Balancing between data protection and other EU Treaty objectives

Lisa Peets and **Ezra Steinhardt** argue that the EU proposal for a new DP framework could curtail profiling and affect EU firms' competitiveness.

In early 2012, following several rounds of public consultations, the European Commission proposed the General Data Protection Regulation (GDPR) – a comprehensive proposal to reform the EU's data protection regime. Over three years later, agreement on important issues is still some way off. But what is clear is that Europe's already exacting rules for the processing of personal data will become more rigorous.

Few question the need for reform. The Data Protection Directive was adopted in 1995, at a time when less than 1% of Europeans used the Internet.[1] The first mainstream Internet browser, Netscape, had been released only a year earlier. "Big Data" and "apps" were unknown, and the mobile phone revolution had yet to begin.

Unsurprisingly, these developments have all had unprecedented – indeed unimaginable – impacts on individual privacy. Lawmakers in 1995 could not have anticipated that users would be part of online social networks that identify nearly every friend, acquaintance, and relationship, nor could they have planned for data-gathering smartphones and wearables. Faced with these developments, EU legislators understandably support new safeguards for the fundamental right to protection of personal data – in line with their duties under the EU's foundational treaties.

At the same time, however, there is a risk that in protecting the fundamental right to protection of personal data, other fundamental rights and freedoms in the very same treaties will be de-prioritised. These rights and freedoms make it a legal imperative for the EU to work towards economic sustainability, competitiveness, and full employment, and to protect and respect the right to conduct a business.

This article explores the importance of balance among fundamental rights in the context of GDPR decision-making. It looks in particular at on-going negotiations over rules on profiling, as an example of the complexity that lies in promoting both data protection and economic rights.

Finding the right balance is a legal, but also a political imperative. Technological change represents one of Europe's best opportunities to realise economically-oriented Treaty goals. As noted in the European Commission's 2012 Digital Agenda, "ICT is the essential transformative technology that supports structural change in sectors like health care, energy, public services, and education".[2] The European Commission's recently-launched Digital Single Market strategy[3] further asserted that "Europe must embrace the digital revolution and open up digital opportunities for people and businesses... A fully functional Digital Single Market could contribute €415 billion per year to our economy and create hundreds of thousands of new jobs".

Treaty rights and objectives at stake

In the course of negotiations over the GDPR, much has been written about the fundamental right to protection of personal data and its interaction with technological advances. But the GDPR will also have an impact on other social and economic rights and obligations, among them:

- **Article 3(3) TEU: Economic growth, competitive economies, full employment, social progress and technological advance**. The Lisbon Treaty amended the Treaty of the European Union (TEU) to provide, for the first time, a consolidated statement of the objectives and values of the Union. Paramount among these is paragraph 1 of Article 3(3), which reaches back to the EU's origins as an economic union, and provides for its sine qua non. It states that "[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance".
  Article 3(5) TEU then commits the EU to the promotion, both internal and global, of free and fair trade, the eradication of poverty and the protection of human rights. Article 3 TEU makes clear that legislators must strike an appropriate balance between (*inter alia*) human rights, balanced economic growth, full employment and advances in science and technology – none are given precedence over the others.
- **Preamble of the TFEU: Constant improvements in living and working conditions**. Building on the TEU's bedrock, the Treaty on the Functioning of the European Union (TFEU) sets out more detail on how the Union functions, and what it seeks to achieve. The TFEU's Preamble reinforces the messages of the TEU, and states that the EU's "essential objective" is to bring about "constant improvements of the living and working conditions" of individuals in the EU.
- **Article 9 TFEU: High levels of employment**. Article 9 TFEU states that "[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and

protection of human health". Although the TEU (Article 3(3)) speaks of "full employment", the TFEU instead aims for a more manageable "high level of employment". Given that over 20 million people in the EU currently cannot find work, more remains to be done before either standard is met.

- **Articles 145, 146 and 147 TFEU**. Title IX of the TFEU ("Employment") sets out in greater detail how the goal of high employment is to be achieved. First, Article 145 TFEU makes it a legal obligation for both the EU and individual Member States to promote "labour markets responsive to economic change with a view to achieving the objectives defined in Article 3 of the [TEU]". Article 146 then commits Member States to "regard promoting employment as a matter of common concern and [to] coordinate their action in this respect within the Council". The obligation is mutual: Article 147(1) commits the Union to "contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action".

  Crucially, Article 147(2) states that "the objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities".
- **Article 16 CFREU: Right to conduct a business**. According to its Preamble, the Charter of Fundamental Rights of the EU (CFREU) was created because the EU deemed it "necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter". Title II ("Freedoms"), alongside the rights to privacy and personal data protection (Articles 7 and 8, respectively), also guarantees the fundamental right to conduct a business (Article 16). Whilst the codification of this right was novel (it does not expressly feature, for instance, in the existing European Convention on Human Rights), the right to conduct a business has been a longstanding right under general principles of EU law. For instance, the Court of Justice of the European Union (CJEU) invoked the right in Case 4/73 Nold, explaining that it was an important constitutional tradition of the Member States that make up the EU, and thus a value to be recognised and enforced in EU law as well.

  Michele Everson and Rui Correia Conçalves have persuasively argued that the right to conduct a business is ultimately about dignity, whereby "human self-expression and self-sustenance is assured by means of secured pursuit of economic activity,"[4] and the freedom to exercise entrepreneurial instincts. Ultimately, they argue, this right is about "securing, at its settled core, the existential status of the individual European, or her economic opportunity within the 'marketplace', broadly defined".[5]
- **Article 15 CFREU and Article 1(1) of the European Social Charter: Right to work**. Equally prominent within Title II of the CFREU, Article 15 guarantees to all the freedom to choose an occupation and the right to engage in work. Article 15 derives from the European Social Charter (ESC), discussed below, but is different: Article 15 emphasises individual freedom to engage in work (so long as that work is available), rather than an entitlement to work.

  The latter, which implies a positive obligation on the state to adopt pro-jobs policies and to refrain from unjustified job destruction, is instead dealt with under Article 1 of the longstanding ESC. Adopted in 1961 and restated in 1996, the ESC is binding on all EU Member States. Article 1 ESC protects both the CFREU Article 15-style freedom to choose work – but it also creates a legal obligation on all parties to aim to ensure "as high and stable a level of employment as possible, with a view to the attainment of full employment".

  Reinforcing the point that having the right to freely choose work is meaningless if job opportunities are not available, the ESC expressly states that the legal commitment to attaining high levels of employment is made "[w]ith a view to ensuring the effective exercise of the right to work".

These rights and objectives are not absolute. Instead, legislators must strike a balance. The Commission's draft proposal recognises the need for balance in Recital 139 ("the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced with other fundamental rights ..."). This need for balance is also reflected in CJEU precedent, which requires that EU laws that engage fundamental rights (such as the ones set out above) pass a two-step test:

- The restrictions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and
- Those restrictions must not exceed the limits of what is appropriate and necessary in order to achieve those objectives.[6]

The question is therefore whether EU measures designed to attain one objective do no more than is necessary and justified to attain it, always bearing in mind the need to respect other fundamental rights and deliver on the legal objectives of the EU.

Case study: Profiling and automated decision-making

EU Treaties call on the GDPR's legislators to strike a balance among Treaty objectives, among them the need to protect personal data as well as generation of economic growth and competitiveness. The draft proposals currently being discussed by the EU institutions on profiling and automated decision-making demonstrate the challenges to achieving this balance.

Data segmentation and profiling involve the extrapolation and correlation of known qualities about people or things to generate new insights about them. Common uses of profiling include:

- In finance, using data about a business and competitors to generate profit forecasts

- In consumer banking, using spending patterns to identify and alert consumers to card fraud and identity theft
- In commerce, using consumer purchasing patterns to better predict demand and to improve logistics for product supply and
- In healthcare, using medical records and clinical trial results to develop models that predict what type of patient reacts well, or badly, to a medicine.

Modern computers and data handling algorithms have led to an exponential growth in the use of profiling techniques in recent years. In some cases, the decision-making itself can also be automated, for instance when credit card fraud detection algorithms block a suspicious transaction, protecting the card-holder's account automatically.

Through these uses, profiling, automated decision-making and "Big Data" applications, generally, have delivered benefits to consumers, researchers, policymakers, and industry alike. Their utility to commerce is perhaps the most widely recognised; for instance, McAfee and Brynjolfsson concluded that "[t]he more companies characterised themselves as data-driven, the better they performed on objective measures of financial and operational results ... companies in the top third of their industry in the use of data-driven decision-making were, on average, 5% more productive and 6% more profitable than their competitors".[7]

The benefits may expand beyond the private sector. McKinsey Global Institute, for example, has estimated that public sector administrations in Europe's developed economies could save up to €300 billion a year through better and more creative data use.[8]

At the same time, profiling and automated decision-making are not without risk. Existing law, set out in the Data Protection Directive, protects individuals from suffering adverse effects from automatic – i.e. computer-determined – decision-making driven by profiling. Specifically, where an automated decision "produces legal effects concerning [a person] or significantly affects [him or her] and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to [him or her]," the Directive empowers the individual to ask for information about the algorithm, obtain human review of decisions, and choose to opt-out.

This safeguard strikes a balance between the imperatives set out in the Treaties described above. For example, if a person's medical insurance was automatically denied, they could find out why, and request a human review of the decision. But, at the same time, economic and social benefits are not neglected; insurance firms can use this technology to improve efficiency and drive down costs, potentially reducing premiums for all.

EU policymakers now propose to go further, however, by significantly curtailing profiling and automated decision-making, potentially even when the data subject has no objection to the profiling or automated decision-making.

The proposed measures could impinge on the efforts by many of the companies and organisations operating in Europe – start-ups, SMEs, large companies, not-for-profits and public administrations alike – to sustain and improve their operations using smart decision-making technology. Economic models suggest that this could reduce current levels of activity, increase costs, and cause markets to become less competitive.[9]

Therefore, while it is difficult to predict the full outcome of such a measure, and there are some arguments that stronger protection of personal data could even improve growth, there is also a risk that paths to economic progress will be blocked. Advances in 'Big Data' analytics, artificial intelligence and machine learning – so keenly anticipated in the next few decades – could also be slowed.

These outcomes, if they occur, would be undesirable from a policy perspective. But they also suggest that a focus on data protection alone may ultimately impede the realisation of other Treaty objectives. This narrow approach may be overshadowing law-makers' duties under Article 147(2) of the TFEU, in particular, to take into consideration the impact of new provisions on the level of employment within Europe.

Moreover, those outcomes could compromise the other Treaty freedoms and objectives mentioned above, such as the fundamental freedom to conduct a business, not just for the many start-ups and established companies looking to develop and offer advanced decision-making software, but also those in the EU that would use that technology to become more competitive, productive, reliable and efficient. As discussed, these rights are not absolute – but they are protected from unjustified and disproportionate interferences.

If the proposed measures cause economic underperformance, business closures, or unemployment, and interfere with protected fundamental freedoms such as the right to conduct a business, the question will be whether a sufficiently risk-based approach has been adopted (i.e. an approach that recognises that where risks to privacy and data protection are greatest, the balance should skew toward robust protections, while the balance may be struck differently where risks are lower).

The answer may be that it has not; there are legitimate reasons to doubt whether features of these proposals – such as preventing automated decision-making even when the data subject has no objection – truly do "no more than is necessary" (and might therefore fail the proportionality test).

Of course, there are other fundamental rights that may be implicated here. They, too, require inclusion in any balancing exercise. For example, the Treaties require the EU to improve public health, promote research, and support measures that help with "monitoring, early warning and combating serious cross-border threats to health" (Article 168 TFEU).

Supporting measures to promote a high level of health is also a requirement under Article 9 TFEU (mentioned earlier in the context of achieving full employment). Arguably, restrictions on profiling and automated decision-making could impede data-driven healthcare, epidemiology and medical research, raising similar questions of necessity and proportionality. This is beyond the scope of this article, but may merit further consideration.

Striking a better balance?

The European Parliament, Council and Commission are now working to find a compromise among the GDPR proposals which they have each put forward. It seems a foregone conclusion that those policymakers will deliver on their primary objective: a law that strengthens and modernises rights to protection of personal data. But the forthcoming negotiations present the new GDPR's legislators with an equally important opportunity to address the question of proportionality.

If the new GDPR proves as long-lived as the Data Protection Directive it replaces, this may be the best opportunity they have to meet that legal imperative, by reconsidering any proposals that demand unnecessary or disproportionate sacrifices of the EU's economic and social objectives.

AUTHORS

Lisa Peets, Partner, Covington & Burling LLP & Ezra Steinhardt, Associate, Covington & Burling LLP.
Emails: lpeets@cov.com and esteinhardt@cov.com

REFERENCES

1 See "Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses," 25 January 2012, available at: http://europa.eu/rapid/press-release_IP-12-46_en.htm.
2 See European Commission, "The Digital Agenda for Europe – Driving European growth digitally," (COM(2012) 784), 18 December 2012, available at: http://ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=1381.
3 See European Commission, "A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen," 6 May 2015, available at: http://europa.eu/rapid/press-release_IP-15-4919_en.htm
4 See Everson, M. and Correia Conçalves, R., 2014. "Article 16." In: Peers, S., et al., eds. "The EU Charter of Fundamental Rights: A Commentary," Oxford: Hart Publishing, p.438, at [16.01].
5 Ibid., p.439, at [16.04].
6 See, to that effect, the judgment of the CJEU in Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and others, at [46], and the jurisprudence cited therein.
7 See McAfee, A., and Brynjolfsson, E., 2012. "Big Data: The Management Revolution," Harvard Business Review 90:60–68.
8 See McKinsey Global Institute, "Big Data: The Next Frontier for Innovation, Competition, and Productivity," June 2011, available at: http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation
9 See Christensen, L., Colciago, A., Etro, F., and Rafert, G., 2013. "The Impact of the Data Protection Regulation in the E.U." Intertic Policy Paper, 2013, available at: http://www.intertic.org/Policy%20Papers/CCER.pdf

Join the Privacy Laws & Business community

Six issues published annually

PL&B's International Report will help you to:

Stay informed of data protection legislative developments in 100+ countries.

Learn from others' experience through case studies and analysis.

Incorporate compliance solutions into your business strategy.

Find out about future regulatory plans.

Understand laws, regulations, court and tribunal decisions and what they will mean to you.

Be alert to future privacy and data protection law issues that will affect your organisation's compliance.

Included in your subscription:

1. Online search functionality
Search for the most relevant content from all *PL&B* publications and events. You can then click straight through from the search results into the PDF documents.

2. Electronic Access
You will be sent the PDF version of the new issue on the day of publication. You will also be able to access the issue via the website. You may choose to receive one printed copy of each Report.

3. E-Mail Updates
E-mail updates help to keep you regularly informed of the latest developments in data protection and privacy issues worldwide.

4. Back Issues
Access all the *PL&B International Report* back issues since 1987.

5. Special Reports
Access *PL&B* special reports on Data Privacy Laws in 100+ countries and a book on Data Privacy Laws in the Asia-Pacific region.

6. Events Documentation
Access International and/or UK events documentation such as Roundtables with Data Protection Commissioners and *PL&B Annual International Conferences*, in July, in Cambridge, UK.

7. Helpline Enquiry Service
Contact the *PL&B* team with questions such as the current status of privacy legislation worldwide, and sources for specific issues and texts. This service does not offer legal advice or provide consultancy.

To Subscribe: www.privacylaws.com/subscribe

"*PL&B's International Report* is a powerhouse of information that provides relevant insight across a variety of jurisdictions in a timely manner. **Mark Keddie, Chief Privacy Officer, BT Retail, UK**"

Subscription Fees

Single User Access

International Edition **£500 + VAT***

UK Edition **£400 + VAT***

UK & International Combined Edition **£800 + VAT***

* VAT only applies to UK based subscribers

Multi User Access

Discounts for 2-4 or 5-25 users – see website for details.

Subscription Discounts

Special charity and academic rate:
50% discount on all prices. Use HPSUB when subscribing.

Number of years:
2 (10% discount) or 3 (15% discount) year subscriptions.

International Postage (outside UK):

Individual International or UK Edition
Rest of Europe = £22, Outside Europe = £30

Combined International and UK Editions
Rest of Europe = £44, Outside Europe = £60

Satisfaction Guarantee

If you are dissatisfied with the *Report* in any way, the unexpired portion of your subscription will be repaid.

Privacy Laws & Business also publishes the United Kingdom Report.
www.privacylaws.com/UK