



How the Snowden Revelations Saved the EU General Data Protection Regulation

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ABSTRACT

Snowden's global surveillance revelations inverted the direction of the European Parliament's debate on the General Data Protection Regulation (GDPR). Before Snowden's revelations, corporations were shaping Europe's privacy rules. But when Snowden's revelations raised the salience of Internet privacy issues, the power of corporations went down, and privacy advocates incorporated their preferences into the GDPR. Thus, the fact that Snowden was able to increase the salience of privacy issues was instrumental in defeating organised corporate power and enabling privacy advocates to mobilise Europe's culture of privacy protection.

KEYWORDS

Privacy; GDPR; data protection; Snowden; political salience; lobbying

In just a short time, between January 2012 and the summer of 2013, the behaviour of the European Parliament (EP) changed and, despite the odds, defeated Silicon Valley corporations by passing the General Data Protection Regulation (GDPR) in first reading, reflecting the preferences of a coalition of privacy advocates. How did this come about? Using a historical narrative that centres on issue salience, and building upon Pepper D. Culpepper's 'quiet politics' theory,¹ in this article I show that the documents revealed by Edward Snowden in the summer of 2013² outraged Europeans, raised the salience of Internet privacy issues including the GDPR, and allowed privacy advocates to reverse the EP's opposition to rules strengthening privacy.

I show that, measured by the number of articles and opinion pieces mentioned in the leading newspapers of the five biggest EU countries,³ Snowden's revelations tripled the salience of Internet privacy issues and allowed pro-privacy advocates to push for privacy-strengthening rules in the Civil Liberties, Justice and Home Affairs Committee in November 2013 and the EP Plenary in March 2014.

This article is structured as follows. First, the literature review is presented. The analytical framework follows. Part one of the analysis explores the state of the GDPR debate from its announcement until the first documents revealed by Snowden were published, focusing on the corporate lobby and the low salience of the debate. Part two explains Snowden's revelations and why and how they affected the GDPR debate, creating a window of opportunity for

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¹Culpepper, *Quiet Politics and Business Power*.

²Greenwald, *No Place to Hide*; Poitras, *Citizenfour*.

³Germany, France, the UK, Italy and Spain.

privacy advocates to reframe the now highly salient GDPR debate and defeat business power. The article closes with concluding remarks.

Literature review

The cultural accounts of Europe's privacy leadership: fascist legacies and European dignity

There are two predominant cultural accounts of European privacy leadership. The first and prevalent variant, known as the 'fascist legacies theory'⁴ highlights that Europeans have learned to defend and protect their privacy due to the totalitarian and fascist experiences of the last century.⁵ As Wolfgang Kilian points out, the experiences of World War II and long-standing intellectual and cultural issues of privacy and the private sphere made Germany one of the first countries in the world to adopt data privacy codes, and to this day Germans remain concerned about the invasion of privacy.⁶

Another very similar cultural account is the European dignity explanation, given by James Whitman.⁷ Comparing the American and the European privacy approaches, but studying only France and Germany while making claims for all of continental Europe, Whitman contends that Europeans view privacy as a matter of dignity, whereas Americans see it as a question of liberty. According to Whitman, European ideas of privacy have their origins in late eighteenth century notions of dignity and honour in French law, and Kantian notions of personality in Germany that place greater emphasis on the right to control one's public image.

However, as Sven Steinmo has pointed out, cultural explanations have three severe analytical problems. First, cultural explanations fail to account for political change. Second, considering that political cultures consist of a mix of often contradictory or competing ideas, culture-based theories fail to provide a convincing explanation of why the dominant political culture might change in certain times or certain arenas. Finally, the causal mechanisms of culture as an independent variable remain vague.⁸ As a consequence of the limitations of cultural explanations, it is worth exploring other theories that may account for the EU's leadership in privacy matters.

The institutional account of EU privacy leadership

In *Protectors of Privacy*, Abraham Newman argues that the Data Protection Agencies (DPAs), established in the 1970s in some European countries, lobbied and 'persuaded' the European Commission (EC) and European Council to pass the 1995 Data Protection Directive in the face of intense lobbying by corporate and non-corporate actors by holding "the European integration process hostage to their demands for greater protection within Europe by threatening to block data flows between EU

⁴Newman, *Protectors of Privacy*.

⁵See, i.a., Beignier, *Le Droit de la personnalité*; Greenleaf, *Asian Data Privacy Laws*; Lindsay, "Conceptual Basis of Privacy"; Mullerat, "EU-US Data Protection"; Rotenberg and Jacobs, "Updating the Law of Information Privacy"; Ruyver *et al.*, *Strategies Combating Transnational Organized Crime*.

⁶Kilian, "Germany".

⁷Whitman, "The Two Western Cultures of Privacy".

⁸Steinmo, "American Exceptionalism Reconsidered", 107.

companies and governments”.⁹ DPAs became political actors capable of bolstering European rules and, through institutionalisation, managed to make privacy a “taken-for-granted issue in European debates”. Moreover, in spite of new security challenges that push for a rebalancing of national preferences toward privacy, DPAs “continue to participate in and shape European policy”. However, as Newman explained, once the 1995 Directive was adopted the DPAs lost their veto power,¹⁰ and as one can conclude following Newman’s reasoning, the DPAs no longer had the same leverage within the political process of the GDPR as they had before the 1995 Directive. Consequently, before Snowden, the Members of the European Parliament (MEPs) reflected the preferences of corporations and not of the DPAs.

In later works, Newman rightly pointed out that institutional innovations resulting from the 1995 Directive, such as the establishment of a European Data Protection Supervisor (EDPS) overseeing the compliance of data privacy rules by European institutions and advocating for DPAs’ interests in Brussels, and a network for coordination among DPAs (the Article 29 Working Party - Art. 29WP) signalled that DPAs (including the EDPS) were actors who had reshaped European political dynamics and whose presence was taken for granted in European politics.¹¹

Newman also highlighted how DPAs used their newly granted powers to limit unilateral action from the European Commission in privacy matters, in alliance with the European Parliament.¹² He illustrates this insight by discussing the case of the 2003 Passenger Name Record (PNR) agreement between the European Union and the United States: after the September 2001 terrorist attacks, the US started requiring all airlines to share extensive personal information about their passengers before accepting planes into its territory. The European Commission tried to come to a quick agreement with Washington in order to allow European airlines to keep their businesses running as usual, but the DPAs opposed and leveraged their authority in data privacy by issuing public statements and lobbying the EP. The final PNR agreement of December 2003 was a compromise between the Commission and the DPAs.¹³

In sum, Newman’s insightful explanation of the adoption of the 1995 Directive allows us to understand the importance of institutions in Europe’s privacy politics and not to take cultural explanations for granted. As Newman explains, once the 1995 Directive was enacted, DPAs institutionalised their power in a way that made it very unlikely that the general levels of privacy protection in the European Union would go down from the levels established in 1995 without a reform first that would water down the Directive. As Newman predicted, the cost DPAs paid for achieving that generally certain threshold of privacy protection was that they would no longer be able to use the tool that had allowed them to raise that threshold, that is threatening to block personal data transfers, once the 1995 Directive established common rules *and* a single market.¹⁴

Thus, paradoxically, in achieving the 1995 Directive DPAs lost their leverage. While DPAs directly influenced and shaped common European rules and achieved the

⁹Newman, *Protectors of Privacy*, 143; Farrell and Héritier, “Negotiating Privacy across Arenas”, 105.

¹⁰Newman, *Ibid.*, 143.

¹¹Newman, “Innovating European Data Privacy Regulation”.

¹²Newman, “Transatlantic Flight Fights”.

¹³*Ibid.*, 492.

¹⁴Newman, *Protectors of Privacy*.

institutionalisation of other similar agencies in European countries that did not have them, by agreeing to the creation of a single European market for personal data in 1995, they gave up their ultimate leverage. As long as the 1995 Directive is in place, DPAs cannot threaten to block the functioning of the single market since that would mean questioning the credibility of the framework that not only institutionalised their power, but created many of them. DPAs achieved institutionalisation but lost leverage power *vis-à-vis* the other political actors of the EU.

Having lost their veto power with the adoption of the 1995 Directive, DPAs were unable to impede the enactment of the 2006 Data Retention Directive,¹⁵ which obliged EU member states to collect and store telecommunications for at least six months and was declared invalid by the European Court of Justice (ECJ) in 2014.¹⁶ This is also why, despite the opposition and protests from European DPAs, the 2000 Safe Harbour agreement allowing American companies to trade personal data with Europeans was signed and in full force¹⁷ until it was also declared invalid by the ECJ in 2015.¹⁸ Crucially, this is why the DPAs were, until Snowden's revelations, unable to beat the corporate lobby that was convincing the EP to water down the GDPR so much that, just a day before *The Guardian* and *The Washington Post*¹⁹ revealed the NSA's PRISM program to the public, on 6 June 2013, the EU Commissioner for Justice promised that the "absolute redline" for the GDPR was the level of privacy protection offered by the 1995 Directive and called upon all to "resist [...] all attempts by those who are still trying to weaken data protection standards in Europe".²⁰

In sum, the institutional account of the adoption of the 1995 Directive sheds light on Europe's privacy framework and the central role played by the DPAs. In this regard, it shows that, having lost their leverage with the adoption of the 1995 Directive, the DPAs did not have the leverage *vis-à-vis* the other European actors to achieve a GDPR reflecting the preferences of privacy advocates. It also proves that it is necessary to question culturalist explanations and consider new theories to explain *why* the GDPR was adopted.

Analytical framework

In accordance with Culpepper's quiet politics framework, which briefly states that "business power goes down as political salience goes up",²¹ I argue that when the GDPR debate had low political salience corporations were able to see their preferences taken up by the EP, and when the debate became highly salient, it was more likely for privacy activists to beat the corporate lobby and push the EP to strengthen Europe's privacy rules.

In low salience scenarios, it is easy for corporations to influence politicians with their expertise and knowledge of a topic. If politicians feel that the people do not care about

¹⁵Ripoll Servent, "Holding the European Parliament Responsible".

¹⁶Arthur, "EU Court of Justice Overturns Law".

¹⁷Among others, Falque-Pierrotin, "Letter from Article 29 Working Party"; Farrell and Hértier, "Negotiating Privacy across Arenas".

¹⁸Drozdiak and Schechner, "EU Court Says Data-Transfer Pact".

¹⁹Greenwald and MacAskill, "NSA Prism Program Taps in"; Gellman and Poitras, "U.S., British Intelligence Mining Data", respectively.

²⁰EC, "Vice-President Reding's Intervention".

²¹Culpepper, *Quiet Politics and Business Power*, 77.

an issue, they will prefer to follow the self-interested advice of corporations, hoping that by doing so the economy will not be disrupted and, consequently, that the voters will reward them with re-election.²²

If public salience of an issue goes up, politicians will be more open to looking for additional sources of information beyond corporations to satisfy public needs, fearing they may lose office if they do not do so.²³ Thus, increasing the salience of an issue makes corporations less influential.²⁴

A good and generally accepted proxy for political salience is the presence of an issue in newspapers, since the more attention political actors pay to such issues and the more concerned members of the public are about specific issues, the more likely the newspapers are to cover them.²⁵ On the whole, newspapers will only persist in publishing news that their consumers care about reading enough to continue using their services.²⁶ However, relying on newspapers to measure political salience has three important limitations. First, even newspapers with a national and international vocation such as the *New York Times* are more likely to cover stories that impact the immediate geographical surroundings of its headquarters.²⁷ Second, one could object that the editorial boards of newspapers will bias coverage to their political concerns.²⁸ Third, relying on a single source might make the researcher unaware that the chosen proxy does not represent a larger “news agenda”.²⁹

A straightforward solution to the limitations just mentioned is to increase the number of sources analysed to guarantee more geographical coverage, including newspapers with different editorial houses in the equation,³⁰ “since it is clear that certain events or topics are so clearly newsworthy that, if we track attention in a range of sources, all will show similar trends”.³¹ However, measuring salience at the European level adds a layer of complexity to the issue, since there are no truly European-wide newspapers. Mahoney has tried to solve this problem by using the *Financial Times* as a source for measuring issue salience in Europe, arguing that such a measure offers comparability with the *New York Times* for transatlantic comparative studies.³² However, while the *Financial Times* is likely the closest thing to a European-wide newspaper, relying on it alone would involve the same limitations that relying only on the *New York Times* would involve (the *Financial Times* is a London-based newspaper with a right-of-centre editorial board), plus the aggravating factor that the *Financial Times* is a newspaper specialised in economic and financial issues.

Therefore, to measure issue salience, I used two print editions of the leading newspapers available on *Lexis-Nexis* of the big five European Union countries – France,

²²*Ibid.*

²³*Ibid.*, 4; Kollman, *Outside Lobbying*, 9.

²⁴Culpepper, *Ibid.*

²⁵Atkinson *et al.*, “Measuring the Media Agenda”; Boydston, *Making the News*; Edwards and Wood, “Who Influences Whom?”.

²⁶Culpepper, *Quiet Politics and Business Power*, 5–9; Gormley, “Regulatory Issue Networks”; Wilson, *Political Organizations*.

²⁷Oppermann and Viehrig, “Issue Salience”, 242.

²⁸Culpepper, *Ibid.*; Epstein and Segal, “Measuring Issue Salience”.

²⁹Atkinson *et al.*, “Measuring the Media Agenda”.

³⁰Culpepper, *Ibid.*

³¹Atkinson *et al.*, “Measuring the Media Agenda”, 356.

³²Mahoney, “Networking vs. Allying”; Mahoney, *Brussels Versus the Beltway*.

Germany, Italy, Spain, and the UK – which together account for more than 60 percent of the EU’s population. Methodologically, I first searched for the news and opinion pieces on Internet privacy or the GDPR³³ from 1 January 2012 (when the Commission presented the GDPR), to the end of March of 2014 (when the EP Plenary voted). Among the pieces found, I looked for those mentioning the global surveillance revelations³⁴ in order to add detail to the understanding of their effect on the salience of Internet privacy issues at large. I controlled for duplicates and false positives. Figure 1, in the analysis part of this article, presents the findings. The qualitative narrative that follows is used to explain the turns in issue salience identified by the quantitative methodology and to strengthen the explanatory power of the quantitative findings. The news and opinion pieces used in the qualitative narrative were chosen for their capacity to illustrate the evolution of the public debate.

But how does an issue become salient? There are two main reasons why an event becomes a public political issue: either through crisis or external shock,³⁵ or through the work of political entrepreneurs trying to mobilise public opinion by revealing a scandal, putting opponents on the defensive, or associating certain policies with widely shared values.³⁶ In the case of the GDPR debate, both factors are involved in increasing the salience of an issue linked to Snowden and his actions: Snowden’s first revelations, while he was still anonymous, produced a shock that brought attention to privacy and surveillance issues in general and the GDPR in particular; but then, in 2013, Snowden (once he had come out of anonymity) and a close group of collaborators clearly became political entrepreneurs and started carefully to publish information and direct attention toward privacy and surveillance issues and the GDPR.

Analysis

Part 1 – A Copernican revolution in European data protection

Less than 20 years after its adoption, European policymakers felt that the 1995 Data Protection Directive was outdated. The European digital economy needed a boost, and personal data, European policymakers believed, could not merely become the oil of the digital age.

Thus, responding to these concerns, the proposed GDPR included various innovations for Europe’s privacy policy, among which it is worth highlighting that: 1) as a Regulation, the law would be implemented in member states without national transpositions;³⁷ 2) the proposed GDPR mandated companies to obtain explicit consent from customers for the collection of their data and limited the further processing of it;

³³The query terms were: in English, (*regulation w/10 “data protection”*) OR (*internet AND privacy*) OR (*online AND privacy*); in Spanish, (*regulación w/10 “protección de datos”*) OR (*privacidad en la red*) OR (*privacidad AND online*) OR (*privacidad AND internet*); in French, (*régulation w/10 “données personnelles”*) OR (*confidentialité en ligne*) OR (*confidentialité AND internet*) OR (*confidentialité AND online*); in Italian, (*regolazione w/10 “protezione dei dati”*) OR (*privacy su internet*) OR (*privacy AND internet*) OR (*privacy AND online*); in German, (*datenschutzverordnung* OR *datenschutzreform* OR (*datenschutz AND internet*) OR (*datenschutz AND online*).

³⁴The query term was the same for all languages: (*Snowden* OR *NSA* OR *PRISM* OR *xkeyscore* OR *tempora* or *XKeyscore*). PRISM, xkeyscore and tempora are the names of the most popular NSA programs.

³⁵Jones and Baumgartner, *The Politics of Attention*, 68.

³⁶Derthick and Quirk, *The Politics of Deregulation*; Wilson, *The Politics of Regulation*.

³⁷Lielveldt and Princen, *Politics of the European Union*, 256.

and 3) the proposed GDPR created more independent and powerful DPAs capable of imposing fines on corporations of up to 2 percent of their global income.³⁸

Privacy defendants received the proposed GDPR positively. In an opinion that together with the “opinion of the [WP29] should be considered as the contribution of the supervisory authorities to the legislative process in the EP”,³⁹ the EDPS considered that “the proposed GDPR constitutes a huge step forward for data protection in Europe”.⁴⁰ Privacy and digital rights NGOs were also happy with the proposed GDPR. European Digital Rights (EDRI, a European-wide umbrella NGO of over 30 other civil advocacy organisations) welcomed the GDPR proposal “since Europe needs a comprehensive reform in order to ensure the protection of its citizens’ personal data and privacy, while enhancing legal certainty and competitiveness in a single digital market”, although it considered it only a first step.⁴¹

Companies and trade organisations were less enthusiastic. DigitalEurope believed that there were several “key issues threatening the EU’s digital technology industry” since “new administrative burdens” would create “useless paper trails and impose unnecessary costs” that “create significant challenges to [...] continued economic growth”.⁴² Likewise, in an open divestment threat,⁴³ the AmCham EU called for a rethink of some of the GDPR’s provisions in order “to make sure Europe remains a desirable place to do business”.⁴⁴

The corporate lobbying campaign was run by public affairs experts and experienced politicians and public servants hired by corporations aware that Brussels is an insider’s town when it comes to lobbying. For example, and in what illustrates companies’ willingness to employ an effective inside lobbying strategy,⁴⁵ one should consider that Facebook’s team was composed of Richard Allan, who served eight years as Liberal MP in the UK and acted as campaign manager for former British Deputy Prime Minister Nicholas Clegg, and led by Erika Mann, who served as a German Socialist MEP for 15 years (1994-2009) and founded, while in office, the European Internet Foundation (EIF), a forum that gathers more than 70 MEPs and Internet giants such as Microsoft, Google, Amazon and Facebook with the mission to “support Members of the EP from all political groups in their efforts to shape policy and regulation responsive to the growing potential of the internet and new technologies”;⁴⁶ Microsoft had former Maltese ambassador to the EU (1993-97) John Vassallo in its public policy team; and Google employed Sarah Hunter, a former Senior Policy Advisor (2001-05) of Tony Blair, as head of UK public policy, and Antoine Aubert, policy bureaucrat of the European Commission from 2005 to 2008, as head of its Brussels Policy Team.⁴⁷

³⁸Kuner, *European Commission’s Proposed Data Protection Regulation*.

³⁹EDPS, “Opinion of the European Data Protection Supervisor”, 2.

⁴⁰*Ibid.*, 3.

⁴¹EDRI, “ENDitorial”.

⁴²DigitalEurope, “Comments on Proposed Regulation”, 1.

⁴³Amongst others, Culppeper, *Quiet Politics and Business Power*; Hacker and Pierson, “Business Power and Social Policy”; Lindblom, *Politics and Markets*.

⁴⁴AmCham EU, “AmCham EU Position on Regulation”, 2–3.

⁴⁵Beyers, “Voice and Access”.

⁴⁶Richard Allan’s LinkedIn <https://uk.linkedin.com/in/ricallan>; Erika Mann’s LinkedIn <https://be.linkedin.com/pub/erika-mann/15/ba3/701>; EIF, “European Internet Forum - ABOUT US”, <https://www.eifonline.org/about-us.html>.

⁴⁷John Vassallo’s Economist Intelligence Unit Profile, <http://www.economistinsights.com/speaker/4040>; Sarah Hunter’s LinkedIn <https://www.linkedin.com/pub/sarah-hunter/17/866/712>; Antoine Aubert’s LinkedIn <https://www.linkedin.com/pub/antoine-aubert/2a/a2a/b4>.

But not all the corporate lobbying was done in-house. Companies hired the services of public affairs consultancies such as Kreab, in which former Danish Liberal MEP (1994-2009) and Vice Chairwoman of the Alliance of Liberals and Democrats for Europe (ALDE) as well as founder of the think tank European Privacy Association (EPA), Karin Riis-Jørgensen, serves as senior advisor,⁴⁸ and law firms such as Hunton & Williams, which had almost half of their attorney staff working on the regulation.⁴⁹

Aligning with companies, the US ambassador to the EU, William Kennard, told EU diplomats in December 2012 that the GDPR would create “poorly-connected regulatory environments for data exchange [that] will slow down transatlantic and global trade”.⁵⁰ Likewise, in an official visit to the EP, a representative of the US Department of Commerce warned MEPs that the GDPR would hurt the economy and cost jobs, and one of his colleagues from the Department of Justice stated that the Commission’s proposal would pose a security threat by making fighting crime more difficult.⁵¹

But the lobbying arsenal of other companies was even bigger. In order to push their preferences forward and multiply their voices, companies used umbrella trade organisations such as the AmCham EU, the Software Alliance, DigitalEurope, the Interactive Advertising Bureau (IAB) Europe, and the Association for Competitive Technologies to publish position papers and organise events; or MEP-Industry forums like the EIF to convince legislators during private industry-legislators events. Thus, AmCham EU together with sympathizing MEPs organised a series of conferences across the European Union alerting business to the perils of the GDPR. For example, in January 2013 the Swedish conservative MEP Corazza Bildt told a Swedish business audience that her group was “already sharpening our knives when it comes to amendments”.⁵²

The EIF, whose governor from 2010 to 2013 was ALDE’s MEP Alexander Alvaro, organised several events exclusively for MEPs and lobbyists on the reform of Europe’s privacy rules to give the former “the possibility to hear from leading European technology firms and groups on the impact of the proposed [data protection] regulation”.⁵³

MEPs and authorities lamented the pressure from the aggressive lobbying of tech companies. Josef Weidenholzer, Socialist MEP, told the *Financial Times*, “We [MEPs] are bombarded with emails and meeting requests by companies who want to water down the proposal. [...] I had never experienced such lobbying in my life.”⁵⁴ Similarly, the head of the WP29 considered the lobbying “unprecedented [...] and extremely aggressive”.⁵⁵ Understandably, pro-privacy NGOs were worried about the impact of lobbying opposing the GDPR. Jeff Chester, from the American Center for Democracy

⁴⁸Kreab, EU Transparency Register, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=1078390517-54>; Kreab, “Press Release: Former Member of the European Parliament Karin Riis-Jørgensen Joins Kreab Gavin Anderson”, <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=1078390517-54&locale=en#en>.

⁴⁹Eudes, “Très chères données personnelles”.

⁵⁰Kennard, “Remarks to the EU”.

⁵¹“The Right to Be Forgotten’: US Lobbyists Face Off with EU on Data Privacy Proposal”, *Spiegel Online*, 17 October 2012. <http://www.spiegel.de/international/business/us-government-and-internet-giants-battle-eu-over-data-privacy-proposal-a-861773.html>.

⁵²Quoted in Landes, “Sweden Enters Fray”.

⁵³EIF, “EIF Dinner Debate”, 19 March 2013, <https://www.eifonline.org/component/events/event/125-data-protection.html>.

⁵⁴Fontanella-Khan, “Brussels, Astroturfing Takes Root”.

⁵⁵Quoted in Fontanella-Khan, *Ibid.*

and Technology expressed concern that the American companies' lobby in Europe was a "very intense" attempt to "weaken" European privacy rules.⁵⁶ Likewise, in January 2013, the spokesperson of *La Quadrature du Net* (LQDN, a French digital rights NGO), Jérémie Zimmermann, told the *New York Times*, "The outcome [of the GDPR] is very unclear at this point. The U.S. lobbying on this has been very effective so far. It is impossible to tell what will happen."⁵⁷

Hence, considering the intensity of lobbying efforts, it comes as no surprise that as late as 29 May 2013, shortly before the irruption of Snowden onto the public scene, the rapporteur for the GDPR, Green MEP Jan Albrecht told the *EUobserver*:

We promised the people that we will help give a proper legislation that will better enforce their rights, better protect their interest . . . and in the end, the only thing that we are doing – and this is not excluded – is to water down existing law.⁵⁸

Albrecht was rightfully worried. First, as shown, companies were succeeding with their lobbying. By May 2013, LIBE (the EP's lead committee for the GDPR) had received more than 3,000 amendments to the GDPR and had decided to delay voting on them at least until July.⁵⁹ Furthermore, a leaked note from the Irish Presidency of the European Council to the Council revealed that "several member states have voiced their disagreement with the level of prescriptiveness of a number of the proposed obligations in the draft regulation",⁶⁰ agreeing with a previous report by the Cypriot Presidency asserting the same thing.⁶¹

According to information collected at different points in time from sources in the EC, the EP, and the privacy advocates, Germany was one of the countries most fiercely opposed to the GDPR inside the European Council in alliance with Sweden and the UK.⁶² The Council's opposition and efforts to delay the GDPR were denounced by an anonymous source in *Der Spiegel* in December 2013, mentioning that Germany was putting the brakes on the process.⁶³ After Snowden, however, Merkel turned around and denounced British inaction: "The UK wanted to delay the DPR because they feel that it may harm the interests of business [. . .]."⁶⁴ Worried by all of this, Albrecht told *Le Monde* on 2 June 2013 that "80 percent of those amendment proposals are arriving from abroad, from companies, primarily from Silicon Valley giants. [. . .] They are so many and so active that it seems as if the same message is coming from everywhere. That creates an overall atmosphere that affects the general spirit"⁶⁵ and turned the European People's Party (EPP) MEPs against the GDPR.⁶⁶

⁵⁶Dembosky, "Facebook Spending on Lobbying Soars".

⁵⁷O'Brien, "European Privacy Proposal Lays Bare Differences".

⁵⁸Nielsen, "New EU Data Law".

⁵⁹*Ibid.*

⁶⁰European Council, "General Data Protection Regulation", 2.

⁶¹European Council, "Report on Progress Achieved under Cyprus Presidency", 6.

⁶²Personal interview with Erik Josefsson, Senior Advisor of European Green Party, Brussels, April 2013; Senior EU NGO Official who prefers to remain anonymous, Brussels, May 2013; EC Justice Senior Official who prefers to remain anonymous, Brussels, April 2013; European Justice Commission Senior Officials, off the record.

⁶³Hecking, "EU-Ministerrat".

⁶⁴Fleming, "Data Protection Rules Delayed".

⁶⁵Translated by the author. Original in French: "Plus de 80 % des propositions d'amendements arrivant de l'extérieur proviennent des entreprises, et principalement des géants de la Silicon Valley. [. . .] Ils sont si nombreux et si actifs que le même message semble arriver de partout à la fois. Cela crée une ambiance diffuse, qui influe sur l'état d'esprit général." Eudes, "Très chères données personnelles".

⁶⁶*Ibid.*

As will be seen in the following section, Snowden's unexpected irruption on the scene transformed the GDPR debate in Europe in general, and turned it around in the EP in particular.

Part 2 – An unexpected twist

A very conservative prediction of the Parliament's opinion on the GDPR made in the summer of 2013 would have been that the best-case scenario for privacy advocates was that the Parliament was not going to strengthen Europe's privacy framework and ratify European leadership in that field. After all, as Commissioner Viviane Reding put it just one day before the PRISM program was revealed to the public, on 6 June 2013: "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."⁶⁷ The next day everything would change.

On 7 June 2013, *The Washington Post* and *The Guardian* jointly published top secret documents leaked by a then-unknown NSA whistleblower – two days later revealed to be Edward Snowden.⁶⁸ They unveiled how the NSA in the United States and the General Communications Headquarters (GCHQ) in the UK were capable of "[c]ollecting [data] directly from the servers of these U.S. Service Providers: Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube, Apple".⁶⁹

Luckily for privacy advocates, the revelations of PRISM were not only an external shock that momentarily raised the profile of the Internet privacy debates in Europe, as seen in Figure 1, but were only the first of a series of revelations made by the activist Edward Snowden.

The timing and pacing of the revelations were carefully calculated since Snowden identified himself as a privacy activist. "I want to spark a worldwide debate about privacy, Internet freedom, and the dangers of state surveillance," Snowden told journalist Glenn Greenwald in an email exchange.⁷⁰ Due to Snowden's revelations, the previously aggressive corporate lobby was forced onto the defensive and had to distance itself from the US government, which had been supporting their lobbying efforts in Brussels. Mark Zuckerberg, CEO and founder of Facebook, said in an interview with *The Atlantic* that the response of the administration of President Barack Obama "to the NSA issues that have blown up are a big deal for [Facebook's] global platform. Some of the government's statements have been profoundly unhelpful."⁷¹

Some internet companies tried to downplay their relationship with the US government by publicly expressing outrage regarding the surveillance revelations. In December 2013, tech giants launched the platform Reform Government Surveillance⁷² and published "An open letter to Washington" arguing that "We understand that governments have a duty to protect their citizens. But this summer's revelations highlighted the urgent need to reform government surveillance

⁶⁷EC, "Vice-President Reding's Intervention".

⁶⁸Greenwald *et al.*, "Edward Snowden".

⁶⁹Gellman and Poitras, "U.S., British Intelligence Mining Data".

⁷⁰Quoted in Greenwald, *No Place to Hide*, 18.

⁷¹Green, "Facebook Nation".

⁷²www.reformgovernmentsurveillance.com

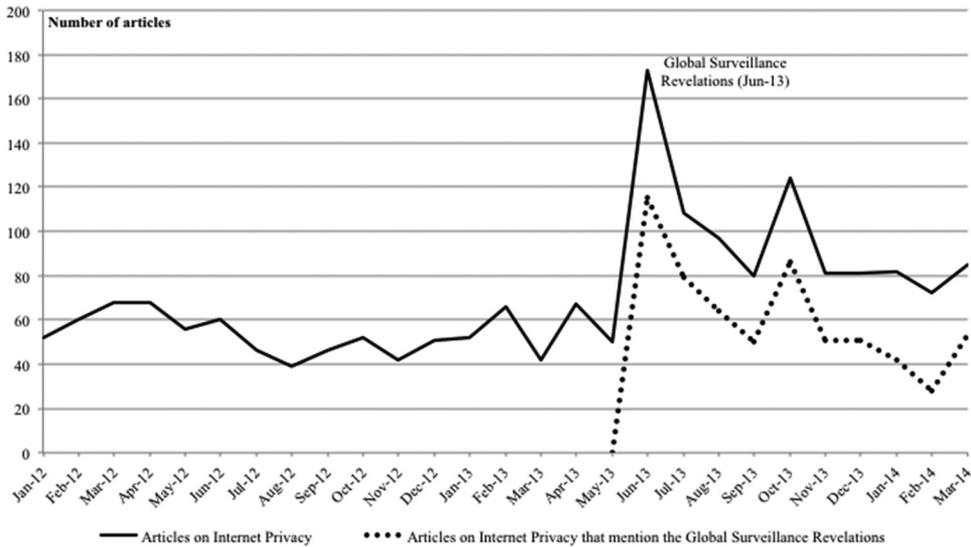


Figure 1. Salience of Internet privacy issues in the five biggest EU countries

practices worldwide.”⁷³ Yet, further secret documents revealed by *The Guardian* and *The Washington Post* showed, and statements of reactions of corporate lawyers to the newspaper’s news confirmed, that some Internet companies were asking for and being reimbursed by the US government for their efforts in complying with the NSA surveillance programs at least since 2011,⁷⁴ harming the companies’ public image.

The lobbying power of companies was also severely damaged since the general public started perceiving them as collaborators and enablers of state surveillance. In June 2013, the well known British historian, Timothy Garton Ash, published an op-ed in *The Guardian* entitled “If Big Brother came back, he’d be a public-private partnership”. He argued that

Edward Snowden’s revelations about massive data-mining by American and British spying agencies show that most of the sources they are digging into are privately owned [...]. This commercial accumulation of intimate personal information is worrying in itself. The reassurance we are offered from Facebook, Google and others – ‘trust us’ – is not good enough. After all, it now turns out they’ve been sharing some of it with the spooks.⁷⁵

At the same time, the privacy defendants, such as Commissioner Reding, rapporteur Albrecht and the DPAs, used the opportunity created by the surveillance scandals to strengthen the GDPR by weakening the position of Internet companies. On 19 July 2013, after an informal meeting with the Justice Ministers of the EU Council, Reding summarised the new leverage of privacy defendants in light of the new scenario: “All EU institutions agree that we have to join forces in order to have a strong European data protection law for our continent [...] PRISM has been a wake-up call. The data protection reform is Europe’s answer.”⁷⁶

⁷³O’Brien, “Apple, Facebook, Google Call for Reform”.

⁷⁴Fung, “The NSA Paid Silicon Valley Millions”; MacAskill, “NSA Paid Millions”.

⁷⁵Garton Ash, “If Big Brother Came Back”.

⁷⁶EC, “Informal Justice Council in Vilnius”.

Rapporteur Albrecht also quickly reacted to “leaks [that] hit the public in the middle of ongoing negotiations and debates in the EP on the GDPR” and reflected that “weakening data protection in Europe will only serve those who operate under weak or non-existing data protection rules in the United States or elsewhere”. He thus called for introducing amendments to the GDPR to address the “NSA/PRISM/Cloud surveillance issues”.⁷⁷ Similarly, the EDPS issued a statement noting that it was “following the NSA story closely and is concerned about the possible serious implications for the privacy and other fundamental rights of EU citizens”.⁷⁸

Companies lamented the change of frame of the GDPR debate. In an opinion piece, John Higgins, the Director General of DigitalEurope, complained that Justice Commissioner “Reding is confusing matters further by linking PRISM-gate to her attempts to push through her data protection regulation” and that her supporters “misleadingly claim that the critics are just US tech firms trying to dumb down European privacy laws for their own bottom line advantages”. He, on the other hand, believed the revelations of surveillance highlighted “that the single biggest threat to citizens’ privacy is surveillance by governments”.⁷⁹ Nevertheless, companies’ legitimacy was hurt by the revelations as was their previously cosy relationship with the US government in lobbying against the GDPR.

The surveillance revelations fundamentally changed the substance of the GDPR debate. If before the revelations the GDPR debate was solely about Internet privacy, now it had become about the protection of Europeans’ Internet privacy from unwanted and abusive American surveillance. As a consequence, conservative groups changed their narrative. LIBE’s shadow rapporteur, Axel Voss (EPP), together with MEPs Marielle Gallo, Sean Kelly and Lara Comi called for the introduction of an anti-NSA surveillance clause in the GDPR “to restore the trust of EU citizens as we continue to negotiate the new Data Protection laws”.⁸⁰

As expected by the quiet politics theory, in this new high salience scenario many of the preferences of the privacy advocates were highly emphasized by the EP. When voted in the Committee in November 2013, LIBE’s report on the GDPR received 48 votes in favour, 3 abstentions, and only 1 against. Unsurprisingly, the DPAs were happy. After LIBE’s committee vote, correctly taking the EP’s approval of the report for granted, Peter Hustinx, chief of the EDPS, said “the result is a positive step for further progress to be made”;⁸¹ likewise, the WP29 considered LIBE’s committee vote “a major step forward in the process towards a comprehensive framework on data protection in the EU”.⁸²

Days later, all the Groups had achieved a consensus on the amendments that could easily be incorporated into LIBE’s report in committee and in plenary. Rapporteur Albrecht told *Time* magazine what the effect of Snowden had been on the parliamentary process: “After Snowden,” said Albrecht, “we agreed that data protection in Europe is part of our self-determination and dignity”, but, he conceded, he did not expect LIBE to

⁷⁷Albrecht, “U.S. Surveillance Leaks”.

⁷⁸EDPS, “Statement: EDPS Following the NSA Story”, https://edps.europa.eu/sites/edp/files/edpsweb_press_releases/13-06-10_statement_nsa_en.pdf

⁷⁹Higgins, “Data Protection”.

⁸⁰EPP Group EP, “We Want ‘Anti Net Tapping Clause’”.

⁸¹EDPS, “An Important and Welcome Step”, 1.

⁸²WP29, “Article 29 Working Party Calls for Swift Adoption”, 1.

agree in only two hours to the privacy strengthening amendments he proposed to what had previously already been considered a stringent proposal: “This was a surprise for everybody.”⁸³ Put to the vote in March 2014, LIBE’s report on the GDPR received 621 votes in favour, 22 abstentions and only 11 votes against.

Conclusion

The salience of an issue can radically change the course of a political debate, altering the balance of power between the involved stakeholders. When the media salience of privacy debates was low, corporations were succeeding in shaping the GDPR according to their interests – and privacy advocates were in despair. However, when the Snowden revelations pushed the fourth estate to pay more attention to privacy and surveillance issues, legislators’ attitude towards advocates’ and corporations’ preferences reversed. The GDPR offers a valuable lesson to the under-resourced activists fighting organised corporate interests in many causes: bringing media attention to a debate can give activist advocates power to fight back.

More specifically, the contributions of this article are several. Empirically, it has shown how corporations influenced the EP during the GDPR parliamentary process and also how Snowden’s global surveillance revelations tangibly affected the Internet privacy debate in Europe. Theoretically, by carefully analysing the political process of the GDPR, this article shows the weaknesses of culturalist readings of Europe’s privacy leadership.

This article does not suggest that Europeans do not care about their privacy or only care when privacy is in the news. The fact that Europeans were outraged by the Snowden revelations and that many policymakers changed their position regarding the GDPR when they realised that their constituencies cared deeply about the issue reveals that, in some scenarios, Europe’s culture of privacy has political effects. But by failing to account for political processes and variations in the positions of political actors over time, cultural theories tend to fall into a static confirmation bias built upon the narrative fallacy of only accounting for positive outcomes. It is clear then that the Snowden revelations had an effect on the GDPR process in the EP because at least a part of the European public cares deeply about this issue.

Regarding corporate power, we have seen how Silicon Valley companies used lobbying strategies defined as aggressive and unprecedented by key EU political actors that proved to be very successful in a low salience scenario: the opinions on the GDPR of opinion-giving committees reflected corporate preferences. Nevertheless, the structural power of these companies did not trigger an automatic response from policymakers and, instead, corporations had to mobilise their power intentionally and turn to a strong strategy of inside lobbying.

The theoretical contribution of this piece is in the field of European privacy leadership. DPAs are in need of high salience scenarios in order to maintain a meaningful grip on European policymaking and contribute to strengthening European privacy rules. In 1995, DPAs created a high threshold for the level of data protection in the EU, but lost the instrument that had allowed them to raise

⁸³Quoted in Shuster, “E.U. Pushes for Stricter Data Protection”.

that threshold when they could no longer threaten to block the European personal data single market. The GDPR case shows how DPAs need advocates to impose their preferences: outsiders such as Snowden or *La Quadrature du Net* to raise the salience of Internet privacy debates across the EU, and insiders such as Albrecht and European Digital Rights to lead and direct a privacy strengthening approach in the European Parliament.

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