The Issue of Privacy in the European Union

Controversies of the General Data Protection Regulation

Espen Berg-Larsen

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Espen Berg-Larsen

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Summary

The processing of personal data has been one of the most widespread uses of computers ever since the invention of the first electronic tabulator. The issue of data protection has bubbled to the surface at several points in history as different publics have been indirectly affected by the use of technology to gather, process and share personal data with, or without individual consent.

In 2012 the European Commission set out to reform the data protection framework in Europe by proposing a Directive and a Regulation for the protection of personal data. This thesis examines how the issue of data protection emerged, and how data protection was put on the agenda in Europe. In particular, this thesis considers how the European Commission and other actors have attempted to frame and reframe the controversies of the General Data Protection Regulation (GDPR) in order to reach a consensus on the proposed legislation. According to the European Commission the GDPR is the most lobbied piece of legislation in the European Union.

This is a qualitative study that applies STS-resources within the study of controversies, issue formation and risk to understand how the GDPR comes into being in the context of the technological progress in the ICT-field. My empirical material is a combination of interviews with key actors within the European Parliament, the European Commission and both non-governmental and business lobby, as well as analysis of lobby documents, proposed legal texts and media coverage of the process.

The way the existing institutions have proved unable to deal with the issue, combined with how the technological advancements have paved the way for even more invasive use of technology has sparked public involvement in the political processes.

The different understandings of the controversy, and how data protection affects society and economic performance has caused many actors to get involved, causing a “hot situation” where everything from scientific facts to perceptions of good and bad are disputed.

By looking to theories of risk and reflective modernity I also show how the introduction of data protection can be seen as a way of handling the unintended consequences of technological progress within ICT, and how the GDPR is an attempt at managing technology and mitigating risks.

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1 Introduction

1.1 Background

Data protection is one of the “hot potatoes” in Brussels, and in European politics in general these days. The European Union is about to undergo a data protection reform, harmonising the data protection legislation in all member states. The proposed General Data Protection Regulation is the most lobbied legislative proposal in the history of the EU (Gencarelli, 2015). Through the EEA-agreement the GDPR will also apply to Norway, Iceland and Liechtenstein.

The technological progress in the ICT sector has been unprecedented the last 30 years. The ongoing digital revolution has created opportunities and is about to radically change the ways we live. It is predicted that the use of Big Data and related technologies will revolutionise our lives and change how we relate to one another (Mayer-Schönberger & Cukier, 2014). But some of the downsides of the technological development are also becoming visible. Lately there has been many scandals related to both private and government surveillance, hacker attacks directed at companies with databases containing large amounts of personal data, and unlawful collecting and processing of data through the use of digital services. The “Snowden leaks”, revealing the systematic collection of data by the surveillance programs of both the United States and some European governments, of citizens on both sides of the Atlantic ocean came as a huge blow to both decision makers and lay people all over the world. These revelations have acted as a game changer to the ways we think about data protection.

The omnipresence of the devices and gadgets that gather information about individuals and their behaviour, along with the government and private use or misuse of this data has triggered a debate about the role of technology in society and data protection. Personal data is the raw material in a growing digital economy, and there appears a controversy in the intersection between data protection and economic growth, where some claim that strong data protection will hamper economic growth, others claiming the increased trust in digital services will boost the economy.

The IT-sector is a rapidly growing part of the economy, and there is a lot at stake when the European Union seeks to change the data protection legislation. There are many actors involved in this process, and a ranging set of interests to take into account. The starting point of this analysis is thus to investigate how the GDPR comes into being in the context of the technological development, the legislative process and the side effects of the use of personal data.

1.2 Research questions

The vast technological progress in the ICT-field is one of the driving factors of the economy. The digital revolution brings hope and promise of a better future, but it becomes evident that it also produces a series of risks that need to be mitigated. Using theories and perspectives from the field of STS-research I will follow the legislative process of the proposed GDPR in the European Union to see what triggered the need to update the legislation, who the actors influencing the process are and how consensus is reached. How does data protection legislation come into being in the context of technological development? Consequently, my research questions are the following:

1. How does data protection become an issue?

2. How are data protection issues framed and reframed, to reach consensus on the legislation?

3. How is data protection a way of handling the side effects, or unintended consequences of technological progress?

My aim here is not simply to see who puts an issue on the agenda, but to uncover how a web of actors are taking part of the controversies that are emerging in the process, and how these controversies are closed. Inspired by theories from the STS-field I investigate how the issue of data protection is treated in Europe.

1.3 Structure of the thesis

In chapter two I will give an introduction to the theories I will apply to analyse my empirical material, and provide the tools to find answers to my research questions. I am mainly using STS-resources on issue formation and the study of controversies, but towards the end of the thesis I will also explore the issue of data protection inspired by a risk perspective and reflexive modernisation theory. In the second part of chapter two, I will explain how I have used a qualitative approach to my empirical material, my choice of informants and the ethical considerations of this approach.

In chapter three, I will present my case. To understand where privacy legislation comes from I will begin with an introduction to the vast technological change that has brought about a debate about privacy. In chapter 3.2 I will give a brief historical overview on privacy legislation. I will look at the reasoning behind the early privacy laws in Europe from the 1970's, then seeing how the understanding of privacy threats changes towards the 1990's, and finally the enactment of the 1995 Data Protection Directive that has been the core privacy legislation in Europe since then. Chapter 3.3 also provides an introduction to the principles of the Directive, and the established rules on data protection in Europe.

Chapter 3.4 presents how the European Commission proposed a data protection reform to be able to keep up with the technological development, harmonise data protection in Europe and pave the way for an innovative digital single market in 2012. The proposal can be regarded as quite radical, as it introduces several new principles and mechanisms to strengthen data protection that are explained in chapter 3.5. In 2015 the European Union is still negotiating on the wordings of this law. When investigating the development of the GDPR I will examine the documents and reports that have shaped the understanding of the threats and risks that the technology poses, the legislative texts, amendments and position papers, and perform interviews with key actors that are influenced by and trying to influence, the legislative procedure. In chapters 3.6, 3.7 and 3.8 I describe the legislative process explaining how various stakeholders and the media frame the issue, and how they lobby both the European Parliament, the European Commission and the Council of the European Union.

In the fourth chapter I apply the theories on issue formation to understand how the issue of data protection has appeared as an issue, articulated by the mass media, interest groups and the publics that are affected by the use of technology. I follow this with an analysis of the controversy and the strategies that are applied by the different stakeholders to heat it up, or cool

it down in chapter 4.2. In chapter 4.3 I use perspectives from the theory of reflexive modernisation and risk to explain the context of which data protection is a way of reducing the risks of information and communication technology, and its use. In the closing remarks I sum up my findings, and how they fit into the research traditions in STS. I also point to further areas of research within data protection and policymaking.

1.4 List of abbreviations

ALDE	Alliance of Liberals and Democrats in Europe
BEUC	The European Consumer Organisation
CoE	The Council of Europe
DPA	Data Protection Authority
DSM	Digital Single Market
EFTA	European Free Trade Association
EEA	European Economic Area
EU	European Union
EC	European Communities (Precursor to the European Union)
ECJ	The Court of Justice of the European Union
ECR	European Conservatives and Reformist Group in the European Parliament
ENISA	European Network and Information Security Agency
EP	The European Parliament
EPP	European People's Party
ICT	Information and Communications Technology
INTA	European Parliament Committee on International Trade
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of the European Parliament
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
S&D	Socialists and Democrats, group in the European Parliament
STS	Science and Technology Studies
TACD	Trans Atlantic Consumer Dialogue

2 Theory and method

Science and Technology Studies (STS) is an interdisciplinary field of research that has gained increased attention since the 1970's as a critique to the traditional understanding of scientific knowledge. At that time sociologists were reading Thomas Kuhn's (1962) "*The Structures of Scientific Revolutions"* , and realised that science is more than theories, it is made of practices and ways of doing, or organising the natural in particular ways (Law and Singleton, 2013 p. 2). STS examines the creation, development, and consequences of science and technology in their cultural, historical, and social contexts (Hackett et. al. eds. 2007). To understand science and technology as a social phenomenon has been a key trait of STS since the beginning. Science is no longer perceived as pure, free or independent. Science and technology creates reality rather than discovering it, or revealing it, and can no longer be separated from each other (Asdal et. al. 2007, p. 9).

There are several theoretical paths in STS, and in this chapter I will outline some of the theoretical perspectives I will utilise to understand my research questions.

There seems to be a mismatch between the technological advance and the ability and reflection to bear the consequences and handle the side-effects of this advancement. It is the response to the technological development within ICT that is in focus in this thesis.

> STS "occupies an enormous void, one created by a society that long ago committed itself to forge ahead full bore with scientific and technological advance, but never to forge ahead in developing the critical self-reflection such change seems to require" (Edge, 1994, p. 19).

Langdon Winner writes in *The Whale and the Reactor* in 1986, "For most people it is enough to know how technical systems are produced, how they are run, how they are best used, and how they contribute to that vast aggregate of blessings: economic growth." (p. ix). In this thesis, the issues and controversy at the intersection of technology, privacy and economic growth is examined using STS-perspectives.

As an entry point into understanding how and why data protection legislation is made in response to technological change I will examine the issue formation literature to understand why data protection has emerged as an issue worth addressing at different political levels, and I will

use contributions from controversy studies to understand how the issue gets settled. Towards the end I will look to the theory of reflexive modernity to put data protection in a larger context, as part of society's reflexes to minimise the consequences of technological progress.

2.1 Issue formation

To understand what issues are, and why issues are important to understand public involvement have gained a lot of attention in the field of Science and Technology Studies (STS) and studies of controversies. I will use the issue formation literature to shed light upon why data protection is an issue today, and what has made it an issue when data protection has emerged on the agenda previously.

> "The work of the world goes on continually without conscious direction from public opinion. At certain junctures, problems arise. It is only with the crisis of some of these problems that public opinion is concerned. And its object in dealing with a crisis is to allay that crisis". (Lippmann, 2002 [1927] p. 56)

STS moves away from the traditional understanding that public involvement in politics is mainly understood through the expression of public will in elections. STS scholars have emphasised that it is the issues that spark public engagement in politics. Noortje Marres points to the debate between the two 20th century pragmatists, Walter Lippmann and John Dewey who illustrates that democracy is a practice dedicated to finding a settlement of affairs. According to Marres (2005) they describe how democratic politics is a practice of issue formation. What triggers public involvement in politics is not the abstract notion of public will, but the settlement of issues that affect publics.

Critical to the STS-perspective is not only determining that issues spark involvement, but understanding how issues become issues. In a technological society it can be the consequences and effects of technology that appears as an issue. If this is the case, privacy and data protection might then become an issue as the consequences and side-effects of the technology becomes apparent. STS provides the tools to look at how issues become issues through the socio-ontological perspective of how different publics relate to the technology. STS is paying attention to how humans relate to objects, and how these attachments create publics. For Lippmann public involvement becomes necessary when the existing institutions fail to address or settle an issue. Dewey takes this concept of public involvement further and defines

the public that gets involved as actors, or groupings of actors that do not have direct influence over the issues (Marres 2005). According to Dewey (1991 [1927]) publics are indirectly affected by human action without direct influence over them (p. 15). “The essence of the consequences which call a public into being is the fact that they expand beyond those directly engaged in producing them” (p. 27).

Looking at the connection between how privacy issues appear and the GDPR may show how issues can play major roles in mobilising publics and triggering and shaping democratic decision making processes.

2.2 Controversy

STS started as a critique to the traditional understanding of scientific knowledge, and a has long tradition within the field of the study of controversies. Understanding science as social practices to find and agree upon knowledge is at the core of the study of controversies. Studying scientific and technological controversies is a question of agreeing upon knowledge. A controversy appears where there are differing opinions about what is correct and what is incorrect (Kall and Sundquist, 2014 p. 3).

Michel Callon (1998) distinguishes between “hot” and “cold” situations. In a hot situation everything becomes controversial, and in cold situations on the other hand, agreement is swiftly achieved. In a cold situation it is often enough to listen to the experts, or scientists as there is little dispute over the sources of knowledge. In a hot situation, like in the controversy of data protection, it becomes difficult to hold onto one single frame. There is no common knowledge base and a variety of actors understand the issue differently. There are disputes over who the experts are, over how data protection affects business or lay people, and what is most important, these “overflows” needs to be managed in order to reach an agreement (Callon, 1998 p. 12).

Framing is a process of creating agreement (Kall and Sundquist, 2014 p. 4) and reducing overflows (Callon, 1998 p. 12). Reducing overflows, reaching agreement helps cooling down an issue. When studying controversies it is interesting to see which actors contribute to cool down an issue, and what actors try to open up an issue to a broader public and heating it up again (Kall and Sundquist, 2014), and studying the different strategies they apply in an effort of containing or releasing overflows.

2.3 Technological risk and reflexive modernity

Theories of modernisation can help to get a better perspective on how society adapts to technological progress. The emergence of the unintended side-effects of the digital revolution, where the individual user is exposed to a growing number of risks are perhaps comparable to the production of risks described in a state of “reflexive modernity”. With the theory of reflexive modernity, Ulrich Beck, Wolfgang Bonss and Christoph Lau lay out a new analytical tool to look at the changes and meta-changes in society in the transition from a traditional modernity where boundaries between society and nature, knowledge and belief, or we and others are given, to a reflexive modernity where the given boundaries are thrown into flux. This does not mean that modernity ceases to exist, but that modernity radicalises and transforms in itself (Beck, Bonss and Lau, 2003). Where modern society sees itself (or is expected) of having reached a social form that will last forever, the very forces of modernisation seem to overthrow this by producing unintended side-effects.

> The continued technical, economic, political and cultural development of global capitalism has gradually revolutionized its own social foundations. In the transformation from a first modernity that was largely synonymous with the nation-state to a second modernity, the shape of which is still being negotiated. In so doing, modernization is calling into question its own basic premises (Beck, Bonss and Lau, 2003 p. 2).

The side-effects of modernisation are unexpected consequences of the progress in a modern society, and can lead to a radical change. This radical change is the transition from first modernity to reflexive modernity (Beck, Bonss and Lau, 2003). The word reflexive is not only to be understood in its traditional meaning, but refers more to the reflexes that are needed to cope with modernisation. The emergence of data protection legislation can be seen as a way of adapting to these changes in the information technology sphere, trying to minimise the unexpected side-effects of information technological progress and the use and processing of data.

2.4 Methods and delimitation

A qualitative approach entails studying written and spoken representations and records of human experience, and can be done using a series of different methods of data collection.

Through the case study of the GDPR, I will mainly use interview data and textual analysis, supported by some quantitative research.

The issue of data protection covers more than only the General Data Protection Regulation, and the data protection reform in the European Union also entails a new Directive covering the protection of personal data processed for the purpose of law enforcement (COM/2012/010). In this thesis I will not examine this Directive, or other pieces of legislation that also cover data protection, like the e-Privacy Directive from 2002 (Directive 2002/58/EC) concerning the processing of personal data and the protection of privacy in the electronic communications sector, mainly telecommunications.

As a key objective in STS is following processes, I have found it most interesting for the purpose of this thesis to look at the ongoing process of the GDPR. I have however also looked into to the origin of data protection legislation in general in order to see how the issue has evolved, yet remained unsolved over time.

2.5 Case study

The objective behind choosing a case study as a strategy is to develop as full understanding as possible of the issue formation and the controversies in one particular case, namely the legislative process of the GDPR.

To investigate a case is to investigate a "bounded system", meaning that there are clear boundaries to what social phenomena is being studied (Punch, 2005 p. 142). When studying the controversies and issue formation around the GDPR, it is less interesting to look at other legislative processes in the EU, although these show several similarities to the case.

When investigating a case it is tempting to take on a "holistic" approach, as it is important to preserve the wholeness of the case in order to understand it properly. But even in a single case study the complexity is too vast to study everything (Punch, 2005 p. 145). To achieve a specific focus the research questions helps to narrow the case.

Although this case study is predominantly qualitative, relying on textual interpretation, interview data and reports, some quantitative data gathered and analysed by others will also be used to inform and strengthen the arguments of the case.

A common critique of case studies is that they are not generalizable as the study is based only on one case (Punch, 2005 p. 145). When investigating the issue formation and the controversies surrounding the GDPR, generalization is not the main objective. The objective is

to apply the theories of issue formation and controversy to gain a better understanding of this particular case, not to generalise to other issues or legislative processes. The insights from this case study are meant however to serve as examples of how the theories on issue formation and controversies can be applied in practice, adding new perspectives to the literature. The knowledge produced can also serve as a tool to gain insight in similar cases at a later stage.

2.6 Text analysis

Documents are a rich source of data for social research. The textual contributes to a better understanding of the reality we are trying to study, but it is never a neutral account of reality. When studying texts it is important to keep in mind that the texts are not neutral, but that they are written using the language in a certain way, and in a specific context (Asdal, 2011 p. 68).

I will make use of legal texts that are meant to be interpreted in a specific way, but they too come into being in a specific context. To understand this context better I will examine the preparatory reports, working papers and early versions of the texts to see the intentions of the authors when writing the texts. I will also consider the proposals to change the texts, which on their own terms are texts that have been shaped by the contexts of which they are written. A legal text is a political instrument, or technology (Asdal 2011) meant to regulate, interfere and control social processes, but it is also shaped through a democratic process where the different stakeholders try to influence the text through their stake in the controversies.

2.7 Semi-structured Interview

An interview is one of the most powerful ways of understanding others (Punch, 2005 p. 168). To get an insight into how people act, relate, define and construct reality, asking them is a pretty straight forward approach. There are many types of interviews, and they can be performed in a variety of ways; face-to-face between two individuals, in groups, by questionnaires, by phone or e-mail. Interviews can also be performed for many different purposes, as marketing, gathering political opinions, newspaper interviews or for therapeutic reasons (Punch, 2005 p. 169). For the purpose of this case study, the interview is performed to gather data for an academic analysis.

It is common to use a three-way classification of structured, semi-structured and unstructured interviews (Punch, 2005 p. 169). The degree of flexibility and structure in the interview strongly affects what kind of answers it is possible to get from the respondents. In this case I am looking for insight into a process, and the respondents perceptions and understanding of the case. A structured interview where all questions are preset, and where

there are clear categories of answers, will be suitable for gathering opinions in a population, which can often be quantified and analysed mathematically, whereas an open-ended, unstructured interview might be more suitable to inform about a person's recollection of an important event, or process.

I will use a semi-structured interview where a set of questions are planned and prepared to get a conversation going, but I will also be able to deviate from this plan to pursue more interesting paths if they appear during the interview. The use of open-ended questions allow the respondent to answer using her own words, and formulate her own thoughts.

It is worth remarking that there are some threats to the validity of the data that includes the use of leading questions where the researcher are looking for particular answers and asks questions in a certain way to provoke these answers. Or where the researcher's own preconceptions define what is or is not worth discussing. To a large extent the questions asked in the interview also reveals the interviewer's knowledge in the field of research, and affects the researchers ability to ask the “right” questions.

“The interviewer effect” also needs to be taken into consideration. It demonstrates how people respond differently to the same questions depending on how they perceive the interviewer. “In particular, the sex, the age and the ethnic origins of the interviewer have a bearing on the amount of information people are willing to divulge and their honesty about what they reveal. The data, in other words, are affected by the personal identity of the researcher” (Descombe, 2003 p. 170).

2.8 Choosing informants

A sufficient number of informants is important to be able to study a case thoroughly, and to be able to draw sound conclusions from the empirical data. However, ensuring that the informants can provide the set of data the researcher is looking for is also of key importance. There is little use in performing many interviews with the wrong informants. As in all projects, time is also a scarce resource, so the informants need to be picked carefully to obtain a balance between quality and quantity of informants.

To study the issue formation and the controversies surrounding the GDPR, I wanted informants who are close to the process, and who have a stake in the outcome of the Regulation. I have therefore chosen to contact Members of the European Parliament (MEPs) from different political

factions. As there are 751 members of the European Parliament, I started contacting the casehandlers or rapporteurs of the data protection portfolio. There is one rapporteur and one shadow rapporteur of the different political factions. As the data protection reform is one of the most debated legislative acts in the EU this summer, it proved quite difficult to get a meeting with the rapporteur, Jan Phillip Albrecht from The Greens[1] in the European Parliament, as he was busy with the trilogues[2] and other negotiations. Due to the time of year I experienced some difficulty in getting in touch with the right informants, as many of the informants are based in Brussels, and the European institutions are on holiday in the month of August. I also experienced that many of the informants contacted were very slow in replying or did not reply at all.

I was able to get an interview with the shadow rapporteur of the biggest faction in the European Parliament, Axel Voss from the European People's Party (EPP), and with Ms Eleni Chronopoulou, the data protection advisor of the shadow rapporteur of the Socialists and Democrats (S&D), the second biggest faction.

Other stakeholders include those who are affected by the outcome of the Regulation, the industry, and the consumer interests. I have interviewed Lars Vinden, the Group Privacy Officer in the Schibsted Media Group, a Norwegian based media company that operates in 27 different countries, and who to a large extent uses personal data to offer services to their customers, adapted to their needs and preferences. The use of personal data to customise and optimise services is of vital importance to improve their services, and they operate in a global context in competition with actors such as Google and Facebook. The outcome of the Regulation can have a huge impact on their use of technology, and on the competitive advantages or disadvantages in relation to other companies.

To get more insight into the NGO lobby and consumer interests, I interviewed Finn Myrstad, co-chair in the Trans Atlantic Consumer Dialogue (TACD), representing the European Consumer Organisation (BEUC). Myrstad has previously been an NGO lobbyist in Brussels.

From the European Commission I have interviewed Bruno Gencarelli, the head of Unit C3, the Data Protection Unit, as they were the unit in charge of preparing the legislative text of

[1] The Greens and the European Free Alliance form one parliamentary group in the European Parliament. The Greens/European Free Alliance is made up of Greens and representatives of stateless nations and disadvantaged minorities

[2] Trilogues are the negotiations between the Council of the European Union, the European Commission and the European Parliament to come to a common agreement on the textual proposal from the European Commission.

the GDPR in 2012, and he also serves as the secretary of the Advisory Body on Data Protection in the European Union, the Working Party 29 that was established with the Data Protection Directive in 1995. Mr Gencarelli is also the representative of the European Commission in the trilogue negotiations between the Commission, the Council and the European Parliament.

2.9 Ethical considerations

When performing social science research, and especially when doing interviews or observations, it is important to consider that this might disclose thoughts or feelings that are private, or that the interviewee or respondent would like to be kept private. To ensure this, questions regarding confidentiality and potential anonymisation have been discussed with the interviewees. All respondents have signed a consent form, agreeing to participate in the research with information on the use of personal data and interview data. All respondents were given the opportunity to go through and edit or delete the quotes used in the research. One respondent did not agree to recording the interview, so the data from this interview is less accurate as it is based on my own notes from the interview.

3 Privacy

3.1 From Data to Big Data

Knowing how much personal data is processed by computers today it may not seem surprising that the purpose of one of the very first “computers” invented was to organise personal data. The computer was not invented to satisfy leisurely needs, but to solve the computational problem of the 1890 United States Census, as the previous census took nearly ten years to finish. A competition to automate the census was announced, and Herman Hollerith was the clear winner of the competition with an electric tabulator machine that permitted an automatic counting and registering of statistical data (Biles et. al, 1989).

The leap from the electric tabulator machine to the supercomputers of today is enormous. I will not use much space on the development of the computer, but there are some traits that need to be pointed out to explain the exponential growth in computational capacity that has brought about a technological development that is hard to grasp. Although the origin of the computer is the electronic tabulating machine, the digital computer was not born until a series of inventions from the 1940’s and onward.

One of these traits are the progression of the hardware representing one bit.[3] From the 1940's one bit was represented by a vacuum tube around the size of a thumb (Fay-Wolfe, 2005). Now it is possible to get a USB-stick of approximately the same physical size containing 8796093022208 bits, or one terabyte (Kingston, 2013). The processing capacity has also grown exponentially, the first digital computers were only able to process simple equations, whereas the average cell phone today can render vast images, or calculate extremely complicated equations.

"According to Moore's Law, every Christmas your new computer games are almost twice as powerful as those from the previous year. Today, your cell phone has more computer power than all of NASA back in 1969, when it placed two astronauts on the moon." (Kaku, 2011 p. x)

It is the combination of the development in storage and processing capacity of the previous decades that have paved the way for the development of software and hardware that can gather and process enormous amounts of information, also known as "Big Data".

> *"Big data refers to the exponential growth both in the availability and in the automated use of information: it refers to gigantic digital datasets held by corporations, governments and other large organisations, which are then extensively analysed using computer algorithms. Big data can be used to identify more general trends and correlations but it can also be processed in order to directly affect individuals."* (Article 29 Working Party, 2013)

The media has several times revealed how both Google and Facebook tracks a user's internet activity and use the information gathered to offer tailored advertising. In september 2012 Business Insider reported that Facebook monitors every online move of its users by adding a pixel beacons[4] or some form of web cookies (BusinessInsider, 2012).[5] Moreover, US News and

[3] One digit in a binary system, meaning 0 or 1. It is used as a measure of the capacity of digital electronic components.
[4] A pixel beacon is an "invisible" image file that loads from an external web-page and sends information about the internet user to the provider.
[5] A cookie is the most commonly used tracking technology. A cookie is a small text file that is sent from a website and stored in the user's web browser. The cookie sends information back to the website informing about previous activity every time the user loads the webpage.

World Report wrote in May 2013 about how Google monitors up to 90 % of all internet users worldwide, whether using a Google product or not, how they read user's e-mails and records all information they can gather (US News, 2013). Not until the Snowden revelations[6] in June 2013 was it revealed how Google and Facebook also share this information with US intelligence services (The Guardian, 2013). In 2011, Computerworld ran a story on how a smartphone is a monitoring device that gathers information about the users through the applications, or apps that the user downloads (Computerworld, 2011). In fact, up to 95% of the top 200 popular free applications exhibit risky[7] behavior when it comes to snooping on the users according to an Appthority report, featured in The Registry. (The Registry, 2014). In 2015, Google invested in an insurance company that will use sensor data gathered through fitness trackers[8] and other devices to monitor their customers, rewarding "good" life choices and discouraging "bad" choices (Business Journal, 2015). This use of Big Data, by both private- and Government actors has led to a renewed interest in data protection, as it becomes evident to more and more people that this directly and indirectly concerns everyone.

3.2 Privacy legislation in the making

The first publication advocating privacy as a right was an article in the Harvard Law review in 1890, by Samuel Warren and Louis Brandeis (1890), "The Right to Privacy". The publication was written in the context of the technological advances in the printing press and instant photography, and the privacy threat of the newspaper press (Bing, 2010). However the very first privacy legislation was adopted in the German Federal State (Bundesland) of Hessen in 1970, and the first nationwide privacy law was adopted in Sweden in 1973 (Bing, 2010). Privacy laws regulating Government use of personal data was adopted in the USA in 1974. Throughout the 1970's several European countries adopted privacy legislation modelled on the Swedish "Datalagen",[9] which established a supervisory or Data Protection Authority (DPA) (Bing, 2010, p. 29).

Inspired by the first European law on data protection, the system of supervisory authorities was enshrined in article 28 in the Data Protection Directive in 1995, where every

[6] See chapter 3.7 for more about the Snowden Revelations
[7] The so-called risky behaviors Appthority identified in its study included location tracking, accessing the device's address book or contact list, single sign-on via social networks, identifying the user or the phone's unique identifier (UDID), in-app purchases, and sharing data with ad networks and analytics companies (The Registry, 2014).
[8] A fitness tracker is a sensor that monitors movement, heart rate and sometimes other health data.
[9] Datalagen, 1973:289 (The first Swedish data protection legislation)

member state of the European Union committed to establishing such institution with the powers listed in the Directive (Directive 95/46/EC).

In Norway, like many other places, there were no data protection laws before the end of the 1970's. There were laws in place regulating who could have access to the national registry and why, and there were also laws regulating the penal register for access to criminal records. There were in practice no limits to the data that could be collected, but access was mainly limited by the duty of confidentiality (NOU 1975:10). In 1975 the government committee in place to evaluate the government's use of data systems and privacy called "Datautvalget" argued that there would hardly be an issue of a government body collecting more data than needed, as this would be a waste of government resources (NOU 1975:10). With the advances in the technology to both collect, administer and store data this view quickly became redundant, and the need for a more general approach to data protection became evident.

The Norwegian Parliament adopted the first general data protection legislation in Norway, "Lov om personregistre" in 1978 after a long fact finding process and an ongoing debate on the need for privacy as a result of the growing use of Electronic Data Processing (Ot.prp.nr.2, 1977-1978). The proposition to the Parliament points to the technological development, with regards to the adoption of electronic data processing to save, systematise and use personal data. The proposition points to the increased processing capacity as one of the strengths of computer based systems, but that this at the same time can have a less fortunate impact on some individuals. The proposition further builds a strong argument for a general data protection legislation, to mitigate the risk of errors in the collection, storage or processing of personal data, and the effect this may have on individuals. It even points to the increased risk where data from different sources are combined, or how pulling it out of context may give a misleading image of the individual in question. Again it is highlighted how modern computer technology will increase these risks, and may lead "one to ignore such shortcomings *(Ot.prp.nr.2, 1977-1978)*."

The fact-finding process saw that transfer of data to other countries might lead to a deterioration of the privacy protection, and tried to map the situations in which data would be transferred to another country. In some scenarios the Committee feared that data would be exported to be processed in countries where there were no data protection legislation. At the same time they saw that data would need to be transferred in relation to international trade, research cooperation and government cooperation (Ot.prp.nr.2, 1977-1978).

The need for a balance between a ban on export of data, and cooperation between data protection authorities to ensure that data is protected when it is exported was needed. In the final legislation there is a ban on export without permission from the data protection authority (Lov om personregistre ("pregl"), § 36, 1978). The legislation also paves the way for cooperation between data protection authorities (§ 36, pregl, 1978).

3.3 The need for international regulations

The Council of Europe (CoE)[10] started looking into data protection issues in the 1960's already, and in the 1970's it concluded that international norms needed to come into being in order to push for data protection legislation in the member countries. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data - known as Convention 108, came into force in 1981, eight years after the Swedish data protection law was adopted.

In 1980 the Organisation for Economic Co-operation and Development (OECD) found it necessary to develop recommendations and guidelines[11] to help harmonise legislation between trading nations to the member countries, arguing that "there is a danger that disparities in national legislations could hamper the free flow of personal data across frontiers; these flows have greatly increased in recent years and are bound to grow further with the widespread introduction of new computer and communications technology" (OECD, 1980).

As international trade grows, and the European Communities[12] set out to remove barriers to trade and establish the internal market, an increased cooperation in data protection legislation was proposed by the Commission of the European Communities in 1990. The legislation proposed has since set the standard for data protection in Europe, the directive was adopted in 1995 (Directive 95/46/EC).

The Data Protection Directive sets out principles for the processing of personal data that are recognisable from both the CoE convention 108, and from the national legislation already

[10] The Council of Europe is a human rights organisation consisting of 47 European member states. All of which have signed the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law.
[11] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980)
[12] The European Communities is the precursor to the European Union. The European Union was established after the Maastricht treaty in 1994.

adopted in several European countries. These principles set out the requirements for lawful processing of personal data.

3.3.1 Consent

As a rule of thumb the data subject[13] needs to consent to the processing of personal data, although the Directive lists a set of exceptions where consent is not required. On consent Article 29 Working Party[14] has advised that free consent is only valid "if the data subject is able to exercise a real choice and there is no risk of deception, intimidation, coercion or significant negative consequences if he/she does not consent" (Article 29 Working Party, 2011, p. 12, Art. 2, Directive 95/46/EC).

3.3.2 Purpose specification and limitation

In order to lawfully process personal data, the data must be collected for specified, explicit and legitimate purposes, and the purpose of processing data must be visibly defined before processing is started (Art. 6, Directive 95/46/EC).

3.3.3 Data quality

There are also requirements that the data collected is adequate to the purpose of collecting it, relevant, and not excessive, prohibiting the collection of personal data that is not directly relevant, or data that can come in handy for other purposes. The data collected also needs to be accurate and, where necessary, kept up to date (Art. 6, Directive 95/46/EC).

3.3.4 Fair processing and right to access

The data controller[15] has an obligation to inform the data subject of the processing of personal data, and the purposes of the processing. Further the data subject has the right to obtain the data from the controller, and to object to the processing (Art. 10, 11 and 12, Directive 95/46/EC).

3.3.5 Retention limitation

When data no longer fulfills the criteria listed it must be deleted. Personal data must not be stored for longer than necessary and solely for the purposes for which they were collected (Art. 6, Directive 95/46/EC).

[13] Data Subject is an identifiable person to whom the personal data relates (Directive 95/46/EC)
[14] An advisory body to the European Union on Data Protection issues
[15] Data controller is the legal person responsible for gathering and processing personal data

3.4 Data Protection Reform in Europe

“From the Commission, everything starts with the Commission” (Chronopoulou, 2015).

The above quote is descriptive of the formal legislative procedures of the European Union, but surely an issue doesn’t appear out of thin air, or from behind the desk of a Commission official. There are many interests at stake, and many factors that push an issue to the surface.

In 2009, the European Commission started to review the legal framework on data protection in Europe, organising a high-level conference and targeted stakeholder consultations. In November 2010, the European Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding set out the strategy to strengthen the EU data protection rules at a press conference in Brussels (European Commission, 2010b).

> "The protection of personal data is a fundamental right [...] to guarantee this right, we need clear and consistent data protection rules. We also need to bring our laws up to date with the challenges raised by new technologies and globalisation” (European Commission, 2010b)

At the press conference Reding invited all stakeholders and the public to comment on the five proposals in the strategy. The deadline was set for 15th January 2011. The European Commission received 288 consultations from a variety of public and private organisations and even private citizens. The majority of the stakeholders agreed on the need to update the data protection framework in order to respond to the technological development and globalisation. In particular, the economic stakeholders asked for harmonisation of the existing rules, to avoid the uncertainties of the current patchwork of legislation (European Commission, 2012). Following this deliberation process the Commission spent just over one year to come up with the proposal for a comprehensive data protection reform.

It is the European Commission who proposes legislation in the European Union, but a proposal doesn’t come out nowhere. The proposal to reform the data protection legislation in the EU is no exception and one the main reasonings behind it is the need to keep up with the technological development.

> "17 years ago less than 1% of Europeans used the internet. Today, vast amounts of personal data are transferred and exchanged, across continents and around the globe in fractions of seconds," (European Commission, 2012).

Yet the technological development is only one factor affecting the need to update the already strict data protection and privacy legislation in Europe.

3.4.1 Meeting the technological development

The technology to gather, store and process personal information is constantly developing and challenging the enforcement of data protection legislation. Already in the 1960's, when the Council of Europe decided to establish a set of norms and principles to prevent unfair collection and processing of personal data, the rapid progress in the field of data processing and new computer technologies was said to be the trigger (Council of Europe, 2014).[16]

It seems that keeping up with the technological progress is still the main objective of proposing new privacy legislation in the European Union. The European Commission argued in 2010 that data protection rules must be updated to keep abreast of technological change, pointing to the use of internet history to inform behavioural advertising,[17] sharing of information through social networking sites and location data collected by smart chips to trace the movement of individuals (European Commission, 2010a). It further elaborates in a Frequently Asked Questions brief that high-speed internet, connected devices and user generated content raises privacy issues (European Commission, 2010c).

In an interview Ms Eleni Chronopoulou, data protection advisor to Member of the European Parliament (MEP) Marju Lauristin, who handles data protection issues for the Socialists and Democrats (S&D) in the European Parliament (EP),[18] told me that "the main concern is to maintain a balance between privacy and the latest technology". She pointed out that the emergence of technology like smartphones, Google, Facebook and digital advertising has pushed the need for an updated framework on data protection (Chronopoulou, 2015). This is echoed by MEP Axel Voss, the shadow rapporteur on data protection from the European

[16] The principles that were established draws inspiration from the European Convention on Human Rights and Fundamental Freedoms, and builds upon article 8 which states that "everyone has the right to respect for his private and family life, his home and his correspondence" (Council of Europe, 1950) and article 12 of the United Nations' Universal Declaration of Human Rights of 1948 stating that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence[.]" (United Nations, 1948).
[17] Advertising that is adapted to users preferences based on information collected about the target.
[18] She was previously advisor to Dimitrios Droutsas who was the S&D rapporteur on the Data Protection Regulation in the previous parliamentary period.

People's Party (EPP) in the European Parliament (Voss, 2015). The two biggest factions in the European Parliament both agree that technology has pushed for reform. However, this seems like a narrow approach to data protection, since most of the principles in the Directive from 1995 are technology neutral, meaning that they are not technology specific but general principles that can be applied to various settings and different technologies.[19] Several stakeholders put forward the need for a more harmonised legislation as equally important to updating the legal framework on data protection (Myrstad, 2015, Vinden, 2015).

3.4.2 Harmonised legislation

The reasoning behind proposing a Regulation as opposed to a Directive is to obtain a more harmonised legislation across the whole European Union, and in effect also in the European Economic Area (EEA). One of the main differences between the two is that a Directive sets out different standards that must be achieved, but leaves it up to the national administration to propose its own legislation to fulfill the requirements of the EU legal text, whereas a Regulation is directly applicable in the EU member states without any need for national legislation. In the EEA, a Regulation needs to be implemented in verbatim[20]. The Regulation leaves less room for interpretation, and secures a higher degree of equal rights and obligations in the whole economy.

The same rights and obligations are important to businesses operating in more than one country, as a common set of rules require less resources than having to comply to 28 different sets of rules. If there is a difference between how a Directive is interpreted in different countries, a company will need legal experts in all countries in which it operates, putting an unnecessary strain on the economy.

“We had 27 different legislations, throughout the EU. It was a mess, different cases in different courts in the member states. The outcome for the same thing could be different, so at some point everyone realised that this needs to be harmonised” (Chronopoulou, 2015)

Ms Chronopoulou implies that even the industry pushed for a more harmonised legislation “Don’t take it for granted, but my assumption is that they [the Commission] were a bit pushed [...] even by companies. Because [...] the industry wants a harmonised legislation”

[19] See section “Radical proposal”
[20] Word for word

(Chronopoulou, 2015). Lars Vinden, the "Group Privacy Officer" in Schibsted Media Group states that their main concern is "not how strict the regulation will be, but that it will be enforced in the same manner, no matter where our competitors operate from" (Vinden, 2015).

When the Commission put forward the proposal in 2012 it reinforced this view by pointing to the divergences in enforcement of the existing rules, claiming that "A single law will do away with the current fragmentation and costly administrative burdens, leading to savings for businesses of around €2.3 billion a year" (European Commission, 2012). At the press conference, the Justice Commissioner prophesied that "[...] a strong, clear and uniform legal framework at EU level will help to unleash the potential of the Digital Single Market and foster economic growth, innovation and job creation" (European Commission, 2012). The arguments for harmonised legislation and a strong digital economy is also repeated by the tech industry interest organisation, Digitaleurope.[21]

"Digitaleurope sees the reform as a unique chance to enhance harmonisation of the data protection rules across Europe and to ensure that Europe reaps the benefits of a data driven economy" (Digitaleurope, 2013).

3.4.3 Building a digital economy

Creating growth in the European economy has been the most important aspiration of the European Communities since the beginning in the 1950's. After the financial crisis hit Europe with full force in 2008, this has proved to be increasingly difficult. One of the initiatives to regenerate growth in the European economy has been to remove barriers to digital trade, trying to build a digital single market. The reform of the data protection rules are part of this plan as the existing Directive puts too many administrative burdens on the companies as discussed earlier, but also to generate trust in the digital economy.

According to the special Eurobarometer survey on *"Attitudes on Data Protection and Electronic Identity*" from 2011, less than one-third of the European population trust phone companies and internet providers, and just over one-fifth trust internet companies such as Google or Facebook, and more than 70% of all Europeans (EU27)[22] are concerned that their personal data may be used for other purposes than for what it was collected (Eurobarometer,

[21] Digitaleurope represents the digital technology industry in Europe.
[22] Until 1.1.2012 there were 27 countries in the European Union

2011 p.2). There are unfortunately no comparable numbers to previous Eurobarometers, as the last one on data protection was in 2003, with only 15 member countries in the European Union. But even in 2003, almost two-thirds (64%) of the population in EU15[23] were worried about leaving personal information on the internet (Eurobarometer, 2003 p. 44). These numbers remain at the same levels in the Eurobarometer in 2015, showing that 70 percent of the population in the EU are still worried that their data might be misused online (Eurobarometer, 2015).

For online private companies trust is very important to attract customers and keeping them. If a company loses the trust of the customer they will avoid using their services and seek out competitors that offer better data protection. For Schibsted this is of key importance to their business model, and Lars Vinden explains that they as a media company and online marketplace need to maintain a trustful relationship with their customers. Schibsted uses information about its customers to improve their existing services, or to create new and better services, and without trust they will not gain access to these data. To Schibsted, respecting the data protection legislation is important to ensure trust and corporate reputation (Vinden, 2015).

One of the ideas behind the high level of data protection in Europe is to use the trust created in European businesses to gain a competitive advantage over non-European businesses, an idea that is well received amongst the proponents of a radical data protection regime, whereas it is frowned upon by others. Axel Voss claims that too much regulation is a disadvantage to the companies (Voss, 2015). Vinden is sceptical to the extent to which the trust created by data protection regulation actually has an impact on consumer choice, but both Myrstad, Chronopoulou and Gencarelli are confident that for businesses to grow, and for digital services to develop, you need the trust of the users. They also consider that the GDPR will benefit European Businesses in this respect (Chronopoulou, 2015, Gencarelli, 2015, Myrstad, 2015).

3.5 A radical proposal

The EU data protection laws are already among the strictest in the world (Ustaran, 2013, p. 137), and there are many requirements that fall upon the data handlers that does not apply elsewhere. Why then is it desirable to adopt even stricter data protection legislation in the EU?

[23] Until 1.5.2004 there were 15 countries in the European Union

Through the Lisbon Treaty[24] the Charter of Fundamental Rights of the European Union became legally binding for the European institutions, and the member states when implementing EU-legislation (Charter of Fundamental Rights, 2012/C 326/02). Article 8 in the Charter puts emphasis on the protection of personal data, and the access to and rights to rectify data collected. It also establishes an independent authority to supervise compliance with these rules. The need to strengthen data protection in the EU thus follows from the ratification of this Charter. "Data protection became one of the fundamental rights with the entry into force of Charter on Fundamental Rights of the European Union. Therefore we had an obligation to update the data protection directive from 1995" (Voss, 2015). The European Commission confirms that the constitutional obligations was one of the driving forces behind the proposal (Gencarelli, 2015).

When the Commission proposed to reform the data protection legislation in the European Union it introduced several new elements into the Regulation to further strengthen data protection in Europe, while promising to maintain the existing principles from the Directive.

3.5.1 Right to be forgotten

One of the most radical and very controversial principles of the new Regulation is the proposed "right to be forgotten", or the right of erasure (Art. 17, COM/2012/011). The right to be forgotten refers to the right of an individual to have personal data that is no longer relevant, or potentially harmful to be erased or "delisted"[25] by the data controller. The right to be forgotten is introduced in the proposal to a new Regulation, however the Court of Justice of the European Union (ECJ) elaborated this principle already in 2014, before the Regulation is adopted, with references to the Directive and the principles of purpose and retention limitation; when "the data appear[s] to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed" (Court of Justice of the European Union, 2014, p.3). In this case the ECJ has gone far in establishing the principle even before the legislator has concluded on the course of action, thus contributing to a consensus for a more radical proposal than the original Directive (Gencarelli, 2015).

[24] The Treaty of Lisbon was adopted to reform the structure of the EU. It has redefined and strengthened actions taken at European level and incorporated the Charter of Fundamental Rights of the European Union in EU-law.

[25] Delisted refers to removal of links to where such data can be found, for example in search engine indexes.

3.5.2 Principle of data portability

The Commission proposes to introduce a measure to ensure that the data subject has the right to obtain the personal data in a format that can be transferred from one system to another in a commonly used format (Art. 18 COM/2012/011). The Norwegian Consumer Council suggests in a report that the promotion of common standards and requirements to the market actors are important to ensure competition. To be able to change provider of services by transferring data from one internet company to another is important to prevent market "lock-in mechanisms" (Forbrukerrådet, 2015). Common standards to allow for the change of providers and further use is also the argument used by both the European Parliament, the Council and the Commission in the Regulation and its amendments (Council of the European Union, 2015, pp. 87, 312, 328, 329).

3.5.3 Data protection by design and by default

Requirements of privacy by design are not elaborated sufficiently in the proposed General Data Protection Regulation. The Commission introduces data protection by design as the idea that appropriate technical and organisational measures are taken, "both at the time of the design of the processing and at the time of the processing itself" (European Commision, 2012b). This is further elaborated by the European Parliament in their amendment, emphasising that data protection by design requires that data protection is "embedded within the entire lifecycle of the technology, from the very early design stage, right through to its ultimate deployment, use and final disposal. This should also include the responsibility for the products and services used by the controller" and the Council considers that "producers of the products, services and applications should be encouraged to take into account the right to data protection when developing and designing such products, services and applications" (Council of the European Union, 2015, p. 101).

Privacy by default requires that privacy settings on services and products should by default be set to privacy settings that comply with the Data Protection Regulation, in terms of respecting the general principles of data protection, data minimisation and purpose limitation (Art. 23, COM/2012/011).

These new principles are specifically introduced to comply with the new technological reality of online services and social platforms where sharing and processing of personal data are the main purposes.

3.5.4 Need to inform about data breaches

Up until today the requirement that the data controller needs to inform the data subjects of a data breach when the breach can adversely affect the data subject has not existed as a general rule, but it was already introduced in the ePrivacy Directive (Directive 2002/58/EC) regulating telecommunications companies. This requirement is introduced in the new legislation (Art. 31 and 32, COM/2012/011) as a means of increasing transparency and trust in the digital economy, as emphasised in the report *"Data Breaches in the EU"* by The European Network and Information Security Agency (ENISA), "Gaining and maintaining the trust [...] of citizens that their data is secure and protected represents a potential risk to the future development and take up of innovative technologies and higher value added online services across Europe" (ENISA, 2011 p. 4).

In the Commission proposal to a new General Data Protection Regulation, the Commission refers to the promotion of trust in data processing when introducing this rule (European Commission, 2012b). In this way, the promotion of trust in the digital economy seems like an important factor for proposing new legislation, as also emphasised by the economic stakeholders themselves (ENISA, 2011 p. 4, Vinden, 2015).

3.5.5 Impact assessments

According to the European Commission Staff working paper for the Regulation (European Commission, 2012b), the data controllers should be incentivised to take responsibility, and show accountability through performing data protection impact assessments before performing "risky" processing of personal data. According to the Commission, this will also increase transparency and provides an easy way of demonstrating compliance with the Regulation. The novelty of this tool is that it forces the data controller, or the designer of services to take privacy into account at an early stage, also enhancing the principles of privacy by design and privacy by default. The definitions of what "risky" processing entails is however debated heavily in both the Parliament and the Council (Council of the European Union, 2015, p. 101), as both the Parliament and Council oppose giving the Commission power to set the criteria, conditions, standards and procedures for Data Protection Impact Assessments (Out-Law.com, 2015). The need for impact assessment is introduced in article 33 of the proposal (Art. 33, COM/2012/011).

3.5.6 One-stop shop

The General Data Protection Regulation will allow businesses operating in more than one EU Member State to be supervised by the Data Protection Authority (DPA) in the member state where the processor has its main establishment (Art. 51, COM/2012/011). This is referred to as the “one-stop shop”, and removes an administrative burden for the companies. This is the provision in the new Regulation that has gathered most support from the industry, as Ms Chronopoulou (2015) comments: “Although some companies do not agree with some articles, also the companies and the industry wants a harmonised legislation”.

3.5.7 Increased fines

The Commission proposed an increase in fines for breaches of data protection law. The sanctions in the existing Directive is decided by the member states (Art. 79, Directive 95/46/EC). In Article 79 of the GDPR, amounts up to two percent of global turnover are proposed as fines. For some large companies, this could result in hundreds of millions of euros. In comparison, the fines that were imposed on Google after its personal data infringements in the StreetView application ranged from one hundred thousand and one million euro (BBC, 2011 and Bloomberg, 2014).

3.6 Influencing the proposal

3.6.1 Lobbying the Commission

There are several controversial aspects, or disputed principles of the Regulation, many of which are listed in the above chapter, however the controversy mostly boils down to the balance between the consumer interest of securing the fundamental rights of the user, and the business interests of securing growth and a competitive digital economy. In order to open up the issue for debate and to be informed of the views of all affected publics, the European Commission opened a public consultation from November 2010 to January 2011 (European Commission, 2011).

As mentioned above,the General Data Protection Regulation is the most lobbied piece of legislation in the history of the European Union according to the Commission, due to a lot of interests being affected by the legislation. In the early phases of the legislative process, for the public consultations, 288 position papers from a wide range of actors were received. The range of opinions stretches from public authorities in Europe and the United States, NGOs on both

sides of the Atlantic, as well as international NGOs and a large number of private companies and their interests organisations (European Commission, 2011, Gencarelli, 2015).

Looking at the position papers of a few of the companies that have issued them, Microsoft, Nokia and Facebook, a pattern of protecting business interests naturally appears when commenting on the above mentioned new measures. However they all seem positive to updating the existing legislative framework (Microsoft, 2011, Nokia, 2011, Facebook, 2011). Where Facebook is sceptical to the scope of the right to be forgotten, it emphasises that such right should not be automatic, but upon request (Facebook, 2011), Microsoft maintains that it should have the right to retain data for a period of time, in case the customer changes its mind (Microsoft, 2011), and Nokia is sceptical to introducing the right, and wants that the focus should rather be aimed at making users “aware of their rights and to develop technical means and infrastructures to exercise the rights already granted” (Nokia, 2011).

Regarding data portability, Facebook claims that its export function is sufficient (Facebook, 2011), but both Nokia and Microsoft are worried about technical specific rules as all data can not be used “as is” in other services. All are clear that a specific data model or a technology should not be mandated by the Regulation (Microsoft, 2011, Nokia, 2011).

Both Facebook, Microsoft and Nokia are worried that a breach notification system will reduce, rather than enhance user safety, and lobbies for a “high risk breach” threshold to avoid the issuing of “immaterial notices”. As data breach notification can potentially harm the reputation of the company, they want notifications to be triggered only in cases where there is a significant risk of serious harm (Facebook, 2011, Microsoft, 2011, Nokia, 2011).

Privacy by design seems to be of some concern, and they all urge the Commission to be as little technology specific and prescriptive as possible. They emphasise that privacy by design should be encouraged, but not to the extent that it hampers innovation.

One-stop shop and harmonisation are among the new measures the companies are very much in favour of. They all point to lack of consistency in interpretation and enforcement of the existing Directive across the member states. They all emphasise that only one member state’s law should apply to a controller that processes data across multiple member states in order to be able to offer the same services everywhere. The way to achieve this is through a Regulation (Facebook, 2011, Microsoft, 2011, Nokia, 2011). Nokia points out that sanctions should also be harmonised, but that criminal sanctions should be the last resort in a variety of different sanctions and incentives (Nokia, 2011).

3.6.2 Lobbying in the Council

The legislative procedure in the European Union goes through the proposal phase in the European Commission, then to finding a compromise between the Council, the Commission and the Parliament. Much of the lobbying in the EU is focused on influencing the position of the European Parliament, as they have a very open and transparent approach. There is of course lobbying of the Commission before the proposal is put forward, but after this phase it is crucial to find an agreement between the Council and the European Parliament in order to pass a law.

Lobbying the Council of the European Union directly is more difficult, as the process is more secretive and closed off from interest groups (LobbyPlag, 2014). However, much of the efforts at lobbying goes through the national governments that are represented in the European Council.

Finn Myrstad from TACD explains that there is a sharing of the burden within their network. "In Brussels the most important actors to influence [on data protection] is the European Parliament and the European Commission. In the EP it is mainly the LIBE[26] committee, but also the INTA[27] committee" (Myrstad, 2015) "The lobbying of the Council happens through our member organisations at the country level. BEUC[28] coordinates and the member organisations all push the national governments" (Myrstad, 2015).

The amendments proposed in the Council are not easily traced back to the various lobby or interest groups in the respective member states. The process and the proposed amendments are in general classified. LobbyPlag.eu has however obtained 11 000 pages of classified documents, and a number of classified diplomatic cables on the Data Protection Regulation. Through a qualitative comparison of all the 517 amendments proposed in the Council, they have found that 403 of the amendments seek to weaken, and 114 seek to strengthen data protection. There is no statistically significant sign that the changes proposed are affected by the government's political affiliations.

[26] European Parliament Committee on Civil Liberties, Justice and Home Affairs
[27] European Parliament Committee on International Trade
[28] Bureau Européen des Unions de Consommateurs, in English BEUC, The European Consumer Organisation. BEUC is the umbrella group for European consumer organisations.

When comparing the intra institutional documents that are published, looking at the amended proposals of the European Parliament, the Council of the EU and the Commission, it is clear that they are all interested in an enhanced data protection legislation in Europe. The controversies appear in the different ways of getting there, and the different frames or knowledge bases.

3.6.3 Lobbying in the Parliament

The strict data protection rules in Europe is claimed to be a constraint on businesses operating in Europe, and some claim that these laws cause Europe to lose competitiveness in a global competition. Axel Voss (2015) claims that "if we put one requirement after the other then this is demanding too much, and will be a disadvantage for the companies" when asked whether the proposed privacy legislation represents a competitive advantage to European businesses. According to Mr Voss (2015), it is the NGOs[29] that has had most impact on the shaping of the legislation, in "creating an environment in saying that everyone who earns money is a bad guy and that we have to protect the individual, who by the way consents to everything, would mean that we overprotect the individual and would be more than escapist".

NGO representative Finn Myrstad confirms that the NGOs are influential, but claims there is sort of a balance, or synergy between NGO- and business lobbyists. He represents the European consumer interests in data protection among other things as the European co-chair in the Trans-Atlantic Consumer Dialogue (TACD). The TACD represents 75 consumer organisations on both sides of the Atlantic. He recalls when working as a lobbyist in Brussels that to make up for the work of an NGO-lobbyist, you need 10 corporate lobbyists on the same issue (Myrstad, 2015). If this is the case, it explains why Microsoft would need over 30 lobbyists on the Data Protection Regulation, as they did have according to interview data from Ms Eleni Chronopoulou (Chronopoulou, 2015). Transparency International lists Microsoft as the company that spends most money on lobbying the EU-institutions, spending more than 4.5 million euro in 2014. According to the same report, Google spends 3,5 million (Transparency International, 2015). It is in other words obvious that technology companies use vast amounts of money to influence tech-policy, with data protection being the most discussed tech issue in Brussels these days.

To monitor who actually has a real impact when lobbying a proposal is a difficult task. Amendments and deletions can be proposed for a variety of reasons, and although they might

[29] NGO - Non Governmental Organisations

correspond to the interests of those who lobby, they do not necessarily originate from the lobbyists. For the Data Protection Regulation there have been performed some legislative footprint mapping with regards to proposed amendments to the readings in the European Parliament and the amendments proposed by the national governments before reaching a common negotiation position. The website LobbyPlag.eu is dedicated to these efforts at exposing links and promoting transparency in the legislative proecss in the EU.

To perform legislative footprint mapping is a laborious task, the team behind LobbyPlag.eu[30] have gone through and compared 3100 amendments and hundreds of pages of lobbyist position papers in 2013. In 2014 they also analysed leaked classified documents from the EU to monitor and open up the normally secret process leading up to the Council position on EU legislation.

When comparing the actual amendments proposed in the different committees leading up to the position of the European Parliament, it is striking how many of the amendments proposed are actually directly copied and pasted from the lobby papers. This form of "copy-paste democracy" came as a surprise to many, and was described by Privacy International as a "scandal" (Privacy International, 2013), although lobbying is a well-known part of the European legislative process. When looking at the amendments that were copied from the lobby papers, it is obvious that both corporate and NGO interests are carried through the parliamentarians.

It is however interesting to break down the numbers a bit further to look at who proposes which changes, and who seems to be listening to whom. Lobbyplag.eu lists 204 proposals that are more or less copied and pasted from the lobby texts they analysed (Lobbyplag.eu). The most active groups in proposing changes which originated from the lobbyists were by far the Greens, the European People's Party (EPP) and the European Conservatives and Reformist Group[31] (ECR), with some contributions from the Socialists and Democrats (S&D) and the Alliance of Liberals and Democrats in Europe (ALDE). Of the amendments proposed by the centre-left parties (S&D, Greens), 98 out of 101 proposals came from the NGO-lobbyists. Looking at the centre-right parties (EPP, ECR, ALDE) 96 out of 103 proposals came from corporate lobbyists (LobbyPlag.eu, 2013). This shows an interesting difference between the centre-right and the centre-left with regards to who it seems that they are listening to. This also

[30] LobbyPlag.eu is based on voluntary efforts as a cooperation between OpenDataCity Datenfreunde UG and europe-v-facebook.org.
[31] ECR is formed mainly by parties previously belonging to the EPP-group

corresponds with the interview data from EPP MEP Axel Voss. When asked whether he is approached by individual companies he remarks that the NGOs have a big influence on the left wing parliamentarians.

“I would say they [the NGOs] have a very big influence on the left wing orientated in delivering their arguments and so on. From my point of view we have to balance this, I try to listen also to the business models and how we can support them and keep them alive” (Voss, 2015).

Ms Chronopoulou further elaborates the view by drawing a picture of the political landscape: “if you draw a line in the center, and let’s say center is the ALDE-group and then you have the centre right who is the EPP and we’re the centre left S&D and then left. The more left you go the more you listen to the citizens and citizen groups and NGOs, and that goes for almost every file [dossier] in the Parliament. And the more right you go, they have a tendency to look a bit more to the market, and care a bit more for the market, I am not saying that this is a rule, but the tension is like this in the Parliament. So I would say that, well this is one of the few files where even we, as the centre left group have discussed extremely with the industry” (Chronopoulou, 2015).

The S&D-group proposed 13 of the changes in the LobbyPlag.eu list of copy-paste amendments, where 10 are copied from the NGO-lobby and three are copied from the corporate lobby (LobbyPlag, 2013).

3.7 A turning point?

With the apparent distance between the centre-left and the centre-right, it seems quite extraordinary that the proposals would reach an acceptable compromise with a broad consensus in the European Parliament. Up until the middle of 2013, the centre-right groups fought against the proposed Regulation, according to Ms Chronopoulou (2015). But the consensus was reached on 12 March 2014.

“The consensus was reached last March when we voted on the proposal in the European Parliament, in the plenary session in Strasbourg for the parliament approach. We had a broad consensus. We had 600-something votes in favour of the Regulation” (Chronopoulou, 2015).

According to Ms Chronopoulou, the Snowden case was the biggest wake up-call. “If it wasn’t for the Snowden case we maybe wouldn’t have had an outcome today” (Chronopoulou, 2015).

The plenary session adopted the position of the LIBE Committee who voted on the amendments in November 2013. Digitaleurope commented on the LIBE voting procedure with astonishment.

Expected to be a long evening of votes with approximately 4000 amendments to get through, finally it only took 20 minutes to adopt the LIBE report, as there was broad cross-party agreement on the compromise amendments. This unusual cross-party agreement is a clear sign of the impact that the surveillance revelations have had on MEPs (Digitaleurope, 2013).

The Snowden revelations had an enormous impact on the general understanding of digital surveillance in the population, as well as with the political decisionmakers. On the 6 June 2013, The Guardian and Washington Post both reported that the NSA has direct access to personal data and correspondence from a series of American tech- and internet companies. These included companies that almost everyone uses regularly for their daily communications, like Facebook, Microsoft, Apple, Google, Yahoo and many others (The Guardian, 2013).

Edward Snowden worked as a computer technician for the CIA and as a contractor for the NSA in 2013. Snowden leaked thousands of classified NSA documents to journalists from a hotel room in Hong Kong, revealing several global surveillance programs run by the NSA and other surveillance authorities, with the help of both private companies and European governments (Wikipedia, 2013). The Snowden leaks made it clear how privacy and data protection concerns everyone, and brought the issue to the attention of new publics. After the revelations even private companies started realizing the costs of not respecting privacy and data security (Gencarelli, 2015).

Looking back to the discussion about the Data Protection Regulation, it is clear that that debate got revived after the Snowden revelations, according to Myrstad (2015) because it showed how much information is gathered not only by American authorities or internet companies, but also that this happens in Europe (Myrstad, 2015). Before Snowden, the centre-right groups were fighting a lot against the Regulation. After what was revealed in the Snowden case there was a rapid change in the political climate, and we got the agreement. The Snowden case was a cornerstone to reach agreement on Data Protection in the European Parliament (Chronopoulou,

2015). There has been a convergence in the proposed amendments from the three institutions throughout the whole process (Gencarelli, 2015).

3.8 Securing a radical compromise

While giving much credit to the Snowden revelations, these alone can not account for how the proposal has gained the momentum it has. Even before Snowden, data protection was considered important to the general public (Eurobarometer 1997, 2003, 2010). The European Commission, whilst not admitting that the lobby has had a huge influence on the legislation, it emphasise that the proposal is balanced and designed to meet both the interests of corporations and the fundamental rights to data protection, by changing from a system based on notifications and approvals to a system where businesses are held much more accountable, combined with higher fines in case of infringements (Gencarelli, 2015).

The ECJ ruling in the case on the right to be forgotten also contributed to silencing the opposition, at least to a certain extent on this measure. Although the Court ruled on existing legislation, it brought the parties to realise that the right to be forgotten to a certain extent already existed, so the debate got more nuanced (Gencarelli, 2015).

To get the necessary agreement between the Council and the Parliament can still be hard, and often the end result of these negotiations will result in a weaker Regulation than what the Commission and the Parliament intended with the proposal (Myrstad, 2015). The former Vice President of the European Commission, Viviane Reding promised in 2013 that this would not happen.

“Today I have made very clear that I will fight for a reform of the EU's data protection rules that will strengthen the rights of EU citizens and stimulate growth in the evolving single digital single market. The absolute red line below which I am not prepared to go is the current level of protection as laid down in the 1995 Directive” (Viviane Reding, 2013).

One way for the Commission to secure the proposal would be to threaten to withdraw it if the negotiations prove unsatisfactory. “The Commission is typically the initiator. And at the end the Council and the Parliament have to agree. Of course the Commission can say: No, I don’t like this, I withdraw the whole proposal” (Voss, 2015).

The scenario that is most feared by civil society is that the protection levels might fall beneath the red line of the 1995 Directive, a withdrawal would in that case be preferred. This is the background for the letters exchanged between a wide range of European and international NGOs and the Cabinet of Commission President Jean-Claude Juncker, where they urge him to stay true to the promises made by Viviane Reding, and in the Charter of Fundamental Rights.

“We write this letter with one simple question – will you take responsibility for ensuring that the Commission's legal and political promise will be kept?” (McNamee, 2015).

The answer from the Commission President confirms that “The Commission has been, and will continue to be true to this commitment” (Smulders, 2015). Thus giving a firm guarantee that he will not allow the Regulation to fall below the protection level already enshrined in the Directive. The ultimate threat to ensure this is a withdrawal of the proposal if the trilogues prove insufficient. That it will really come to this is however highly unlikely, as the Commission emphasised in my interview data with Mr Gencarelli. The Commission emphasised that the protection level will not drop below the red line of the Directive, and that the other actors of the trilogues confirmed that they shared this view at the launch meeting of the trilogues in June. The Commission also emphasised that there are constitutional constraints to the protection level as well, as the parameters to the level of protection are already given from the Charter of Fundamental Rights of the European Union and the Treaty of Lisbon (Gencarelli, 2015).

4 Discussion

4.1 An issue emerging

According to the Lippmann-Dewey debate, government action becomes necessary when existing institutions fail to address or settle an issue that affects the publics that do not have direct influence over the issue (Marres, 2005 p. 31). The STS literature in the field provides the tools to understand how issues become issues, by looking at the socio-ontological perspectives or ways of being (Marres, 2005) and by seeing how different publics relate to objects, or understand technology, and how this affects their attachment to an issue.

The issue of data protection has bubbled to the surface several times for the past 130 years. In Boston in 1890 the issue was raised by the two lawyers Brandeis and Warren (1890)

in the publication “Right to Privacy”. They described the technological development in the printing press and instant photography and use of this technology as a potential threat, and called for privacy to be respected in the law. In the 1950s and 1960s the intergovernmental Human Rights Organisation, the Council of Europe, brought the issue back to the fore, in light of a new technological advancement, the ever increasing electronic computer processing and storage capacity that allowed for the establishment of data banks and interlinking of data sources (Council of Europe, 2014). Both the publication “Right to Privacy”, Article 8 of the European Convention on Human Rights and Fundamental Freedoms from 1950 and the Convention 108 of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data, are aimed at influencing the respective governments to “deal with an issue the existing institutions seem unable to deal with”. The three texts all speak up for different “publics” that are indirectly affected by human action, the processing of personal data, and the technologies that are used to carry out this processing. The publics are also unable to have direct influence over these actions.

When data protection first made its appearance in legal texts in the 1970 the preparing legal documents, like the Norwegian proposition to the Parliament (Odelstingsproposisjon), put emphasis on the need to regulate in order to reduce the risks and potential unwanted side effects storing and processing of personal data could have on the individual (Ot.prp.nr.2, 1977-1978). When framing the issue in this particular manner, the general population of individuals are described as a public that are indirectly affected by human action or technology without direct influence over it, as described by Dewey (1991 [1927]). The widespread use of personal data in marketing, social media and even insurance has made it clear that this is an issue that concerns everybody.

However, according to Lippmann-Dewey, issues normally become issues when the existing institutions seem unable to deal with a problem, and publics that are affected mobilise to address this. Here it seems that the existing institutions are dealing with the problem, or at least trying to. Noortje Marres distinguishes between “problems” as used interchangeably with “issues” in the Lippmann-Dewey debate assuming possible mastery, where an STS-approach and the Sociology of Risk does not automatically assume that all issues are necessarily solvable (Marres, 2007). The issue of data protection does not seem to be solved with the introduction of privacy legislation in the 1970’s, and thus the issue appears again in the 1990’s, and again in at present time.

4.1.1 Publics

The issue and its publics continues to be framed and reframed by experts in law, mass media and human rights organisations. This articulation of the issue brings forth new publics, that are shaped by how they are framed by the different presentations, and how they relate to the issue of data protection and the objects, or technology that plays a part in the issue.

In the 1990's Data Protection, came more to the attention of the consumer, through consumer groups and private NGOs. In 1990, the organisation Privacy International was established to "investigate government surveillance and expose the companies enabling it, advocate for strong national, regional, and international laws that protect privacy and raise awareness about technologies and laws that place privacy at risk, to ensure that the public is informed and engaged" (Privacy International, 2015). The technological change that brings about this awareness is especially the ability to gather information about users through the internet and after the turn of the millennium the use of internet connected devices, or smart devices.[32] The gathering of information happens through voluntary sharing, or without the awareness of the user through cookies and other tracking technology.

The mass media also plays a large role in the framing of the issue. Their role as a watchdog brings media attention to many of the cases reported by Privacy International and other NGOs, and at the same time they report on current affairs within law making institutions. There is an increase in the number of newspaper articles with the words "data protection", "privacy" or the Norwegian equivalent "personvern" from the 1980s up until today[33] (Fig. 1)(Retriever, 2015).

[32] Smart devices range from internet connected smartphones, fire alarms, refrigerators and household appliances, cars or even clothes.

[33] This might not be a very good indicator, as the indexing and searchability of newspaper articles has also grown in the same time period. It may still however act as an illustration that data protection is more publicly debated now than before.

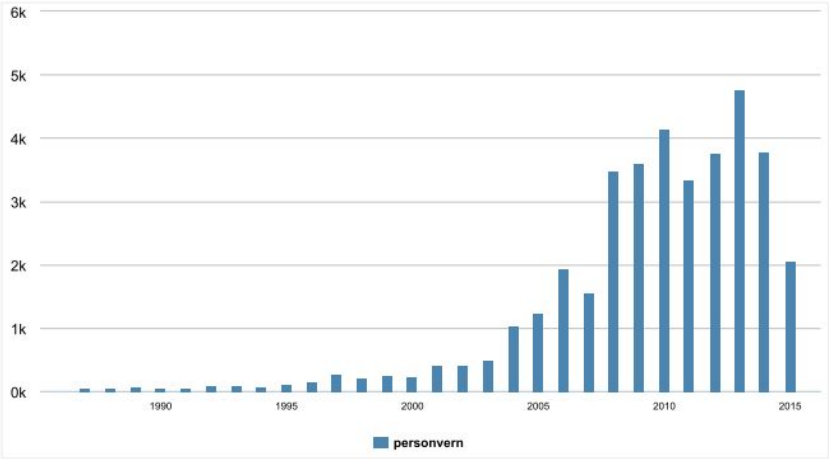

Figure 1 (Retriever, 2015)

There is also an increasing number of private individuals that are actively engaged in issues concerning data protection. Since 1973, the European Commission has been monitoring the evolution of public opinion in the member states. The surveys and studies address major topics concerning European citizenship (European Commision, 2015). There have been conducted four Special Eurobarometer surveys on the topic of data protection. Although it is not possible to make a valid statistical comparison between the figures as they are not looking at the same sample, nor asking exactly the same questions, it is worth noting that data protection and the perceived control over personal data seems to be getting more important over the years.

- **1996:** Two thirds of the Europeans are worried about the tracks they might leave by using information networks. Only 12% are not at all worried about this (Eurobarometer, 1997).
- **2003**: 60% of all EU citizens were concerned, to a greater or lesser degree, about the broad issue of the protection of their personal privacy (Eurobarometer, 2003).
- **2010:** 70% of Europeans are concerned that their personal data held by companies may be used for a purpose other than that for which it was collected (Eurobarometer, 2011).
- **2015:** More than eight out of ten respondents feel that they do not have complete control over their personal data, although only two thirds of this group are worried about this (Fig.2)(Eurobarometer, 2015).

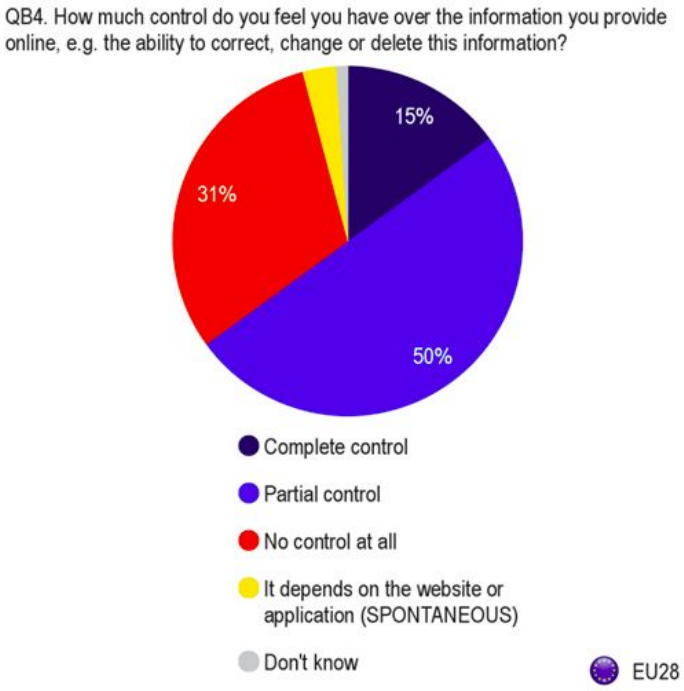

Figure 2 (Eurobarometer, 2015)

The fact that almost 50 of the 288 responses to the public consultation on the early proposal to update the current Data Protection Directive came from private individuals, shows that data protection is of concern to the general public (European Commission, 2011).

The public perception of the issue is connected to how they relate to the technology and the issue. The answers from the Eurobarometer surveys and the public consultation shows that people are in general concerned about how the data gathering technology is used to gather information about them, and how this information is processed to be used again for other purposes than what they have consented to. This is linked to the Snowden revelations, but also to the general trend where private actors, like Google, Facebook or any tech company that develops applications and services online, or for a smartphone, to use the opportunity to gather more information than needed. This data is often passed on to others for profiling purposes to make a profit, or even for surveillance purposes. The uncertainty of how the data about individuals might be used and what consequences this might have on the individual might cause what is referred to as a “chilling effect”. A chilling effect is when people limit their behaviour, fearing the consequences of their activities. If there is no control with how data is used, these consequences can affect a person's ability to get insurance, a bank loan or even the next job.

In the case of the GDPR, members of the general public engage in the issue personally by passing on their own concerns and opinions to the lawmakers, which is a clear example of how the issue sparks public participation in a democratic process as described by Marres (2005), Dewey (1991 [1927]) and Lippmann (2002 [1927]).

The fact that the General Data Protection Regulation is the most lobbied piece of legislation ever in the history of the European Union (Gencarelli, 2015) shows that publics engage in this democratic process when the government action taken seems insufficient and not up to date. Their view of the legislation is further framed by how people in general feel in lack of control of the use of their own data (Eurobarometer, 1996, 2003, 2010 and 2015) and is further emphasised by how the issue is presented in the mass media (The Guardian, 2013), and the different publics that all have their own framing, or understanding of the issue. The Regulation has been lobbied by nearly everyone according to the European Commission from lay people to the the giants in the silicone valley, a great number of NGOs, medical research, the red cross, Universities and even the Holocaust research institute and many more (Gencarelli, 2015).

According to Lars Vinden “some draw into question whether people really are concerned about data protection, or just go with the flow; that there is an environment created by the NGOs and mass media where being opposed to strict data protection is frowned upon, like it would be frowned upon to not be concerned about the increase in violence against women” (Vinden, 2015). It is true that despite of the seemingly growing concern, people share more information through the internet than ever, supporting this view. However, the lack of alternatives to the most popular services, and the downside of not participating online weighs up for this. Also the number of sources that document the concern speaks against this understanding.

4.2 Cooling down by heating up

Studying how actors frame the controversies of the GDPR in order to reach agreement and reducing the overflows that appear from differing opinions on what is good or bad policy outcomes is one of the objectives of this research. The previous chapters have presented how different actors frame the issue of data protection, putting forward their views and arguments to both influence the final legislation, and to convince the other actors of what is important, and what is not.

All agree that personal data is the raw material of the digital economy, as expressed by the European Commission (Gencarelli, 2015), but there are two diametrically opposing views to

how data protection affects economic performance, that causes one of the biggest controversies of the General Data Protection Regulation.

One view is that reflected by Axel Voss in the interview, where he explains how strict data protection rules put too many restrictions and administrative burdens on European businesses, and how businesses in third countries, like the USA, are not bound by these restrictions in the same ways and stand much more free in the ways they want to gather and use data (Voss, 2015). If companies in third countries are able to use data that European businesses can not use, they will have a comparative advantage over the Europeans.

The other view, that is reflected in the interview with Ms. Chronopoulou, is that strict data protection is a competitive advantage for European business, as it fosters trust in the services offered by these companies. With the GDPR the EU attempts to limit the ways businesses are allowed to use technology to gather and process information. What understanding that ultimately closes the controversy will affect how technology is used in Europe at least.

The controversy of whether imposing a strict data protection legislation is hampering economic growth and innovation or not, is at the centre of most of the granular amendments to, and position papers on the GDPR. And it has become obvious that the controversy of the GDPR is not distinguishable as a “cold situation” as described by Callon (1998), where it is simply enough to refer to the experts of data protection. It is as demonstrated not clear who these experts are. The issue of data protection can rather be described as a “hot situation” where there is no common knowledge base, there is a dispute over how the legislation will affect both the market and the different publics that try to make their views heard.

The process of framing in order to reach consensus is a laborious process. In an effort to cool down the issue, the issue has been heated up by the many actors that have delivered their position papers, their amendments and the opening up of the issue to the broader public. This chapter will analyse how the actors have approached this process, and how the controversy is edging closer to a colder phase, where it might cool down enough to reach a common understanding, or a compromise between the affected actors.

4.2.1 Making overflows manageable

When the European Commission first proposed to update and reform the framework for data protection in Europe they approached the public with a “sandwich list” of justifications into why this was necessary. This sandwich list can be seen as the Commission’s attempt at framing the

controversy to manage potential overflows at an early stage. By referring to three main challenges they framed a common understanding of why the reform was necessary:

1. The technological development needs to be faced with updated legislation
2. There is a need for a more harmonised legislation
3. We need to build trust in a digital economy, later labelled the Digital Single Market (DSM)

Interestingly, this initial frame has been little disputed, and as a starting point this was a very wise approach to get everybody on board. However that is only the beginning of the legislative process. In order to come to an agreement between consumer rights and business interests the Commission invited all actors, both public and corporate to issue their position papers at an early stage of the legislation. By opening up to public debate they allow the controversy to heat up, in order to map overflows. This early opening up of the controversy allowed the Commission to include disagreements in the discussions and meet the needs of both business interests and protecting fundamental rights. Kall and Sundquist labels this as a flexible strategy of closing the controversy as it is aimed at modifying the Commission's own understanding of the controversy (Kall and Sundquist, 2014). However, the strategy can seem a little half hearted, as this deliberation process is limited to a period of two and a half months. This short deadline can be viewed as a way of reducing the number of actors that will be able to respond, thus limiting and managing the overflows to a certain extent.

When the European Commision presented its proposal for a General Data Protection Regulation on the 25th of January 2012 they first repeated the existing consensus, which are the three agreed upon reasons for introducing the legislation. It then proceeded explaining in detail how the Regulation would cater the interests of strengthening the rights of the individual, then carefully explaining the benefits to business interests in terms of savings, reduced reporting and strengthening of trust. By at the same time setting up a website with a "Press pack", eight "fact sheets" on how the reform will impact various interests and all related documents, the Commission was early on trying to frame the controversy and the public understanding of the issue. Even the title of the press release witnesses this; "Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses" (European Commission, 2012). The European Commission established the "Article 29 Working Party" as an expert panel that give advice on data protection, as well as engaging a lot of legal and technical experts in the law making process.

By trying to establish a common knowledge base for data protection, referring to the expertise it had on the subject, the Commission again tried to establish consensus around the proposal. This approach can be labelled an inflexible strategy, as this creates and reproduces an image of the Commission as an expert organisation, and as possessing the best and most unique kind of expertise (Kall and Sundquist, 2014 p. 11).

4.2.2 Hybrid forum

The legislative process in the European Union is in a way constructed to give way to overflows and offer opportunities to "all" actors to influence a proposal before it is passed as a legislative act.[34] Thus from the legislation is proposed up until it is adopted, it is open for influence both at the national level, and in the European Parliament. In this process lobbyists are welcome to offer their own "frames" and try to create understanding and consensus for these opposing views. The lobbying process can be described as a very hot situation, or a "hybrid forum" as labelled by Callon (1998), where "facts and values have become entangled to such an extent that it is no longer possible to distinguish between two successive stages: first, the production and dissemination of information or knowledge, and second, the decision-making process itself" (Callon, 1998 p. 12). In this hybrid forum the overflowing is continuous with an ever-growing set of actors. In this period the amendments to the proposal grew to over 4000 amendments, and the controversy lurched first one way then the other. To describe the situation it is appropriate to use a quote from Callon again, "even when they enter the debate they are incapable of reaching agreement either on the facts or on the decisions that should be taken" (1998, p. 12).

Some actors use strategies of referring to real life experiences, like the companies arguing that their economic performance is threatened or medical research institutions describing the challenges they face with access to patient history and medical journals, others using the ever trumping argument of the need to keep up with the technological development. Yet others again use references to scientific knowledge to force their frame on the other actors. A smart lobby does what the Commission have been doing all the time, namely giving credit and embracing the frame of the other actors and taking back by applying their own frame onto this view (Gencarelli, 2015).

To close the controversy it is necessary to reach a consensus on the facts and issues at stake, a common frame. By using the momentum created by the Snowden revelations, many of

[34] The term law does not generally apply to European Union legislation, as Directives require adoption by national governments to become law.

the actors realised the need to reach an agreement, and through elaborate voting procedures on reports authored by the LIBE committee, the European Parliament reached a consensus in the plenary session in Strasbourg in November 2013. This common position, or frame, is however fragile, and always open to contest from dissatisfied parties, like Axel Voss.

"We have somehow achieved this but having in mind, not everything is the way I would like to have it, and therefore we have to work on that now in the trialogues, and I hope we can fix one or other points in a better way there" (Voss, 2015).

Moving from one hybrid forum to the next, the trilogue is also a situation where the agreed upon knowledge and controversies get drawn into question again. The number of actors are to a certain extent reduced as there are only a few present at the negotiating table, but here the three amended proposals; that of the Commission, the Council and the Parliament, which are put up against each other. The aim is to find a common text that all can agree upon, a final frame. In the trilogues there are a set of closing mechanisms or framing strategies that are applied by the various actors. It is, as demonstrated, vital for the Commission not to fall below the level of protection in the Directive from 1995, in the trilogues it operates as the moderator in guiding the two other institutions in a direction that brings them closer to each other (Voss, 2015). One strategy of the Council and the Parliament is referring to the parameters given by the consensus they have reached in their respective votings. The Commission uses the constitutional obligations by referring to both the Charter of Fundamental Rights of the European Union and the powers given by the Treaty of Lisbon to maintain a high level of protection. As all actors have agreed not to fall below the threshold of the Directive, the threat, although not explicit, to withdraw the proposal also acts as a closing mechanism that forces the three institutions to converge.

Whether the strategies of the Commission in managing the overflows in order to reach a consensus in the trilogues will be successful remains to be seen, as these negotiations are ongoing. But every actor is aiming at this. The European Commission expects a successful outcome of the trilogues, and hopes to finish the negotiations on time, hopefully within the end of 2015 (Gencarelli, 2015).

The strategies applied to close the controversy falls into the two categories proposed by Kall and Sundquist (2014), the flexible strategy that incorporates the frames of other actors and an inflexible strategy of overriding overflows and imposing one's own frame. By combining the

two strategies the European Commission opens the controversy, or heats it up, before incorporating the frames of other actors to reach agreement and cooling down by imposing restrictions and ultimatums.

4.3 Minimising side-effects and managing technology

One of the main arguments of the introduction of new data protection legislation in Europe is as demonstrated to be able to meet the technological development with up-to-date regulations.

> Technological progress and globalisation have profoundly changed the way our data is collected, accessed and used. New ways of communicating such as online social networks have profoundly changed the way people share personal information, while cloud computing means that more data is stored on remote servers instead of personal computers. 250 million people now use the internet daily in Europe. In this fast-changing environment, individuals must retain effective control over their personal data (European Commission, 2012c).

The introduction of new technologies like Big Data analysis, social media, cloud computing and an exponential growth in the processing and storage capacity of data has introduced new challenges to the way our data is gathered, shared, used and reused with or without the user's knowledge and consent. According to Mr Gencarelli some claim that we know as much about the potential of personal data as we knew about the potential uses of electricity in the beginning of the 19th century (Gencarelli, 2015).

The consequences and potential of the technologies and the use of our data is unknown, and produces unintended consequences. The amount of information that can be deduced from the data we share, and the patterns we reveal is unprecedented. Personal data has become the raw material of our digital economy. To protect the individual from unlawful processing of data, to avoid putting the individual in a vulnerable position and to limit the unintended consequences of the digital revolution are some of the main tasks of the data protection framework.

Digital technology has provided great opportunities and economic growth, but the whole system is threatened by the boomerang effect of unintended consequences that not only hit the unexpected masses, but also the industry that produces the risks. Recent cases of data breaches and the pursuant lack of trust in the industry are consequences of the risks produced. One such case is the Epsilon data breach in 2011, where millions of records of personal data

was exposed (Reuters, 2011), or the Heartbleed virus exposing a security breach in a large number of online services (The Guardian, 2014).

The “modernisation of modern society”, or reflexive modernization challenges the social form of the nation state and the structures that goes with it, by several ongoing processes, such as globalisation, individualisation and a global ecological crisis with the acknowledgement of nature’s limited resources.

The internet and the information technology is inherently global, and does not respect the existence of borders. Data flows are international, and the processing of data can happen anywhere in the world. It is the globalisation and technological progress that leads the way, and the national, or regional framework needs to adapt to these changes by handling the risks that are produced. Even where facts are uncertain, decisions need to be made, the reflexes or frames that are produced to reduce risk need to be acted upon. Modernity has not vanished, but it is becoming increasingly problematic (Beck, Bonss and Lau, 2003 p. 3). Data protection is under enormous pressure. It has become much more difficult to safeguard against data breaches, unlawful processing and tracking online (Myrstad, 2015).

“The state is back, and for the oldest Hobbesian reason – the provision of security in world risk society” (Beck, Bonss and Lau, 2003 p. 10).

The way the European institutions act to mitigate the risks posed by the use of information technology, and the technological progress in the field shows that they are acting in an uncertain world. Even in “hot situations” where science has lost its monopoly on knowledge, and facts are questionable, they still need to reach consensus in order to provide security in a risk society. By agreeing upon data protection regulations, the European Union tries to handle the side effects of the use of data that poses a threat and risks to the individual, and also to handle the unintended consequences and lack of trust in an industry that runs the risk of being hit by the boomerang effect of the risks they produce.

5 Closing remarks

This study has focused mainly upon the legislative process of the GDPR and how the issue of data protection has been shaped, reshaped and acted upon at different legislative levels throughout time. It has used a method for studying the settlement of controversies to see how actors, with emphasis on the European Commission, have tried to cool down the controversy in

order to reach a compromise in the trilogues and adopt a regulation for the protection of personal data.

In the introduction I described data protection as a “hot potato” as it is the talk of the town in Brussels these days. As mentioned, the General Data Protection Regulation is the most lobbied piece of legislation in the EU. I sat out to study how the issue was formed, and how the controversy is framed and reframed in order to reach consensus.

The issue of data protection has bubbled to the surface several times throughout history, at times where it has become evident to the different publics that they are indirectly affected by how technology is used to expose their personal and private lives. First through the developments in the printing press and instant photography, then through the rapid development of computers, in terms of communication, storage capabilities and automatic processing. The issue has kept reappearing as the existing institutions have proved unable to deal with the issue, combined with how the technological advancements have paved the way for even more invasive use of technology. This reemerging of the issue has again sparked public involvement and brought data protection to the political attention of the European Union.

I have demonstrated how the controversies of the GDPR can be understood in Callon’s terms as a “hot situation” where multiple actors all have different views on the controversy, and how the different actors even have different understandings of what is true, or false or right and wrong. Whether data protection will hamper economic growth, or boost it, has shown to be, and still is highly controversial. It remains to be seen whether a final consensus can be reached in the trilogues, and whether the result will be a strengthened data protection regime in Europe. In time it will also be interesting to examine the performance of tech companies in Europe vs. the rest of the world in order to consider the effect of data protection on economic performance.

Data protection can be seen as a way of handling the side effects of the technological progress, through making businesses more responsible of how they handle data. Data protection can furthermore create incentives for businesses to respect the regulations in place, and be more cautious about the risks of data breaches and leaks. By pointing to the risks introduced by the inherently borderlessness of the internet, and the need to protect the individual from the unknown consequences of how ICT is being used, I have shown that the introduction of data protection attempts at managing technology and mitigating risks.

By applying STS-research methods in issue formation and the study of controversy, this thesis has demonstrated how these can be applied to a legislative process in the European Union. By following a law in the making, and applying perspectives from the theory of reflexive modernity I have continued a tradition of combining an STS-approach with other areas of research, to nurture the interdisciplinary qualities of the field.

There is still much to be said about the issue of data protection, and this thesis has only scratched the surface of controversies that are playing themselves out behind the stage of European policymaking. I would find it interesting to examine closer how the controversies of data protection have been settled within the Council of the European Union, as this entails the convergence of the frames of 28 different governments.

Another question I would find it worth looking deeper into is whether the strength of the lobby is defined by the institution's limited understanding of the technology and challenges the tech-companies are facing.

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Appendix 1

Interview guide

This is the guide I will use when conducting the semi-structured interviews for my thesis.

I will conduct interviews with actors in the legislative bodies of the European Union (the Parliament and the Commission), to understand how they consider threats, and what forms the basis for their decisions. Where they gather knowledge about their decisions, and what they put emphasis on when shaping privacy regulations.

I will also conduct interviews with the technologists, and the privacy officer in Schibsted to unveil what considerations and opportunities lies in the new regulation. Through the interviews I will try to uncover how they relate to the privacy regulations of the European Union, and how they work to influence these.

NB: Turn on recorder

Warm up:
I begin by giving a short introduction to my thesis, and why I am interested in privacy and data protection.

Background:
Can you state your name and position for the record?

What is your main concern when it comes to data protection?

What triggers legislation?

Why is there a need to update the existing Data Protection Legislation?

What characterises the process, and why does it take so long?

Is Data Protection threatened by technological advances and Big Data?

Knowledge

When working with the Data Protection regulation, where do you seek knowledge and information about the issues at hand, challenges, technology and such?

Who are the experts/specialists on Data Protection? Who do you listen to?

Does the European commission and the Council listen to the same specialists?

How does the specialists relate to the corporate interests, consumer interests or legislative interests?

Negotiations:

I went to a hearing two weeks ago on data protection, and it seems that there is a consensus in the European Parliament. What are the different positions in the EP, and who represents them?

The DPR have gone to the first round of trilogues, who are is the strongest part here? And what are they fighting over?

How does one influence the other parts of these negotiations?

Private actors:

How do you relate to private companies when working with the DPR?

Is the Corporate sector organised or fragmented on these issues?

How do they try to influence the legislation? Does it work?

Who lobbies on DPR? And who has the most influence? Corporate, consumer, privacy organisations?

Risk:
How is the risks of new technology addressed in the legislation?

Is Data Protection threatened by Big Data?

Does the regulation define new powers to the EU?
Some argue that DPR leads to a loss of competitiveness vs. other countries, how is this treated in the EP?

How do you seek to balance DP and economic interest?

Appendix 2

Invitation to take part in a research on “Data Protection and Risk Reduction”

“Data protection in a Risk Society”

Background and purpose of the study

New technologies come with the promise of making our lives better. At the same time new technologies introduces new threats that challenge our ways of living.

The threat to our privacy is one of these, and the ways we perceive privacy is changing. The risks digital development imposes on our lives is hard to grasp, and is also perceived differently by various actors. The solutions to these threats also poses new risks to the actors that are operating in a technological society, both economically and ethically.

I will investigate how the various actors in society perceive Big Data and privacy threats, and how they seek to tame Big Data. How do government legislators and private actors answer the forthcoming challenges?

How are risks perceived by the various actors, and how does the various actors balance risk mitigation and the economy?

What is expected?

My study is a qualitative study, based on information from interviews with informants from the institutions of the European Union and the private sector. Other data material is reports produced by the European Union, the Norwegian Data Protection Authority, legal texts from the European Union and nationally implemented rules.

The questions I will ask will be on perception of risk, basis for legislation, considerations that have to be made and how actors influence and adapt to the legislation. I am interested in how the bodies of the European Union, the Data protection Autorities and the private sector respond to new technology, and the impact of new legislation regarding this technology.

Privacy policy

All information gathered will be subject to the consent of the interviewee. The research does not need sensitive information about individuals. The transcripts from the interviews are subject to approval by the interviewee, and personal information will be deleted or anonymised after the study is completed. Data collection will end by the end of September.

It is voluntary to take part in the study, and consent can be withdrawn at any point. All information that is gathered up until withdrawal will be anonymized.

Any questions regarding the study can be directed to: Espen BergLarsen, espenbla@student.uio.no+32 (0) 476 06 9122 or +47 97 07 84 78

Consent

I have received information about the research project, and I consent to take part in the study:
Signature:

_____

[NAME and DATE]