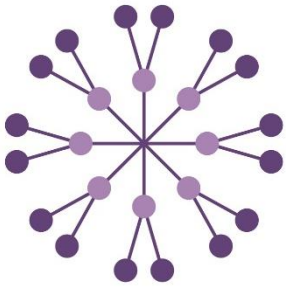

INTERNATIONAL
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STUDIES IN LAW

5th International Conference of PhD Students and Young Researchers

HOW DEEP IS YOUR LAW? BREXIT. TECHNOLOGIES. MODERN CONFLICTS

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FOREWORD BY THE ORGANISERS

We are delighted to present you already the fifth edition of international conference papers of the PhD students and young researchers. This year the international conference is once again devoted to very challenging and many different discussions raising topic "How Deep is Your Law? Brexit. Technologies. Modern conflicts"". The topic is devoted to analyse events and problems which could shape and influence the legal, political and economic future of many regions of the world and the topics are relevant not only for lawyers but also for representatives of other professions. Themes of presentations span from legal problems to trigger Brexit to possible effects of Brexit for Eastern European countries; from protection of privacy in social networks to challenges of E-waste; from hybrid wars to impact of counterterrorism for human rights in Africa.

Conference papers are presented by PhD students and young scholars from Belarus, Belgium, Estonia, France, Germany, Italy, Latvia, Lithuania, Poland, Russia, Spain, Ukraine and United Kingdom. This shows that in 2014 established International Network of Doctoral Studies in Law by Vilnius University Faculty of Law, Frankfurt am Main J.W. Goethe University Faculty of Law, Paris Nanterre University Faculty of Law and Lodz University Faculty of Law and Administration already created an international platform to develop academic and scientific activities, to enhance quality of doctoral studies in law and to help the interchange of information and ideas among PhD students and professors.

We hope that while we wait for the next year conference, this edition of papers will be a perfect way to deepen knowledge in many relevant aspects of law for scholars, students and practitioners in different fields of interest.

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PERSONAL DATA AS AN ECONOMIC GOOD – MISLEADING COMMERCIAL PRACTICES AND SOCIAL NETWORKS

Ricardo Pazos[1]

Abstract

In the digitised world, businesses seek different types of information, and personal data is one of them. These data allow them to economise their resources, reach a larger public and target their goods and services to the right users. All the collected information can be used, sold to or exchanged with other economic operators. This paper covers two of the large number of legal issues that arise from the increasing importance of personal data in the digitised world.

First, Internet users usually must give information in exchange of online content which is allegedly 'free'. Taking into account the economic value of that information, we might be facing a case of 'misleading advertising'. Even if it is not, the CJEU has recently developed more its case-law regarding transparency on terms that are not individually negotiated, in connection with the Unfair Terms Directive. This case-law can be used to make online content providers be subject to a special obligation of transparency on the payment through personal data.

Second, the owners of social networks require users to give access to their personal data and to transfer or share their rights on information, videos or images uploaded and diffused through the platform. Two sets of property rights play here. On the one hand, those on the network, held by its owner. On the other, those on the personal data, held by the user. A property rights approach to this interaction lead us to foster privacy and data protection rules designed by contracts between network owners and each user.

Keywords: social networks, personal data, misleading commercial practices, transparency, property rights.

Introduction

'If you are not paying for a product, you are the product'. This is becoming a common message on the Internet nowadays, expressed in many different ways. I believe it is true to a certain degree, and that it would be convenient for everybody to internalise the idea and take it into account in their everyday life. With the previous quote in mind, the starting point of this paper is that information is an economic good and an article of commerce. Sometimes, data are the end in itself. Someone simply wants to know, to possess information. In other occasions, information allows to satisfy needs and desires in a better way. It becomes a means to economise resources, a key that opens possibilities. In the digitised world, businesses focus in the latter function of information, and one of the types of information they seek is personal data.

The first issue covered in the paper, and in fact its core, points at the allegedly free of charge nature of some online contents. If information is an economic resource each Internet user has, providing some of it to get an application or a social network account makes the latter 'purchased' goods, and thus not strictly

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free[2]. In part 1, I will present the main features of the notions 'unfair' and 'misleading' commercial practices in EU law. In part 2, I will explain why I think that offering something 'free of charge' when there is a counter-performance in the form of information or personal data does *not* amount to a misleading commercial practice. However, in part 3, I will argue that online content providers do have a special duty of transparency regarding the economic value of the information supplied, especially personal data.

The second topic I will deal with, in a much more concise way, is the proper understanding of the rights that seem to be colliding on the Internet in general, and in social networks in particular. On the one hand, we find property rights held by online content providers and social network owners. Online platforms are not public spaces, but private property. On the other hand, we find the property rights that Internet users hold on their personal data, their photos and their videos. In part 4, I will start by succinctly recalling the basic rights of the data subject according to the recent EU Regulation 2016/679. Next, I will suggest adopting a property rights approach, which leads us to the conclusion that privacy by design through contracts between network owners and network users may be a better solution than one-size-fits-all legislation.

1. Misleading commercial practices

The interest protected by rules against unfair commercial practices is twofold, as these rules aim at guarding the economic interests of both consumers and businesses. One instance of this double goal is **Directive 84/450/EEC, concerning misleading advertising**[3]. One example of a legal text that focus more on the consumer protection side is Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market (hereinafter, 'Unfair Commercial Practices Directive')[4]. Misleading commercial practices are one of the actions forbidden by the Unfair Commercial Practices Directive, which applies to business-to-consumer relations. Its scope is any action, omission, conduct, representation or commercial communication by which a trader approaches a consumer, connected with the promotion, sale or supply of a product[5]. It is important to remark that, for the purposes of the Directive, product means 'any goods or service including immovable property, rights and obligations', according to article 2(c). The Unfair Commercial Practices Directive follows a three-level scheme: a general clause on article 5, the particularly unfair commercial practices (misleading or aggressive, as set out in articles 6 to 9), and Annex I, which includes a list of commercial practices deemed to be unfair in all circumstances without further assessment[6].

Article 5(1) of the Unfair Commercial Practices Directive states that 'unfair commercial practices shall be prohibited', and article 5(2) indicates the two cumulative criteria conforming the notion of unfair practices. The first one is being contrary to the requirements of professional diligence. The second is materially

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[2] Here I use 'good' in a broad sense, as 'any corporeal or ideal reality that may provide an utility to contribute to the satisfaction of a need'. See L. DÍEZ-PICAZO, V. MONTÉS, 'Derecho privado y sistema económico' (Madrid: Universidad Autónoma de Madrid 1979) 59.

[3] Council Directive (EEC) 84/450 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising [1984] OJ L250/17.

[4] Directive (EC) 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L149/22 (Unfair Commercial Practices Directive). On 25 May 2016, the European Commission issued a new version of the Guidance on the application of the Unfair Commercial Practices Directive (SWD(2016) 163 final), available at http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf.

[5] Articles 3(1) and 2(d) of the Unfair Commercial Practices Directive.

[6] H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 81-82. and H.-W. MICKLITZ, G. HOWELLS, 'Commercial Practices and Advertising', in H.-W. MICKLITZ, J. STUYCK, E. TERRYN (eds.), 'Cases, Materials and Text on Consumer Law' (Oxford and Portland, Oregon: Hart Publishing 2010) 96-97.

distorting, or being likely to materially distort, the economic behaviour of the average consumer whom the practice reaches or to whom it is addressed, or of the average member of the group the practice is directed to.

For the purposes of EU legislation, the average consumer is someone reasonably well-informed and reasonably observant and circumspect[7]. For an example on how the average consumer standard plays, let us recall the Court of Justice of the European Union (hereinafter referred to as 'CJEU') judgment ***Verein gegen Unwesen in Handel und Gewerbe Köln v Mars*** **(commonly known simply as** *Mars*)[8]. The wrapping of the chocolate bars were marked indicating that they contained an extra 10% of the product, but the percentage of the marked surface of the wrapping was 'considerably more' than 10%, a fact that could induce consumers into believing the increase was larger than the actual one[9]. However, the CJEU stated that the average consumer 'may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase'[10].

'Professional diligence', the first element of the concept of unfair commercial practices, is defined in article 2(h) of the Directive as 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'. It is an objective standard that makes irrelevant the intention of the trader. It takes into account the consumer legitimate expectations, and is expressed broadly to cover the great variety of situations that may arise in the market. At the same time, it avoids to apply the standard of the 'normal' market practices, initially present in article 2(j) of the 2003 Proposal for the Directive[11], so businesses cannot move down the threshold by following a less honest conduct on a daily basis[12].

Materially distorting the economic behaviour of consumers is defined in article 2(e) of the Unfair Commercial Practices Directive as 'using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise'. According to article 2(k), a transactional decision is any consumer decision concerning aspects such as whether or not to purchase, how and on what terms, making a partial or a full payment, retaining or disposing of a product, or exercising or not a contractual right. The aim is to shield consumers against actions that affect their autonomy and endanger the rationality behind their economic decisions. The Directive does not require an actual distortion, but only the suitability to cause an appreciable or sufficiently high distortion. In this context, an objective standard, disregarding the intention of the trader, is also applied[13].

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[7] CJEU judgments *Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt,* Case C-210/96 [1998] ECR I-4657, ECLI:EU:C:1998:369, paragraph 31. and *Estée Lauder*, Case C-220/98 [2000] ECR I-117, ECLI:EU:C:2000:8, paragraph 27.

[8] CJEU judgment *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars,* Case C-470/93 [1995] ECR I-1923, ECLI:EU:C:1995:224.

[9] *Mars*, cited *supra* note 8, paragraphs 4, 8 and 22.

[10] *Mars*, cited *supra* note 8, paragraph 24.

[11] Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/EEC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive) [2003] COM (2003) 356 final.

[12] H.-W. MICKLITZ, G. HOWELLS, 'Commercial Practices and Advertising', in H.-W. MICKLITZ, J. STUYCK, E. TERRYN (eds.), 'Cases, Materials and Text on Consumer Law' (Oxford and Portland, Oregon: Hart Publishing 2010) 97-98. For a detailed analysis of the notion of 'professional diligence', see J. MASSAGUER, 'El nuevo derecho contra la competencia desleal' (Cizur Menor, Navarra: Thomson Civitas 2006) 59-78.

[13] On the requirement of distorting the economic behaviour of the average consumer, see J. MASSAGUER, 'El nuevo derecho contra la competencia desleal' (Cizur Menor, Navarra: Thomson Civitas 2006) 78-88.

In a more specific way, article 5(4)(a) of the Unfair Commercial Practices Directive stresses that practices which are misleading as set out in articles 6 and 7 will be deemed to be unfair. A practice that responds to the Directive notion of misleading is considered automatically unfair, without having to determine if it violates the professional diligence and is likely to distort consumers[14]. Two categories of misleading practices can be found[15].

One is that of misleading actions. It means that the practice contains false information and is therefore untruthful about some elements indicated right after in article 6(1) of the Unfair Commercial Practices Directive, or that, in any way, deceives or is likely to deceive the average consumer in spite of its correctness from a factual point of view. causing or being likely to cause to take a transactional decision the consumer would not have taken without the practice. The existence or nature of the product and its main characteristics are among the elements mentioned by the Directive.

A commercial practice may also be unfair by virtue of a misleading omission. That is, if the commercial practice omits material information that the average consumer needs in order to make an informed transactional decision. What amounts to material information depends on the factual context, and it is necessary to take into consideration all the circumstances attending, as well as the limitations of the communication medium itself. This omission must cause or be likely to cause that the average consumer makes a decision that otherwise they would not have made. It is also considered a misleading omission if the trader hides the material information, or supplies it in an unclear, unintelligible, ambiguous or untimely manner. Or even if the trader does not identify the commercial intent of the practice, in case it is not obvious from the context.

Rules on both misleading actions and misleading omissions aim at allowing the consumer to make informed decisions. They require the misleading conduct to affect core issues for the average consumer, not any element of the transaction. When the commercial practice constitutes an invitation to purchase, material aspects encompass the main characteristics of the product and the price or the manner in which the price is calculated, as well as 'the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence'[16]. To classify a practice as misleading for the purposes of the Unfair Commercial Practices Directive, it seems a mere abstract danger is not enough. It must be proven there is an actual, concrete risk that consumers make an economic decision they would not make otherwise[17].

On the third level of the Directive scheme, we find Annex I. It contains up to 31 categories of practices which are always considered unfair. The first 23 are classified as misleading, and the other 8 are classified as aggressive. According to point 20 of Annex I, it is unfair to describe a product as 'gratis', 'free', 'without charge' or similar, when the consumer 'has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item'.

2. 'Free of charge' contents and information or personal data as counter-performance

[14] H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 88-89.

[15] On the notion of misleading commercial practices, see J. MASSAGUER, 'El nuevo derecho contra la competencia desleal' (Cizur Menor, Navarra: Thomson Civitas 2006) 103-107, 122-127. and H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 89-98.

[16] By virtue of article 7(5) and Annex II of the Unfair Commercial Practices Directive, the elements indicated in articles 5 and 6 of Directive (EC) 2000/31 of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (Directive on electronic commerce), are regarded as material.

[17] H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 92-94.

It is reasonable to say that the Unfair Commercial Practices Directive has been conceived in terms of a product-for-money-payment scheme. Its prescriptions have to be somewhat adapted to the product-for-product (digital content in exchange of information) transactions. Next, I will share some thoughts on the matter, to justify why presenting an application or a social network account as free of charge when there is a counter-performance consisting of providing information or personal data, is *not* a misleading or unfair commercial practice.

Most consumers would define 'free' as 'no price to be paid' or 'not having to pay money'. Indeed, let us look at the 2015 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content[18]. The Directive would apply to contracts where digital content is supplied to a consumer in exchange of a price or a counter-performance in the form of personal or any other data[19]. Article 2(6) of the Proposal defines 'price' as 'money that is due in exchange for digital content supplied'. Therefore, provided that no payment of money is due, to offer something 'free of charge' when there is an actual demand of information or personal data in exchange may not be totally correct from an economic point of view, but it is not false from a legal perspective. I do not think such an offer is contrary to the requirements of professional diligence, and I do not think it materially distorts the economic behaviour of the average consumer. I would not qualify it as untruthful from the legal point of view. And even if presenting the service as free of charge is not factually correct economically speaking, it is not likely to deceive the average consumer at all[20].

This explains why the practice analysed does not fall into point 20 of Annex I of the Unfair Commercial Practices Directive. This provision states that it is unfair to describe something as free when the consumer has to '*pay* anything other than…'. The rule is to be interpreted in accordance with its ultimate goal, which is protecting consumers against deception. Since most consumers link 'payment' to the notion of 'price', and the notion of 'price' with that of 'money', it is questionable that point 20 of Annex I covers supplying information in exchange of a good or a service. So far, people do not think they are 'paying' when they give personal data. And the best evidence for that is that there is not a big reaction from Internet users against companies. If people really thought they are being deceived, they would speak out against it and there would be a high demand for changes in commercial speech.

As some scholars have put it, making a reference to the CJEU judgment *X* (commonly known as *Nissan*)[21], 'not all false or deceptive information is prohibited by article 6 of the Directive'. Nevertheless, they have warned that the standard set in this case might not work on a general basis for the Unfair Commercial Practices Directive, because the issue at stake affected parallel imports, and the Court is usually suspicious of any attempt to protect national markets[22]. In that case, some cars were advertised as new and cheaper than those sold by other dealers. However, the cars had been registered before importation, and their lower price was matched by a reduction in the number of accessories[23]. The CJEU considered that a car is new

[18] COM(2015) 634 final.

[19] An exception is made when processing the data requested is 'strictly necessary' for the performance of the contract or for meeting legal requirements, as long as the digital content supplier does not go further in the use of the data, processing them in an incompatible way with that purpose. See articles 3(1) and 3(4) of the Proposal.

[20] A different view is held by C. LANGHANKE, M. SCHMIDT-KESSEL, 'Consumer Data as Consideration' [2015] 4 Journal of European Consumer and Market Law 218 ('this formula 'for free' mainly refers to the fact that the contract does not provide for a monetary consideration, whereas the fact that the supplier is provided with personal data of the other party and that the other party's consent to deal with the personal data is widely ignored in the descriptions given in (*insofar misleading*) advertisements and contract terms') (emphasis added).

[21] CJEU judgment *X*, Case C-373/90 [1992] ECR I-131, ECLI:EU:C:1992:17.

[22] H.-W. MICKLITZ, G. HOWELLS, 'Commercial Practices and Advertising', in H.-W. MICKLITZ, J. STUYCK, E. TERRYN (eds.), 'Cases, Materials and Text on Consumer Law' (Oxford and Portland, Oregon: Hart Publishing 2010) 118-120.

[23] *Nissan*, cited *supra* note 21, paragraphs 11-13, and 16.

until it is first driven on a public road. Therefore, the commercial practice would be misleading only if it sought to conceal that the cars were registered before importation, and if a significant number of consumers would not have purchased the cars had they known it. Regarding the price issue, a claim that the cars are cheaper would only be misleading if a significant number of consumers targeted by the advertising made their decision to buy ignoring the correspondence between the lower price and the lower number of accessories on the cars[24].

The Unfair Commercial Practices Directive demands transparent and truthful information about the existence and nature of the product and its main characteristics, forbidding material omissions. One could argue that Internet users are actually the product, and that it would be misleading not to tell them that they are being sold. But this argument is far from being decisive, because the information of the user is not the only product sold in the transaction. The consumer is both a customer and a product (that is why 'if you are not paying for a product, you are the product' is true only to a certain degree)[25]. Therefore, traders satisfy their disclosure obligations by just informing about the essence of their own product—the main features of the relevant application or social network.

It is also important to address the consequences of article 5(3) of the Unfair Commercial Practices Directive. If the distortion caused by a commercial practice is likely to affect only a clear identifiable group of particularly vulnerable consumers, the assessment of the commercial practice must be made on the basis of the average consumer of that group. As causes for that weakness, the Directive explicitly mentions mental and physical infirmity, age and credulity. This provision requires that the trader can reasonably be expected to foresee that the practice is likely to affect a given group of consumers. On the contrary, it is not necessary for the practice to be specifically directed towards that group[26]. This could be more important that it might appear. As time passes and more people have downloaded an application or joined a social network, most of new users will probably not be adults, but underage. The offer to download an application or join a network will be general, but it will reach mostly children, a vulnerable group. The possible unfairness of the commercial practice will have to be assessed from the point of view of the average underage consumer.

At this moment in time, I do not think this changes the conclusion that presenting online content as free when the user needs to provide some counter-performance in the form of data is not a misleading commercial practice. In the future, however, the assessment regarding both groups of people, that of general consumers and that of underage ones, can produce different results. With the development of digital contents, adults will presumably get used to pay for services through personal data and other types of information. They will get more and more aware of the fact that it is a form of payment. And this might change the concept of 'free of charge'. If this is the case, it is unsure whether underage can follow the same path. Because of their youth and inexperience, they will be less aware, and they will probably continue to understand free of charge as 'no money payment'. This reasoning leads us to a surprising and even paradoxical outcome. A given commercial practice, while being misleading for the average consumer, will not be misleading for a particularly vulnerable group of consumers, such as underage.

3. Transparency regarding information and personal data as counter-performance

Even if presenting a service as free when there is a payment in the form of information does not constitute a misleading commercial practice, I think traders have a special duty of transparency towards

[24] *Nissan*, cited *supra* note 21, paragraphs 14-16.

[25] I. WINKLER, 'Facebook is not free' [2011] October 17, 2011. Available at http://www.computerworld.com/article/2499036/web-apps/facebook-is-not-free.html.

[26] See H.-W. MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising', in H.-W. MICKLITZ, N. REICH, P. ROTT, 'Understanding EU Consumer Law' (Cambridge: Intersentia 2009) 87-88.

consumers. They must highlight that the user is going to supply personal data and other types of information, so the user is truly aware of the rationale behind the transaction. Now I turn into **Directive 93/13/EEC on unfair terms in consumer contracts**[27]. Article 4(2) excludes the assessment of the unfairness of terms that define the main subject matter of the contract, and also of the adequacy of the price paid. However, this rule is subject to a requirement. In order for the terms to be excluded from assessment, they must be in plain intelligible language. Next, article 5 starts by setting out that contract terms offered in writing must always be drafted in plain, intelligible language.

In my view, contract terms that establish the counter-performance the user must provide fall within the terms that define the subject matter of the agreement, because they allow us to determine the type of transaction at issue and classify it as a bargain although there is no price in terms of money. However, the importance of whether or not those terms belong to the subject matter of the contract is not very high, since the CJEU has concluded that the transparency requirement in articles 4(2) and 5 of the Directive has the same scope[28]. Both sets of terms have to be offered in a transparent way, because it is of fundamental importance for the consumer to have the relevant information before concluding a contract[29].

Transparency must be understood in a broad sense, which means it cannot be reduced to formal and grammatical intelligibility. Taking into account all the relevant facts, including pre-contractual information, the judge must examine whether or not an average consumer can know in advance the actual functioning of the clause at stake and its hypothetical consequences. This high standard of transparency has been developed in a recent case-law of the CJEU that encompasses the judgments *Kásler and Kasleriné Rábai* (concerning a credit contract denominated in foreign currency)[30], *Matei* (on a consumer credit agreement)[31], *Van Hove* (regarding an insurance contract)[32] and *Bucura* (also a consumer credit agreement)[33], and it is now a well-settled case-law.

It should be clear that the CJEU has developed the duty of transparency focusing on the payment obligations the consumer will be bound to. The Court points to the 'economic consequences' of the agreement, and its main goal is that the consumer knows the cost of the goods or services. The perspective certainly is that of a payment in the form of money. But transparency requirements are a protective measure in favour of consumers, something that compels us to interpret them extensively. For that reason, it is convenient to apply that case-law to social networks and other digital content supplied in exchange of personal data. Traders must disclose the kind of data they get, process and use themselves or transfer to others, and the reasons for that. We cannot forget that the screen size of a laptop, a tablet or a mobile phone is limited. It is simply impossible to offer all the relevant information at once. But businesses can and must make that information easily accessible.

Free of charge social networks operate in the market of 'targeted eyeballs'. Network owners offer a platform consumers want, the use of the platform produces information which is collected, and that information allows network owners to target advertising to the right consumers, obtaining a revenue in the process[34]. I think the duty of transparency requires businesses to clearly tell this to each new user who wants

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[27] Council Directive (EEC) 93/13 on unfair terms in consumer contracts [1993] OJ L95/29.

[28] CJEU judgments *Kásler and Káslerné Rábai*, Case C-26/13 [2014] ECLI:EU:C:2014:282, paragraphs 68-69. and *Matei*, Case C-143/13 [2015] ECLI:EU:C:2015:127, paragraph 73.

[29] *Kásler and Káslerné Rábai*, cited *supra* note 28, paragraph 70. and CJEU judgments *Van Hove*, Case C-96/14 [2015] ECLI:EU:C:2015:262, paragraph 41. and *Bucura*, Case C-348/14 [2015] ECLI:EU:C:2015:447, paragraph 51.

[30] *Kásler and Káslerné Rábai*, cited *supra* note 28, paragraphs 71-75.

[31] *Matei*, cited *supra* note 28, paragraphs 73-78.

[32] *Van Hove*, cited *supra* note 29, paragraphs 41-50.

[33] *Bucura*, cited *supra* note 29, paragraphs 49-56.

[34] G. A. MANNE, W. RINEHART, 'The Market Realities that Undermined the FTC's Antitrust Case Against Google' [2013] Harvard Journal of Law & Technology Occasional Paper Series (July 2013) 8-9.

to join the network, because that is the essence of the agreement users sign[35]. People who do not want to give access to their data and let the network target them can refuse to join a free of charge social network. If many consumers refuse to deal, or even if they deal but they actively express their unsatisfied preferences, there will be an incentive to create social networks where profits are made out of users' fees. At the same time, social network owners will have an incentive to offer both free-of-money-payment and free-of-information-collecting accounts.

What is important to understand is that the efficiency of the market of 'targeted eyeballs' depends on the amount of information collected and the quality of its processing. Concealing information is a right everyone has, as an expression of the right to privacy. But you cannot keep all the information for yourself, use social networks whose profitability depends on knowing your interests and patterns, and expect those networks to be highly interesting and to offer a large range of possibilities[36]. If consumers want to enjoy social networks without paying fees, they have to pay the non-monetary price. Simply stated, *the less you want to be a product being sold, the more you must be willing to pay for the product yourself*. And, at least for now, it looks like most consumers are more willing to give some personal information than money[37].

4. The rights of the personal data subject and a property rights approach on social networks

The development of the information society has led us to make changes in EU law regarding personal data. For example, Directive 95/46/EC on personal data[38] was thought to be outdated, and rightly so. In 2012, a Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data was issued[39]. And some CJEU judgments from 2014 on showed reforms were needed[40]. Finally, Directive 95/46/EC has been repealed with effect from 25 May 2018 by Regulation (EU) 2016/679 on personal data (hereinafter, the 'General Data Protection Regulation')[41]. This Regulation is already into force, but it will apply from 25 May 2018.

The General Data Protection Regulation strengthens data subject rights. Chapter III, encompassing articles 12 to 23, set out rights such as those to transparency, to information, to access, to rectification, to restriction of processing, to data portability, to object to processing, a right not to be subject to a decision based solely on automated processing (including profiling), and a right to erasure or the so-called 'right to be forgotten'. This last right received a boost in 2014 by the CJEU through its judgment *Google Spain and Google* regarding search engines[42], and the General Data Protection Regulation goes further. Even if the

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[35] On the personal data Facebook collects, and how it uses it, see L. GARCÍA MONTORO, '¿Utiliza Facebook nuestros datos personales con fines desleales?' [2016] 'CESCO Blog' 2-6. Available at http://blog.uclm.es/cesco/files/2016/03/Utiliza-Facebook-nuestros-datos-personales-con-fines-desleales.pdf.

[36] On how information concealing reduces the efficiency of a market, see R. A. POSNER, 'The Economics of Privacy' [1981] 71 American Economic Review 405-406.

[37] O. BEN-SHAHAR, L. J. STRAHILEVITZ, 'Contracting over Privacy: Introduction' [2016] 45 (no. S2) Journal of Legal Studies S5.

[38] Directive (EC) 95/46 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

[39] COM(2012) 11 final.

[40] M. BURRI, R. SCHÄR, 'The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy' [2016] 6 Journal of Information Policy 482-488.

[41] Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (General Data Protection Regulation).

[42] CJEU judgment *Google Spain and Google*, Case C-131/12 [2014] ECLI:EU:C:2014:317.

right to be forgotten is just one among others, it comes as no surprise that it is the feature of chapter III that receives most of the attention[43].

Data protection rules are ultimately designed to give consumers more power and control over information about them. This praiseworthy concern, however, should not make us forget the possible conflicts we can create. Internet users are not acting in a vacuum, they are enjoying online platforms which are private property. Therefore, the more we enlarge data subject rights, the higher the risk we excessively limit private property and invade individual liberty. With this in mind, I believe it is necessary to think more about privacy and data protection settings designed through private contracts.

It has been said, and it does not miss the mark, that there is a conflict between Americans and Europeans concerning what privacy means and should mean. Although there are some common ideas, both have indeed different sensibilities. Americans consider intrusions actions that Europeans regard as justified, and vice versa. It is argued that Europeans understand privacy more as connected to individual dignity and what can be called 'informational self-determination', while for Americans the issue is linked to liberty, mostly liberty from the State, and the protection of one's home[44].

It is obvious that we can draw some general conclusions on what privacy and personal data protection means for Americans and for Europeans. Nevertheless, I think the right approach is to protect minorities. And, more specifically, the smallest minority of them all—the individual. In a recent judgment of 15 February 2017, the Plenary of the Civil Chamber of the Spanish Supreme Court[45] has stated that a photo which is displayed in Facebook and available to the public in general (not only for the members of the social network), cannot be used by the media without the consent of the user. The photo was not related to the newsworthy event, and use by the media does not amount to a 'natural consequence' of the accessibility of the data uploaded and publicly displayed in a social network. According to the Spanish Supreme Court, the user gives their consent for the purposes of the network, not for third-party uses.

Taking this example, what I would like to underline is that it should not be for a legislature or a court to determine what purposes users of a social network give their consent for, nor what are the 'natural consequences' of publicly displaying a photo or a video in it. Within a network–its owner's private property, it is for the owner to set the rules others have to comply with. The network owner and the user can agree to different privacy settings and rules, more or less protective, for free or in exchange of a fee. That is, data protection rules may be better implemented as general default rules susceptible to design by way of a contract. Some data subject rights can certainly be classified as inalienable, but many others should have an opt in or opt out nature, or be modifiable. Of course, this entails some risks. How contract can play for privacy issues in a digitised world is still to be analysed. We will have to look at externalities, transaction costs, the proper default rules, the nature of the rules, asymmetries of information and information overload, the eventual contract formation provisions, etc.[46]. But from my perspective, what we should not do is taking a one-size-fits-all model. Privacy and personal data are, precisely, deeply private and personal, and that means one size truly fits only one individual.

5. Conclusions

[43] M. BURRI, R. SCHÄR, 'The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy' [2016] 6 Journal of Information Policy 490-492. and G. MINERO ALEJANDRE, 'Presente y futuro de la protección de datos personales. Análisis normativo y jurisprudencial desde una perspectiva nacional y europea' [2017] 50 Anuario Jurídico y Económico Escurialense 38-40.

[44] J. Q. WHITMAN, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' [2004] 113 Yale Law Journal 1154-1164.

[45] Reference in Aranzadi – Westlaw legal database: JUR 2017, 36954.

[46] O. BEN-SHAHAR, L. J. STRAHILEVITZ, 'Contracting over Privacy: Introduction' [2016] 45 (no. S2) Journal of Legal Studies S1-S11.

This paper started with the sentence 'if you are not paying for a product, you are the product'. I have tried to explain why this is true, but not all the truth. Internet users provide a product, information, and they receive other products, such as applications and social network accounts. Since 'free of charge' is commonly understood in the sense that one can obtain something without paying *money*, it is not misleading or unfair to present something as 'free' when it is supplied in exchange of information and personal data. However, traders have a special duty of transparency, in order for consumers to know why they are getting what they are getting without a money payment. If we take into account the product-for-product (digital content in exchange of information) scheme, we come to the conclusion that privacy and data protection rules are limiting the product Internet users can trade with. It is therefore needed a cautious exam of what features of the consumers' rights have to be set out following a one-size-fits-all model, and which ones can be subject to private design through contract.

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