

Privacy as Quality in Modern Economy

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Contents: 1. Deep-Ranging Changes – 2. Assessing Market Requirements – 3. Effects on the Relationships between Economic Actors – 4. Privacy as Quality.

At the end of 2002, the Italian data protection Authority held an international Conference on the relationship between data protection and enterprise (Privacy: Cost to Resource). A book collecting the contributions presented at the Conference is to be published in a few weeks.

I believe it may be useful for the discussion in this Session to outline some considerations contained in the Foreword to this book, which I was honoured to edit.

1. Deep-Ranging Changes

We all believe that we are living through an age of deep-ranging changes involving, to an ever-increasing extent, all human activities. Technological developments enable communication in a way that was unconceivable up to some time ago, indeed they allow almost doing away with distance in the transfers of goods, capitals, and persons and reduce decision-making time by directly influencing production and distribution mechanisms. On the other hand, technological developments produce effects on – or, as is the case with the Internet, go beyond – the relationship conventionally existing between effectiveness of domestic law and territorial scope of application. As regards personal data protection, this raises several issues for consideration – which confirm day after day that the overall framework of data protection legislation is really at the crossroads of the development paths followed by contemporary society.

In analysing the consequences resulting from these innovations and opportunities, one usually dwells on the legal wording setting out the limitations that may apply, if any, to an individual's right of being in control of the information concerning him or her.

Being an economist, I think it is appropriate to point out that – jointly with the ethics principles and the legal conditions to be safeguarded – there is also a change in progress concerning both the weight of production and distribution factors as related to final results and work management policies inside enterprises.

Specific attention should be paid to the de-composition of production processes. I am referring to the increasingly widespread practice of fragmenting the steps between launch of the project concerning a given product (good or service) and marketing of such product. This is where personal data are transferred.

The widespread practice of process decomposition is not an instance of de-industrialisation; in fact, it entails conferring specific, specialised functions in respect of individual components and positions that will be ultimately assembled to yield the finished product. Again, personal data are processed throughout the phases of this process.

Moreover, innovation as the driver of production progress has long ceased being limited to the effects produced on manufacturing processes or else on the invention of new products. Indeed, innovation also means introducing new organisational patterns – such as the externalization allowed by outsourcing -, using automated systems to communicate and process data, or jointly managing business sectors that are shared with other enterprises.

2. Assessing Market Requirements

Innovations are successful not only to the extent that they are original, but also – quite often – insofar as they are based on the assessment of emerging and/or hidden market requirements.

This consideration shifts the focus of discussion on the *personal components* of the assessment performed by seller and purchaser in the decision-making leading to conclusion of a “contract” in modern times.

In bilateral contracts – including those based on the mere acceptance of a public offer, such as the exhibition of goods in a shop window or on a shelf, or an offer advertised on media – a party's decision to enter the contract does not result exclusively from cost assessment as it is also based on the existence of some guaranteed certainties, in addition to the considerations relating to taxation and/or contractual constraints as well as to the immediate and/or future availability and accessibility of the relevant good. Therefore, a key role in shaping both the seller's and the purchaser's intent is played by the assessment of the certainty degree in addition to the evaluation of economic suitability. And the former item is a typical component of an actor's individual personality.

Let us briefly consider the components coming into play as regard intent formation. They are the following: a) the ratio between the sacrifice inherent in the price to pay and the expected benefit resulting from the good to be acquired; b) the economic suitability related to deprivation of the good as opposed to the profit resulting from payment of the relevant consideration; c) the degree of risk related to sale/purchase mechanisms, immediate/postponed delivery, and payment in cash or by instalments; d) guarantees against hidden flaws/defects; e) validity of payment means; f) trust in post-sales assistance (spare parts, repairs, time to repair, etc.); g) reliability in managing customer relations (professionalism, confidentiality, customisation, continuity, service levels, performance quality, adequacy of information, instructions for use, etc.).

Points c) and g) are related to the processing of personal data. It is quite clear that the appropriate management of the information concerning those collecting and/or providing such information means certainty for the market. Sellers tend to expand their offers and purchasers feel that their rights are safeguarded. Regulating liability in performance-based contracts is a source of trust as well as providing the foundations for the expansion phases of the economic cycle.

There is currently no assessment system available as regards the quality resulting from the appropriate processing of personal data in the economic activities related to the exchange of goods against a consideration. However, this component would appear to play a key role by having regard to the importance attached by businesses to the information on their prospective customers' conduct and timeliness in paying as well as, on the other hand,

to the concern shown by purchasers in respect of the accuracy of the information describing their conduct. The protection of privacy is fundamental in connection with assessing reliability and creditworthiness.

The relationships between enterprises and consumers are also changing.

As maintained by Vance Packard in the '50s, advertising companies availed themselves of the techniques conventionally implemented by “hidden persuaders”, who “*do not sell products, but buy customers*” for mass-production industry. In the face of a mass market, commercial communication also tended to massification. Consumers were not taken into consideration as individuals, but rather as members of a homogeneous, non-diversified group. Conversely, new contacting methods based on customised advertising are getting increasingly common nowadays – partly because of the modern interactive communication systems. Each consumer is therefore becoming the focus of a network of messages converging on him/her to get him/her to purchase goods by leveraging his/her specific interests and individual requirements. The shift from “mass-oriented” to “individual-oriented” markets has already taken place.

However, the change has not concerned “commercial contact” and “invitation to purchase” components only. The post-sales phase, i.e. the services provided to established customers, is also undergoing considerable modifications because of the technical possibility to fine-tune assistance by meeting the consumer’s ever-changing, diversified requirements.

It is no chance that customer loyalty programs have long become the staple of business management and huge resources are being invested in order to carefully manage customer relationships and extend their duration – according to Customer Relationship Management (CRM) principles.

I think it is important to point out that the public administration also avails itself increasingly of technological tools, at both central and local level, in order to facilitate contacts with citizens and provide its services speedily and transparently. I am referring, in particular, to the modernisation of bureaucratic activities that is often referred to as e-government. This complex change, though including positive features for both enterprises

and public bodies and producing beneficial effects to consumers and citizens, is also fraught with some dangers and criticalities.

3. Effects on the Relationships between Economic Actors

The protection of personal data – seen against this background – takes on key importance as it produces deep-ranging effects on the relationships between economic actors.

Thus, privacy retains its fundamental role within the framework of fundamental personal rights – that is to say, it is established by now as a pre-requisite to ensure implementation of all other personal rights set out in constitutional instruments – and, at the same time, it is coming to play a strategic role in determining future market developments. Privacy can set the inviolable boundary defending citizens against undue influence and/or interference from enterprise and/or the public administration. However, in a negative perspective, privacy can also dampen the development of an offer that cannot adjust to the demand coming from markets and the society at large – as per a fundamental law of economics. Therefore, it is necessary to create the conditions for the protection of personal data to become a driver of economic development rather than a hindrance to growth.

Given these premises, there is little doubt that the right to personal data protection is bound to play a fundamental role in shaping the future pattern of the relationships between enterprise and consumers as well as between public bodies and citizens.

On the one hand, there is the danger – resulting from new technologies – that consumers are besieged, denuded and influenced, investigated and surveilled daily by “collectors of personal information” – who, in the absence of rules and checks, or preferably of self-regulatory tools such as codes of practice, might use this information to urge useless or downright harmful purchases and stimulate demand in a way that is unrelated to real, actual requirements. The ultimate risk is that customers may be exposed to undue influence or else give up in exhaustion. On the other hand, markets might end up

being blocked and unable to get in touch with consumers to set up a direct relationship with them, which would oblige them to re-trace their steps and avail themselves of the methods used by “hidden persuaders” to induce mass consumption – via invasive, redundant advertising. Similar considerations apply to the activity of the public administration.

4. Privacy as Quality

The protection of personal data by public authorities and the attempt to protect personal data made by individuals – if placed in an efficient, knowledgeable economic context – can actually assist in developing appropriate, more productive relationships between enterprise and consumers as well as between institutions and citizens. Indeed, the existence of data protection legislation can allow improving the quality of relationships with customers and citizens: enterprises can be provided with accurate, truthful information that is collected with the data subjects’ consent where the latter are really interested in being contacted for commercial purposes. The same applies to the data that are processed by public utility bodies. In this manner, social usefulness and all-round ethicality can become components of today’s open economy, which tendentially goes hand in hand with the open society and the awareness of the community benefits to be achieved.

On the other hand, if one considers the evolution of privacy over its century-old history, one could argue that its peculiar feature, indeed the core of this major legal achievement, consists exactly in the capability to adjust itself to new social requirements.

Personal data protection has been the subject of deep-ranging regulations throughout Europe for over thirty years. Data protection has sprouted from the privacy law tree, which had been first sown at the end of the 19th century in the US legal system as the expression of the elitarian “right to be left alone”. However, nowadays it has turned into the response to a requirement existing cross-wise in all social strata – i.e. the requirement that everyone should be in control of the information concerning him or her so as to be free to decide how to behave in the frequently strained relations between individuals and society. Personal data protection has ceased to be a right simply aimed at protecting the privileges of the happy

few; it has become a pre-requisite for the development of everyone's personality – a pre-requisite to exercise the fundamental rights pertaining to all citizens. It is no chance that exactly the protection of personal data is included – in the Chapter concerning “Dignity of Individuals” – among the opening principles of the Charter of Fundamental Rights of the EU signed in Nice in December 2000 – now corresponding to Article 50 of the Draft Constitution.

Therefore, we are confronted with a social, cultural and political achievement of the utmost importance, which should also be regarded as an economic advancement related to quality of the goods that are produced and exchanged.

This is shown most clearly by considering the unrelenting technological development and the importance that is attached to the free flow of information both in social and in economic terms. Whilst it is increasingly easy to communicate and collect information on any of us for multifarious purposes, it is fundamental to set out the boundaries within which this type of processing is lawful and to what extent one may exercise the right to informational self-determination.

I think it is quite evident that the regulatory framework applying to data protection rests not only on ethical and cultural developments, but also on the findings of sociological and economic analysis – which goes well beyond the dry ground of legal technicalities.