPAs continued to tangibly influence it. This is reflected, for example, in the concern of such stakeholder as the USA, in whose view the EDPS (discussed in the next section) and national DPAs have been regularly making "high-profile public statements on areas outside of their formal competence…[which] tend to give primacy to civil liberties-based approaches for the EU's Single Market, consumers, or law enforcement" (US Mission to the EU, 2009 cited in Brown and Marsden, 2013c:61). The guidance issued by the WP29 has at least to some extent an impact on business behaviour, is taken into account by courts and, more generally, shapes policy formulation on emerging privacy-related issues in the EU and beyond (Newman, 2007:135; Newman, 2011:186, 187). The WP29's highly critical opinions were significant during the drafting of the Safe Harbour agreement (Princen, 2003:151). "The importance of the [WP29] for the EU data protection cannot be

[49] The area without internal border control between most EU MSs and some non-EU states.

overstated […] a recent show-case of its strength is the deadline set by it for the replacement of the Safe Harbour Agreement, annulled by the [CJEU] that was promptly observed by the negotiating parties" (De Hert and Papakonstantinou, 2016:193).

The WP29 constitutes a pan-European transgovernmental co-operative structure for the oversight of data protection rules. National expertise is pooled regionally through a process of information exchange, harmonisation of standards, and joint enforcement (Newman, 2011). Coordinated responses were given to a number of recent incidents, for example, concerning the updated Google privacy policy in 2013 (BBC, 2013m), the eBay massive data breach in 2014 (Wakefield, 2014a), enactment of the CJEU "right-to-be-forgotten" ruling in 2014 (Lee, 2014b), or non-users tracking by Facebook in 2015 (Fioretti, 2015a).

However, the network of DPAs has not had a consistent strategy in approaching the EU institutions to be able to better counterweigh business lobbying. Only several WP29 chairs had a real strategy in this realm (interview with national DPA official, 22 January 2015). The perception of their role in the policy formulation process differs also among the DPAs (Barnard-Wills, Pauner Chulvi and De Hert, 2016:5). While "there is a community of EU DPAs with sufficient shared perspectives that it is possible to talk about an EU DPA perspective" (Barnard-Wills, Pauner Chulvi and De Hert, 2016:11), collectively elaborated common opinions may differ from individual views held by national DPAs (Isabelle Falque-Pierrotin, WP29 Chairwoman, speaking at Privacy in a Connected World conference, Privacy Laws & Business, 2015b). Divergent responses may be also given while interpreting the same law or addressing the same issues, even defecting from commonly advanced positions[50]. Within the WP29, depending on the issue, different

[50] For instance, German DPAs declared an intention to be less lenient than in the common WP29 position regarding alternative legal grounds for data transfers in the interim between the annulment of the Safe Harbour and a new such agreement (Moody, 2015).

countries may find common interest. The newer EU countries, except for Poland, tend to be significantly less pro-active in the discussions than the older ones, despite some of them playing a prominent regulatory role domestically (interview with national DPA official, 22 January 2015). Although there is a lot of substantial informal day-to-day cooperation and best-practice sharing (Barnard-Wills, Pauner Chulvi and De Hert, 2016), these informal forms of bilateral, regional, supranational and international cooperation have not yet been unfolding with full potential (Kloza and Galetta, 2015). Besides, the DPAs function very differently in terms of administrative, legal and economic contexts, the resources and powers available to them, cultures and approaches to their role as regulators and enforcers (Barnard-Wills, Pauner Chulvi and De Hert, 2016:9-10)[51]. In many countries, the DPAs are under-resourced in terms of staffing and funding. In several MSs, the DPAs have limited investigatory and/or sanctioning powers, with emphasis being placed on the pre-emptive "soft" ex-ante measures and "hard" enforcement instruments even non-existent in some jurisdictions (FRA, 2010). The network of DPAs is therefore a strong and a weak link in the EU policy process.

Upgrading the governance of data protection enforcement and addressing the above deficiencies was one of the key pillars of the reform to be conveyed through the GDPR laid down in two dedicated entire chapters – VI on Independent supervisory authorities and VII on Cooperation and consistency mechanism – with some relevant provisions also in the chapter VIII on remedies, liability and penalties. "It is a key project for the DPAs […] it is going to alter very deeply the way we work, our operational tool box, the way we reflect […] it is the reason why the WP29 has from the very beginning been very active on this

[51] This may determine their political behaviour with regards to reforms. E.g. the phasing out of the processing operations notification requirement with the GDPR was affecting the funding model of the British DPA that resulted in its lobbying against the GDPR (Brewster, 2012; Oltermann, 2013a; ICO, 2013; DecisionMarketing, 2013).

project" (Isabelle Falque-Pierrotin, WP29 Chairwoman, speaking at Privacy in a Connected World conference, Privacy Laws & Business, 2015b). The WP29 issued about a dozen of opinions on the draft proposal. Some individual positions were advanced by a number of DPAs, too. The DPAs have been influential in the GDPR discussions (Fedma, 2015; CNIL, 2013c), feeding into the process in various modes: as the WP29; as part of some DAPIX delegations in the Council (see Section 5.4) and having an impact on the formation of national positions in all MSs (interview with Permanent Representation official B, 3 February 2016, Brussels); or individually liaising with politicians (e.g. see comments by Sean Kelly, MEP and ITRE rapporteur, 2014 in Section 6.5). During the discussions the regulators made some robust contributions in advocating strong privacy protection rules (WP29, 2013b), and acted also as stakeholders whose future operation was going to be determined by the new law, and whose major interest in the light of the reform was to be given full powers, envisaging a governance model constructed as increasing, integrating and professionalising cooperation whilst remaining *decentralised* (Isabelle Falque-Pierrotin, WP29 Chairwoman, speaking at Privacy in a Connected World conference, Privacy Laws & Business, 2015b, emphasis added). These expectations were related to several dimensions: the DPAs' oversight powers, the capacity to issue operational-level guidelines in the implementation phase, and maintaining decision-making competence in their own jurisdictions, i.e. vis-à-vis supervised operators, vis-à-vis the Commission, and vis-à-vis their peers, respectively (WP29 2012a; WP29 2012b; WP29, 2013a; WP29, 2014).

The adoption of the GDPR resulted in many gains for the DPAs, with some already present in the draft proposal, and some that emerged during the process. It enhanced their oversight powers and made them more harmonised. The EDPB will have the possibility to challenge enforcement measures applied by national DPAs viewed as inadequate, potentially placing

more scrutiny on more lenient DPAs (Privacy Laws & Business, 2016)[52]. The reduction of the number of delegated and implementing acts and the introduction of mandatory consultation with the EDPB in case of some remaining ones (Article 70, GDPR final, 2016) as well as prevention of the Commission interference in the decision-making within the EDPB after the review by the EP and the Council concurred with the preferences of the DPAs concerning their role in the implementation stage (WP29, 2012a; WP29, 2012b; WP29, 2013a) and diminished the Commission's powers as compared to its draft proposal of 2012. Besides, with the WP29 upgrade to the EDPB, its secretariat previously provided by the Commission has been moved under the auspices of the EDPS. The strongly opposed original one-stop-shop model conferring exclusive decision-making powers on the lead authority (WP29, 2014) was altered during the negotiations, especially in the Council's version, and was finalised as a "qualified" one-stop-shop where other concerned supervisory authorities do not lose their say (Chapters VI and VII, GDPR final, 2016; one-stop-shop is discussed in detail in Subsection 4.5.4).

As it can be seen from the discussion in this section, there is a very dynamic and sophisticated process between transnational integration and collaboration, and striving to preserve the decision-making autonomy in one's own jurisdictions. The DPAs' pursuit of their strategic interests and the quest for preservation of their spheres of influence relate to the notions of the rational choice institutionalism of actors' strategic behaviour when formal rules are being decided. The high degree of their informal influence as experts and informal co-operation also link to the sociological institutionalism perspective. The emergence and institutionalisation of these actors in the EU policy-making landscape and their subsequent feeding into policy formulation encompasses, as suggested by Newman

[52] While this may diminish sanctions application autonomy of individual DPAs in some cases, it augments the overall DPAs' enforcement power in that it helps tackle the "jurisdiction-game", which was often the case in Europe.

(2007), a historical institutionalism dimension, i.e. the impact of earlier policy developments on later policy processes.

5.6 The EDPS: more supranational-level policy dynamism in advocating privacy protection

The EDPS is a unique actor in the EU governance defined by Hijmans (2006:1324-1332) as "not an institution, not an agency, not a regulator, not an Ombudsman and not a judicial body", but having some characteristics of each, who has been fulfilling explicit and implicit public expectations (De Hert and Papakonstantinou, 2014:237-252). Apart from its general function to oversee processing of personal data by the EU institutions and bodies, the EDPS also has an advisory role to examine and consult on privacy and data protection implications in the new EU legislation related to a wide range of issue-areas. It exercises this role at all stages of policy-making process, both on request by the institutions and through own-initiative interventions (EDPS, 2014f). The GDPR was a particular case. Since it is really EDPS's core business and core expertise as well, this institution had a great interest in this file and tried to be more involved (interview with EDPS official, 30 January 2015, Brussels). While the EDPS comes mainly under the Regulation 45/2001 on the processing of personal data by the EU institutions, some GDPR provisions touched upon certain aspects of the EDPS future role, too, because of the transfer of the WP29 secretariat from the Commission to be provided by the EDPS with the coming into force of this new law. The timeframe for the revision of the Regulation 45/2001 itself and whether it should be established in the GDPR was also part of the discussions (see Section 5.2).

Referring to the EDPS's own comments, it did have some influence over the drafting of the GDPR both in the preparatory phase and later (EDPS, 2012c; Buttarelli, 2016). It has been viewed as having an influential role by external actors as well (Reding, 2014b:v-vi;

FEDMA, 2015). The EDPS's prominent "soft power" is the result of its systematic, pro-active profile building through a careful and successful selection of dossiers for intervention since the very beginning of its existence (De Hert and Papakonstantinou, 2014:237-252). The EDPS's input was important in both the GDPR deliberations and in rebalancing debates surrounding the tensions between Big Data and fundamental rights in general (interview with European consumer organisation representative, 11 December 2015, Brussels). Lately, this institution has been very pro-active in bringing to the fore the need to rely more on the ethical and human dimensions in the current technological and business environment (EDPS, 2015d; EDPS, 2016a). Besides, in 2015 and 2016 it organised meetings with the representatives of the civil society (EDPS, 2015a; EDPS, 2016b). At the first of those meetings civil society organisations urged the EDPS not to limit itself to the role of technical experts and to undertake a more political role in the GDPR negotiations.

According to an EDPS official, the very (ordinary legislative) procedure applied to the GDPR was posing constraints oftentimes for the EDPS involvement at various stages, as its participation was simply not foreseen, or where it was foreseen it was limited to its advisory role, i.e. not necessarily taken on board. Other barriers in making an input derived from either misperception of the role and aims of the EDPS as an institution (as who they really are, what they really do, or what interest they might be representing), or, on the opposite, knowing well the EDPS as a body who can release an independent opinion. This resulted in "reluctance from some actors to get [EDPS] more involved" (interview with EDPS official, 30 January 2015, Brussels). The former (misperceptions) makes some MSs somewhat wary of the EDPS, for example. The latter was likely to make the input of the EDPS in some phases of the process undesirable for the Commission, for instance, where, in pursuing its position, it might not want another external voice, a respected expert,

expressing criticism in the on-going negotiations. Similarly, despite the EDPS and the national DPAs working together in the WP29, individual perspectives were, nevertheless, divergent[53]. So even other (national) DPAs could happen to feel averse about the EDPS's potential interference at certain venues of the political process, such as DAPIX, of which they wished to take advantage of to articulate their specific preferences (interview with EDPS official, 30 January 2015, Brussels).

But the EDPS's involvement is not limited to only formal procedures and its expertise is often called upon by co-legislators (the EP and the Council) also in other cases, where there is a significant data protection component. "In practice, this way of informal collaboration with the co-legislators […] works" (interview with EDPS official, 30 January 2015, Brussels). However, the cooperation with the EP has been much easier, also because their work is much more transparent. Besides, the EDPS has "its natural point of contact" in the LIBE committee, which in the case of this specific policy file had been very keen on using the EDPS as experts. The EDPS was approached by the LIBE committee during the revision of the famous 4000 amendments. Also, it was even invited to some of the shadow meetings when compromises were discussed (interview with EDPS official, 30 January 2015, Brussels).

The interaction with the Council was more difficult, particularly while it was working on its position, and it was mainly due to the procedure – the DAPIX meetings were closed, and only the MSs delegations, the Council Secretariat and the Commission were present at the meetings. More interaction was, however, foreseen in the trilogue phase, during the work on the final text. But the process in the Council was monitored by the EDPS, as much

[53] The EDPS represents "a unique European perspective" (interview with EDPS official, 30 January 2015, Brussels), which at times may not be congruent with the preferences of some national DPAs, especially, when their domestic authority is at stake, as discussed in the previous section.

as possible, deploying also informal contacts (interview with EDPS official, 30 January 2015, Brussels). Then the EDPS's intervention, when perceived needed, included both more formal avenues, such as writing letters, as well as informally "talking to people", as in some instances the option of formally expressed position could be potentially too confrontational and counterproductive. Sometimes the EDPS was also approached by the Presidency, in which cases it could "provide a more or less structured input on issues which were really crucial" and seemingly were going "in the fundamentally wrong direction" (interview with EDPS official, 30 January 2015, Brussels). A less radical proposal in terms of reduction of harmonisation for the public sector in the GDPR ultimately presented by the Presidency (see Subsection 4.5.3) was "purely a result of informal interaction and experts explaining to the Presidency" as well as of talks from the part of the EP and the Commission (interview with EDPS official, 30 January 2015, Brussels).

The above discussion of the EDPS's role reveals a lot of interesting, and maybe not immediately obvious, aspects of the political process. Firstly, it indicates how nuanced and multi-channelled the influences over policy outcome are. While the previous section on the DPAs has already shown that understanding of policy formulation cannot be limited to the interactions between interest groups and the decision-making institutions, and that advisory bodies introduce additional layers in the policy solution flows, the presence of such actor as the EDPS creates even more dynamism. In addition, a significant impact of informal factors surfaced here. These factors played out in various ways in the GDPR talks. While the EDPS technical expertise – a sociological dimension – in some cases extended this body's access to the policy process, at the same time, perceptions by other actors related to its role may also be constraining, along with limits posed by formal rules, when exclusive spaces of influence are sought. The latter observation brings attention to the rational choice

institutionalism perspective in explaining the GDPR policy process, i.e. the strategic behaviour of the participants in the pursuit of self-assertion and maximisation of their gains. As with the DPAs discussed in the previous section, the impact of the EDPS on the policy formulation is also relevant to the historical institutionalism, i.e. the effect of the creation of this body on the subsequent EU data protection policy and governance landscape. The importance of informal policy networking when delicate issues are at stake was also brought up by the discussion in this section.

5.7 FRA – competing rights and competing realities: between supranational policy ideas and national practice on the ground. The collective redress issue

In response to the EP request, the FRA produced its assessment of the EU data protection reform proposals. The FRA stated that, given the prior release of the opinions by the EDPS and the WP29 specifically addressing the right to data protection, it focused on examining the effect of the reform on other fundamental rights enshrined in the EUCFR and a larger number of them than those mentioned in the explanatory memorandum of the draft proposals. The FRA analysis advanced considerations in favour of various interests.

On the one hand, for example, it referred to the freedom to conduct a business, Article 16 of the EUCFR, noting that in order to enhance protection of the rights of data subjects the reform introduced new obligations on business, such as mandatory data protection officers, data protection impact assessments, documentation obligations, or related to some data subject's rights, e.g. the right of access, the right to be forgotten or the right to data portability, implementation of which entail new costs. The opinion suggested that the balancing of the rights could take into account more aspects relevant to the freedom to conduct a business beyond "special arrangements for micro, small and medium-sized enterprises" (FRA, 2012). In a separate dedicated paper, the FRA also urged that this

freedom should be more considered in the EU policies, especially in the light of the need for economic recovery, acknowledging, however, that it may be limited by the right to data protection or other rights (FRA, 2015). The freedom to conduct a business was hailed in the industry response to the reform proposals in 2012 (ICDP, 2012), although, seemingly, these arguments did not have a major impact in the debates (interview with European consumer organisation representative, 11 December 2015, Brussels).

On the other hand, the FRA position brought up the lodging of complaints by civil society organisations question – a contentious issue both in terms of data protection namely and in exercising other rights in the EU. The Commission and the EP were proposing to concede the right to the civil society organisations to lodge complaints with supervisory authorities independently of a data subject's mandate, if they believe that rules laid down in the GDPR have been breached (see the comparative table of the GDPR texts at EDPS, 2015c, Articles 73 and 76). FRA stressed the importance of broadening the possibilities for any body, organisation or association acting in the public interest to take a more direct role in litigation, as very often access to remedies is too complex and costly for individuals, rendering the existing redress mechanisms and the enforcement of the rights ineffective in practice (FRA, 2012:27-29; FRA, 2014:7). Pursuant to the Council position, however, the final GDPR text stipulates that whether or not organisations are allowed to act in the absence of data subjects' mandates (including to judicially challenge a DPA's decision or its handling of a complaint, and to seek a judicial remedy against a controller or processor) will be optional for the MSs to provide (Article 80(2), GDPR final, 2016). While there has been a lot of lobbying against bundling of complaints (EuroChambres, 2012), this outcome has been probably more determined by a very divergent situation between different MSs with regard to collective redress legislation. In a large number of countries in Europe, no kind of collective action for damages was foreseen by law at the outset of the reform

(BEUC, 2011). A common collective redress policy at the EU level is only nascent with a non-binding Recommendation issued by the Commission in 2013 (Commission, 2013c; BEUC, 2013). Formulation of this provision reflects the dynamics discussed within the rational choice perspective: small change at the EU level – a provision in a field-specific law, such as data protection – entails big implications at the national level related to uneven adjustment costs in different MSs as well as uneven impact on national law systems. The historical institutionalist dimension was present here, too. The absence of laws foreseeing the role for civil society organisations in enacting redress in some countries as well as the absence of a strong horizontal instrument at the EU level – a factor unrelated to data protection – affected the outcome of this provision in the GDPR.

5.8 Privacy advocacy by civil society – a fragmented but consolidating force

Advocacy interests active in the field of privacy protection are very diverse, ranging from more specialised actors engaged only with privacy protection to "traditional civil liberties organisations, consumer associations and groups established to promote freedom in cyberspace" who tend to form loose temporary coalitions to enact some specific causes when privacy-related controversies arise (Bennet and Raab, 2006:281-282, see also 231-233). This diversity of participants weakens privacy advocacy in that they at times "also lobby on a range of civil liberties and consumer-related issues, some of which can sit uneasily alongside privacy" (Bennet and Raab, 2006: 281-282). Moreover, although the media "occasionally mount vigorous campaigns against erosions of privacy", often in alignment with advocacy groups, they also have a conflicting relationship with privacy "given their own commercially driven propensity to pry into private lives" (Bennet and Raab, 2006: 282). Both of these divergences were felt in the recent policy debates concerning the widely misinterpreted so-called "right-to-be-forgotten", following the

related CJEU ruling, its enforcement by the European DPAs, and the provisions in the GDPR proposal (Llansó and Jeppesen, 2016; Powles, 2015).

For some time, in Europe coordination and communication between different groups involved in privacy advocacy was not consistent, although some organisations such as Privacy International, Statewatch, The Chaos Computer Club and BEUC managed to build international ties and to have a tangible impact on the policy debates and outcomes. At the national level, different countries tended to be stronger in different types of advocacy with "the UK […] well positioned for civil liberties, France for human rights, the Netherlands and the Scandinavian countries for consumer rights, and Germany and Austria for Netizen rights" (Davies, 2012). This diversity implies focus on different issues that are being addressed, with consumer organisations, for example, largely not dealing with government surveillance (interview with European consumer organisation representative, 11 December 2015, Brussels), or may result in conflicting perspectives, as we have seen above. Further, the patterns of engagement in the policy-making are diverse among the groups of the same type in different countries. For instance, while consumer organisations in some countries are involved only in litigation, in other countries they are also active in lobbying directly the government (interview with European consumer organisation representative, 11 December 2015, Brussels). In some countries, such as Italy, the dialogue between the government and civil society can be defined as almost non-existent (interview with privacy advocacy organisation representative, 10 July 2014, London).

Privacy advocacy and digital rights forces have been consolidating at the Europe-wide level since early 2000s, in particular with the establishment of the European Digital Rights Initiative (EDRi) that, in a way, was prompted by the surfacing of the Echelon affair[54] at

[54] The electronic communications interception programme run by a number of Western countries discussed in more detail in Subsection 2.6.1.

the time. In the recent years, it has been felt that privacy advocacy in Europe has gained its momentum and has become "part of the fabric of legislation" (Davies, 2012). A number of the US civil society organisations, including American Civil Liberties Union (ACLU), Electronic Privacy Information Center (EPIC), Electronic Frontier Foundation (EFF), Center for Digital Democracy (CDD), Center for Democracy and Technology (CDT) are also active in the European privacy policy-making both through individual as well as concerted action with their European counterparts. This was also the case with lobbying the GDPR (see, for instance EDRi, 2015b; EDRi, 2016a; Sean Kelly, MEP and ITRE rapporteur, 2014). Apart from occasional collective actions, there are also some more permanent forms of cooperation, as, for example, through a sort of bridging platform – the Transatlantic Consumer Dialogue (TACD), bringing together over 75 NGOs from the USA and the EU engaging with consumer protection issues. It is also interesting to note the input of a young, US-born digital rights organisation Access Now, with 10 offices around the world, including in Brussels, Berlin and London, who were one of the key civil society voices during the GDPR talks.

Currently, there have been some ground-breaking achievements by the civil society in changing policy and regulatory landscape that the invalidation of the DRD instigated by the Digital Rights Ireland and the invalidation of the Safe Harbour in a lawsuit against Facebook data transfers instigated by Max Schrems - one of the most prominent activists of the last few years – showcase (see Sections 2.6 and 6.4 regarding these rulings). However, as discussed later in Section 6.5, the resources that the civil society was able to deploy to work systematically on the GDPR dossier were extremely scarce.

The main overall expectation of the civil society from the data protection reform and the lobbying goal was keeping existing rights and upgrading them in the way that data subjects

possess control over their personal data. Among other important criteria, there were maintaining the level of protection offered by the Directive 95/46/EC and having a new law with an easily intelligible to ordinary ICT users text that they could meaningfully make use of in exercising their rights (CPDP, 2014; interview with European digital rights organisation representative, 8 December 2015, Brussels; interview with European consumer organisation representative, 11 December 2015, Brussels). Similarly to other stakeholders, the civil society was feeding into the process through a series of position papers, statements, public events, liaising directly with policy-makers as well as through some bespoke platforms dedicated to the GDPR deliberations, some of which LobbyPlag and www.protectmydata.eu. Some non-specialised, i.e. not primarily privacy or digital rights-focused, but civil rights watchdogs' role undertaking platforms, such as Statewatch and Corporate Europe Observatory (CEO), were also engaging with the data protection reform-related matters and giving publicity to arising issues. The civil society action was important in providing more legitimacy to policy decisions that already had a lot of currency due to other factors, such as EU fundamental rights norms and institutional framework that has to be enacted, the salience of data protection in the light of Snowden revelations, on-going massive consumer platform data breaches, non-ceasing lack of user trust in the ICT environment, and in countering the voices urging for a more relaxed privacy regime (see the next two sections).

5.9 Business actors – resourced influencers, but not quite the winners in the struggle over the GDPR

Based on the responses received during the deliberations, the rules proposed in the GDPR touched upon the activities of a wide variety of business operators (see, for instance, the list of contributors at Commission, 2010:15-21; Commission, 2011a). However, the major

stake was held by firms with business models centred on collection and exploitation of personal data, primarily such as so-called tech companies, on-line advertisers, digital marketers and on-line traders, and also insurers, credit rating companies and banking businesses, who were most actively engaged in lobbying against the efforts to stipulate strict data protection provisions. The American Internet giants played a prominent role in campaigning against the GDPR (see, for instance, http://www.lobbyplag.eu/influence). "The key industry players used various methods to make sure their arguments were repeated by lots of different voices, to create the impression of a broad opposition against the legislation" (EDRi, 2016b). The views of these businesses were mainly voiced through a bespoke Industry Coalition for Data Protection (ICDP) – a coalition of associations of digital industries with overlapping membership including US companies, such as Microsoft, eBay, Apple, Verizon, Google, Yahoo!, etc. (EDRi, no date). Besides, apart from various European industry bodies, American Chamber of Commerce to the EU (AmCham EU), TechAmerica Europe and Japan Business Council in Europe were also adhered to this coalition. Another bespoke lobbying platform targeted at the GDPR stipulation process was European Data Coalition, active since 2014, with intentionally, as it can be inferred, heterogeneous membership ranging from fashion retailers to vehicle producers, to emphasise a detrimental impact of the to be GDPR on broader realms of the European economy, apart from those of Internet businesses. One of the publicly most pro-active voices and a member of both above platforms, was the Allegro Group – a Poland-based e-commerce company with subsidiary links to the multinational South African Internet and Media business (Naspers, 2016) – posing as a Central and Eastern European firm. One of the industry's strategies that surfaced was the controversial European Privacy Association, named in disguise in the way that "may give the impression that it is a supporter of citizen's rights to data privacy" and presenting itself as a think tank, while

being funded by some of the US tech giants and with connections to lobbying consultancies (CEO, 2013c).

Apart from the above described unified actions, business companies and industry associations also liaised individually with politicians of all levels. The resources available to the commercial players, especially big firms, enabled them to be present at all relevant conference panels where the GDPR was debated and to put pressure on governments in all MSs (interview with European consumer organisation representative, 11 December 2015, Brussels) to advance a perspective that Big Data is the only possible way forward that cannot be hindered (interview with European digital rights organisation representative, 8 December 2015, Brussels). Some reports revealed Google's longstanding privileged access to the senior members of the British government (Garside and Ross, 2016). However, the amount of lobbying received at the national level differs across countries (interview with national Ministry of Justice official, 18 March 2015), but is very intense at the EU level (see Section 6.5). Economic recession had created a favourable context for business stakeholders' views to gain more weight in the debates and was used by business actors to increase pressure (Data Now, 2015).

The major interest of the industry stakeholders aimed at this process was that of "complete deregulation" (Jan P. Albrecht, EP rapporteur, quoted in CEO, 2013a), i.e. as unrestricted collection, processing and monetisation of personal data as possible. In its statements, ICDP countered the proposition that strict EU privacy rules would play out as a competitive advantage for companies operating on the continent, saying instead that they would scare off investors from investing in Europe who would look to invest somewhere else (INTA/LIBE, 2015; Fioretti, 2015b; DataIQ, 2015). Although, conversely, Apple – an American tech giant with a less data-intensive business model – recently has been trying to

market itself with a claim of more privacy offered to its users as a competitive advantage to distinguish itself from its competitors, such as Google and Facebook (Lee, 2015; Cellan-Jones, 2015).

As discussed later in Section 6.5, an unprecedented effort was mobilised in lobbying against the GDPR (Warman, 2012; Hastings, 2013b). While the initial proposal was weakened on some key provisions, e.g. on profiling or breach notifications and others, it can nevertheless be said that the overall outcome was somewhat disproportionate to the extent of lobbying, or at least the result was not an omnibus "watering down" of the rules towards the business side. In fact, some elements exceeded even the Commission's draft, already perceived as a strict reform. Among these are the sanctions, the re-introduction of the Article 43a[55] prohibiting disclosures of personal data to third countries' authorities that do not fall under the legal frameworks adopted by the EU or its MSs, opposed by the industry (EDC, 2015a; see Section 6.3), and the legally-binding decision-making powers conferred on the EDPB during the stipulation process[56], alongside the overall increase in DPAs powers embedded in the reform. Further, the GDPR resulted in less harmonisation and a re-shaped one-stop-shop process, again, not meeting the expectations of commercial companies. The interplay between various lobbying efforts and the actual policy outcomes across different decision-making venues is discussed in more detail in Section 6.5. As also follows from the discussion in Sections 5.3 and 5.4 as well as a privacy-friendly position of some of the most recession-hit countries such as Italy and Spain, the economic factors, while being very salient ones, have not been the wholly determinant forces, and other factors, such as institutional and national contexts, need to be taken into consideration in investigating policy outcomes. In the post-trilogue statement the industry stakeholders

[55] Numbered as the Article 48 in the GDPR final text.
[56] Which introduced the prospect of scrutiny over jurisdictions with weaker enforcement practices.

lamented that the legislators had not been inspired by their four-year-long efforts (EDC, 2015c).

5.10 Foreign governments in the EU policy networks – the USA input into the GDPR policy process

The USA had a great interest in the EU data protection reform since its very early stages (Guarascio, 2012) for its impact on "the transatlantic market, as well as on international regulatory and law enforcement cooperation" (Kennard, 2012). The US government and firms were principle lobbyists against the European data protection standards (Brown and Marsden, 2013c:60). As explained in Sections 2.5 and 2.6, due to the dominance of the American companies in the on-line market that generates huge revenues for the US economy, the EU capacity of setting global data protection standards since the adoption of the Directive 95/46/EC that affects data-driven business models, and the US extensive practices of all sorts of intelligence gathering through the global communications infrastructure, the stakes of this actor in the outcome of this reform were very high. Alongside the American tech firms' own effort to lobby against the GDPR that policy-makers spoke about as unprecedented, including their share in the famous 4000 amendments tabled in the EP, the US government was active in the process of deliberations, too. The main areas of concern indicated by the US government were the proposed provisions on binding corporate rules, explicit opt-in consent, the right-to-be-forgotten, data breach notification, and, in particular, data transfers to third countries, including adequacy decisions and foreign law enforcement bodies' access to the data held by companies, which it found too restrictive. In general, the US government was lobbying for more alignment between the European privacy rules and the US Consumer Privacy Bill of Rights, and moving towards mutual recognition between the two privacy protection

regimes, i.e. easier personal data exchanges (Kerry, 2012). As pointed out by Hornung (2012), from the outside it is not possible to make judgements about the actual extent to which modifications in the GDPR were related to the US government's involvement. There were developments towards various directions. Some reports were alleging the US government's impact on "watering down" the Commission's initial draft before its public release in 2012 (Guarascio, 2012; Fox, 2013; Fiedler, 2014). There were also reports potentially indicating the US administration's direct liaisons with some of the DG Home cabinet staff in the Commission (Access Now, 2014). Formal bilateral consultations were held, too (Fleming, 2013b). Overall, the USA is an important stakeholder in the EU. This is reflected, for example, in the Commission's invitation for the US administration and e-companies to contribute the ideas on the EU digital future (Digital minds, 2014). Seemingly, big pressure from the USA part through the diplomatic networks had an impact on making adequacy decisions as implementing rather than delegated acts, where the EP would have had a veto prerogative in case of the latter, in finalising the GDPR provisions during the trilogue (interview with EP source C, 8 February 2016, Brussels). However, some other developments indicate that it will not be easy for the US government, despite being an important and well-resourced actor, to alter the policy course taken in Europe. Among these were the return of the Article 43a restricting the access of foreign law enforcement bodies to the personal data of European citizens into the GDPR text following the EP intervention (the so-called anti-FISA clause, numbered as Article 48 in the GDPR final), and the CJEU's invalidation of the Safe Harbour agreement that also had implications for the data transfers regulated in Chapter V of the GDPR (see Section 6.3). In general, the USA has also been facing difficulties in various related realms. In autumn 2016, the TTIP negotiations, where data protection has been a salient issue, although not directly included in the negotiated package, came to a halt due to the USA

unwillingness to accept the European expectations of standards in a number of societal spheres (BBC, 2016c). At the same time, concerns were voiced by an American body regarding a detrimental tendency for the US "infocomm" sector – the prevalence being given to the domestic ICT providers in many countries, not the least on national security grounds (Reuters, 2016).

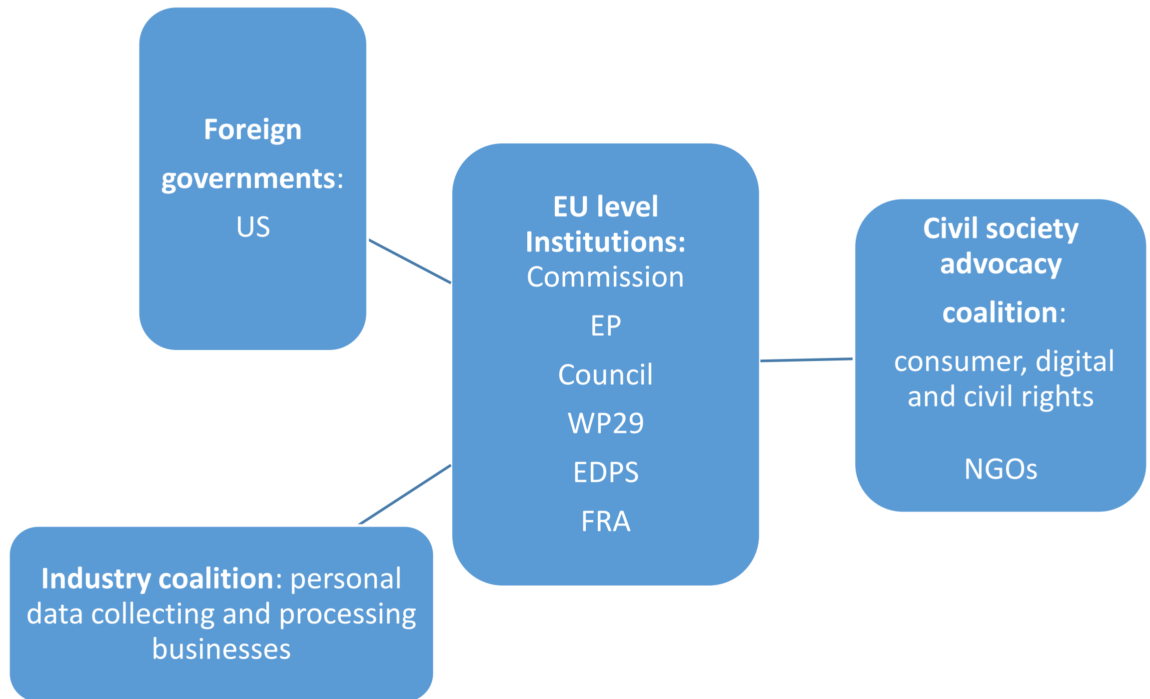
5.11 Conclusions

The EU data protection reform was a central piece of legislation for data-driven industries which draw on the use of personal data as their core asset and which had a particularly high stake in the outcome of the reform that emerged in 2012 as a stringent upgrade of the existing rules. Despite remarkable mobilised efforts in the attempts to prevent stricter rules from being enshrined in the new law, alongside the efforts towards the same direction of the US government, and despite significantly lesser resourced privacy advocacy action, the EU data protection regime, while accommodating some less user rights-friendly preferences, progressed towards stronger provisions in many aspects of the GDPR. This was determined by the presence of such influencers as the network of national DPAs and the EDPS in the process as well as the strategic interest of the supranational-level EU institutions to legitimise themselves, especially, in the light of the Lisbon Treaty in which an emphasis was put on the fundamental rights in the EU constitutional order. The governance ideas to enact the new regime differed among the stakeholders. The Commission's aspiration to centralise the oversight was unsuccessful in favour of the DPAs powers. At the same time, the MSs difficulty to find a lowest common denominator diluted the degree of harmonisation.

Different institutional contexts had a tangible impact on the policy process within the Council and the EP. Such sociological factor, as diverse institutional adherence of the

delegations and very different national political economies were hindering the process of negotiations in the Council, while such sociological factor as institutional profile-building in this issue-area in the EP was a consolidating force. The construction of the institutional identity, as in the case of the EP, as a means of self-legitimisation overlaps with the rational institutionalist perspective which is also relevant to the power contest between the Commission and the DPAs, among many other aspects of the making of the GDPR discussed in this chapter pertinent to this strand of the neo-institutional theory. Historical institutionalism was particularly reflected here in the prominent impact on the GDPR formulation process by such actors as the WP29 and the EDPS who embody the effect of the previous policy decisions that created them on the recent policy process. In addition, this chapter defined the competing advocacy coalitions: the structure, interests and strategies of the privacy advocacy by the civil society groups, who were promoting fundamental rights alongside the DPAs and the EDPS, and the same features of the industry groups, who were lobbying for a more relaxed privacy protection regime alongside the US government. The lobbying-related aspects during the GDPR deliberations are further discussed in more detail in Section 6.5.

Figure 1. The main actors of the GDPR deliberations



Source: Author's compilation

CHAPTER VI

The factors that shaped the adoption of the GDPR: more insights into the context of the policy process

6.1 Introduction

This chapter explains some important aspects of the GDPR adoption process without which the policy process that shaped this dossier cannot be fully understood. The first section takes a look at some macro-level processes, i.e. redistribution of powers, related to the transition from a Directive to a Regulation that placed this dossier in a certain context and had an impact on the strategic behaviour of the institutional actors and their policy choices. The section on the Snowden revelations, building on Sections 2.5 and 2.6, explains the impact that the political environment that emerged in the aftermath of the surveillance scandals had on the GDPR and the role the decision-making actors played in determining the provisions affected by the Snowden revelations. The section on the role of the CJEU in shaping the EU data protection policy explains the drivers behind some landmark rulings of the Court. These judgements were prominent developments that influenced the GDPR policy process. The section on lobbying covers the interplay between policy networks and the institutional factors in shaping policy outcomes. It builds on and converges the material presented in Chapters III and V. The section on domestic politics aims to explain how some national factors fed into the supranational-level negotiations. The British and German cases are discussed. The last section of this Chapter looks into the time dimension and how actors' motivations, possibilities and policy outcomes were determined by certain timeframes. The time dimension is particularly important to historical institutionalism.

6.2 The GDPR in the context of broader EU politics: the choice of the instrument and putting breaks to integration

Replacing the Directive 95/46/EC with a Regulation was not the default option of this main EU data protection instrument. "Internal discussions took place in the Commission, whether to propose limited amendments of the old Directive or a more radical harmonisation and reform" (interview with EU official D, 27 February 2015, Brussels). A few policy options of different scale and depth of the reform were considered:

- "***Option 1***: this option consisted of minimal legislative amendments and the use of interpretative Communications and policy support measures such as funding programmes and technical tools;
- ***Option 2***: this option comprised a set of legislative provisions addressing each of the issues identified in the analysis and
- ***Option 3***: this option was the centralisation of data protection at EU level through precise and detailed rules for all sectors and the establishment of an EU agency for monitoring and enforcement of the provisions" (EP, 2012a).

These options were assessed in the light of their perceived impact "on the **three policy objectives** of improving the internal market dimension of data protection, making the exercise of data protection rights by individuals more effective and creating a comprehensive and coherent framework covering all areas of Union competence" (EP, 2012a, original emphasis). The impact assessment identified Option 2 as the preferred option, but with the incorporation of certain elements from the other two options. Such solution was "the most likely to achieve the policy objectives without excessive compliance costs, and with considerable reduction of administrative burden" (Commission, 2012d:9). The choice of a Regulation as instrument was justified by the need to tackle the

deficiencies of the Directive that led to fragmented implementation, which was particularly tangible in the divergent MSs' responses to the Google street view incident[57] .

However, functional justifications aside, there was a political dimension, too, to the choice of Regulation. With a Regulation the Commission could strengthen its control "over the way in which MSs apply data protection legislation" (interview with EU official B, 13 February 2015, Brussels).

> "There are various factors in this process, and in the contest over influence between the institutions not everything has to do with this particular file. In a broader sense, it is part of the contest between the Commission and the Council related to the processes of harmonisation" (interview with national Ministry of Justice official, 18 March 2015).

The ways in which the Commission had attempted to increase its powers were discussed in Section 5.2, but a wide range of actors were critical of that. Besides, the very introduction of the "so-called one-stop-shop mechanism with harmonised and very beefed-up sanctions" in the Commission proposal "would have been very difficult in the context of a Directive" (interview with EU official B, 13 February 2015, Brussels). Although, as mentioned earlier, the majority of MSs were ultimately supportive of the Regulation as a form of legal instrument (some countries, among which France, Poland and Luxemburg, being even strongly pro-Regulation), the prospect of no transposition leeway was nevertheless a factor for MSs, making them cautious during the process. Consequently, the MSs strongly resisted rushing the adoption of this law before the 2014 elections to the EP, as it was initially aimed for by the Commission. Moreover, in the light of pending difficulty to adapt it to their national systems, delegations became "fiercely critical of the

[57] When the lawfulness of inclusion of un-blurred images of persons who were not aware about being photographed was interpreted differently between the MSs.

text of the Regulation", i.e. the language they were committing to, leading at times to the attempts to renegotiate even some aspects that the GDPR was inheriting from the Directive 95/46/EC (interview with EU official B, 13 February 2015, Brussels).

Although, as one single directly applicable instrument, the Regulation is a desirable move towards greater harmonisation and consistency in all MSs, the message promising "one single set of rules" used to promote this form of law in the GDPR policy debate was nevertheless overstated. The GDPR is unable to replace all pertinent national laws due to the way the EU law interacts with the national law and due to the existence of other national laws, apart from those specifically on data protection, that contain provisions related to the processing of personal data (Hustinx, 2014:34-35). In fact, certain discretionary powers were conceded to the MSs already in the Commission text[58]. However, even acknowledging the above, the degree of derogations that emerged from the deliberations within the Council and made their way into the final text, was perceived as excessive (see the initial discussion on this in Subsection 4.5.1). "There are specificities at national level. But we cannot give too much space to adjustment, derogations, clarifications that can simply reintroduce through the main door what we are throwing out through the window" (Giovanni Buttarelli, the EDPS, quoted in Stupp, 2015). It can be argued, that this was determined by the divergence of the national positions and the difficulty in finding an agreement, as discussed in Section 5.4.

[58] E.g. located in Article 6 (3) (b) on the basis of the processing (GDPR), Article 9 (2) (b) and (g) on the processing of sensitive personal data, Article 17 (3) (d) on the "right-to-be-forgotten", Article 20 (2) (b) on profiling, Article 21 on restrictions of the rights and obligations with regard to public interests, Article 44 (1) (g) and (5) on transfers of personal data, Articles 46 and 48 on the modes of establishing supervisory authorities, Article 73 (2) on representative actions, Article 78 (1) on penalties, Article 80 on processing of personal data for solely journalistic or artistic purposes, Article 82 on processing of personal data in the employment context and some other.

> "When you cannot find a compromise, let the MSs decide. Council always wins, if it really insists. If you cannot find a compromise, you stick to the status quo. Harmonisation is based on the principle of subsidiarity: why you are harmonising, why it happens at the supranational level? If there are no benefits, it should stay at the national level. It is a political choice sometimes. There are also some forces within the EP – among the EPP and other – that push towards more nationalism. The Greens, S&D, and ALDE have a more harmonisation-oriented approach" (interview with EP source C, 8 February 2016, Brussels).

> "A lot of it goes back in this particular file, again, to the fact that Commission is proposing a Regulation to replace a Directive. Because it creates all kinds of problems: they have to replace their national law, and it's not just one law on privacy, it is scattered throughout legislation […] The rather mundane reality is in this particular type of negotiations, and especially here, when we are talking about the replacement of national law adopted pursuant a Directive by a Regulation, what you are trying to do is as much as possible to make sure that the situation does not change drastically. They are to a large extent defending their status quo, not because they are inherently politically conservative, but because that makes their lives easier, rather than having to change all kinds of rules in line with the future Regulation" (interview with EU official B, 13 February 2015, Brussels).

> "Harmonisation, yes, but not at any price" (Ole Schröder, Secretary of State in the German Ministry of Interior, quoted in Fleming, 2013d).

The lowest common denominator between 28 MSs is very difficult to find and it may end up being "very dangerously low" (interview with EU official A, 1 February 2016, Brussels). Such countries as Germany and Austria feared potentially lowering their standards with the GDPR, while it was raising standards for some others, such as Britain, Ireland and Luxembourg (interview with EU official D, 27 February 2015, Brussels).

The discussion in this Section is relevant to the macro-level analysis of the GDPR formulation process and the explanation of the EU as a consociational system (Sections 3.2 and 3.3). The non-linear, two-way dynamics was clearly seen in the degree of harmonisation that was possible to achieve through the instrument of Regulation, i.e. the degree to which the level of harmonisation has been limited. It reflected growing European competence and preservation of national competences at the same time, located in what

was aimed to be a directly applicable measure. The convergence of the MSs preferences, on which progress towards integration depends, was particularly difficult in the GDPR case.

The proposal for a Regulation and subsequent derogations from it are also a clear case for a rational choice institutionalist analysis that looks into how actors compete for influence in asserting themselves and how they seek to extend their spheres of influence, as in the case of the Commission, or maintain their domains of authority as much as possible, as in the case of the MSs, during the process of reforms. As it could be seen, the passage from a Directive to a Regulation tangibly generated such tensions in the light of the decision-making power shifts that this reform entailed. Although, despite abundant flexibility clauses, the level of harmonisation in the GDPR results higher than in the Directive 95/46/EC, the mechanism of the EU politics, at least to some extent, allows to pull the evolving integration back to the national level.

6.3 Snowden revelations: the patterns of international politics feeding into the GDPR deliberations and its limits

The Snowden revelations (see Section 2.6) emerged in summer 2013, i.e. during one of the most difficult stages in the political process of the GDPR when this dossier was seemingly failing to progress within the two co-legislating institutions – the Council and the EP. This move by the US NSA contractor to expose the massive on-going communications interception by the US and European intelligence agencies was an unexpected but very significant turn in the political debate surrounding data protection and privacy. It was since referred to as a “wake-up call” to make the case for speeding up the EU data protection reform as well as ensuring strong safeguards in its content (EP, 2013a; Reding, 2014a). It was consistently defined as a factor during the interviews conducted for this thesis. “The process would have been far far worse if not for the Snowden revelations” (interview with

privacy advocacy organisation representative, 10 July 2014, London). “Mass surveillance revelations had a very big impact […] on the intensity of the lobbying. It had a massive impact on the industry, because they realised they suddenly had all this big trust and public relations issue and they had to do something about it” (Anna Fielder of Privacy International, speaking at CPDP, 2015).

The Snowden revelations had mainly an impact on Chapter V of the GDPR on the transfers to third countries or international organisations and to an extent was a mobilising factor in dealing with this dossier, although mainly in the EP.

The major development related to these revelations was the reintroduction by the EP of Article 42 addressing disclosures not authorised by Union law that allegedly still featured in the Commission’s draft in late 2011, but was dropped following US pressure. The provisions of the article would have prevented any US requests for data handovers on EU citizens through telecoms or technology companies (ORG, 2013b). For example, in the explanatory part of the proposal it stated:

> “Article 42 clarifies that in accordance with international public law and existing EU legislation, in particular Council Regulation (EC) No 2271/9633, a controller operating in the EU is prohibited to disclose personal [data] to a third country if so requested by a third country's judicial or administrative authority, unless this is expressly authorized by an international agreement or provided for by mutual legal assistance treaties or approved by a supervisory authority” (Statewatch, 2011:12);

and one of the paragraphs of the article read as:

> “No judgment of a court or tribunal and no decision of an administrative authority of a third country requiring a controller or processor to disclose personal data shall be recognized or be enforceable in any manner, without prejudice to a mutual assistance treaty or an international agreement in force between the requesting third country and the Union or a Member State” (Article 42(1), Statewatch, 2011:69).

In the EP GDPR text, this article was reintroduced as a new Article 43a. This article in a shortened version remained in the final post-trilogue text of the law (renumbered as Article

48). The amendment to the Commission text proposing such an article was already present in the LIBE's draft report of January 2013 (LIBE, 2013a), i.e. a few months before the Snowden news. As these revelations raised public awareness and public pressure to the highest levels, including German Chancellor Angela Merkel, for data protection in general, they made it very easy to agree on Chapter V on international data transfers within the EP, including the addition of the Article 43a, and put pressure on the shadow rapporteurs and everybody to finally agree on the whole dossier. Another aspect that these revelations had an impact upon was helping to come up with much higher fines - up to 5% of the annual turnover and 100 million euros – in the EP text if compared to those proposed by the Commission. It did not really have a substantial impact on other aspects, such as details of data protection foundations, like legitimate interest, or on the consistency mechanism, although indirectly the leaks about mass interception of the communications invoked more seriousness towards, for example, American IT companies in the larger political discourse around the GDPR, based on understanding that "if companies collect less of our data, the less NSA can get" (interview with EP source B, 5 February 2015, Brussels).

The Snowden revelations also affected negotiations in the Council, "but not as much as some may have wanted to" (interview with EU official B, 13 February 2015, Brussels). It obviously put more pressure on the MSs and on the Council to negotiate, and that was the reason why the first chapter that the Council agreed on was on the international transfers (interview with EU official B, 13 February 2015, Brussels).

> "And regarding personal data transfers outside the EU, it made it impossible to look at alternative models. At one stage, in particular the German delegation, was looking into ways how the Safe Harbour model could be extended to other third countries, like new Asian economies, that became impossible after the Snowden revelations. The US Safe Harbour became a dirty word […] or something very suspicious, at least. It became very difficult to defend that this model should be

> extended to other countries" (interview with EU official B, 13 February 2015, Brussels).

Besides,

> "If there were MSs that had a very clear pro-data protection stance, after Snowden it was fierce. In certain delegations, where certain DPAs have a more vocal role, after the Snowden revelations they had an absolutely dominating role in shaping positions. The EP gained more influence. Governments feel pressure coming from the public opinion. At the present, I would say, that none of the MSs can possibly think of taking a stance which is anything but oriented towards data protection. And the whole question of the Transatlantic relationship, and data protection and data exchange, is a huge chapter" (interview with Permanent Representation official A, 20 January 2015, Brussels).

Due to the pressure in the Snowden aftermath, "the European Council has called 'we have to move forward' […] But, usually, there is a difference between what is said at the very high political level and the way it ripples down to the lower level. It is technically a very complicated file and that is why […] the things did not go as far as some would have hoped" (interview with EU official B, 13 February 2015, Brussels).

The Council General Approach was agreed upon in June 2015 and did not contain an addition similar to that of the EP's Article 43a amendment restricting the powers of the public authorities of third countries, although in summer 2014 a proposal to have such a clause was brought up by Germany (Fiedler, 2014). Conversely, it contained an exemption from the provisions of the GDPR on the grounds of national security and defence in the Article 21 (Article 23 in the GDPR final). The UK, soon after the political agreement on the GDPR was reached between the EP and the Council in December 2015, hailed its opt-in prerogative in the JHA matters under the Lisbon Treaty that, as it was stated, certain wording in the Article 43a triggered, and declared that it will not be opting in on the grounds "of concerns relating to the integrity of the UK legal system" (UK Parliament, 2016).

The Article 43a was pleaded for by the rights groups (Fiedler, 2014), but lobbied against by the industry, who were arguing that it was creating jurisdictional conflicts that private companies would be exposed to as well as interoperability issues (EDC, 2015a; AmCham, 2015).

The Snowden revelations also fed into the GDPR formulation process through the 2015 CJEU ruling invalidating the Safe Harbour agreement (see Sections 2.5, 2.6 and 6.4). Following the ruling, the EP insisted on some stronger provisions on the adequacy decisions. Based on the wording and reasoning in the ruling, the requirement that third countries "should offer guarantees that ensure an adequate level of protection ***essentially equivalent*** to that guaranteed within the Union" was inserted into the recital 104 (GDPR final, 2016, recital 81 in earlier versions, emphasis added). Besides, in the paragraph 5 of the Article 45 (41 in the earlier drafts) the Commission was obliged to repeal, amend or suspend adequacy decisions, i.e. to take action, if the situation changed in the third country, as compared to previous drafts that only foresaw it within the competence of the Commission (interview with EP source B, 4 February 2016, Brussels; GDPR final, 2016).

The discussion in this section clearly indicates polycentric decision-making in the EU and how the interplay between the policy choices of the four supranational-level institutions were altering the provisions on international transfers and safeguards of personal data against the reach of foreign public authorities in the GDPR. Different responses given by different actors to the issue of surveillance indicate how the protection of citizen interests depends on the strategic interests of decision-making actors. The EP and the CJEU positions advanced more citizen protecting stances, while the Council, representing the MSs, was less susceptible to the political pressure spurred by the mass surveillance revelations. As it follows from the discussion in Section 2.6, the interests of foreign and national authorities in the EU are rather intertwined. The UK's stepping away from the

article 43a on the restrictions of data handovers to foreign authorities reinstates the state-centric argument of this thesis, showing how the EU composing parts maintain significant decision-making powers even as the integration advances.

6.4 CJEU – politics never goes away. Tracing strategic interests of the constitutional court

Similarly to the Snowden revelations, the CJEU landmark rulings of 2014 invalidating the DRD (*Digital Rights Ireland and others*) and instating the right to delisting[59] (*Google Spain SL*) as well as of 2015 annulling the Safe Harbour (*Schrems v Data Protection Commissioner)* have been viewed as influential factors during the GDPR deliberations as well as heavy-weighted contributions to the earlier-mentioned overall "climate of data protection enforcement" in the EU[60].

> "The bottom line is that we have a big 'wake-up' call saying to everyone: 'you have to take this seriously'. These two judgements [of the spring 2014] have been a major factor in the negotiations, if not specifically on the topics we are dealing with in the discussions, but certainly the attitudes of the delegations have changed" (interview with Permanent Representation official A, 20 January 2015, Brussels).

As a constitutional court and the supreme judicial authority, the CJEU is a very important supranational actor that has played a key role in the processes surrounding privacy protection and fundamental rights in the EU. While the CJEU is not directly engaged with policy creation, its main task, as of any courts, being interpretation of the law, the Court's judgements have a tangible potential to alter the existing policy regimes in the EU and influence policy processes (Buonanno and Nugent, 2013:57-59; Falkner, 2012:292-310). It has been one of the key elements in the EU institutional framework. Its decisions create "a rule-based context for policy making […] set the parameters for future initiatives and shape actor expectations" (Bjurulf and Elgström, 2005:53). This is known as judicial

[59] Linked to the upcoming "right-to-be-forgotten" in the GDPR.
[60] See page 120.

policy-making (Falkner, 2012:292-310; Majone, 1997). It is therefore important to understand the context of the CJEU rulings and the motivations behind them, which will be analysed below.

The CJEU jurisprudence had played a crucial role in the constitutionalisation of fundamental rights in the EU before the Lisbon Treaty and before the EUCFR became legally-binding. In the 1950s, during the time of inception of the European Communities that also foresaw a Political and a Defence Community, a rigorous human rights catalogue was being drafted. This catalogue was intended as part of the institutional design of the European Political Community, the setting up of which failed following the unsuccessful ratification of the European Defence Community Treaty. In the light of these developments and the difficulty of the underlying political processes, the idea of a comprehensive rights catalogue was subsequently abandoned when establishing the EEC, in order not to hinder the process (De Búrca, 2011: 465-497).

In the absence of a supranational-level human rights protection system in the following decades, institutionalisation of human rights in the Community gradually emerged through the CJEU case law from the late 1960s onwards (Rittberger and Schimmelfennig, 2007:223-229). The beginning of this process is famously known as the "triptych of cases" (De Búrca, 2011:478), the first of which – *Erich Stauder v City of Ulm-Sozialamt* of 1969 – involved privacy issues, i.e. arguably unnecessary divulgation of personal information. However, "[t]he CJEU did not start as a champion of European-level human rights protection" (Rittberger and Schimmelfennig, 2007:223). Its stance that human rights, albeit implicitly, were, however, indeed guaranteed and protected by the EC legal system appeared in some of its rulings in the 1960s and 1970s when the supremacy of EC law and the jurisdiction of the CJEU were disputed by some German national courts (Rittberger

and Schimmelfennig, 2007:224-225). “Without the rights-based challenge of the German administrative and constitutional courts, the CJEU would not have been pressed to introduce, and increasingly strengthen its commitment to, human rights review” (Rittberger and Schimmelfennig, 2007:228).

Eventually, the fundamental rights became fully constitutionalised in the Lisbon Treaty signed in 2007 and through the legally-binding force of the EUCFR. In the post-Lisbon time challenges to the CJEU’s status quo as well as stimuli for activism in this issue-area continue due to the domain of the ECtHR case law, specialised in human rights, and the imminent EU accession to the ECHR, which will make the latter Court an ultimate judicial authority in the EU, since the CJEU decisions will become open to its scrutiny. The CJEU has long managed to resist such developments, but the amendments to the Lisbon Treaty made the accession mandatory (Douglas-Scott, 2013; Cameron, 2013). The current engagement with the rights to privacy and data protection by the CJEU that particularly came to the fore with the still much debated landmark rulings of April and May 2014, invalidating the DRD and in favour of the right to de-listing from search engines results, respectively, can be linked to this context.

> “At the moment, the CJEU is undergoing a quite substantial political transformation, because it is in the process of asserting itself as a fundamental rights court. It feels pressure coming from the competition with the ECtHR, operating on the same continent, which works brilliantly in this respect. The CJEU is extremely worried about this competition. In order to show the world that they are capable of acting as a fundamental rights court, which is an important factor, because it is an important dimension to show that the EU is a bit more understandable to its citizens and a bit friendlier, it has chosen, among other subjects, data protection. And that has to do with the two rulings which were quite staggering. The two decisions, with similar undertones, on the same topic, so close to each other, were not accidental” (interview with Permanent Representation official A, 20 January 2015, Brussels).

The CJEU now features as a powerful supranational-level actor in the EU politics. Most notably, this is linked to its ability to have developed the doctrine of the supremacy of the EU law over national law. The difficulty for the governments, despite the existing formal mechanism allowing to do so, to overturn its judgements in practice prompt some commentators to attribute "dictatorial power" to this institution (Falkner, 2012: 298). This notwithstanding, the CJEU remains heavily reliant on the national level in that the cases are referred to its jurisprudence by the preliminary ruling procedure from national courts on which the implementation of its decisions also depends. The support of the national courts, especially the lower courts, has been crucial for the CJEU's actorness (Alter, 2002). The salient cases that enable the CJEU to assert itself as a "norms entrepreneur" and a fundamental rights actor are outsourced from the national level. "[N]ational judges when applying EU law are key actors in ensuring effective judicial protection in relation to the rights provided for in the Charter and […] the increased number of applications for preliminary rulings with specific reference to the Charter submitted by national courts to the CJEU since 2010" has been noted (COREPER, 2014:5). The CJEU remains bound by "the importance of having domestic interlocutors to make adherence to international institutions politically constraining at home […] international norms will most influence national politics when they are drawn on or pulled into the domestic political realm by domestic actors" (Alter, 1998:144). Although judges cannot be viewed as an epistemic community as they do not have entirely shared values and beliefs (Alter, 2002), the above described dynamics can be viewed as a kind of policy networking.

Moreover, while this institution is known to have brought the European integration much further than it was originally envisaged and it has demonstrated the institutional and political capacity to rule against MSs interests, it still is sensitive to the national interests in a broader sense. The national interest of MSs differs and the CJEU judgements tend to

affect them differently. A number of MSs deem having a strong EU legal system with a strong role for the CJEU in it as beneficial. The Court is unlikely to make decisions that would fundamentally compromise national systems and could make these allied governments cease favouring its strong powers (Alter, 1998). This probably can explain the CJEU's rulings of 2013 (*Schwarz v Stadt Bochum*) and 2015 (*Willems and Others*) not banning the use of biometrics in the national ID documents – a very intrusive, privacy undermining state surveillance measure – that are somewhat incongruent with its latest data protection wave, its own earlier case law and, in particular, tangibly departs from the ECtHR stance taken in these matters (Wisman, 2015).

The construction and protection of its authority by the CJEU, especially the EU law supremacy discourse as well as strategic behaviour that can be inferred in at least some of its rulings, as discussed in this section, reflect rationalist lines of the neo-institutional theory. The tangible parameter-setting effects of the CJEU's judgements and its contribution to the development of the fundamental rights in the EU, including privacy and data protection, embed considerations of the historical institutionalist branch of this theory. This discussion on the CJEU indicated the prominence of the institutional factors in the policy formulation process. In addition, it showed the importance of the CJEU's connectedness to the national-level actors as one of the sources of its power.

6.5 Lobbying the GDPR: different venue receptiveness to competing policy advocacy

> "Since an extremely diverse range of interests is often involved, lobbying may also be understood as a form of feedback on the interests of different social groups […] politicians […] need to be able to verify and weigh up lobby proposals […] The information provided may be deliberately misleading, incomplete or selective" (Bendrath, 2015:33).

The accounts given by the decision-makers on the efforts of various actors with a stake in data protection rules in accessing the decision-making process indicated an overwhelming

amount of requests for meetings and significantly contrasting preferences among those advanced (interview with Permanent Representation official A, 20 January 2015, Brussels; interview with Permanent Representation official B, 3 February 2016, Brussels; Sean Kelly, MEP and ITRE rapporteur, 2014).

> "There is the whole galaxy of interest groups that have an almost infinite range of major or minor concerns about what you are doing, who are keen to present their point of view, to try to convince you to do certain changes or to maintain certain points for the benefit of the groups they represent. Many have extremely specific points of interests: we are talking about one sentence or one article that they really really want or do not want. And these interest groups do that with the 28 delegations, the Commission, and each and every MEP that has something to say about this. It is really really complicated. Points of view differ" (interview with Permanent Representation official A, 20 January 2015, Brussels).

> "I met, amongst others, Google, Facebook and IBM on the one hand, and the European Digital Rights Initiative, the American Civil Liberties Union and many senior US and EU government officials as well as virtually all EU data protection authorities on the other" (Sean Kelly, MEP and ITRE rapporteur, 2014).

The success of the proposals in being taken on board will depend on the perspectives represented by the decision-makers themselves, their goals, and approach taken towards policy-making (interview with EP source A, 21 January 2014, Brussels; Traynor *et al*, 2014) as well as existing political constraints (interview with Permanent Representation official A, 20 January 2015, Brussels). This is evident from the very different positions developed by such institutions as the EP and the Council. "The EP was taking a rather radical left-wing stance, while the Council was more right-wing minded" (interview with Permanent Representation official B, 3 February 2016, Brussels; see the respective Sections 5.3 and 5.4 on the motivations behind these institutions). This also follows from the varied behaviour among the same type of actors at the decision-making venues and related policy outcomes. Within the Commission, there are more accessible and less accessible as well as more progressive and less progressive DGs. For instance, DG Competition and DG Justice can be deemed quite progressive (interview with European

digital rights organisation representative, 8 December 2015, Brussels). In this particular file, the competent DG Justice had always interacted with the civil society, including the preparatory phase before 2012, and the officials of all levels have been receptive to this side of the debate (interview with European digital rights organisation representative, 8 December 2015, Brussels; interview with European consumer organisation representative, 11 December 2015, Brussels). Some Permanent Representations, e.g. the Italian, the Polish and the French ones could be mentioned as aligned with the rights-based approach. The Luxembourgish Presidency in the second half of 2015 was very open to the civil society and even invited their representatives for a follow-up meeting on their own initiative, despite their extremely busy schedule. The Greek delegation was constructive and receptive, but did not have a strong position on this, so the result was limited. The German and the British Permanent Representations, though were available to talk, did not take on board the civil society messages (interview with European digital rights organisation representative, 8 December 2015, Brussels; interview with European consumer organisation representative, 11 December 2015, Brussels). Similarly, in the EP the openness of the MEPs to certain categories of stakeholders and their impact on decision-making vary based on the legislators' own views regarding this issue-area (interview with a privacy advocacy organisation representative, 10 July 2014, London; interviews with European and international digital rights organisations representatives, 8 December 2015, Brussels; interview with European consumer organisation representative, 11 December 2015, Brussels). At the national level, again, the dynamics of the interaction of the different governments with the interest groups and the outcomes of such interaction are different. For instance, while the UK is open and transparent with all, it had been nonetheless taking a pro-business stance, whereas the Polish government, despite a lot of

pressure from various actors, had had a much more balanced position (interview with privacy advocacy organisation representative, 10 July 2014, London).

However, the unprecedentedly enormous amount (circa 4000) of amendments tabled in the EP makes the overall pressure on the file and the high stakes involved obvious (see Chapter II explaining the political economy in which this issue-area is embedded), and necessitates a more in-depth discussion.

According to the Corporate Europe Observatory, “on average, a piece of legislation attracts 50 to 100 amendments in the [EP]”, but one legislative file in the recent years was exposed to more than 1600 (CEO, 2013a).

The GDPR amendments flood in the EP was accompanied by the “copy-pasting” scandal, when the text identical to the proposals coming from the business stakeholders, among which large American tech companies, was detected in the documents tabled by the MEPs (see, for instance, http://www.lobbyplag.eu/influence and Hastings, 2013b). However, a number of proposals coming from digital rights lobby papers, e.g. Bits of Freedom and EDRi, also went into the amendments text (http://www.lobbyplag.eu/influence), but submissions from NGOs were much less numerous and imbalanced as compared to those from the industry (Eva Lichtenberger, an Austrian MEP, quoted in Hastings, 2013b).

One of the most prominent cases of the “copy-pasting” from the industry papers pertained to the Belgian MEP Louis Michel, who featured in an investigatory documentary into the “lobby war” around the GDPR by a Flemish TV team (CEO, 2013b; Brems, 2013). Around 230 amendments, 158 of which strongly anti-privacy, were tabled by Mr. Michel. As it emerged later, the industry-friendly amendments were submitted by his assistant, allegedly, without the MEP’s knowledge. After these issues of contested democratic

process were revealed, Mr. Michel announced that he withdrew 80-90 of his amendments (CEO, 2013b).

The above case, however, is not a generalisable example. Overall, both privacy-unfriendly and privacy protecting amendments were abundant in the EP, while there were also a lot of neutral proposals. According to the data available at the www.lobbyplag.eu[61], the highest number of amendments with also the highest ratio of privacy-unfriendly proposals came from the ALDE group. This notwithstanding, one of the fiercest defenders of the rights to privacy and data protection in the EP – the Dutch MEP Sophia in't Veld – along with some other MEPs, who presented only privacy-friendly proposals, belong to this group. The ALDE is followed by the EPP group, both in terms of the number of amendments and the ratio of the protection weakening proposals. Three political groups with the highest ratios in advancing pro-privacy proposals were the Greens/EFA, followed by the S&D and the European United Left - Nordic Green Left (thereafter GUE/NGL).

One of the factors as to why industry preferences succeed in finding a fertile ground in the law-making process is because of the pro-business mindset that many MEPs have, assuming "that what's good for big business […] is good for Europe as a whole" (CEO, 2013a). This data protection reform had been carried out in the context of the economic recession, when the EP electorate was also more sensitive to the issues of the economic well-being. At the time when the reform started, the data-driven economy and the ICT sector were reportedly outperforming other struggling sectors (Fleming, 2013a). For instance, European on-line advertisers claim having created millions of jobs and generated a contribution to the EU economy that amounts to hundreds of billions of euros (IHS-IAB Europe, 2015).

[61] A civil society platform set up by transparency campaigners to report on the developments of this dossier.

The employment-oriented reasoning was reflected in the IMCO rapporteur Lara Comi's (EPP) intervention during the EP debate before the plenary vote on the GDPR in March 2014, where she emphasised the importance of micro-enterprises that create apps as a possibility for young people to earn a living and criticised "a rather aggressive approach" taken by the EP rapporteur in promoting data protection (EP, 2014a, author's translation from Italian)[62]. The same MEP was also behind many data protection weakening amendments. In the meantime, as covered in Chapter II, the apps industry currently represents a major source of data protection issues (see page 38, footnote 8).

The above example points to another factor spanning across both national and supranational levels of policy and law-making – the lack of internal expertise. This, combined with scarce resources of time, makes some law-makers and their teams both domestically and in the EP, who are not necessarily very pro-business *per se*, susceptible to the influence of the tech industry advice while drafting their amendments (CEO, 2013a; BBC, 2014p).

A large number of the MEPs are involved in some of the existing dozens of cross-party groups that can be deemed "MEP-industry forums", frequently being run and funded by industry lobby groups or consultancies based in Brussels. The platform relevant in this policy process is the European Internet Forum (thereafter EIF), whose membership includes MEPs as its political members, as well as ICT industry and associate representatives. A significant share of the industry-oriented amendments tabled in the EP originated from the EIF members (CEO, 2013a).

[62] An American think tank the Progressive Policy Institute estimated that the app economy counted 1.64 million jobs between the EU, Switzerland and Norway as of January 2016 (PPI, 2016).

But there are also MEPs with engagement in privacy advocacy networks like, earlier-mentioned, Sophia in't Veld who is a member of the advisory board of Privacy International organisation. Besides, the far left GUE/NGL political group came to the GDPR discussions with proposals as strong as wanting "to scrap the legitimate interest line altogether", arguing that "the only legitimate interests are the citizens' fundamental rights to privacy and data protection" (Nielsen, 2013b)[63]. In general, some very strong initiatives in balancing business and non-business interests, and not limited to specific political groups, originating in the EP are not unusual. Such was the case of the EP resolution adopted by an overwhelming majority in autumn 2014, urging "the Commission to consider proposals aimed at unbundling search engines from other commercial services" as an anti-trust measure to prevent commercial operators from taking unfair advantage of their dominant position in the market. This resolution, inter alia, stressed the importance of the creation of privacy-friendly communication networks and services (EP, 2014e).

Technical complexity from both a technological and legal point of view, was also an obstacle in generating more public pressure on this file and engaging a wider public. As the earlier mentioned ACTA rejection case by the EP (see Section 3.6) indicates, public pressure has a potential to have a very tangible impact on policy outcomes. While the website of the digital rights group Access Now states that more than 400 000 emails were sent to the EP (Access Now, 2013), which can be considered a substantial amount that seemingly should have had an "ACTA effect", the mode of campaigning was rather different in the two cases. In the case of ACTA, it was a straightforward "NO" campaign against the entire agreement, as it could also be done with the EU PNR Directive. In the

[63] The vague wording in the "legitimate interest" clause as one of the legal grounds for the processing of personal data in the GDPR draft proposals was criticised by privacy advocates as a loophole that might be exploited by businesses, which was weakening the strength of the whole law (BBC, 2013n). See also Slovenia's criticism regarding the notion of "legitimate interest" in Section 5.4.

case of the GDPR, instead, the message was more complex, more specific and very technical. The GDPR proposal contained many good things and only certain undesirable elements. Prompting the general non-specialist public to oppose such aspects as profiling, for example, or to advance demands for an explicit consent was quite challenging, as it required difficult explanations of what such things meant and how they affected data subjects. Therefore, often, like in the case of the above-mentioned 400 000 e-mails, only rather generic messages, demanding a more privacy-protective stance in general, could be advanced (interviews with European and international digital rights organisations representatives, 8 December 2015, Brussels).

Yet another factor in the process was the strongly polarised and asymmetric interest representation. The pro-privacy perspective lobbyists counted only a few people across the whole Europe working on this file[64] and the DPAs, while the forces lobbying against the data subjects' rights strengthening proposals in the GDPR potentially counted several hundreds (interviews with European and international digital rights organisations representatives, 8 December 2015, Brussels; interview with European consumer organisation representative, 11 December 2015, Brussels). Reportedly, only the American Chamber of Commerce had a task force of 50 people working on this dossier (Brewster, 2012). The role of the LobbyPlag platform, which brought to the fore the influences behind the proposed modifications to the GDPR draft proposal, was hence very important in raising public awareness and preventing a potentially even higher number of amendments and "copy-pasting" from industry papers (interview with EP source B, 5 February 2015, Brussels). While a situation when civic or consumer interests are under-resourced and under-represented in the policy process is not unusual (CEO, 2013a), a strongly

[64] The civil society resources were mainly confined to the work of the limited staff at such NGOs as Privacy International, EDRi, BEUC, Access Now, Panoptykon Foundation and Bits of Freedom.

asymmetric and polarised configuration is not necessarily always the case. For instance, the process of the Telecoms Package deliberations has seen fragmented and competing interests of different business players, in addition to the presence of consumer interests (interview with European consumer organisation representative, 11 December 2015, Brussels). There are rather fierce tensions between mobile network providers and on-line content publishers surrounding ad-blocking (Kleinman, 2016). Consumers' and smaller telecommunications providers' interests seem to concur in the broadband market liberalisation matters (Reinhold, 2016). Both the civil society and the tech industry oppose the attacks on the use of encryption pursued by some state authorities and politicians.

This section discussed the dynamics of how the demands of various interest groups were feeding into the GDPR decision-making process, their impact on it and the variables that determined that impact. Some factors uniquely characteristic to the context of the GDPR policy process – such as unprecedented amount of amendments that entered the EP deliberations, difficulty to generate public pressure due to the technical complexity of this dossier, and particularly imbalanced and polarised configuration of competing interests – were identified.

The varying receptiveness across different decision-making venues to certain types of interests lends support to the Galperin's ideas, referred to in Section 3.6, about the importance of the "institutional fabric" in understanding the actual policy outcomes. Based on the EP example, it can be said that the impact of the pressure that was put on this institution in the attempts to "water down" the new data protection rules and some disadvantageous to the pro-privacy side of the debate circumstances mentioned here were not decisive. There were other, "gatekeeping" factors, e.g. the personality in the steering position, the overall salience of this particular dossier and this issue-area in general for the EP (see Section 5.3), and the overall political environment (e.g. see this Chapter, Sections

6.3 on Snowden revelations and 6.4 on the CJEU rulings) that were significant. This has links to the new institutionalist reasoning explained in Chapter III.

6.6 Domestic politics as the source of difficulties in the GDPR talks

6.6.1 UK: negotiating the GDPR in the context of "referendum games"

The UK is an EU MS with a particular track record. While having been offered a membership since the conception of the European Communities in the 1950s (Taylor, 2003:113), the country joined the Treaties only in 1973. However, since its accession, it has gained a reputation of "a spoiler and scavenger" (Taylor, 2003:117), as it has been opposing most of the policy initiatives and obtained a series of exemptions from various EU instruments and agreements, some of which being the introduction of the EU currency euro and the Schengen zone. But a number of cases demonstrate that the supranational level, despite its demonisation, still represents an indispensable venue, to which even the most eurosceptic actors appeal to surmount both domestic and international as well as political and business issues. For instance, such were the cases of using the EU level for data retention legislation policy by the UK after nationally unsuccessful attempts (Hills, 2006:206, 209; Morris, 2014); the UK inability to overcome without the aid of the EU institutions the alleged territorial tensions with Spain over Gibraltar in 2013 (BBC, 2013l); or the Rupert Murdoch's News Corp's – a well-known EU-unfriendly publisher – demand to the European Commission to tackle the Google dominance (Greenslade, 2014).

As the Directive 95/46/EC, which the GDPR replaces, was adopted, the UK was the only abstention with all the other MSs assenting to it. The reservations of the British Conservative government in office at the time about the necessity of such an instrument on data protection, given the existence of the Council of Europe Convention 108[65], as well as

[65] Council of Europe Convention 108 of 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

wider concerns of a gradual centralisation of supranational powers, alongside some technical legal divergence between certain provisions in the new EU law and the existing related national law, added to the protraction of the stipulation process of the above Directive (Bennett and Raab, 2006:93-94, 96)[66].

A few years later, when the EUCFR was due to be adopted, most EU governments wanted it to be given a Treaty status in the Nice Treaty. The UK led a coalition of a few opposing governments to prevent such a development. As consequently the Charter was merely "solemnly proclaimed" by the EU governing institutions in 2000, its legal status was rather uncertain and, accordingly, its impact weaker for almost a decade. With the coming into force of the Lisbon Treaty in 2009 the Charter acquired a legally-binding status, but again failed to be incorporated into the EU Treaties, and became an annex to them due to the concerns of some countries that the Charter might open up an avenue to weaken the national governments' position with regards to their citizens through its potential interpretations by the CJEU. The UK felt particularly uneasy with this catalogue inferring a threat of spillover of some continental economic and social rights through the Charter as well as was wary of more prescriptively enshrined rights, as compared to the common law principles. The UK, along with Czech Republic and Poland, insisted on a guarantee that citizens in their states would not gain new rights through the Charter. Such guarantee was granted in Protocol 30 of the Lisbon Treaty (Buonanno and Nugent, 2013:246-250).

Soon after the drafting of the EU Lisbon Treaty, the UK Conservatives, at odds with the history, became uncomfortable with commitments to another international rights catalogue

[66] There were issues with the implementation of this and another EU law – ePrivacy Directive – in the UK. In 2009, an infringement proceeding was opened by the Commission in relation to the use of some tracking and behavioural advertising technologies by the ISPs (EC, 2009).

– the ECHR[67]. The proposals as radical as the withdrawal from the above Convention and the replacement of its national transposition with a new national law have been propagated by the conservative forces since around 2010 (UK Parliament, 2010; Klug, 2012; Mignon, 2012). This became part of the Tories' manifesto in the 2015 elections (Watt and Bowcott, 2014).

The time of drafting of the GDPR coincided with the height of the debates around the proposed "EU in or out" referendum – the so-called Brexit – in the UK political agenda that in June 2016 resulted in the vote to leave the EU. The Conservatives aligned themselves with what was the main message of the populist one-issue UK Independence Party, as the latter started gaining more relevance in the British political landscape (Winnett and Mason, 2013; Hunt, 2014). Since the new EU data protection law was designed as a directly applicable Regulation leaving much less leeway for the MSs in its implementation, it clearly clashed with the general political climate in the country and the government's course of "getting the powers back from Brussels". Similarly to the negotiations on the Directive 95/46/EC, the UK position was determined by various motivations: from opposition to concrete elements of the GDPR, some of which the "right-to-be-forgotten" (Bowcott, 2013) or breach notifications (Corera, 2013), to the overall architecture of the law. The UK, based on the common law perceptions, wanted a concise piece of law[68], while the majority of the MSs, coming from the continental civil law

[67] Winston Churchill, the Second World War time British Prime Minister, is viewed as one of the main initiators and visionaries of this Convention as well as of the related institutions – the Council of Europe and the ECtHR (Commission, no date), "to hold states to account by a higher judicial authority upholding a European-wide set of values" (Klug, 2012). The drafting of the Convention "was heavily influenced by British lawyers" (Mignon, 2012). Churchill was envisaging that building of a "United States of Europe" would help "to eliminate the European ills of nationalism" (Commission, no date) that led to two very atrocious wars in the 20th century.

[68] In this regard, even the British Information Commissioner criticised the GDPR as "too dirigiste" and that "regulation that is a to-do list" is not suited for Britain (Christopher Graham quoted in Oltermann, 2013a).

perspective, preferred more detailed rules (interview with national Ministry of Justice official, 18 March 2015). The above-mentioned EU membership issue and the on-going power contest between London and Brussels also shaped the British position in the GDPR negotiations in its preference for a Directive instead of the Regulation. However, the majority of the MSs did not agree with the UK stance and preferred a Regulation. In the process, the UK influence declined, as its steady opposition deterred other MSs from paying much attention to its demands, and even the Council Presidencies started putting less efforts in accommodating its preferences (interview with national Ministry of Justice official, 18 March 2015). Thus, as it can be seen, the UK attitude driven by domestic politics proved to be counterproductive for this MS in the negotiations. Later, as business stakeholders favoured a Regulation as the instrument and, accordingly, greater harmonisation, the UK changed its position (interview with EU official D, 27 February 2015, Brussels; interview with national Ministry of Justice official, 18 March 2015). There was also realisation that "this law is inevitable, it is going to happen", so the British negotiators started opposing less in general to a Regulation. Even though, "for the UK it is also politically difficult to sell some aspects of this reform at home, for the UK 'symbolism' is difficult", where more EU competence is involved, e.g. as in the case of the EDPB (interview with EU official D, 27 February 2015, Brussels). This "symbolism" can be clearly inferred in the UK's statement as the Council voted to adopt the GDPR, where it expressed the intention to "make use of the available discretion for [MSs] to implement the regulation domestically in an appropriate way" (General Secretariat Note, 2016b).

The UK example covered here shows how competition between domestic political forces, unrelated to a particular issue-area in question, may feed into the EU-level policy processes in that specific sector. The Brexit discourse was the case of the so-called "referendum game", mentioned in Section 3.5 on the rational choice institutionalism, that affected the

country's stance in the GDPR stipulation process. This Subsection also aimed to explain that the recent "referendum game" in the UK was not a random development and that this country has always represented a "hesitant" MS (see Taylor, 2003: 99-134). Moreover, as it can be seen from the calls of withdrawal from the EHRC, the UK isolationist politics is not limited to the EU and problematisation of any international commitments and fora can be used to gain more weight domestically. The first paragraph examples show that the same forces that advance nationalist rhetoric benefit from integration and the institutions that govern them. These tendencies – that integration does not in essence weaken domestic forces – were discussed within the consociational paradigm.

6.6.2 Germany – preference formation is much more than the country's data protection and federalist profile

The part Germany played in the GDPR formulation has been very controversial. It is a country with a strongly embedded data protection culture, a lot of expertise in the field, very vocal and active DPAs, and a country behind the development of the influential concept of the "informational self-determination" that has played an important role in the development of the data subject rights (Hornung and Schnabel, 2009; Coleman, 2014; Moody, 2015). Germany can be also perceived as a pro-integration MS (Taylor, 2003: 99-134), as opposed to the above discussed UK example. Given these dimensions, this country's input in the GDPR deliberations could have been expected as facilitating, which was not the case. The mismatch between the public official rhetoric in favour of strong data protection and the actual position brought to the GDPR table has been noticed several times (Fleming, 2013d; Scally, 2015).

Germany had been from the beginning very unhappy with the Commission proposal and had been gradually accepting it, as with the question of the public sector on which

compromise was found in December 2014 (interview with EU official B, 13 February 2015, Brussels; see Section 4.5.3). One of the issues related to Germany's position in the negotiations originated from the regional (länder) level, and the reluctance of the local administrations to give competence to legislate on the federal level to the EU. Another big factor was that in Germany data protection is settled in the Ministry of Interior which had been run for some time by conservative ministers who, as it can be expected, tended to be "more industry-friendly than in favour of fundamental rights and privacy" (interview with EP source B, 5 February 2015, Brussels). Besides, the minister who was in post till late 2013 did not seem to have a particular interest in data protection matters and seemingly favoured self-regulation. The situation changed to some extent when another minister took office. While the German proposals remained still industry-friendly in substance, the Ministry started engaging more with the data protection dossier and interacting with various stakeholders. Also, under the new minister, Germany started showing a more constructive approach in finding a compromise in the Council and to that end the DAPIX delegation was changed (interview with EP source B, 5 February 2015, Brussels). Germany was supporting some controversial proposals in February 2015 to relax safeguards on purpose limitation, fairness and lawfulness of processing. For instance, Germany's concern that the GDPR provisions would "not hamper direct marketing or credit information services" features in some of the Council documents (Latvian Presidency Note, 2015a; Latvian Presidency Note, 2015b).

The German example importantly shows that, while a lot of attention was focused on the attempts of big tech-industry players, often American companies, to prevent stronger data protection standards from getting into the GDPR text, the role of other – both public and business - domestic actors should not be underestimated in the formation of the national preferences. In Germany's case it could also be seen that several dimensions relevant to the

sociological institutionalism, such as the country's "data protection culture" and ideological (in this case conservative) adherence may be competing in determining policy choices.

6.7 Time, timing and timeliness: how the EU data protection reform was affected by its timeframe

As mentioned in Section 3.6, time is an important variable that may determine the context and fate of a policy initiative. In some cases, even a short difference in time may lead to a reconfiguration of political factors and personalities at the negotiations table to produce different results, like this happened with the process of "communitarisation"[69] of the JHA issues while drafting the Lisbon Treaty (Donnelly, 2008:20-21). Besides, time is "a scarce and valuable resource of policymakers" who "operate under significant and varying time constraints" (Ackrill *et al*, 2013:872). The time dimension played out in various ways for various actors involved in the process and for this dossier as such.

The EU data protection reform has been often referred to as long overdue (e.g. see BEUC, 2015b). For instance, according to the EP rapporteur Jan P. Albrecht this reform was 10 years late already at its starting point given "the realities out there" (CPDP, 2015). The Commission reports of 2003 and 2007 on the implementation of the Directive 95/46/EC stated a number of issues, including tangible divergences and deficiencies of its enactment between MSs. However, until 2009, when the preparation of a new EU data protection framework started, it preferred corrective measures rather than amending the Directive (Hustinx, 2014:24-25). The end of the Commission mandate in 2009 shifted its proposal to

[69] Inclusion into the "Community method" remit, by means of which most EU decisions are taken. It is characterised by the use of the ordinary legislative procedure when the Council and the EP act as co-legislators. It also assigns an exclusive agenda-setting role for the European Commission and significant powers for the CJEU. It involves the use of qualified majority voting in the Council.

be issued later – “it is always difficult to draft such big reforms when the term is nearing the end” (interview with EU official D, 27 February 2015, Brussels). The newly appointed Commission seemingly had a stronger human rights agenda (Hustinx, 2014:25).

Since 2009 onwards, there were a number of developments on the timeline to enhance the realm of fundamental rights in the EU and to have an effect on drafting the GDPR. “A considerable emphasis on the protection of fundamental rights” was placed with the new institutional framework brought along with the Lisbon Treaty that entered into force at the end of 2009. Amongst others, it enshrined a specific right to the protection of personal data in Article 8 of the Charter, which became legally-binding, and a new horizontal legal basis in Article 16 of the TFEU, providing for comprehensive protection to adopt rules on data protection regardless the policy area (Hustinx, 2014:27). The Commission draft GDPR proposal issued later in 2012 built on this new legal basis.

> “The data protection reform package is the first legislation proposed since the entry into force of the Charter of Fundamental Rights of the European Union in 2009 that explicitly aims at comprehensively guaranteeing a fundamental right, namely the fundamental right to data protection” (FRA, 2013:104).

The effect of the norms being enshrined in the EU primary law, e.g. purpose limitation, was tangibly felt in the shaping of the GDPR, as they prevented some of the most dangerous to the users’ rights proposals, such as possibility of further incompatible processing of personal data (see Section 4.4), getting into the final text of the law.

The Lisbon Treaty and the binding status of the Charter increased the CJEU competences in the field of human rights (Douglas-Scott, 2013:160-163). While the absence of an explicit legal basis for the rights to privacy and data protection arguably did not allow to fully take advantage of the Directive 95/46/EC potential, making the CJEU reasoning and rulings somewhat cautious in the pre-Lisbon era, the effect of the above two institutional

developments was soon felt in the Court's decisions that were taking a bolder stance on data protection (Lynskey, 2013). Several landmark rulings (see Section 6.4), whose timing coincided with the deliberations on the GDPR, along with the Snowden revelations in 2013 and later (see Section 6.3), were developments that can be interpreted as "focusing events" in the process (discussed in Section 3.6).

Further considerations pertain to how different actors are affected by the timeframes posed by the rules and policy delivery tasks that are set. While there are time limits that the ordinary legislative procedure, applied to the GDPR, sets to further stages, if they are needed, there are no time limits neither for the EP's first reading nor for the Council's first reading (EP, no date). Nevertheless, the two institutions found themselves in different situations. Differently from the Council which could afford more time for the 1st reading discussions, the EP was constrained by the 2014 May elections, i.e. the end of its mandate, which was a mobilising factor. The Commission was another institution pressed by the 2014 end of mandate and very keen on the adoption of the GDPR by the 2014 EP elections. This file was one of the Viviane Reding's top priorities. She was in office as the Justice, Fundamental Rights and Citizenship Commissioner when the reform proposal was released, and took a very proactive and vocal role in the process (Hustinx, 2014:25). Towards the end of the process, though, and in particular when the trilogue phase started, all the three institutions were under similar pressure to find the interinstitutional political agreement by the end of 2015 due to the related calls from the European Council and the salience of the EU data protection reform for the creation of the EU Digital Single Market, completion of which originally was set by 2015 and later moved to 2016 (e.g. see European Council, 2013:3-4; European Council, 2015). These political and institutional constraints prevailed over the calls of business stakeholders not to adhere to "self-imposed" deadlines in order to allow more time for getting the content of the reform right

(EDC, 2015b). Finally, another interesting observation to make, is how the timing when proposals are introduced matters in the outcomes of the negotiations. For instance, more than 10 MSs were against the incompatible further processing clause (Latvian Presidency Note, 2015e:102, footnote 178). It, nevertheless, was introduced into the Council text and the issue was left for the trilogue, when it was discussed anew, so that the adoption of the General Approach would not be hindered (interview with Permanent Representation official B, 3 February 2016, Brussels).

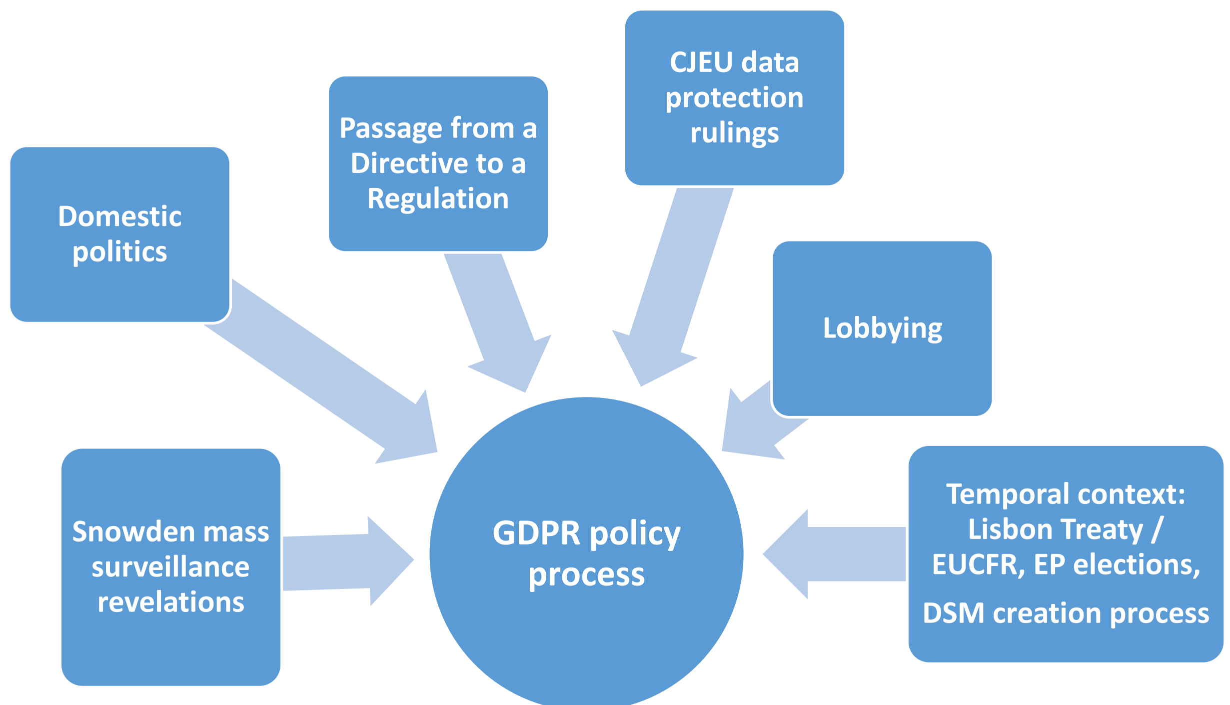
Time is a dimension central to the historical institutionalism perspective. Previous arrangements create and determine path dependencies that have an impact on subsequent policy outcomes, as it could be seen from the impact of the Lisbon Treaty on this particular dossier and this issue-area in general. As it was seen from the EP elections and the delivery of the Digital Single Market, to which the data protection reform was linked, decision-making actors' behaviour is strategically projected into the existing timeframes and these can be important variables in the policy process and outcomes.

6.8 Conclusions

This Chapter aimed to cover a number of factors deemed essential to complement the analysis in the two previous Chapters and to better explain links between the actors' motivations and the actual developments in the policy process. External influences, for instance the international political climate as in the case of mass surveillance revelations (Section 6.3), or the dynamics of lobbying (Section 6.5), played out differently with diverse decision-making actors. This was due to their interests of asserting themselves in the political landscape, the existing political commitments and values prioritised in each case, as well as the institutional setting of the GDPR policy process, reinforced by the landmark CJEU judgements infusing data protection-oriented parameters (Section 6.4). All

these variables have been important in forming the actors' positions and shaping the balance of interests. As the section on the transition from a Directive to a Regulation (6.2) and the section on domestic politics show (6.6), the process of the GDPR negotiations was shaped by the power contest between national and supranational levels as well as by the competition between domestic forces. The discussion in the last section (6.7) implies that the context of a particular timespan in which decisions are made is an important factor to be considered in understanding policy outcomes. Figure 2 below provides a summary of the main factors in the GDPR policy process examined in this chapter.

Figure 2. The main factors that have influenced the GDPR policy process



Source: Author's compilation.

CHAPTER VII

Conclusions – GDPR: a unique policy dossier, but politics as usual?

7.1 Introduction

This final chapter summarises the analysis of the policy process of adoption of the GDPR laid down in the empirical chapters IV, V and VI. It provides the synthesis of the findings based on the research questions that this study strived to answer. These research questions focused on

- the EU policy process dimensions and actor constellation in the debate that surrounded the formulation of the GDPR between January 2012 and April 2016 (research question 1);
- the interests and the strategies of the policy stakeholders in influencing the EU data protection reform (research question 2);
- and the factors that determined the course of the policy process and the ultimate balance of stakeholder interests in the GDPR (research question 3).

This thesis argues that (1), despite not meeting entirely the initial expectations, the Internet users' rights to privacy and data protection were strengthened in the GDPR; (2) that the institutional factors were key in determining the policy outcomes; and (3) that there was a tangible state-centric shift in the power balance between the data protection governance design in the original Commission's proposal tabled in 2012 and the outcome of the reform finalised in spring 2016, where many national discretions were introduced and the powers of the national DPAs preserved. Below a more detailed reflection on these findings is offered, linking them to the analytical strands (consociational paradigm, policy networks and new institutionalism) that this research drew upon.

7.2 Explaining the GDPR policy process

The formulation and adoption of the GDPR underwent a very intense policy process that, despite many tensions, as mainly presented in Chapter IV, was finalised in spring 2016. The Commission's reform proposals tabled in January 2012 were introducing a set of new rights, a stronger liability and accountability regime as well as governance innovations and further Europeanisation in this issue-area. Many GDPR aspects were substantially altered across different decision-making venues, i.e. during the Council and the EP deliberations. This resulted in various gains and losses for the stakeholders.

The competing policy networks - privacy advocacy coalition of consumer, digital and civil rights organisations (covered in Section 5.8) and data-reliant businesses, among which the US and European digital companies (Section 5.9) – had similar strategies and footprint. These strategies included, amongst others, direct liaising with policy-makers, preparation of position papers, writing open letters, and participation in public debates. Similarly, the footprint of these two main competing policy networks span across national, pan-European, and transatlantic dimensions. The policy goals of these groups were mainly polarised in the GDPR case, with imbalanced availability of resources (Section 6.5). For instance, only a few digital and civil rights NGOs were able to consistently engage with the GDPR dossier, as compared to a whole host of tech industry and some other industries' lobbyists. However, their views were congruent on some elements of the reform proposals, such as the opposition to the Commission's empowerment through a very large number of delegated and implementing acts (see Subsection 4.5.2) and higher harmonisation expectations (see, for instance, Subsection 4.5.1). The industry's campaign to relax data protection rules in the GDPR was enhanced by the presence of such an actor as the US government in the process that was advocating for the same policy direction. The outcome

of the reform does not, however, reflect such a configuration of forces. While the final GDPR text was not as ambitious in terms of the users' rights protection as envisaged at the outset of the reform, there was, nevertheless, more disappointment in the industry feedbacks that spoke of the formulated regime as being too restrictive. Institutional factors, such as specific internal institutional dynamics and how institutional actors endeavour to position themselves with regard to the other actors (mainly discussed in Chapter V), and the overall political context, notably the salience of the data protection issue-area, played an important role alongside various advocacy efforts.

The policy process was influenced by some unique factors, specific to this policy dossier, which are not generalisable in that their presence and impact were more circumstantial rather than indicative of certain underlying processes. These include the gaining of the rapporteur position by the Greens – a strong pro-privacy group in the EP (Section 5.3); the Snowden revelations (Section 6.3) – an autonomous external development that made on-line privacy issues more prominent in the political agenda; the CJEU rulings acting as autonomous internal EU developments (Section 6.4) setting data protection-oriented parameters for the EU policies; the particular technical complexity of this file, and others.

Other factors that are significant in understanding the GDPR policy process can be viewed as part of the dynamics of the EU integration processes and related interactions between national (including subnational) and supranational levels. Related core actors, their interests and interactions have been mapped in Chapters V and VI. The EU-level actors, such as the Commission, the EP and the CJEU are generally inclined to promote the European integration, albeit not necessarily always in concert, and compete for influence among them. National realm actors, such as national governments and DPAs, weigh the benefits of integration against adjustment costs and sovereign decision-making related

trade-offs. At the EU level, they have been collectively acting through the Council of Ministers and the WP29, respectively, which, nevertheless, should be viewed as fragmented fora in terms of the individual interests articulated there.

The focus of this study was on the EU-level policy process, taking the EU as a unit of analysis, where a vast number of supranational institutional actors were involved in shaping the GDPR, such as the Commission, the EP, the Council, the CJEU, the EDPS, the WP29, the FRA, etc. Depending on issues, there have been shifting coalitions between the institutional actors. Overall, the Council and the EP had similar views regarding the lessening of the Commission's powers aspired for in the initial proposals. However, the Council was in support of the Commission for stipulation of adequacy decisions as implementing acts instead of delegated acts which entail the EP veto prerogative. Other stakeholder interests (civil society and business) were articulated through European-level coalitions and associations.

Application of the consociational analogy as a macro-level paradigm was useful for the analysis of the GDPR political process in understanding the accommodationist politics on which the negotiations in the Council were based: consensus ("nothing is agreed until everything is agreed") was sought despite the majority vote procedure that this dossier was subject to. The difficulty to agree on this file can be aligned with other features of this state-centric theory, such as cross-cutting cleavages and heterogeneity of national contexts as well as high degree of autonomy of the composing units. As discussed in Subsection 4.5.1 and Section 6.2, at odds with the purpose of stipulating a Regulation that aims at the highest possible degree of approximation of national laws, a lot of autonomous decision-making was maintained through the multiple exceptions in the GDPR to adapt to individual national situations. Decision-making sovereignty was also an issue in endorsing

the one-stop-shop mechanism by the MSs (covered in Subsection 4.5.4), which was altered to preserve the powers of national DPAs and to curb exclusive competence conferrable on the lead authority. The above aspects of the process are also a combination of rational choice and sociological institutionalist elements. The rational choice perspective pertains to the effects of actor interests defended in the light of altering authority landscape that this reform was bringing about within the 2012 proposals. The sociological dimension is linked to the differing domestic political economies and ideologies. The GDPR stipulation dynamics were not limited only to the specificity of the data protection sector, i.e. the pre-reform patterns of its governance at the national and supranational levels, but was also determined by factors unrelated to data protection, such as unwillingness to delegate more powers to the Commission by the Council and the EP, while the Commission had tried to increase its powers. The tensions around distribution of oversight powers and progressing integration observed during deliberations on the GDPR can be similarly observed in other areas, such as in the proposals for regulation of telecommunications, for example (Simpson, 2009; Stupp, 2016)[70].

There are many important historical institutionalist dimensions pertinent to the recent data protection reform. Primarily, the way for the current policy course was paved by the Directive 95/46/EC – the first EU-level data protection legislation – which has left a very strong legacy (see Section 2.5). The creation of this instrument in the 1990s, enacting protection of a fundamental right to privacy, marked a very important structural shift from predominantly economic focus of the EU activities to a more political integration (Simitis,

[70] However, different models of centralisation have been pursued by the Commission in the two areas. While in the case of the GDPR the Commission was not supportive of a creation of an EU agency due to related costs and the time needed, but was pushing for a streamlined oversight model through the so-called one-stop-shop, an upgrade of the WP29 into the EDPB, and an ultimate “backstop” decision-making power for itself (see Subsections 4.5.2 and 4.5.4, and Sections 5.2 and 5.5), in the telecoms sector it has been trying to install an actual EU-level agency for about a decade now. More Commission powers in both cases have been opposed by national regulators, the Council and the EP.

1995). Internationally, it has influenced privacy protection regimes in many countries. As mentioned in Section 4.4, Directive 95/46/EC was playing the role of a threshold in assessing the acceptability of the new rules that were expected not to go below the level of safeguards enshrined in this law. The GDPR proposal inherited most of the content of the Directive and happened to reflect another shift in the EU institutional order, as it was a piece of legislation pioneering the enactment of the Charter and the new Article 16 TFEU on the protection of personal data in the Lisbon Treaty (see Section 6.7). The existence of the Directive, later also in combination with the Charter, produced a host of CJEU case law that also influenced data protection reform (as discussed in Section 6.4). Finally, as highlighted in Section 1.1, the content of the GDPR has set a new precedent, too, by introducing a series of innovations, such as the “right-to-be-forgotten”, the right to data portability, privacy by design and default, as well as by taking the accountability, liability and enforcement regime to a whole new level.

While this study was not focused on comparing the stipulation of the Directive 95/46/EC with the process of adoption of the GDPR, some aspects available in the academic accounts on the Directive 95/46/EC compare meaningfully with some of the findings related to the current reform. This alignment reveals certain tendencies that, based on their repeated presence, can be termed as long-standing and indicate an unaltered landscape of actor interests and power. One of such tendencies was the attempt to centralise Commission oversight powers in the initial drafts that failed in both cases and were reduced to the minimum through the EP and, in particular, through the Council interventions (see Bignami, 2005: 838-839 for the Directive and Section 5.2 for the GDPR). Another similarity can be drawn with regard to the Southern European MSs’ inclination towards a more rights-based approach versus the more pro-business position of many Northern MSs during the revisions of the GDPR proposal (see Section 5.4). This

broad conceptual privacy policy divide between the Northern and Southern countries was felt when the Directive came into existence, too (Princen, 2003:151; Bignami, 2005: 841-845). Furthermore, despite a different institutional, political and economic setting, the drafting of the Directive 95/46/EC was as contentious as the GDPR deliberations – both processes had undergone a phase when speculations were made regarding the potential failure of these dossiers altogether (see Simitis, 1995 for the Directive and Section 4.3). Despite being a much longer law and negotiated among a significantly larger number of MSs, the coming into being of the GDPR took slightly shorter than the Directive, which was accomplished in five years. The contrasting MSs preferences were very difficult to converge already in the 1995 Directive, which was an instrument which granted a certain room for manoeuvre to the MSs during the implementation phase. This notwithstanding, the GDPR's predecessor was perceived as too open-ended (Simitis, 1995). While already building on the initial degree of harmonisation introduced by the Directive, and also tabled for the negotiations with even higher ambitions for harmonisation, since the new law was proposed in the form of a directly applicable Regulation, the current data protection reform, as mentioned above, did not escape the issue of derogations. In fact, as analysed in Subsection 4.5.1, the degree of flexibility clauses in the GDPR ended up being so excessive that it placed this new legislation somewhere between a Directive and a Regulation, marking probably also the least achieved goal in terms of the reform ideas. The reasons behind these derogations vary, with some being more political ones as, for instance, exceptions in Article 23 for national and public security, and the others, such as in Article 80 on collective redress, can be linked to the very unequal adjustment costs across MSs, due to the presence or absence of related national laws (discussed in Section 5.7). As it can be seen, here the historical institutionalism perspective overlaps with the rational choice one, i.e. previously adopted policies or their absence may shape the

strategic interests of the actors. However, despite these weaknesses, further unification of data protection rules still occurred on the whole, and the replacement of the Directive by a Regulation can be viewed as an incremental historical policy development in the EU.

Another interesting side concerning historical processes has to do with the presence of such actors as the WP29 and the EDPS and their prominent role in the debates surrounding this data protection reform (see Sections 5.5 and 5.6, respectively) that is a result of previously made policy decisions through which these institutions emerged. The process of adoption of the GDPR encompassed a growing institutional significance attributed to these actors. Their functional mechanism has been consolidating with the establishment of the EDPB, although the actual powers of this new body were far from having been architecture in a straightforward fashion. Many of these powers were repositioned by the EP and the Council from the remit of the Commission, as in its draft proposal of 2012, to the remit of the DPAs' authority and their collective decision-making within the EDPB. While the EDPS, representing a unique European perspective in privacy matters, has already been part of the WP29 predominantly formed from national DPAs, the further merger of the two realms can be envisaged in the move of the WP29 secretariat from being provided by the Commission to being provided by the EDPS. It is very interesting to see how this convergence and the consolidating institutionalisation of the EU network of DPAs, taken to another level in the form of the EDPB now endowed with legally-binding powers, will be developing in the future, and whether it will ever evolve into an EU Data Protection Agency. The idea of a need of such an agency, which has been around since the 1990s (Simitis, 1995; Newman, 2007), was reiterated recently during the discussions on the one-stop-shop mechanism, but has been long resisted by the national DPAs and many MSs governments. It was not at this stage aimed for by the Commission, either (see Section 4.5.4 and Commission, 2013a; Van Quathem, 2015). It is interesting to note that very

similar processes have been occurring in the construction of the regulatory governance in the telecoms sector, where, about a decade ago, unsuccessful Commission proposals to move from the networked EU governance to a more centralised one under the European Electronic Communications Market Authority where opposed by the national regulators, the EP and the MSs (Simpson, 2009). Currently similar centralisation proposals that would entail the replacement of the Body of European Regulators for Electronic Communications[71] by a European agency have been revived by the Commission, but again do not seem to be welcome by other actors (Stupp, 2016). While the presence of the networks of national regulators directly link to the policy networks perspective and the role of epistemic communities in the policy-making, since, as mentioned in Section 5.5, even in institutionalised regulatory networks such as the WP29 there is also a significant amount of informal policy coordination, the governance through two-level regulatory networks, "even regarding policy deliberation which occurs in European level contexts", predominantly encompasses the elements of intergovernmentalism (Simpson, 2009:7; see also the Commission referring to the EDPB (the upgraded WP29) as to an "intergovernmental club" in Commission, 2013a). Thus, it reinstates the state-centric paradigm that this thesis draws on.

Sociological dimensions also played an interesting role in the process of the GDPR negotiations. Different national contexts and varying institutional adherence in the Council delegations were affecting the course of the talks. Very different sociological dynamics has been observed within different institutional venues, e.g. the Council with more formally unfolding deliberations, and the EP and the WP29, where there is more social cohesion (Section 5.4). Further, such an attribute as technical expertise has been a source of

[71] that similarly to the WP29 transition to the EDPB evolved from the advisory European Regulators Group for electronic communications.

authority and influence in the process for such actors as the DPAs and the EDPS formally playing mainly an advisory role at the EU level.

Of all the strands of the institutional theory, the elements of the rational choice perspective, looking into the interplay of strategic interests and the power contest, were the most significant in explaining the process of adoption of the GDPR.

7.3 Conclusions

This study finds that, in congruence with the state-centric paradigm applied to this research, the process and the outcome of the GDPR drafting was hugely influenced by the national cleavages in this policy area and the MSs' sovereignty concerns. This manifested itself in the process of transition from a Directive to a Regulation which, even though it took the degree of harmonisation further, resulted in extraordinarily numerous derogations, and in the difficulty of agreement on the one-stop-shop mechanism and the public sector in the Council negotiations. There has been a substantial repositioning of decision-making powers that shifted from the Commission to the WP29 reborn as the EDPB pursuant to the adoption of the GDPR, maintaining a decentralised data protection oversight model that is, at the same time, more state-centric. It can be argued that the DPAs accrued most gains from the reform in terms of their power base and the degree to which the implementation and enforcement of the GDPR will rely on their functions and toolbox. Individual rights, after a very intense drafting process balancing between a risk-based approach promoted by the Council and a more prescriptive approach advanced by the EP and the Commission, have been upgraded, although not to the extent expected in the original proposals. The EP's role was very significant in defending a stronger data protection regime and together stronger users' rights. This institution was behind one of the most prominent outcomes of the reform – the level of fines imposable for data breaches – with which, alongside a

number of other provisions, the GDPR has set a new global precedent in data protection. The institutional factors – the internal dynamics within the main EU institutions, and how they are located and strive to position themselves in the processes of the EU integration – played a decisive role in influencing the outcomes of this reform. Therefore, while in many aspects the GDPR stood out as a particular policy dossier, it was nevertheless part of various processes of "politics as usual".

The research accomplished for this thesis brought to the fore some interesting phenomena worth a more in-depth exploration that could not be offered due to the comprehensive nature of this study, its scope and limited resources. These, however, provide some important indications for future research. Among some of the subjects for further research to be considered as dedicated stand-alone studies are the complexity of the Council deliberations revealed in this analysis, the controversial position of Germany in the GDPR negotiations that contrasted with the expectations based on the country's strong data protection culture, the evolving and multi-faceted governance model surrounding the role of the DPAs and the politics around it.

ANNEX

List of the interviews

Interview with EP source A, 21 January 2014, Brussels;

interview with privacy advocacy organisation representative, 10 July 2014, London;

interview with Permanent Representation official A, 20 January 2015, Brussels;

interview with national data protection authority official, 22 January 2015;

interview with EU official A, 29 January 2015, Brussels;

interview with EDPS official, 30 January 2015, Brussels;

interview with EP source B, 5 February 2015, Brussels;

interview with EU official B, 13 February 2015, Brussels;

interview with EP source C, 16 February 2015, Brussels;

interview with EU official C, 23 February 2015, Brussels;

interview with EU official D, 27 February 2015, Brussels;

interview with national Ministry of Justice official, 18 March 2015;

interview with European digital rights organisation representative, 8 December 2015, Brussels;

interview with international digital rights organisation representative, 8 December 2015, Brussels;

interview with European consumer rights organisation representative, 11 December 2015, Brussels;

interview with EU official A, 01 February 2016, Brussels;

interview with Permanent Representation official B, 3 February 2016, Brussels;

interview with EP source B, 4 February 2016, Brussels;

interview with EP source C, 8 February 2016, Brussels.

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