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PUBLIC VOICE IN PRIVACY GOVERNANCE: LESSONS FROM ENVIRONMENTAL DEMOCRACY[1]

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Abstract: Departing from a need to remedy the insufficient participation of stakeholders in the governance of privacy, and in particular in privacy impact assessments (PIAs), this paper proposes the adaptation of the so-called environmental democracy, of which the 1998 Aarhus Convention is the most recent and most important formalisation, to the needs and reality of privacy, thus creating the "privacy democracy". Since both fields – privacy and environment – are matters of fundamental rights importance, such a framework would comprise three enforceable rights: to access privacy-related information, to take part in privacy-related decision-making in specific situations and to seek remedy should the two previous rights be violated. The experience of the functioning of the environmental democracy would offer invaluable insight for the implementation of its privacy counterpart.

1. Introduction

> Privacy will be to the information economy of the next century what consumer protection and environmental concerns have been to the industrial society of the 20th century.[3]
>
> – *Marc Rotenberg* (1996)

> Back in early 2006 I expressed the view that "Privacy is the new Green" – by which I meant that I thought advocates of a stronger approach to personal data privacy were regarded with the same bemused semi-tolerance as the 'tree-hugging eco-warriors' of preceding years. Ecological and sustainability issues are now, of course, squarely in the mainstream of both policy and public awareness, but privacy concerns are often still treated as if they were a niche lobbying interest, compelling only to conspiracy theorists, and those who, it is implied, must have "something to hide".[4]
>
> – *Robin Wilton* (2009)

The words of Marc Rotenberg and of Robin Wilton illustrate quite well at least two similarities between the approaches to the protection of privacy (including personal data) and that of the environment. Nowadays "the issue of privacy" has risen to prominence in many aspects of life and has got comparable attention and importance to its environmental counterpart. Accordingly, the place of privacy protection on policy-makers' agendas – ideally

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[1] This paper is based on the research project PIAF (*Privacy Impact Assessment Framework for Data Protection and Privacy Rights*) (2011-2012), co-funded by the European Union under its Fundamental Rights and Citizenship Programme, http://www.piafproject.eu. The contents are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

[2] I wish to thank Paul De Hert, Colin J. Bennett, J. Peter Burgess, Armelle Gouritin, Anna Mościbroda and Irene Wieczorek for their useful comments. Paweł Baraniuk ably produced the bibliography.

[3] Marc Rotenberg quoted in: Gleick, James, "Big Brother Is Us", *New York Times*, 29 September 1996. http://www.nytimes.com/1996/09/29/magazine/big-brother-is-us.html

[4] Wilton, Robin, *What's happened to PETs?*, Future Identity Ltd., Westbury, 27 September 2009, p. 5. http://ftc.gov/os/comments/privacyroundtable/544506-00076.pdf

– should be as high as that of the environment. The idea of these similarities suggests looking comparatively at the (legal) means that protect the environment and investigating whether any of them is useful for the (legal) protection of privacy.

Claims to look at other branches of law for an inspiration on how to protect best various aspects of privacy are not new *per se*. Such analyses have often focused on property law[5] and competition law,[6] among others, but it is environmental law that probably has attracted the most of attention. In the United States academic arena, Nehf (2003) was perhaps one of the first to propose an analogy between the protection of the environment and (informational) privacy, arguing that "in the modern digital world information privacy should be viewed as a societal value justifying a resolution in the public interest, much as we do environmental policy and other societal concerns."[7] Furthermore, assuming that "the privacy injuries of the Information Age are structurally similar to the environmental damage of smokestack era", Hirsch (2006) claimed that second-generation environmental laws and policies "can serve as a model for protecting privacy in the digital age". He understands the second-generation instruments as those initiatives that encourage the regulated parties *themselves* to choose the means by which they will achieve performance goals, as opposed to the „command-and-control" regulation in a form of prescriptive and uniform standards.[8] He then has turned to the "specific lessons", such as emission fees that could "readily be adapted for the purpose of reducing spam" and "regulatory covenants, pollution release and transfer registries, and government support for environmental management systems" that could be "adapted for the privacy field and used to protect personal information in the digital age".[9] In the European academic arena, De Hert – having analysed the case law of the European Court of Human Rights (ECtHR) related to the protection of "environmental health" – argued (2012) that "the current human rights framework requires States to organise solid decision-making procedures that involve the persons affected by technologies. … Further case law is required to clarify the scope of the duty to study the impact of certain technologies and initiatives, *also outside the context of environmental health*".[10]

In this paper I intend to advance these ideas and to see how environmental law could further inspire the protection of privacy.[11] In particular, I would like to see how one of the aspects of environmental law, i.e. the framework for public participation in environmental decision-making, could inspire the strengthening of public voice in decision-making in privacy matters

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[5] Cf. e.g. Purtova, Nadezhda, *Property Rights in Personal Data: A European Perspective*, Kluwer Law International, 2011.

[6] Cf. e.g. Kloza, Dariusz, Anna Mościbroda, and Gertjan Boulet, "Improving Co-operation Between Data Protection Authorities: First Lessons from Competition Law," *Jusletter IT. Die Zeitschrift Für IT Und Recht*, 2013. http://jusletter-it.weblaw.ch/issues/2013/20-Februar-2013/2128.html

[7] Nehf, James, "Recognizing the Societal Value in Information Privacy", *Washington Law Review*, Vol. 78, 2003, p. 5.

[8] For the debate on classification of regulatory instruments, cf. e.g. Bronwen, Morgan, and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials*, Cambridge University Press, 2007, pp. 80-113.

[9] Hirsch, Dennis, "Protecting the Inner Environment: What Privacy Regulation Can Learn from Environmental Law", *Georgia Law Review*, Vol. 41, No. 1, 2006, pp. 8, 10-11, 23.

[10] De Hert, Paul, "A Human Rights Perspective on Privacy and Data Protection Impact Assessments," in David Wright and Paul De Hert (eds.), Privacy Impact Assessment, Springer Netherlands, 2012, pp. 70-74 (emphasis added). Cf. also section 4.3. .

[11] For the conceptualisation and legal construction of both privacy and data protection as well as the relationship between these two, cf. Gutwirth, Serge, Michael Friedewald et al., *Legal, social, economic and ethical conceptualisations of privacy and data protection*, Deliverable D1 of the PRESCIENT project [Privacy and emerging fields of science and technology: Towards a common framework for privacy and ethical assessment], Karlsruhe, March 2011, p. 8. http://www.prescient-project.eu/prescient/inhalte/download/PRESCIENT-D1---final.pdf

and especially in privacy impact assessment (PIA). This exercise aims at improving the level of the protection of the right to privacy by analysing a potential new means of protection.[12]

There are couple of points where the governance of privacy meets the governance of environment and perhaps the most important one is the use of human rights language. In many jurisdictions privacy is explicitly considered a human right. However, this is not necessarily a case with "environment", which has not (yet) received such recognition internationally, but a human rights machinery is often used to obtain some protection thereof (cf. *infra*, at 4.3.).

From a technical viewpoint, another "meeting point" in the governance of both fields is the use of impact assessments.[13] In other words, in both fields impact assessments are used as a tool aiming primarily at better decision-making. Such assessments have emerged precisely in the field of environment in the 1960s in the United States,[14] but lately they have been gaining growing worldwide importance in the field of privacy. To that end, the concept of PIA came to the light and matured during the period 1995–2005.[15] This increased interest in PIA has been predominantly caused by public distrust in emerging technologies in general, by the robust development of privacy-invasive tools, by a belated public reaction against the increasingly privacy-invasive actions of public authorities and private sector as well as by a natural progress of rational management techniques.[16] PIA has shifted the attention from reactive measures towards more anticipatory instruments in the belief in the rational of an "ounce of prevention", i.e. in trying to prevent privacy abuses before they occur.[17]

Crucial to the success of any impact assessment is a meaningful participation of stakeholders, i.e. those to be affected and those likely to be affected by the envisaged project, initiative, etc. as well as those who have any interest therein or their representatives, e.g. NGOs. Strongly linked to fundamental rights, to the concept of democracy and to corporate governance, public participation brings benefits for decision-making in both public and private sectors. Therefore methodologies for impact assessments often acknowledge the need for stakeholders' participation.[18] So does the European Commission's *Smart Regulation* policy[19] as well as the

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[12] This paper is situated well in the debate on the role of the "tools" for protection of privacy, such as Privacy by Design, Privacy by default, Privacy Enhancing Technologies (PETs) and privacy impact assessments (PIAs).

[13] There are many definitions of the notion of impact assessment as well as many types thereof. Put simply, an impact assessment is a tool that aims to support decision-making. It is a process that prepares evidence for decision-makers on the advantages and disadvantages of possible options by assessing their potential impact. Impact assessment emerged in the fields such as environment, regulation, health and fundamental rights, among others. European Commission, *Impact Assessment*, 2012. http://ec.europa.eu/governance/impact/index_en.htm

[14] Noble, Bram F., *Introduction to Environmental Impact Assessment: A Guide to Principles and Practice*, 2nd ed., Oxford University Press, 2009, p. 2.

[15] Privacy impact assessment (PIA) is usually defined as a process for assessing the impacts on privacy of a project, policy, programme, service, product or other initiative and, in consultation with stakeholders, for taking remedial actions as necessary in order to avoid or minimise the negative impacts. De Hert, Paul, Dariusz Kloza, David Wright, *Recommendations for a privacy impact assessment framework for the European Union*. Deliverable D3 of the PIAF project [A privacy impact assessment framework for data protection and privacy rights], Brussels, 2012, p. 5. http://www.piafproject.eu/ref/PIAF_D3_final.pdf

[16] Clarke, Roger, „Privacy Impact Assessment: Its Origins and Development", *Computer Law and Security Review*, Vol. 25, No. 2, 2009, pp. 123-135. http://www.rogerclarke.com/DV/PIAHist-08.html

[17] Bennett, Colin J, and Charles D. Raab, *The Governance of Privacy: Policy Instruments in Global Perspective*, Ashgate Publishing, Limited, 2003, p. 204.

[18] International Finance Corporation, *Guide to Human Rights Impact Assessment and Management*, Washington, 2010, http://www.guidetohriam.org/app/images/secure/GuidetoHRIAM_v13_LR.pdf; International Finance Corporation, *Introduction to Health Impact Assessment*, Washington, 2009, http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_healthimpactassessment__wci__1319578475704

Commission's *Impact Assessment Guidelines*.[20] Assessors are assisted by a number of textbooks discussing techniques for stakeholders' participation.[21] However, as it will be demonstrated *infra*, existing PIA frameworks as well as the current practice of PIA with regard to such participation leave much to be desired.

In order to remedy the problem of insufficient public participation in PIA and thus to strengthen public voice in privacy decision-making, a lesson might be drawn from environmental law. Acknowledging that "environmental issues are best handled with the participation of all concerned citizens",[22] this branch of law has developed a comprehensive framework for environmental procedural rights. The so-called environmental democracy encompasses three rights: access to environmental information, participation in decision-making on specific activities and access to justice. All these rights are interconnected: put simply, access to environmental information is a prerequisite for a meaningful participation in decision-making and access justice is meant to remedy a violation of any of the two previous rights. The concept of environmental democracy can comprise various means to exercise these rights, of which environmental impact assessment (EIA) is the most important in practice; others include e.g. standalone access to information and its dissemination. The most recent formalisation of this idea in Europe is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[23] A similar framework is provided in the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Arts 3-5)[24] and in 2003 African Convention on the Conservation of Nature and Natural Resources (Art. XVI).[25] Elements of this framework are present in numerous jurisdictions worldwide.[26]

Taking as a starting point the arguments that public participation is crucial for decision-making, and for impact assessments in particular, as well as that the *status quo* of such participation in PIA still requires improvement, this article argues that it is worth to consider the adaptation of the concept of environmental democracy to the governance of privacy in order to strengthen the public voice in the latter. I shall proceed as follows. In the second section, I will overview the concept of and the rationale for public participation in decision-making. In the third section, I will analyse how the public nowadays is involved in the

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[19] European Commission, *EU Regulatory Fitness*, Brussels, 12 December 2012, COM(2012) 746 final.

[20] European Commission, *Impact Assessment Guidelines*, Brussels, 15 January 2009, SEC(2009) 92; cf. further Art 2 of the Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, attached to the EU Treaties.

[21] Cf. e.g. Organisation for Economic Cooperation and Development, *Stakeholder Involvement Techniques*, Paris, 2004. http://www.oecd-nea.org/rwm/reports/2004/nea5418-stakeholder.pdf; Taschner, Stefan and Matthias Fiedler, *Stakeholder Involvement Handbook*, Deliverable D2.1 of the AENEAS project [Attaining Energy Efficient Mobility in an Ageing Society], 21 April 2009. http://www.aeneas-project.eu/docs/AENEAS_StakeholderInvolvementHandbook.pdf; Neil Jeffery, *Stakeholder Engagement: A Road Map to Meaningful Engagement*, Doughty Centre, Cranfield School of Management, April 2009. http://som.cranfield.ac.uk/som/dinamic-content/think/documents/CR_Stakeholder.pdf

[22] United Nations, *Rio Declaration on the Environment and Development*, 1992, Principle 10. http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

[23] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 July 1998 in Aarhus, Denmark (hereinafter: Aarhus Convention). The Convention was prepared under the auspices of the United Nations Economic Commission for Europe (UNECE). As of April 2013, there were 47 Parties to the Convention, including all Member States of the European Union. Cf. UNECE, *Public Participation*, 2013. http://www.unece.org/env/pp/ratification.html

[24] The Convention on Environmental Impact Assessment in a Transboundary Context, adopted on 25 February 1991 in Espoo, Finland (hereinafter: Espoo Convention).

[25] The African Convention on the Conservation of Nature and Natural Resources, adopted on 11 July 2003 in Maputo, Mozambique. http://www.tematea.org/?q=node/6416.

[26] Noble, op. cit., p. 7.

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process of PIA. Next, in the fourth section, I shall overview the three procedural rights that constitute the environmental democracy. I shall pay special attention to the state's obligation to collect and disseminate environmental information. By analysing the relevant case law of the ECtHR I shall analyse the role of the environmental procedural rights in protecting fundamental rights in Europe. Furthermore, since many courts and extra-judicial bodies on various levels in Europe have dealt with environmental democracy, thus offering invaluable insight into its practical application, I shall analyse for that purpose the example of selected case law of the European Court of Justice (ECJ).[27] I will conclude, in the fifth section, by proposing the adaptation of the framework for environmental democracy to the needs and reality of privacy. Additionally, I shall analyse the most evident limitations that such an adaptation might face as well as some possibilities for further research. In this paper I will take the legal perspective: I shall explore all these issues from the human rights viewpoint in the European context.

2. Why should the public participate in decision-making?

> Sustainable management of resources and ecosystems should be shaped by those who are most at risk. … The core issues involved are procedural fairness – allowing people to be part of the process – and community empowerment – enabling people to take an active role in decision affecting their lives.[28]
>
> – *Jona Razzaque* (2012)

> … a survey … identified eight participation functions: (1) Give information to citizens; (2) Get information from and about citizens; (3) Improve public decisions and programs; (4) Enhance acceptance of public decisions and build consensus; (5) Supplement public agency work; (6) Change political power patterns and power allocations; (7) Protect individual and minority group rights and interests; and (8) Delay or avoid making difficult public decisions.[29]
>
> – *Advisory Committee on Intergovernmental Relations* (1980)

> We have learnt that it is necessary with major technologies to ensure that the debate takes place 'upstream', as new areas emerge in the scientific and technological development process.[30]
>
> – *Lord Sainsbury, UK Science Minister* (2004)

Defined most broadly, public participation is a process by which concerns, needs and values of both the public at large and of individuals[31] are incorporated into governmental and

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[27] The selection of the cases under scrutiny does not come from a systematic analysis of all „environmental" cases in both Courts, but from an attempt to illustrate only the main points.

[28] Razzaque, Jona, "Information, public participation and access to justice in environmental matters", in: Alam, S., Bhuyian, J., Chowdhury, T. and Techera, E. (eds.), *Routledge Handbook of International Environmental Law*. Routledge, 2012, p. 138.

[29] A survey conducted by Advisory Committee on Intergovernmental Relations, cited in: Popović, Neil A.F., „The Right To Participate In Decisions That Affect The Environment", *Pace Environmental Law Review*, Vol. 10, 1993, p. 685.

[30] [UK] Department of Trade and Industry, „Nanotechnology offers potential to bring jobs, investment and prosperity – Lord Sainsbury", press release, London, 29 July 2004. http://www.voyle.net/Nano%20Debate/Debate2004-0017.htm

[31] Despite the environment being predominantly a collective interest (cf. Francioni, Francesco, "International Human Rights in an Environmental Horizon," *European Journal of International Law*, Vol. 21, No. 1, 2010, pp. 41–55), public participation is a way to advocate the interests not only of the public at large, but also of individuals. As the ECtHR underlined on numerous occasions, in the field of environment, "the decision-making process leading to measures of interference must be fair and must afford due respect to the interests safeguarded to the individual by Article 8". Therefore, "in a case involving decisions affecting environmental issues" the Court would "scrutinise the decision-making process to ensure that due weight has been accorded

corporate decision-making.[32] It might go as far as to include individuals making and implementing decisions directly in ways that are largely or even entirely independent of public authorities. In a narrow sense, it is an organized process adopted by public authorities or private sector organizations to engage the public in assessment, planning, decision-making, management, monitoring and evaluation. Often the role of the public is advisory and in this sense public participation constitutes an immediate precursor to decision-making.[33] The public might range from organised interests to experts to just individuals; these people are most often external to public authorities or private sector organisations.

Much ink has been spilled over the rationale for public participation in decision-making, but the main reasons have to do with international fundamental rights law and with the concept of democracy, including the place of science in a democratic society. For the private sector in particular such participation is linked to the concept of corporate responsibility. Summing up, the rationale for public participation follows to some extent the logics of the famous slogan "no taxation without representation". In any case, its most important benefit is the improvement of decision-making quality.

The first argument sees public participation in decision-making as a requirement derived from international fundamental rights.[34] The right "to take part in the government of his country, directly or through freely chosen representatives" is foreseen in Art. 21 of the Universal Declaration of Human Rights (1948). Similarly, Art. 25 of the International Covenant on Civil and Political Rights (1966) foresees that "every citizen shall have the right and the opportunity ... to take part in the conduct of public affairs, directly or through freely chosen representatives". So does Art. 29 of the American Convention on Human Rights.[35] The UN Human Rights Committee further explained that "citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves."[36] Since a meaningful

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to the interests of the *individual*" (emphasis added). ECtHR, *Hardy and Maile v. the United Kingdom*, Judgement of 14 February 2012, Application No. 31965/07, §§ 217-219; *Giacomelli v. Italy*, Judgement of 2 November 2006, Application No. 59909/00, §§ 79-82; *Taşkın and Others v. Turkey*, Judgement of 10 November 2004, Application No. 46117/99, §§ 115-118. Furthermore, the ECJ struck a similar chord: "Moreover, the requirement that the cost should be 'not prohibitively expensive' pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an *individual's* rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law" (emphasis added). ECJ, *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, Judgement of 11 April 2013, Case C-260/11, § 33. AG Kokott observed, in the same case, that "taking the public interest into account does not, however, rule out the inclusion of any individual interests of claimants. … the presence of individual interests cannot prevent all account being taken of public interests that are also being pursued. For example, the individual interests of a few people affected by an airport project cannot, upon assessment of the permissible costs, justify disregard for the considerable public interest in the case which in any event stems from the fact that the group of those affected is very much wider." ECJ, *Opinion of Advocate General Kokott*, Case C-260/11, §§ 45-46.

[32] Creighton, James L., *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement*, Wiley, 2005, p. 7.

[33] Cf. Dietz, Thomas, and Paul C. Stern, "Introduction," in Thomas Dietz and Paul C. Stern, *Public Participation in Environmental Assessment and Decision Making*, National Academy of Sciences, 2008, pp. 11-12.

[34] Cf. also section 4.3. *infra*. For the rationale of the right to participate, cf. Brownsword, Roger, and Morag Goodwin, *Law and the Technologies of the Twenty-First Century: Text and Materials*, Cambridge University Press, 2012, pp. 248-252.

[35] By contrast, Art 3 of the Additional Protocol to the European Convention on Human Rights (1950) is limited to the elections to the legislature.

[36] Human Rights Committee, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, at 8.

participation requires access to relevant information, the free communication of information and ideas about public and political issues is essential.[37] Thus this participation is "supported by ensuring freedom of expression, assembly and association".[38] Consequently, the disclosure of relevant information enhances transparency of decision-making and constitutes a prerequisite for accountability.

Second, public participation is intrinsic to democratic governance. In particular, from the deliberative democracy viewpoint, the idea of legitimate law making issues from the public deliberations of citizens and not merely from elections.[39] Deliberative democracy constitutes a form of government in which free and equal citizens (and their representatives) justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.[40] In practical terms, deliberative democracy is a way to supplement traditional forms of democracy by advocating for the involvement of citizens in decision-making in ways other than electoral.[41] In the words of della Porta, "democracy cannot rely only upon checks every four or five years at elections; there must be other ways of controlling those in power. We cannot ask people just to vote – they need to participate".[42]

Hildebrand also points out the place of science in democracy:

> Taking democracy serious means that the scientists and engineers that produce hybrids like RFID systems, genetic tests or technologically enhanced soldiers should be obligated to present their case to the public that is composed of those that will suffer or enjoy the consequences. ... When funding and developing specific technologies these publics should have the opportunity to voice their opinion, co-determining the direction of research as well as the introduction of such artifacts into everyday life infrastructures. Different types of technology assessment (TA) have been developed to involve lay persons into the early stages of technological design ... often entailing citizen participation.[43]

Third, there is a strong business case for public participation as it constitutes an integral element of corporate responsibility. A company should be aware of, and responsive to, the demands of its stakeholders, including employees, customers, suppliers and local communities.[44] Furthermore, by engaging stakeholders a company can reduce costs, gain public trust and support, avoid activism and escape negative public reaction or loss of reputation, among others.

The fourth and the last argument links the three previous ones: public participation contributes to informed decision-making with a view to improve its quality. In particular, engaging stakeholders helps to discover risks and impacts that might not otherwise be

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[37] Jayawickrama, Nahil, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002, p. 793.

[38] Human Rights Committee, op. cit., at 8.

[39] Bohman, James F., and William Rehg, *Deliberative Democracy: Essays on Reason and Politics*, Cambridge 1997, p. ix.

[40] Gutmann, Amy and Dennis Thompson, *Why Deliberative Democracy?*, Princeton, 2004, p. 7.

[41] Tanasescu, Irina, *The European Commission and interest groups. Towards a deliberative interpretation of stakeholder involvement in EU policy-making*, Brussels, 2007, p. 15.

[42] della Porta, Donatella, *Can democracy be saved? Representation, Participation and Deliberation*, paper presented at conference *Democratic Representation in Crisis: what kinds of theories for what kinds of research, and to what ends?*, Florence, 9-10 April 2013, quoted in: European University Institute, *Citizens respond to crisis by reshaping democracy, press release*, Florence, 18 April 2013. http://www.eui.eu/News/2013/04-18-Citizensrespondtocrisisbyreshapingdemocracy.aspx

[43] Hildebrandt, Mireille, "Legal and Technological Normativity: More (and Less) than Twin Sisters," *Techné*, Vol. 12, No. 3, 2008. http://works.bepress.com/mireille_hildebrandt/13

[44] Blowfield, Michael, and Alan Murray, *Corporate Responsibility*, Oxford University Press, 2011, pp. 207.

considered. It is a way to gather fresh input on the perceptions of the severity of risks and on possible measures to mitigate them.[45] In complex uncertain situations, it can overcome the incompleteness of scientific knowledge as the management of risks cannot solely be based upon technical knowledge.[46] In other words, the public may have information, ideas, views or values that had not been previously considered or had been regarded as relatively minor.[47] The public may also be able to suggest alternative courses of action to achieve the desired objectives or may have some suggestions for resolving complex issues.[48]

Against the foregoing, critics often worry that participation in practice may not achieve the goals articulated in theory and may actually impede good decision-making. They offer three basic arguments: that the costs (i.e. time, money and manpower) are not justified by the benefits, that the public is ill-equipped to deal with the complex nature of analyses that are needed for good assessments and decisions, and that participation processes seldom achieve equity in process and outcome.[49] Furthermore, potential stakeholders might lack interest, whereas some with strong but specific interests might dominate the agenda.[50] Others argue that participatory processes tend to experience a set of pathologies that range from paralysis by endless deliberations to reaching only trivial results when trying to accomplish a consensus among stakeholders with conflicting values and interests.[51]

Despite the strong case for public participation in decision-making, the *status quo* of such participation in PIAs, as it will be demonstrated in the following section, leaves much to be desired.

3. How does the public voice come to the fore in privacy impact assessment?

> … opinions and feedback from relevant stakeholders … should be appropriately considered as part of the PIA review of potential concerns and issues. Consultations should be appropriate to the scale, scope, nature, and level of the RFID Application.[52]
>
> – *Privacy and Data Protection Impact Assessment Framework for RFID Applications* (2011)

> Where processing operations present specific risks to the rights and freedoms of data subjects … the controller … shall carry out an assessment of the impact of the envisaged processing operations on the protection of personal data … The controller shall seek the views of data

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[45] Wright, David, "The State of the Art in Privacy Impact Assessment," *Computer Law & Security Review*, Vol. 28, No. 1, 2012, p. 58.

[46] This follows the logic of the precautionary principle, well established in environmental law. According to the 15th principle of the 1992 Rio Declaration (op. cit.): "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Cf. e.g. Wright, David, Raphael Gellert, Serge Gutwirth, and Michael Friedewald, "Minimizing Technology Ricks with PIAs, Precaution, and Participation," *IEEE Technology and Society Magazine*, Vol. 30, No. 4, 2011, pp. 47–54.

[47] Wright, op. cit., p. 58.

[48] Wright, David and Emilio Mordini, "Privacy and Ethical Impact Assessment", in Wright and De Hert, op. cit., p. 397.

[49] Dietz, Thomas, and Paul C. Stern, "The Promise and Perils of Participation," in Thomas Dietz and Paul C. Stern, *Public Participation in Environmental Assessment and Decision Making*, National Research Council, 2008, pp. 33-34.

[50] Owens, Phil, *Sediment Management at the River Basin Scale*, Elsevier Science, 2007, p. 207.

[51] Dietz and Stern, op. cit., pp. 51-66.

[52] *Privacy and Data Protection Impact Assessment Framework for RFID Applications*, Brussels, 12 January 2011. http://ec.europa.eu/information_society/policy/rfid/documents/infso-2011-00068.pdf. The Framework is based on the Commission Recommendation on the implementation of privacy and data protection principles in applications supported by Radio-Frequency Identification, Brussels, 12 May 2009, C(2009) 3200.

> subjects or their representatives on the intended processing, without prejudice to the protection of commercial or public interests or the security of the processing operations.[53]
>
> – *Proposal for … General Data Protection Regulation* (2012)

The history of PIA in the European Union (EU) legal order[54] started in 2009 when the European Commission issued a recommendation on safeguarding privacy and personal data in Radio-Frequency Identification (RFID) applications.[55] The Commission suggested developing of a PIA framework for such applications, a task that was accomplished almost two years later. January 2012 saw tabling of a proposal for the General Data Protection Regulation,[56] which – if turned into law – would foresee a mandatory data protection impact assessment (DPIA).[57] It is apparent from the two quotations above that both frameworks opt for engaging stakeholders in the PIA process. From a global perspective, however, only few PIA frameworks, be it hard-law or soft-law, explicitly provide for stakeholders' involvement. A study on PIAs indicated that, apart from the EU, only four out of thirteen examined frameworks worldwide clearly foresee stakeholders' participation, i.e. Australia, the Australian state of Victoria, Ireland and the United Kingdom.[58]

In practice, the final PIA reports often fail to acknowledge the importance of the stakeholders' consultation or give it limited berth. At other times, details on such consultations are lacking or the stakeholders are not adequately identified.[59] For example, Canadian PIAs seldom involve public consultation, opinion polling or other means of gauging the privacy values of the public. The end product tends to resemble a compliance checklist and does not require documentation of deliberations.[60]

Furthermore, the public has often difficulties in benefiting from reports of PIAs actually carried out or – at least – from summaries thereof. For instance, the Canadian federal audit of PIAs carried out revealed that only a minority of the institutions audited were regularly posting and updating the results of PIA reports to their external web sites. Just as the public reporting on PIAs was lacking in completeness, so too was it lacking in quality. Despite the government's recommendation that PIA summaries describe the privacy impacts of all new programs and the measures taken to mitigate them, none of the reviewed departmental

[53] European Commission, *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 (General Data Protection Regulation)*, Brussels, 25 January 2012, COM(2012) 11 final.

[54] In the Member States of the European Union it started in 2007 when the Information Commissioner's Office (ICO) published its first PIA Handbook. The 2nd edition (2009) does provide for stakeholders' consultation. ICO, *Privacy Impact Assessment Handbook*, Wilmslow, Cheshire, UK, Version 2.0, June 2009. http://www.ico.gov.uk/upload/documents/pia_handbook_html_v2/index.html

[55] European Commission, *Recommendation…*, op. cit., fn. 52.

[56] European Commission, *Proposal…*, op. cit., fn. 53.

[57] For the sake of comparison, the modernisation of the Council of Europe's Convention 108 also introduces privacy risk management but it offers no explicit provision on public participation [Art 8bis(2)]. Council of Europe, *Modernisation of Convention 108*, Strasbourg, 29 November 2012, T-PD(2012)4Rev3_en. http://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/T-PD(2012)4Rev3E%20-%20Modernisation%20of%20Convention%20108.pdf

[58] Wright, David, Kush Wadhwa, Paul De Hert, and Dariusz Kloza (eds.), *PIAF: A Privacy Impact Assessment Framework for data protection and privacy rights*. Deliverable D1 of the PIAF project, 21 September 2011, pp. 187-188. http://www.piafproject.eu/ref/PIAF_D1_21_Sept2011Revlogo.pdf. Clarke, Roger, "An Evaluation of Privacy Impact Assessment Guidance Documents," *International Data Privacy Law*, Vol. 1, No. 2, 2011, pp. 111–120.

[59] Wright, Wadhwa, De Hert, Kloza, op. cit., p. 193.

[60] Bayley, Robin, and Colin Bennett, "Privacy Impact Assessments in Canada," in Wright and De Hert, op. cit., p. 183.

summaries contained more than a simple project description and "privacy disclaimer". Privacy issues were rarely described and action plans were generally missing.[61]

From the policy-making viewpoint, the majority of EU data protection authorities do not support compulsory stakeholders' consultation in the PIA process. Asked about the optimum PIA policy for the EU, the common view expressed is that external stakeholders' engagement is a matter that should be left to either individual organisations or to the Member States to determine. Only one such authority sees stakeholders' engagement as indispensable while other authority argues that "such an obligation makes sense especially for products and services that will necessarily affect a specific category of people in everyday life: employees, hospital patients, public transport users, etc."[62] (In a broader sense, observed could be a tendency to oppose any external dimension of PIA, i.e. any form of engaging external entities in the PIA process, be it third-party audit, central registry of PIAs actually carried out or filling in PIA reports to the competent supervisory authority.)[63]

It is therefore apparent that the notion of public participation in the process of PIA is not yet commonly accepted and requires further encouragement. A "wish-list" here would include a widely practiced PIA, supported by public authorities (including data protection authorities and privacy commissioners) and conducted on the basis of methodologies in which stakeholders' participation is a core element. In other words, a framework in which the stakeholders are identified, appropriately informed about the envisaged measure, properly heard and their views taken into consideration. Furthermore, if they are not informed or heard in a correct way, they should be able to remedy that. Such methodologies should be adequately detailed and accompanied by practical guidance. To that end, a valuable lesson can be learnt from environmental law. In the next section I will discuss procedural environmental rights and analyse how these rights can be of inspiration for improving public participation in privacy governance and in particular in PIA.

4. How does public participation come to the fore in environmental law?

4.1. The concept of environmental democracy

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[64]
>
> – *Rio Declaration on the Environment and Development* (1992)

The Principle 10 of the 1992 Rio Declaration, quoted above, is an encapsulation of the view that procedural rights are an essential part of environmental regulation.[65] An underlying premise is that these rights should "contribute to the protection of the right of every person of

[61] Example taken from Stoddart, Jennifer, *Auditing privacy impact assessments: the Canadian experience*, Wright and De Hert, op. cit., p. 434.

[62] Hosein, Gus, and Simon Davies, *Empirical research of contextual factors affecting the introduction of privacy impact assessment frameworks in the Member States of the European Union*, Deliverable D2 of the PIAF project, August 2012, pp. 16, 35, 69. http://www.piafproject.eu/ref/PIAF_deliverable_d2_final.pdf

[63] Hosein and Davies, op. cit., pp. 11-20.

[64] United Nations, *Rio Declaration…*, principle 10, op. cit.

[65] Douglas-Scott Sionaidh, "Environmental Rights: Taking the Environment Seriously", in Gearty, C.A., and A. Tomkins, *Understanding Human Rights*, Continuum International Publishing Group, Limited, 1996, pp. 436.

present and future generations to live in an environment adequate to his or her health and well-being".[66] In practice, a procedural approach provides environmental protection by way of democracy, i.e. by ensuring that those who have to live with the consequences of environmental degradation will be able to have their say in *how*, *if* and *when* it should occur.[67] Such an approach is also an attempt to remedy the situation of the "silent environment" because – as Krämer puts it – the environment is an "interest without a group".[68] In result, developed has been the so-called environmental democracy, i.e. an advanced, three-pillar framework for environmental procedural rights, providing for the rights to (1) access to information, (2) participation in decision-making on specific activities, and (3) effective access to justice.

The 1998 Aarhus Convention formalises the above-mentioned environmental procedural rights.[69] In the Convention, the first pillar of the environmental democracy, i.e. access to information (Arts 4-5), comes into two forms: "passive", i.e. where public authorities provide information on request, and "active", i.e. where public authorities gather, publish and promote information widely, making it easy accessible and affordable for all. For the "passive" access, the Convention stipulates that every individual and every legal person has a right to access environmental information,[70] in the form requested, without stating any interest and without undue delay. Public authorities may refuse the request for environmental information on the grounds of confidentiality of commercial and industrial information, intellectual property rights and personal data, among others. These grounds for refusal shall be interpreted in a restrictive way. For the "active" access, the Convention requires public authorities to collect and disseminate environmental information; special emphasis is paid to the digital form of dissemination.

The second pillar, i.e. participation in decision-making, offers a right to take part therein by receiving information and providing comments (Arts 6-8). However, public participation is required only for planned activities that, generally speaking, have a "significant effect on the environment". An extensive list of such activities is provided in Annex I to the Convention. Yet nothing precludes the parties to the Convention to extend this list in their jurisdictions. Furthermore, the second pillar's *ratione personae* is limited to the so-called public concerned, i.e. those affected or likely to be affected as well as those who have an interest therein. Nevertheless, the Convention extends this scope to non-governmental organisations promoting environmental protection that meet any requirements under national law. The

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[66] Art 1 of the Aarhus Convention, op. cit.

[67] Sionaidh, op. cit., pp. 436-437.

[68] Krämer, Ludwig, *Access to justice in environmental matters, in particular by NGOs* [manuscript]. Cf. Stone, Christopher D., „Should Trees Have Standing – Toward Legal Rights for Natural Objects", *South California Law Review*, Vol. 45, 1972; Stone, Christopher, *Should Trees Have Standing? Law, Morality, and the Environment*, Oxford University Press, 2010; Sama, Linda M., Stephanie A. Welcomer, and Virginia V. Gerde, "Who Speaks for the Trees? Invoking an Ethic of Care to Give Voice to the Silent Stakeholder," in Sanjay Sharna and Mark Starik, *Stakeholders, The Environment And Society*, Edward Elgar Publishing, 2004, pp. 140–161.

[69] Cf. also Hart, David, "Aarhus for real beginners", *UK Human Rights Blog*, 12 October 2013. http://ukhumanrightsblog.com/2013/10/12/aarhus-for-real-beginners/

[70] Art 2(3) of the Aarhus Convention defines environmental information as any information in written, visual, aural, electronic or any other material form on (1) the state of elements of the environment and the interaction among them, (2) factors and activities or measures affecting or likely to affect the elements of the environment as well as cost-benefit and other economic analyses and assumptions used in environmental decision-making, and (3) the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures affecting the environment.

Convention requires that the procedures for such participation should include reasonable time frames and, eventually, due account must be taken of the outcome thereof.

For the third pillar, i.e. access to justice (Art. 9), anyone whose request for information has been ignored, anyone who believes such a request has been wrongly treated, or whose rights to participate in decision-making has not been respected, has a right to seek justice (Art. 9).

The Aarhus Convention is characterised by taking a rights-based approach, by affording minimum standards, by compliance monitoring and by providing a high level of prescriptiveness. The rights to access information and to participate in decision-making are enforceable, safeguarded by the right to seek justice. A party to the Convention can introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice than required by the Convention. On the basis of Art. 15, the Convention Compliance Committee was established to monitor observance, examining compliance on its own initiative or by accepting submissions from the parties and from the Secretariat to the Convention as well as from the public.[71] The Convention spells out all three rights in a very detailed way with a view of their easier application and better observance. To illustrate the last point, let me quote in its entirety one of its provisions [Art. 6(2)]:

> The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, *inter alia*, of:
>
> (a) the proposed activity and the application on which a decision will be taken;
>
> (b) the nature of possible decisions or the draft decision;
>
> (c) the public authority responsible for making the decision;
>
> (d) the envisaged procedure, including, as and when this information can be provided:
>
> (i) the commencement of the procedure;
>
> (ii) the opportunities for the public to participate;
>
> (iii) the time and venue of any envisaged public hearing;
>
> (iv) an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
>
> (v) an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
>
> (vi) an indication of what environmental information relevant to the proposed activity is available; and
>
> (e) the fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

National implementations of these provisions could go even more into details. Here let me take the UK as an example: Arts 13-18 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 provide, *inter alia*, that a developer must make a reasonable number of copies of the environmental statement, including a non-technical summary, available to the public, either free of charge or at a fee

[71] United Nations Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *Decision I/7 on Review of Compliance*, Lucca, 21-23 October 2002, ECE/MP.PP/2/Add.8. http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf

"reflecting printing and distribution costs". A notice should be displayed at the development site for at least 21 days accompanied by a local newspaper advertisement.

4.2. Addendum: collection and dissemination of environmental information

> Communication-based tools regulate behaviour by enriching the information available to the targeted audience, thereby enabling them to make more informed choices about their behaviour and, it is hoped, to choose to act in a manner that facilitates the attainment of regulatory objectives. The aim is therefore to bring some kind of indirect social pressure to bear on individual decision-making in the hope that it will lead to behavioural change.[72]
>
> – *Morgan Bronwen and Karen Yeung* (2007)

In parallel to providing environmental information on a request of a natural or legal person, and beyond the requirements of EIA, public authorities are obliged to collect and widely disseminate environmental information.[73] Such an obligation supplements the "passive" aspect of the right to access environmental information. It is built on the idea that these authorities act as a broker of information to which public has a "right to know" and serves at least double aim. The use of environmental information and its disclosure can cost-effectively drive improvements in environmental results. As Bronwen and Yeung claim, public attention might simply be drawn to particular cases of exemplary (''naming and faming'') or woeful (''naming and shaming'') efforts to achieve compliance with regulatory rules and objectives.[74] On the one hand, as a result of enhanced transparency, individuals who are informed about environmental hazards in their communities can make more rational decisions about their own protection. On the other hand, such disclosure would motivate industry to take action to prevent them from being viewed as a poor environmental performer.[75]

Let me analyse briefly two examples of such active promotion of environmental information. First, in the United States, the Emergency Planning and Community Right-to-Know Act of 1986[76] requires companies to report annually the quantity of hazardous chemicals that they have released into the environment or transferred off-site. The United States Environmental Protection Agency then incorporates this information into the Toxic Release Inventory (TRI), which is a nationalised database freely accessible over the Internet,[77] and subsequently issues an annual report naming those facilities that have released the most toxic substances. Since no company wants to be near the top of the list and thus they come up with their own way of improving the environmental performance, the TRI has been seen as a tremendous success due to its cost-effective substantial reduction of chemical releases.[78] It could be argued, however, that access to such data could be equally achieved by the means of the freedom of information request, but it is the TRI that had shortcut the bureaucratic information request and made data truly accessible.[79]

Yet the experience of functioning of such inventories shows that data gathered are sometimes difficult to understand any fully exploit, that these data might be misrepresentative without

[72] Bronwen and Yeung, op. cit, p. 96.
[73] Art 5 of the Aarhus Convention.
[74] Bronwen and Yeung, op. cit., p. 101.
[75] Herb, Jeanne, Susan Helms and Michael J. Jensen, *Harnessing the 'Power of Information': Environmental Right to Know as a Driver of Sound Environmental Policy*, in Thomas Dietz and Paul C. Stern (eds.), *New Tools for Environmental Protection: Education, Information, and Voluntary Measures,* National Research Council, Washington, 2002, p. 254.
[76] Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. § 9601 et seq.
[77] United States Environmental Protection Agency, *Toxics Release Inventory (TRI) Program*. http://epa.gov/tri/
[78] Hirsch, op. cit., p. 57.
[79] Herb, Helms, Jensen, op. cit., p. 253.

context (both reasons due to the lack of technical knowledge impeding interpretation) and that chemical volumes are alone poor indicators of human health risks. Individuals are overwhelmed by the amount of this kind of "practical" information. If they are not affected directly by an environmental hazard, they are unlike to pay attention to the data so "remote" from them. From the policy-making viewpoint, many companies switch to use the chemicals that they do not need to report or simply fail to report. Therefore, some authors suggested that in a first place the data should be clear, put into context and cover as many facilities as possible. Second, these data should be distributed effectively, widely available to those with and without computers and people need to know that the information exists. Finally, individuals need both a meaningful reason to track down information and the skills to take advantage of it.[80]

Second, some jurisdictions have in the recent decade introduced a requirement to report on environmental performance in the company's annual reports.[81] (In other jurisdictions some companies include these data voluntary.) For example, these reports in Australia have included, *inter alia*, the impacts their activities on the environment, management of environmental risk, usage of resources, exposure to regulation, breaches and how they rectify and prevent future breaches, supply chain policy and the involvement of the board in environmental performance.[82] (The scope of such reporting might be broadened: in 2012 it was announced that the UK would make publicly listed companies report their greenhouse-gas output, the first country to do so.)[83] The Australian experience also shows that not all the reports are meaningful and that mandatory reporting should be coupled with guidance and enforcement by a regulating authority.[84]

4.3. Environmental democracy in the Strasbourg Court: a matter of fundamental rights importance

> We have already pointed out that in the past 25 years the Strasbourg Court has made a positive contribution to the construction of an environmental dimension of several rights enshrined in the Convention. … The Strasbourg case law has contributed to the development of certain 'environmental obligations' incumbent upon states parties by virtue of the Convention.[85]
>
> – *Francesco Francioni* (2010)

In the second section I claimed that public participation in decision-making constitutes a requirement derived from international fundamental rights. Let me here develop this argument further by analysing in a greater detail the relevant case law of the ECtHR.

Cases dealing with environmental issues appear quite often on the Strasbourg Court agenda.[86] Although the European Convention does not provide an explicit right to a clean and healthy

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[80] Ibid., p. 258.

[81] Cf. Art 5(6) of the Aarhus Convention which stipulates that „Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means."

[82] Bubna-Litic, Karen, "Environmental Reporting as a Communications Tool: A Question of Enforcement?," *Journal of Environmental Law*, Vol. 20, No. 1, 2008, p. 82.

[83] Bakewell, Sally, "U.K. to Require Public Companies to Report CO2 Emissions", Bloomberg, 20 June 2012. http://www.businessweek.com/news/2012-06-20/u-dot-k-dot-to-require-public-companies-to-report-co2-emissions

[84] Bubna-Litic, op. cit., p. 84.

[85] Francioni, op. cit., p. 49.

[86] ECtHR, *Environment-related cases in the Court's case law*, factsheet, Strasbourg, December 2012, http://www.echr.coe.int/NR/rdonlyres/0C818E19-C40B-412E-9856-44126D49BDE6/0/FICHES_Environnement_EN.pdf

environment, the Court's case law has been defining the extent to which the Convention and its Protocols can be relied upon to provide some form of environmental protection and a means of redress (i.e. the "greening" of human rights law).[87] As the Court recently pointed out in *Kyrtatos v. Greece* (2003),[88] "neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such", the relevant rights invoked to obtain environmental protection usually include the right to life (Art. 2), the right to fair trial (Art. 6), the freedom of expression (Art. 10), the right to property (Art. 1 of the Additional Protocol No 1) and – most frequently and importantly – the right to protect private and family life, home and correspondence (Art. 8).[89]

Specifically concerning Art. 8, the Court has developed a number of positive obligations[90] for protecting the interests safeguarded by the right to privacy. From a historical perspective, the first cases dealt with the right to protection of family life and one of the first requirements developed was that of participation.[91] For example, in *W. v. the United Kingdom* (1987),[92] the Court wanted to determine whether the decision-making process to put a child into care "has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8". In particular,

> the relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents. The decision-making process must … be such as to secure that *their views and interests are made known to and duly taken into account* by the local authority and that they are able to *exercise in due time any remedies available to them* … In the Court's view, what therefore has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken*, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests* [§§ 63-64; emphasis added].

This requirement of participation has progressively become a standard in cases related to the placement of children into public care, access rights of parents, the withdrawal of parental responsibility and custody. Ever since, the statement that "the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests safeguarded to the individual by Article 8"[93] spread from family life cases to other

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[87] „It is self-evident that insofar as we are concerned with the environmental dimensions of rights found in avowedly human rights treaties … then we are necessarily talking about a 'greening' of existing human rights law rather than the addition of new rights to existing treaties". Boyle, Alan, "Human Rights and the Environment: Where Next?," *European Journal of International Law*, Vol. 23, No. 3, October 15, 2012, p. 614.

[88] ECtHR, *Kyrtatos v. Greece*, Judgement of 22 May 2003, Application no. 41666/98, § 52.

[89] Stookes, Paul, *A Practical Approach to Environmental Law*, Oxford University Press, 2009, pp. 45-50.

[90] For the analysis of the concept of positive obligations in the Strasbourg system, cf. e.g. Mowbray, Alastair, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, 2004; Akandji-Kombe, J.F., *Positive Obligations under the European Convention on Human Rights. A Guide to the Implementation of the European Convention on Human Rights*, Human Rights Handbooks, Council of Europe, 2007; Bates, Ed, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford University Press, 2010; Xenos, Dimitris, *The Positive Obligations of the State Under the European Convention of Human Rights*, Oxford University Press, 2012.

[91] Brems, Eva, and Laurens Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights," *Human Rights Quarterly*, Vol. 35, No. 1, 2013, pp. 191-193. This paper also offers a detailed list of cases dealing with each of these issues.

[92] ECtHR, *W. v. the United Kingdom*, Judgement of 8 July 1987, Application No. 9749/82, § 62.

[93] E.g. ECtHR, *McMichael v. the United Kingdom*, Judgement of 24 February 1995, Application No. 16424/90, § 87; ECtHR, *Buckley v. The United Kingdom*, Judgement of 29 September 1996, Application No. 20348/92, § 76.

cases under Art. 8, dealing with issues such as deprivation of legal capacity, data registration, registration of ethnic identity, access to abortion and – notably – environment.[94]

In a number of cases related to environmental issues, the Court has explicitly referred to the need to provide access to information, public consultations and access to justice. Let me use the case of *Taskin et al. v. Turkey* (2004)[95] to illustrate that. As Francioni observed, "this case is noteworthy for the emphasis the Court places on the procedural duties concerning provision of information and consultation with affected parties as a condition for the fulfilment of the obligations inherent in Article 8".[96] First, the Court emphasised the need for informed decision-making, to be achieved by means of "appropriate investigations and studies" that should be subsequently available to the public:

> Where a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve *appropriate investigations and studies* in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake (see *Hatton and Others* … § 128). The importance of *public access* to the *conclusions of such studies* and to *information which would enable members of the public to assess the danger to which they are exposed* is beyond question (see, *mutatis mutandis*, *Guerra and Others v. Italy*, judgment of 19 February 1998 … § 60, and *McGinley and Egan v. the United Kingdom*, judgment of 9 June 1998 … § 97) [§ 119; emphasis added].[97]

Next, the Court emphasised the need for public consultations in decision-making:

> It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the *views of individuals were taken into account throughout the decision-making process*, and the *procedural safeguards available* (see *Hatton and Others*, *cited above*, § 104) [§ 118, emphasis added].

Finally, the Court stressed the need for access to justice if the interests safeguarded by Art. 8 were violated:

> Lastly, the individuals concerned must also be able to *appeal to the courts* against any decision, act or omission where they consider that their interests or their comments have not been given sufficient weight in the decision-making process (see, *mutatis mutandis*, *Hatton and Others*, cited above, § 127) [§ 119, emphasis added].

In *Giacomelli v. Italy* (2006),[98] the Court referred explicitly to a positive obligation to conduct an environmental impact assessment:

> [The Court] considers that the procedural machinery provided for in domestic law for the protection of individual rights, in particular *the obligation to conduct an environmental-impact assessment* prior to any project with potentially harmful environmental consequences and the possibility for any citizens concerned to participate in the licensing procedure and to submit their own observations to the judicial authorities and, where appropriate, obtain an order for the suspension of a dangerous activity, were deprived of useful effect in the instant case for a very long period [§ 94, emphasis added].

Consistent with the foregoing, the Strasbourg Court reaffirmed, that when it comes to the right to privacy (Art. 8), the three procedural rights – access to information, public participation in decision-making and access to justice – are of vital importance to fundamental

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[94] Brems and Lavrysen, op. cit., pp. 191-193.
[95] ECtHR, *Taskin and others v. Turkey*, Judgement of 10 November 2004, Application No. 46117/99, § 118.
[96] Francioni, op. cit., pp. 49-50.
[97] Some of these positive obligations appeared earlier in: ECtHR, *Hatton and Others v. the United Kingdom*, Judgement of 8 July 2003, Application No. 36022/97.
[98] ECtHR, *Giacomelli v. Italy*, op. cit.

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rights. In result, this case law has an effect of introducing into European human rights, by way of interpretation, the concept of environmental democracy.[99]

4.4. Environmental democracy in the Luxembourg Court: practical application explained

The functioning of the environmental democracy has been reviewed by courts at various levels and in various jurisdictions. Since the Aarhus Convention it has been also subject to oversight by the convention's Compliance Committee acting as an advisory body.[100] Such case law offers an invaluable insight into everyday application of the environmental democracy.

The ECJ, taken here as an example, dealt with the environmental democracy for the first time in *Plaumann* case (1963),[101] i.e. long before the environmental procedural rights were formalised under the Aarhus Convention and subsequently implemented into the EU legal order.[102] After *Plaumann*, a number of significant cases followed; they are analysed elsewhere.[103] Here let me refer only to a few recent cases dealing with the questions of practical application on the Convention's provisions.

A bulk of recent ECJ cases about environmental democracy deals with costs.[104] As Art. 9(4) of the Aarhus Convention establishes, *inter alia*, an obligation of costs protection, in *Commission v Ireland* (2006)[105] the ECJ has sanctioned participation fees as long as they do not create an obstacle to the right to participate in the EIA process.[106] In *Commission v Ireland* (2009),[107] the Court scrutinised the discretion vested in a national court when it comes to the costs of an unsuccessful party:

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[99] Francioni, op. cit., pp. 49-50. Francioni refers here to the observation made by Boyle in: Boyle, Alan, "Human Rights or Environmental Rights? A Reassessment", *Fordham Environmental Law Review* (2007) 471, at 497.

[100] United Nations Economic Commission for Europe, *Compliance Committee – Documents*. http://www.unece.org/env/pp/ccdocuments.html

[101] ECJ, *Plaumann & Co. v Commission*, Judgement of 15 July 1963, Case C-25/62.

[102] The Aarhus Convention has been implemented into the European Union law by the patchwork of legal instruments; the key ones include: Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, pp. 26–32; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, pp. 17–25; and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13–19.

[103] United Nations, Economic and Social Council, Economic Commission for Europe, *Report of the Compliance Committee – Addendum – Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union*, Geneva, 14 April 2011, ECE/MP.PP/C.1/2011/4/Add.1, at 20-31. http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf. Cf. also Schall, Christian, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?," *Journal of Environmental Law*, Vol. 20, No. 3, 2008, pp. 417–453.

[104] For the analysis of the UK courts practice on fees, cf. ECJ, *Opinion of Advocate General Kokott*, 12 September 2013 in Case C 530/11, *European Commission v the UK*.

[105] ECJ, *Commission v. Ireland*, Judgement of 9 November 2006, Case C-216/05.

[106] Ryall, Áine, "EIA and Public Participation: Determining the Limits of Member State Discretion," *Journal of Environmental Law*, Vol. 19, No. 2, 2007, pp. 247–257.

[107] ECJ, *Commission v. Ireland*, Judgement of 16 July 2009, Case C-427/07.

> Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts. That mere practice … cannot, by definition, be certain … [and] cannot be regarded as valid implementation of the obligations arising from [the EU law] [§ 93].

In *Edwards and Pallikaropoulos v Environment Agency* (2013),[108] the Court elaborated on the concept of "prohibitively expensive" judicial procedures:

> The requirement … that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts … by reason of the financial burden that might arise as a result.
>
> … the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime [operative part].

Another group of latest cases deals predominantly with *locus standi*:

- In *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (2009)[109] the ECJ found that members of the public concerned must be able to have access to a review procedure to challenge the decision on development consent, regardless of the role they might have played in the examination of the request (e.g. by taking part in the procedure before that body and by expressing their views). Furthermore, the Court ruled that the right to bring an appeal against a decision on projects cannot be reserved only to environmental protection associations which have at least 2 000 members.
- In *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein‑Westfalen eV v Bezirksregierung Arnsberg* (2011),[110] the Court ruled that the EU law precludes legislation which does not permit non-governmental organisations promoting environmental protection to rely before the courts on the ground that that rule protects only the interests of the general public and not the interests of individuals.
- In *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (2011),[111] the court stated that "the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure". Therefore the said provision "does not have direct effect in European Union law". Since "those provisions, although drafted in broad terms, are intended to ensure effective environmental protection" it is for the

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[108] ECJ, The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others, Judgement of 11 April 2013, Case C-260/11.

[109] ECJ, Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd, Judgement of 15 October 2009, Case C-263/08.

[110] ECJ, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein Westfalen eV v Bezirksregierung Arnsberg, Judgement of 12 May 2011, Case C 115/09.

[111] ECJ, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, Judgement of 8 March 2011, Case C 240/09, §§ 45-52.

national court "to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3)".

- In *Flachglas Torgau GmbH v Federal Republic of Germany* (2012)[112] the Court ruled that the option given to Member States of not regarding bodies or institutions acting in a legislative capacity as public authorities (Art. 2(2) of the Aarhus Convention) can no longer be exercised where the legislative process in question has ended. Accordingly, in a situation when individuals cannot gain access to environmental information during the legislative process (since the provision of information to citizens is usually adequately ensured in the legislative process), they can do so after the legislative measure has been adopted and therefore information can be obtained for the purposes of challenging the legislative measure subsequent to its adoption.

Recently the Aarhus Convention's Compliance Committee was requested to examine the compliance of the European Union law with the Convention,[113] and in particular with regard to the *locus standi* of environmental associations. Put simply, the jurisprudence of the EU courts shows that such associations are practically barred from bringing cases to these courts. The way in which these courts interpret the requirement of "direct and individual concern" – a prerequisite for *locus standi* in the EU courts – does not comply with the spirit of the Convention, whose broad interpretation should be presumption and not the exception.[114]

As the preceding sub-sections show, environmental law offers a complex and stringent framework for access to information, public participation in decision-making on specific issues and access to justice in environmental matters. This framework stems from fundamental rights and it benefits from extensive judicial and quasi-judicial interpretation. In the next section I shall demonstrate how this framework can be adapted to the needs of privacy governance.

5. What can the protection of privacy and personal data learn from environmental law?

5.1. Adaptation of environmental democracy to the needs of privacy governance

> Even more valuable is the requirement that citizens concerned by new technologies and processing operations are heard and given the necessary facts and data coming from impact assessments.[115]
>
> – *Paul De Hert* (2012)

There is undoubtedly a need for the public voice to be heard decision-making, and in particular when privacy is or might be intruded by new technologies.[116] Although there is a

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[112] ECJ, *Flachglas Torgau GmbH v Federal Republic of Germany*, Judgement of 14 February 2012, Case C-204/09.

[113] United Nations, Economic and Social Council, Economic Commission for Europe, *Report of the Compliance Committee – Addendum – Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union*, Geneva, 14 April 2011, ECE/MP.PP/C.1/2011/4/Add.1, at 20-31. http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf

[114] Poncelet, Charles, "Access to Justice in Environmental Matters – Does the European Union Comply with Its Obligations?," *Journal of Environmental Law*, Vol. 24, No. 2, July 2012, pp. 287–309. Krämer, Ludwig, *Access to justice in environmental matters, in particular by NGOs* [manuscript].

[115] De Hert, op. cit., p. 75.

[116] De Hert, op. cit., pp. 70-72. Furthermore, the European Commission argues for its regulatory impact assessment to include in its scope all fundamental rights foreseen in the EU Charter. Cf. European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights*, Brussels, 19 October 2010, COM(2010) 573 final, at 1.1.2.

consensus that public participation is crucial for successful impact assessments and thus should be a core element thereof, the *status quo* of such participation in the process of PIA leaves much to be desired. The legislative framework, case law, scholarship and practice of environmental democracy can provide valuable ideas for the protection of privacy in the digital era, and in particular for engaging stakeholders. At least three major lessons can be drawn, subject to necessary adaptations to the reality of the privacy governance.

First, environmental law has conceptualised and developed a comprehensive, three-pillar framework for the environmental democracy, in which access to environmental information is a prerequisite for meaningful participation in decision-making on specific activities and in which due account must be given to the results of public consultations. To strengthen these rights, effective access to justice is offered should any of them be violated. As the Aarhus Convention offers minimum standards, the state parties can go beyond and provide a higher level of protection. Furthermore, within the context of Art. 8 of the European Convention, these rights are a matter of fundamental rights importance.

Second, two pillars of the environmental democracy, i.e. access to environmental information and participation in environmental decision-making constitute enforceable rights, safeguarded by the third pillar, i.e. effective access to justice. Any limitations to these rights must be interpreted restrictively. The way the parties to the Convention implement its provisions and how these rights are exercised in practice is monitored by the Convention Compliance Committee. It is this rights-based approach and international monitoring that contribute to the efficiency of this framework.

Third, dissemination of environmental information, by means of e.g. release inventories or corporate reporting on environmental performance, enhances transparency and thus allows the individuals to make informed decisions about their own protection as well as forces industry to perform well with regard to the environment.[117]

From a formal point of view, environmental law offers stringent regulation. The legal provisions are very detailed and deal with issues ranging from the content of the public notice or the environmental report to the time frames for participation. Furthermore, environmental democracy has been extensively interpreted by the courts and other bodies. These institutions, supplemented by the critical perspective of academia, have offered further clarification of already detailed provisions, creating unprecedented knowledge about the practical application of environmental democracy.

These characteristics of environmental democracy make it appealing for the adaptation to the needs of privacy protection. A comprehensive and adequately prescriptive three-pillar framework for the "privacy democracy", comprising of a right to access information (both "passively" and "actively"), to take part in decision-making in specific situations and to seek remedy if any of these were violated, seems attractive. Environmental law suggests providing not only the individuals but also the general public information about the performance of the entity with regard to the protection of privacy. Environmental law also suggests where the limits of public participation are, i.e. those situations that can have a significant impact on environment. Thus, if we look only at PIA, and assuming that such an adaptation would be achieved by means of hard-law, it might benefit the most from establishing an enforceable

[117] Hirsch already discussed how "public disclosure" could serve as a model for privacy protection by proposing a scheme that would require companies that collect and use personal information to report annually how much of it they released that year. Such a report would include both intentional releases (e.g. transfers of information to affiliates or other third parties) and unintentional ones (e.g. data security breaches). Hirsch, op. cit., pp. 57-58.

right to access privacy-related information, to take part in PIA and – finally – to access to justice, should these two be violated. This could be supplemented by an obligation to widely disseminate information on "privacy performance".

5.2. Possible limitations

> Privacy, like the weather, is something everyone talks about. … In an effort to learn and to legitimate, the ideal PIA involves relevant "stakeholders". This democratic impulse is admirable, but who decides who is a legitimate stakeholder? – e.g., do those arrested, but not charged or found guilty, have a seat at the table when decisions are made about preserving DNA?[118]
>
> – Gary T. Marx (2012)

The adaptation of the framework for environmental democracy to the needs of the protection of privacy would undoubtedly face certain limitations. Let me analyse a few most evident ones.

First and foremost, would the public actually take part in decision-making in privacy matters? What would trigger their interest to participate? This inquiry goes beyond the legal viewpoint on which this paper is based and a number of factors need to be analysed. Yet it shall suffice here to mention that certain differences between "environment" and "privacy" could have decisive impact on the participation of the public.[119] One of the concerns is that privacy harms are rather obscured in comparison with environmental ones. Whereas it is possible to observe and measure the direct results of much of environmental pollution, arguments against excessive invasion of privacy often have to be pitched in terms of abstract rights and fears of hypothetical consequences.[120] Furthermore, while environmental issues "tend to bundle around strip mining and air pollution",[121] privacy issues are decentralized and pervasive. Another concern is that privacy harms are highly contextual and subjective while those resulting from environmental degradation are rather more objective. Likewise, the appropriate level of privacy protection is only something that can be decided at an individual level, and according to the highly variable instincts about what is, and is not, intrusive or sensitive.[122] This is linked to the next concern in which it is some form of collective threat to a common good in a given (local) community that would trigger collective response; think of e.g. a nuclear power station being planned in the neighbourhood. Taking all these arguments into account, participation of the public most probably would be produced by big-scale initiatives in which there exists visible and somehow measurable threat to the right to privacy and in which many individuals (and/or their organisations) feel that that right might be threatened. A further argument can be made that the interest to take part in privacy decision-making often would be a function of the role that "privacy culture" plays in a given society.

Second, it might be argued that certain issues are already covered. With regard to the first pillar of environmental democracy (access to information), both the freedom of expression, in particular its passive aspect (i.e. right to receive information), and the laws on freedom of information can ensure access to information. However, they lack greater specificity and particular focus as well as constitute a complicated procedure to follow. As the Strasbourg Court observed, Art. 10 ECHR "guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed"[123] yet it does not impose on

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[118] Marx, Gary T., "Privacy Is Not Quite Like the Weather" in Wright and De Hert, op. cit., pp. v-xiv.
[119] I thank Colin J. Bennett for bringing this matter to my attention.
[120] Bennett, Colin, *The Privacy Advocates. Resisting the Spread of Surveillance*, MIT Press, 2008, p. 213.
[121] Valerie Steeves quoted in Bennett, Colin, *The Privacy Advocates…*, op. cit., pp. 210-214.
[122] Bennett, op. cit., pp. 210-214.
[123] ECtHR, *Sunday Times v the United Kingdom*, Judgement of 26 April 1979, Application No. 6538/74, § 66.

public authorities "positive obligations to collect and disseminate information of its own motion".[124]

Furthermore, in the current EU data protection framework, the data subject (i.e. an individual) already has a right to be informed about her personal data being processed,[125] *de facto* supplemented by privacy policies. Some initiatives – voluntary ones or not – have been already undertaken, e.g. data breach notifications,[126] transparency reports (e.g. Google,[127] Microsoft[128] and – recently – Vodafone)[129] or publication of PIA reports (or summaries thereof).[130] However, vast majority of these initiatives focus on one particular aspect of privacy and do not give a broader picture how privacy is addressed in a given organisation.

With regard to the second pillar, i.e. participation in decision-making, in the EU, Art. 33(4) of the proposed General Data Protection Regulation[131] require the data controller, while performing a DPIA, to "seek the views of data subjects or their representatives on the intended processing". If entered into force and in the current shape it could be argued that it would create a right to take part in such an assessment. This would be strengthened by a number of remedies and sanctions.[132] However, this particular aspect of participation would be limited by the scope of DPIA foreseen in this proposed Regulation, thus omitting other types of privacy.

It might also be argued that a three-pillar framework for "privacy democracy", if mandatory, would just create more "red tape" and would not receive support neither from policy-makers nor from the private sector. However, this negative effect could be minimized by the benefits a project's sponsor could get (cf. *supra*, section 2), by a careful design as well as by minimal cost and disruption of such a framework, among others.

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[124] ECtHR, *Guerra et al. v Italy*, Judgement of 19 February 1998, Application No. 14967/89, § 53.

[125] Cf. Arts 10-11 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, pp. 31-50.

[126] Cf. Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, pp. 37-47.

[127] Google, *Transparency Report*. http://www.google.com/transparencyreport/userdatarequests/

[128] Microsoft, *2012 Law Enforcement Requests Report*. http://www.microsoft.com/about/corporatecitizenship/en-us/reporting/transparency/

[129] "Vodafone is to take a stand on privacy by asking British ministers, and the governments of each of the 25 countries in which it operates, for the right to disclose the number of demands it receives for wiretapping and customer data." Garside, Juliette, *Vodafone takes a stand on privacy with plan to disclose wiretapping demands*, The Guardian, 15 January 2014. http://www.theguardian.com/business/2014/jan/15/vodafone-aims-to-disclose-wiretap-demands

[130] The RFID Recommendation (op. cit.) repeats certain requirements of the Directive 95/46/EC (op. cit.), i.e. the information about the controller and about the purpose of processing (Arts 10-11), but it suggests further to include additionally the categories of personal data involved, the summary of privacy impact assessment carried out with regard to the RFID application in question and the information about the likely privacy risks.

[131] European Commission, *Proposal…*, op. cit., fn. 53.

[132] In particular, Art 73 introduces the right to lodge a complaint with a supervisory authority if the data subject "consider[s] that the processing of personal data relating to [her] does not comply with [the Regulation]". Art 75 provides for a right to a judicial remedy against a controller or processor "if [data subjects] consider that their rights under [the] Regulation have been infringed as a result of the processing of their personal data in non-compliance with [the] Regulation". By virtue of Art 77 "any person who has suffered damage as a result of … an action incompatible with [the] Regulation shall have the right to receive compensation". Finally, a supervisory authority would be able impose a fine "to anyone who, intentionally or negligently … does not carry out a data protection impact assessment" [Art 79(6)(i)]. However, it remains an open question if the remedies foreseen in the proposed General Data Protection Regulation are structurally similar to those in environmental law.

5.3. Suggestions for further research

Apart from investigating the above-mentioned possible limitations, a few suggestions for further research can be made. First, as the concept of "environmental information" is well defined in broad terms in the environmental law,[133] the scope of "privacy information" could be defined too. Second, the scope of "privacy performance reporting" needs to be demarcated. Both public and private sector organisations certainly need to report issues such as their privacy policies and their amendments, PIA reports (or meaningful summaries thereof), statistics on data transfers to other data controllers, and in particular to other jurisdictions, data breaches as well as law enforcement requests. However, individuals might need more information on how privacy issues are dealt within organisation. Third, it should be analysed what is the stance of the Strasbourg Court – and other constitutional or international human rights courts – on the three positive obligations – access to information, participation in decision-making and access to justice – outside the scope of environmental protection. Fourth, particular means of introduction of each of these ideas should be analysed, e.g. soft-law or hard-law, whether this framework should apply to both public and private sector, what should be its territorial scope (international, regional), and how to minimize negative impact thereof, in particular the "red tape". Fifth, a body to monitor compliance should be created or designated as well as whether – on a national level – it should be a data protection authority.

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[133] Cf. footnote 70.

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