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Harnessing the collective potential of GDPR access rights: towards an ecology of transparency

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The GDPR's goal of empowering citizens can only be fully realised when the collective dimensions of data subject rights are acknowledged and supported through proper enforcement. The power of the collective use of data subjects' rights, however, is currently neither acknowledged nor properly enforced. This is the message we sent to the European Commission in response to its call for feedback for its two-year review of the GDPR. In [our submission](#) entitled *Recognising and Enabling the Collective Dimension of the GDPR and the Right of Access – A call to support the governance structure of checks and balances for informational power asymmetries*, we demonstrate the collective potential of GDPR access rights with a long list of real-life



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examples.

According to the [European Commission's recently published evaluation](#), the GDPR is doing well in attaining this goal of empowering citizens. We do not agree with this conclusion. While we share some aspects of the positive evaluation, our research shows that the empowerment provided by the GDPR is severely limited. We cannot ignore the fact that most [data protection experts](#), including regulators, academics, practitioners and NGOs are indicating that in a fair assessment of the success of the GDPR the glass is at best half full. Moreover, as shown by the surveys conducted for the Commission, the majority of European citizens already felt that they did not have control over the personal data they provide online before the introduction of the GDPR, and the proportion of citizens feeling that way has only grown since the introduction of the GDPR [see Eurobarometer 497a, Eurobarometer 431]. The whirlwind of cookie banners, “informed” consent forms and privacy policies which the GDPR triggered, have probably contributed to a sense of dis-empowerment, as these are very demanding on the individual and may have just made people more aware of their existing lack of control. We believe the discrepancy between the Commission’s largely positive evaluation and the practical experience of many citizens can be explained by the Commission ignoring the two key elements we highlighted in [our submission](#).

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LACK OF COLLECTIVE DIMENSION AND PROBLEMS OF ENFORCEMENT

First, the Commission fails to acknowledge the collective dimension at the core of the governance system put in place by the GDPR. In the face of an ever-increasing digitalisation of our society, and the growing informational power asymmetries that accompany this shift, the potential for empowerment through *individual* rights is limited. This fact is recognised in the “architecture of empowerment” provided by the GDPR, which places individual citizens and their rights in a broader infrastructure, also empowering societal organisations as well as data protection authorities (DPAs). In order for data subject rights, and the right of access in particular, to live up to their potential for empowerment and social justice in a datafied society, we need to recognise and stimulate an ‘ecology of transparency’.

Second, the Commission underestimates the existing problems in compliance and enforcement. While enforcement went up over the last years, most DPAs are structurally under-resourced and many blatant infringements of the GDPR remain unenforced. Without proper enforcement there can be no citizens’ empowerment. The “architecture of empowerment” will inevitably lack the backbone that is needed to enable the “ecology of transparency” to express its full potential.

THE ECOLOGY OF TRANSPARENCY

In order to substantiate our call for more attention and effort to be put into enabling an ecology of transparency, we provided a broad overview of real-life cases where the right of access has been used collectively. The annex to our submission describes around 30 cases in which an engaged civil society (including NGOs, journalists and individuals) used the right of access to achieve collective goals. As such, we wish to highlight this collective dimension of access rights under GDPR, emphasising their potential for social justice and the actions that need to be taken for rendering them effective. The European Commission, along with the European Data Protection Board (EDPB) and national data protection authorities has a duty to create an enabling environment for collective access rights.

The ecology of transparency we envisage is constituted by the intra-institutional network of actors, laws, norms and practices in which the right of access is exercised. It is shaped by the interplay between the law, the regulators and the actual practices of civil society. Taking this broader view on the ecosystem of institutions and practices allows us to better identify the social conditions that need to be in place for the right of access to achieve its goal of enabling citizens to assess and contest systems that rely on the processing of personal data.

This ability to scrutinise and challenge digital infrastructures or ecosystems has become even more urgent in the wake of the massive migration of work, education and social life to online services and platforms. GDPR transparency measures – and the right of access in particular – offer a vital legal tool for investigatory research into these digital infrastructures, identifying what data is collected, how and why it is processed, with whom it is shared, and how it is (supposed to) affect people.

Apart from the “usual suspects” such as Privacy International, NOYB and Bits of Freedom, we also observed other NGOs, collectives, journalists and motivated individuals capitalising on access rights in order to achieve goals reaching beyond mere curiosity and/or self-interest. These range from climate activists fighting corporate surveillance, to students uncovering discriminatory admission criteria, content creators challenging YouTube’s demonetisation and content recommendation practices, gig-economy workers pushing for better working conditions and a whole range of investigative journalism projects. These examples illustrate a crucial point: data subject rights are not only necessary tools to safeguard ‘privacy’ or ‘data protection’ rights, but are vital to the defence of all fundamental rights.

NO EMPOWERMENT WITHOUT ENFORCEMENT

While the real-life cases listed in our submission clearly demonstrate the importance and collective potential of access rights, we observe major failings that obstruct this ecology of transparency, and thereby thwart the emancipatory potential of the GDPR. Meaningful compliance with the right of access is still very low. Many data controllers only grant access to some of the information they are legally required to give, and/or raise many legal and technical obstacles along the way. This has resulted in numerous complaints filed with data protection authorities across the EU. For example, in the last year, almost 40% of the complaints received by the UK Information Commissioner's Office (ICO) concerned access requests, and almost 30% of the complaints received by the Dutch DPA were about data subject rights, with a substantial part relating to the right of access.

Considering this high number of complaints, as well as the seriousness of the alleged infringements, it is harrowing to see how weak enforcement has been in the last two years. The Commission holds the view that “DPAs have made balanced use of their strengthened corrective powers” (p. 5). We forcefully disagree with this position. In our submission to the Commission, we raised four enforcement issues in particular: (a) lack of consistent enforcement across EU member states; (b) apparent low-priority of data rights cases; (c) *very slow* enforcement; and (d) over-tolerant enforcement. DPAs should take data subject (access) rights

much more seriously, as they are a crucial tool within the GDPR's architecture of empowerment. We observe that even where NGOs or academics have filed well-argued and documented complaints for often blatant cases of non-compliance, DPAs have only taken action occasionally, and if so, very mildly. This stands in sharp contrast to their pivotal role in the ecology of transparency, in which DPAs are explicitly tasked (and given extensive powers) to monitor and enforce the application of the GDPR. A significant increase in resources and know-how is crucial in resolving these issues. In light of this, we welcome the Commission's acknowledgment that many DPAs lack the required funding. Crucially, both the right of access and DPA's duty to verify compliance are explicitly mentioned in the Charter of fundamental rights and freedoms of the EU. As it stands now, there is a strong argument to be made that most member states fail to comply with Article 8(2)-(3) Charter.

The effectiveness of the 'ecology of transparency' depends on the effectiveness of its individual components, i.e. the network of actors, laws, norms and practices in which the right of access is being exercised – and their ability to mutually reinforce each other. Active citizens, digital rights organisations, the media, academia, but also regulators, data protection authorities and data protection officers interact with each other and function together as a network of checks and balances.

SUPPORTING A THRIVING EUROPEAN CULTURE OF DATA PROTECTION

The severe information and power asymmetries in modern society cannot be addressed effectively by data subjects acting alone. It is in recognition of this reality that the GDPR provides a broader architecture of empowerment. Yet the importance of the collective dimension underlying the GDPR has still not been properly recognised. This is problematic, because collective processes are vital when contesting situations where the current status quo is essentially at odds with fundamental rights. Especially in contexts characterised by strong information and power asymmetries. In [our submission](#), we list numerous real-life cases that exemplify this, such as [Max Schrems contesting data transfers](#) to the US because their surveillance laws are in contradiction with European fundamental rights, or civil society scrutinising the ad personalisation sector. Without immediate action reinforcing the collective dimension of the GDPR, we risk further solidifying the current status quo where individuals - and society more broadly - are at the mercy of those operating data infrastructures.

For these reasons, the competent institutions – i.e. the European Commission, EDPB, DPAs and European Data Protection Supervisor (EDPS) – should properly consider, value and strengthen the ecology of transparency when interpreting and applying the GDPR. Fully

recognising the ecology of transparency is vital in enabling the GDPR to realise its function as a baseline framework for a fair data-driven society. The time is now to invest in collective empowerment so as to nurture a thriving European culture of data protection.

1 Comment