adjudicating personal data protection in the European Union: what to expect from impact assessments?
(1) housekeeping
all about us

- works predominantly in English
- ca. 50 full-time researchers
- 3 spin-off’s:
  - Brussels Privacy Hub
  - Privacy Salon
  - Brussels Laboratory for Data Protection & Privacy Impact Assessments (**d.pia.lab**), created in 2015
- 1\(^{st}\) policy brief of **d.pia.lab** (framework) published in May 2017 [EN] [FR]
- 2\(^{nd}\) policy brief of **d.pia.lab** (method) expected in June 2019 [EN] [FR]
agenda

14:00 – 14:15 Introduction (Dariusz Kloza)

  - Dr. Brendan van Alsenoy  Autorité de protection des données / Gegevensbeschermingsautoriteit [BE]
  - Katerina Demetzou  Radboud University Nijmegen [NL]
  - Dr. Rossana Ducato  Université catholique de Louvain [BE]
  - Mag.ª Cindy Fökehrer  Österreichische Notariatskammer [AT]
  - David Gee  Brunel University [UK]
  - Dr. Raphaël Gellert  Universiteit van Tilburg [NL]
  - Prof. Dr. Eleni Kosta  Universiteit van Tilburg [NL]
  - Estelle Massé  Access Now [BE]
  - Anna Mościbroda  European Commission [EU]
  - Heidi Waem  Crowell & Moring LLP [BE]

15:30 – 16:00 Roundtable Part II: discussion between the panelists (moderator: Dariusz Kloza)

16:00 – 16:15 Debate with the audience

16:15 – 16:30 Closing remarks (Paul De Hert)

rapporteur: Sergi Vazquez Maymir
statistics

- Academia: 50%
- Independent regulatory authorities: 10%
- Legal practice: 20%
- Non-governmental organisations: 10%
- Policy-makers: 10%
- Independent regulatory authorities: 10%
rules

- Chatham House Rule
  “When a meeting, or part thereof, is held under the **Chatham House Rule**, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.”

- 5-minute (sharp) intervention
  - legal question(s)
  - justification thereof
  - only questions, **no answers**!
  - repetitions & overlaps more than welcome
(2) background (general)
WORK IN PROGRESS
why?

- relative novelty of **DPIA** & of a **legal obligation** to conduct it
- novel concepts, e.g. “risk to a right”
- minimalistic contents of the legislative provisions (‘legal hook’)
- occasional vagueness of the terminology, e.g. “large scale”
- “fear of getting it wrong” (Oppé 2012)
- high fines for non-compliance and malpractice
- ...
what? IMPACT ASSESSMENT

- technology
- environment
- regulation
- health
- privacy
- data protection
- surveillance
- algorithms
- artificial intelligence
- ...

An impact assessment is a tool used for the analysis of possible consequences of an initiative on a relevant societal concern or concerns, if this initiative can present dangers to these concerns, with a view to support the informed decision-making whether to deploy this initiative and under what conditions, ultimately constituting a means to protect these concerns.

[Kloza et al. 2017: 1]

Data protection impact assessment

(Col. 31) An assessment of the impact of the envisaged processing operations on the protection of personal data.

(Col. 34) A Data Protection Impact Assessment (DPIA) consists in identifying the main risks to a project with respect to the rights of data subjects concerning their personal data. It is a systematic process to: (1) identify to the privacy of individuals, compile the procedures and practices in place to mitigate these threats, and documented how the risks were addressed in order to enhance harm to data subjects (Chee et al. 2016: 60).

(Col. 38) A Data Protection Impact Assessment is an instrument to identify and analyze risks for individuals, which result from the use of a certain technology or software by an organization in their various roles (as citizens, customers, patients, etc.). On the basis of the outcome of the analysis, the appropriate measures to remedy the risks should be chosen and implemented (Sheler et al. 2016: 19-25)
by what means?  METHOD

Phase I: Preparation
1. Screening
2. Scoping
3. Planning

Phase II: Assessment
4. Description
5. Appraisal (identification, analysis and evaluation)

Phase III: Recommendations
6. Recommendations
7. Documentation

(On-going phase)
8. Public involvement
9. Quality control

Revisiting
10. Revisiting
how? LEGAL INTERACTIONS

- impact assessment as a regulatory requirement
  - normative requirement
    - hard law
    - soft law
  - technical standard
    - EU: ‘harmonized standard’
  - contractual obligation
  - …

- impact assessment in ordinary legal proceedings
  - evidence
  - standard of liability
  - …

- impact assessment in extra-ordinary legal proceedings
  - constitutional matter
  - human rights matter
  - …
where?  VENUES FOR LEGAL INTERACTION

- national court (civil, criminal, administrative)
  - ordinary court
  - senior court (e.g. supreme court, constitutional court, conseil d’état, etc.)

- independent regulatory authority (e.g. a DPA)

- international adjudication bodies
  - ‘constitutional’ court
  - human rights court, tribunal or commission

- national human rights institution

- alternative dispute resolution bodies
  - national
  - international

- ...

...
who? DRAMATIS PERSONAE

- policy-maker
- data controller
- data processor
- assessor
- data subject or her representatives
- data protection officer
- data protection authority, incl. EDPB
- judiciary
- advisor
when? ADJUDICATION THUS FAR

- 2017 EPIC v. Presidential Election Commission [US]
- ????
(3) background (DPIA)
narrowing down...

- adjudication
- European Economic Area (EEA)
  - European Union (EU) [CJEU]
  - Norway, Iceland, Liechtenstein [EFTA Ct.]
  - nb. *not* Switzerland
what?

- 1995 Art 20 Directive 95/46 (prior checking)
- 2009 RFID
- 2012 smart grids
- 2016 Arts 35-36 GDPR
- 2016 Art 27 Directive 2016/680
- 2018 Arts 39-40 & Art 42 Regulation 2018/1725
- 2019 Art 6 ePrivacy Regulation (proposal)
- 2019 Recital 53 re-use PSI Directive (proposal)
- ...

Article 35

Data protection impact assessment

1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.

2. The controller shall seek the advice of the data protection officer, where designated, when carrying out a data protection impact assessment.

3. A data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of:
   (a) a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural persons;
   (b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10; or
   (c) a systematic monitoring of a publicly accessible area on a large scale.
1. **threshold**
   - criterion 1: high risk **YES**
   - criterion 2: specific cases (3) **YES**
   - criterion 3: (national) exclusion list **NO**
   - criterion 4: (national) inclusion list **YES**
   - criterion 5: already carried out **NO**

2. **description**
   - technical
   - contextual

3. **assessment**
   - necessity & proportionality
   - risks to the rights & freedoms of individuals (all relevant human rights)

4. **stakeholder consultation**
   - when appropriate
   - data subjects or their representatives
   - due respect for legitimate secrecy

5. **consultation with a data protection officer**

6. **contingency plan: measures envisaged to:**
   - address the risks
   - ensure compliance with the GDPR

7. **prior consultation**
   - high residual risk
   - possible ban of processing

8. **re-visiting**
   - when necessary
where? (a provocation)

- ...  
- failure to fulfil obligation  
- action for annulment  
- damages  
- ...  
- reference for a preliminary ruling
  - no obligation to refer, unless the ultimate instance

Article 267  
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.
where? (a provocation)

grounds for dismissal

- already decided (de facto precedent)

- acte clair [C-283/81 CILFIT]
  - ... the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt ...
  - ... it must be borne in mind that [...] legislation is drafted in several languages and that the different language versions are all equally authentic ...
  - [...] EU law uses terminology which is peculiar to it. [...] legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various Member States ...
  - ... every provision of [EU] law must be placed in its context and interpreted in the light of the provisions of [EU] law as a whole ...

- a ruling is unnecessary to enable a referring court to give a judgment
- a question is hypothetical
- a question not articulated sufficiently clearly
  - facts insufficiently clear
- nb. the CJEU:
  - decides itself if the reference is warranted
  - can correct improperly framed questions
(4) legal questions
How exactly the “necessity and proportionality of processing operations in relation to the purposes” are to be assessed?

What approach and scope are to be used for determining both a “likely” and “high” “risk” to the “rights and freedoms of natural persons”?

Which “physical, material or non-material damages” resulting from processing of personal data should be included?

When would it be “appropriate” to “seek the views of data subjects or their representatives”? Who can count as a “representative”?

Can data subjects, or their representatives, seek justice should they have not been consulted (sufficiently) during such a process? Can data subjects be charged a fee for partaking in a DPIA process?

How, if ever, would DPIA affect liability of controllers or processors for data protection wrongdoings?

What is the evidential role of a DPIA process in legal proceedings?

...
comparatively: EIA

- (some) answers to be found in environmental law & jurisprudence
  - CJEU
    - participation fees
    - availability of a review procedure
    - *locus standi*
    - ...
  - ECHR
    - human rights dimension of the environmental protection
    - ...
further questions

- how D/PIA can interact with the law?
- do you know any further court cases on D/PIA?
- where these cases could be heard?
- what could be learned from the experience of other jurisdictions, if any?
- ...

...
dank u!

dariusz.kloza@vub.be
niels.van.dijk@vub.be
@darekkloza

LSTS.research.vub.be
dpialab.org
@dpialab