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Strange Bedfellows: Consumer Protection and Competition Policy in the Making of the EU Privacy Regime

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Abstract

How was the European Union's privacy regime built? Drawing on regime theory and carrying out qualitative document analysis, we present the evolution of the privacy regime across the three decades from the 1995 European Data Protection Directive to the 2016 General Data Protection Regulation, the 2022 Data Governance Act and finally the 2022 Digital Markets package. Our analysis focuses on the European Commission and suggests that the privacy regime emerged out of the seemingly conflicting interplay between the (digital) single market whose power draws on the network effects of *expanding* data resources and concerns for personal privacy that seek *limiting* data gathering itself. Contrary to expectations, potential tensions between competition law and consumer protection have not hindered or decelerated the formation of the regulatory regime. In fact, these tensions have proven to be surprisingly productive.

Keywords: digital privacy; digital single market; competition policy; digital advertising; European Commission

Introduction

'It's the final countdown for digital regulation!', tweeted European Commissioner Thierry Breton (2022a). His tweet linked to a Spotify[1] playlist featuring a moot compilation of songs from *Gatekeepers* to *Big Tech*. The Commissioner for Internal Market was in the final stretch of negotiating the Digital Markets Act (DMA), a key piece of legislation regulating the digital economy that was passed in July 2022. A few months before, the Commissioner's media game had already raised eyebrows when he posted a Leone-style Western video promoting the Digital Services Act (DSA): 'It's time to put some order in the digital "Wild West"' (Breton 2022b). Together the DSA and DMA mark the European Union's (EU's) latest legislative efforts to govern digital services and by implication digital privacy. In this article, we chart the formation of the EU's 'privacy regime' (Newman 2008) from its early days to the present. We focus on landmark regulatory packages: the European Data Protection Directive (1995), the General Data Protection Regulation (GDPR 2015), the Data Governance Act (DGA) (2022) and the Digital Services package (COM 2022).

The EU's privacy regime, we argue, has emerged out of a productive tension within the European Commission between the digital single market (the competition policy side) and growing concerns over the use of personal data (the consumer protection side). Despite inherent discord between these two, both concerns have helped to build and advance

[1]Spotify had complained to the European Commission in 2019 claiming that Apple was unjustly demanding a 30% share of its subscription fees for featuring Spotify in its App Store, a practice that might be curbed under the DMA (Financial Times 2022). Given this charge of antitrust breach, the playlist does not appear so innocent.

the regime we encounter today. Our analysis is based on a comprehensive qualitative analysis of primary policy documents and secondary sources as well as academic literature from public policy, law and media studies.

This article has two aims. First and empirically, our research contributes to the literature on the EU's maturing privacy regime. This literature predominantly focused on single pieces of legislation (e.g., Cini and Czulno 2022; Kalyanpur and Newman 2019; Laurer and Seidl 2021). Our article widens the temporal lens of regime formation across legislative initiatives. Starting with the 1995 Directive, we trace the evolution of the regime between competition policy and privacy protection from its beginning. In so doing, we take inspiration from König's call (König 2022, p. 485) for 'research that takes a broader perspective on digital policy while foregrounding the central role of data in the digital era'. Second and theoretically, we argue that regime theory offers a panoramic and sharp lens to consider the evolution of the EU's privacy regimes. Our research aims at contributing to the scant literature of regime theorising in EU studies. A further theoretical contribution follows from this: our research is particularly interested in the productive tension between consumer privacy and market competition and the main field of this tension, Adtech.[2] It is easy to assume, as work on regime complexes usually does, that the existence of tensions such as this is a weakness. But building on the work of Stark, we find that the privacy/competition tension has actually been a strength. As Stark puts it, the friction between different, apparently incompatible principles of evaluation can be '[c]reative' and 'productive' (Stark 2009, p. 18), and that is exactly what we find here. Given the key role of digital data, a better understanding of this regulatory dynamic is not only useful in understanding an existing regime but also bound to be relevant for future studies on the EU's evolving digital single market.

This article proceeds as follows: first, we discuss our theoretical framework before presenting a summary of the regulatory milestones of regime formation. In the next section, we consider the role of the European Commission and in particular the lead Directorate-Generals (DGs). We argue that with different DGs at the helm of the regime, the Commission provided leadership both from a consumer-oriented (privacy concerns) and a market-oriented policy side (competition policy). These tensions proved productive with the Commission succeeding in integrating both into the EU's privacy regime. In the subsequent sections, we consider how the Commission used public opinion surveys and called on expert groups to support the emerging privacy regime. The article closes by drawing out wider implications and charting avenues for future research.

I. Regime Theory

The concept of regime used in this article follows Krasner's canonical definition (Krasner 1982, p. 185). Regimes are 'sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge'. For the privacy regime studied here, this means sets around questions of the protection of private life and personal data as demanded in the EU Charter of Fundamental Rights. We delineate the institutional boundaries deliberately narrowly. By focusing on the EU level and more specifically the European Commission, we do not use a broader 'regime complex'

[2]Adtech is short for advertising technologies used for managing digital advertisements across channels.

perspective that would map the international network of actors and wider institutions that have a bearing on the formation of this regime. Our institutional focus emerges from our main research interest in explaining the formation of the EU's privacy regime sitting between competition policy and consumer protection. Competition policy refers to the active oversight and regulation of markets with the aim of enhancing market efficiency and reducing market distortion. Consumer protection refers to the set of regulations and measures aimed at preventing or remedying market failures and ensuring the safety and health of consumers. In our account, the European Commission is placed at the heart of the EU's privacy regime. As we detail in our analysis, this focus emerges from its role as key actor, and it is thus primarily empirically motivated.

Regime theory continues to receive a lukewarm reception from Europe integration scholarship. Initially, close links with US-centric hegemonic stability theory made it an uneasy fit for the EU setting. As the field of EU theorization matured, scholars built on and away from regime theory. These new theories offered tailored models for explaining European integration and (though not always explicitly) regime formation (e.g., Moravcsik 1998). Regime theory does not offer an off-the-shelf set of hypotheses or actors.[3] The regime framework used here does not aim to provide a probabilistic model in the neo-positivist sense but offers orientation towards understanding a particular regime. An important focus of regime theory is that of legitimacy and knowledge (e.g., Sinnott 1995; Susskind 1994). We draw on this literature to examine the use of public opinion and the role of expert groups in the evolution of the EU's privacy regime.

Like success, regimes are claimed by many parents. Any endeavour to examine regime formation must therefore contest with its equifinality (Levy et al. 1995, p. 286). Given that multiple possible constellations can lead to regimes, a research design that privileges one track over another is likely to offer an inadequate account. The discussion that follows does not attempt to compress regime building into a single factor – an explanation that would be bound to fail when applied to different aspects and instances over a 30-year study period. Instead, we identify a common theme that runs through the history of the EU's privacy regime, namely, that of the productive tension between competition policy and consumer protection.

The presence of tensions within a regime is frequently cited as a pathology of one kind or another. The literature on regime complexes postulates that such regimes are likely to be weakened by forum-shopping, strategic inconsistency, regime-shifting and poor compliance (e.g., Tesche 2023). Building on Stark's research (Stark 2009), we arrive at a different conclusion: in the case of the tensions between privacy and competition, what appears to be a weakness is, in fact, a strength. Stark argued that the friction generated by seemingly incompatible principles of evaluation can prove to be both 'creative' and 'productive' (Stark 2009, p. 18); dissonance can bring something new into being. Examining both competition and consumer policy, we draw on different strands of regime theory in explaining how disparate policy elements can be woven into a coherent approach. To be clear, we do not seek to promote regime incoherence tout court. Instead, we wish to contribute to the literatures on regimes theory and complexes, by adding a more favourable

[3]Although the first wave of regime theory was predominantly state-centric, the cast of actors in regime theoretical accounts has broadened substantially over the years.

reading of regime tension. Following an overview of the EU's privacy regime in the subsequent section, this article will shift its focus to three critical aspects that have been highlighted as central to regime development within the existing literature: (1) core actors in the European Commission, (2) the Commission's use of public opinion surveys as legitimation tool and (3) the support role of expert groups.

II. A Short History of the EU's Privacy Regime

A history of the EU's privacy regime is also a history of technology and markets, especially advertising markets. The need for states to respond to the vicissitudes wrought by technological advancements has arisen well before the IT revolution (Ruggie 1975).[4] Technology and markets are the two factors that first-generation regime theory (the target of Strange's scorching critique; Strange 1982) tended to neglect. With the arrival of personal and mainframe computers, the scope of accessing and processing personal information increased substantially – especially compared to the surveillance technologies of previous centuries such as watchtowers, baptism ledgers or population censuses. 'Privacy' and here specifically 'data protection' became a permanent item on the political agendas of most liberal states by the early 1970s. For much of the 1980s however, rules for data privacy were a domestic affair, despite calls from Commissioner Spinelli for an EU-wide approach. It was only when conflicting domestic privacy regimes began to impede the single market that the European Commission started to build an EU privacy regime. Competition policy is not inherently market-creating or market-serving: it can be used to enable and constrain private market power. Yet during the period of investigation, the EU's competition policy has been marked by a neoliberal discourse[5] aimed at removing barriers to competition of which differing data protection regulations were one example. National data privacy authorities banned or threatened to ban the transfer of personal data between countries when out of 12 members, only 7 had data protection laws (Jones 2019, p. 42; Newman 2008). As the Commission put it in 1990 (COM 1990, p. 314): 'The diversity of national approaches and the lack of a system of protection at Community level are an obstacle to completion of the internal market [which was set to come into force in 1993]. If the fundamental rights of data subjects, in particular their right to privacy, are not safeguarded at Community level, the cross-border flow of data might be impeded.' Put different, up-holding national privacy standards was seen as a problem for competition policy. From the very beginning, EU competition policy interacted with privacy concerns.

The resulting 1995 European Data Protection Directive, which took effect in 1998, sought to regulate the processing of personal data whilst ensuring its safe free movement. The 1995 Directive was the child of an emerging EU-wide network of national regulators who came to share a joint outlook on privacy matters (Newman 2008). The directive not only prompted a wave of further regulations regarding the appropriate use of personal

[4]The term 'technological' in the wider literature denotes the use of scientific and other knowledge for practical purposes and not what we understand as modern (often digital) technology. An early example of technology and regime interaction is Anderson and Hill's account of the arrival of barbed wire in the American West (1975) and the evolution of property rights.
[5]Buch-Hansen and Wigger (2011) define this as a 'competition-only focus, entailing a consumer welfare and efficiency rhetoric'; in a similar vein, Staab et al. (2022) refer to the EU's approach of regulating the digital economy as 'counter hegemonical neoliberalism'. For an overview of the different paradigms in EU competition policy, see also Warlouzet (2023).

information but led to the establishment of an EU network of national regulators, known as the Article 29 Working Party. The 1995 Directive was written when the internet and web were still in their early years. The 1995 Directive was therefore not drafted for the internet specifically but situated in a discourse of trans-border data flows based on telematics and an emerging digital network (Jones 2019, p. 42). Increasingly, the European Data Protection Directive (EDPR) came 'under different technological, legal and organizational pressures' (Bennett 2018, p. 240). In 2009, the Treaty of Lisbon and in particular its Art. 8 on the protection of personal data (Charter of Fundamental Rights) provided the European Commission with a stronger legal basis to modernise and strengthen data protection rules (Laurer and Seidl 2021).

The resulting 2016 GDPR provided a needed update.[6] Edward Snowden's revelations of governmental mass surveillance by the National Security Agency boosted regulators standing against big tech companies, which were perceived as 'enablers of state surveillance' (Rossi 2018, p. 61). Although the EU's privacy regime has from the get-go been directed at both public and private infringements, the focus during the early years of the regime was on private infringers. This changed with the Snowden leaks that brought to the fore the privacy implications of the entanglement between public and private actors in the data economy. The GDPR is widely considered a landmark regulation that set a standard for personal privacy, ushering in a 'new sanctions regime' (Streinz 2021, p. 909) inspired by competition law with fine-able, individual transparency and data control rights codified. Its most visible effect has been around online advertising, where the GDPR has led to the proliferation of cookie[7] consent boxes as the collection of cookie-based personal data now required explicit consent.

The Commission encountered resistance when enforcing the GDPR. Large platforms used the privacy stipulations of the GDPR to restrict access to 'their' data by third parties, thereby entrenching their data advantage and market position (Competition and Markets Authority [CMA] 2020). Once more, market practices that boosted data privacy threatened market competition. This tension between consumer protection and market competition was to be addressed with re-regulation (Cini and Czulno 2022). The Commission set out to establish a new set of regulatory measures with the Digital Services package presented as two separate legislative acts, the DMA and the DSA. The DSA introduces stricter rules for online advertising including bans on targeting and amplification using special categories of sensitive data and granting users the right to opt out of content recommendations based on profiling. Moreover, the DSA seeks to institutionalise and structure co-operation between oversight authorities, including data protection authorities, consumer protection authorities and competition authorities. This further formalised the ongoing dialogue between the privacy and the competition side of the regime. The

[6]Even though the GDPR is a key regulatory innovation, the EU's privacy regime did evolve in the interim – for instance, with the Directive on Privacy and Electronic Communications (2002/58/EC) that sought to enhance the security and by implication privacy of online services. In practice, the directive did little introduce consent or choice in privacy matters, yet there is evidence that it reduced advertisers' ability to target banner ads.

[7]Cookies are tracking devices. These electronic files, usually just strings of letters and numbers, are deposited in the user's browser by a website to be able to identify actions as being by the same user/browser, a role that is essential for many practical purposes. What is controversial is the use of cookies (especially 'third party' cookies, set not by the website being visited but by another firm) to collect information on users' identities and behaviour across websites.

DMA meanwhile defined a new category of regulated actor, 'gatekeeper' platforms,[8] and prohibits uncompetitive practices. From a competition point of view, reining in the practices of gatekeepers was intended to boost competition across the EU and particularly for EU-based companies. From a privacy point of view, the DMA is particularly relevant in curbing platforms' hold over individual data. Under the new rules, users can no longer be tracked outside the gatekeepers' core platform service for the purpose of targeted advertising without informed consent and user profiles may no longer be combined with data from other services. Gatekeepers are now obliged to be transparent as to the scope and nature of user data collected as well as the profiling practices for which sensitive personal data could no longer be used.

The DMA and DSA are part of a broader EU strategy to break big tech's dominance in the data economy to which the DGA also belongs (Cini and Czulno 2022). The DGA (2022) seeks to unlock public sector data that is not subject to the Open Data Directive due to special protections (e.g., intellectual property rights and commercial confidentiality) and to facilitate data sharing and re-use in and between the private and public sectors with harmonized rules on data exchange. This was meant to boost the accessibility and reduce the cost of data. Simultaneously, the DGA aimed to streamline the exchange of non-personal data amongst enterprises and enable the sharing of personal data.

The regulatory landscape of the EU's privacy regime has matured over the past decades. This is not to suggest that we have reached an endpoint. Indeed, the DMA, in recognition of an ever-changing digital landscape, has lowered the regulatory threshold for future modifications. The EU's privacy regime is evolutionary or incremental in nature, as opposed to static (cf. Levy et al. 1995). The capacity to modify and layer rules as well as institutional responsibilities befits the changing nature of privacy concerns. It is indeed not unusual for regimes to emerge without a predefined endpoint, although regimes with an endpoint do of course also exist (e.g., the ozone protection or fur seal regimes).

III. The European Commission

The previous section reviewed regulatory milestones in the formation of the EU's privacy regime. Core actors are a prime focus of regime theoretical accounts (Young and Osherenko 1993). The European Commission at large, and within it key DGs and their Commissioners, formed the core group for the privacy regime examined here. The regime's interplay between consumer protection and competition policy is apparent in the different choices of lead DG in charge of the regime's legal building blocks over the decades.

The 1995 Directive was led by the Commissioner for Industrial Affairs, Martin Bangemann, who had gained a reputation for breaking up cartels. The so-called Bangemann Report (1994), officially the Commission White Paper 'Growth, competitiveness and employment', describes the irreversible shift towards an information society and called for further regulation. The report (Bangemann Report 1994, p. 3) stressed that the EU should 'put its faith in market mechanisms as the motive power to carry us into the Information Age'. Given the key motivation to prevent different national privacy laws from impeding free movement in the Internal Market, the Bangemann Report and the

[8]Gatekeeper platforms must have a minimum annual revenue of €6.5 billion, operations in at least three EU nations, at least 45 million active EU end-users each month, 10,000 active EU business users annually, and they must have achieved these targets in each of the previous 3 years.

subsequent 1995 Directive came under attack for compromising 'privacy in favor of corporate data commerce' (Maxwell 1999). However, the harmonization of member states' data protection laws did not lead to an erosion of privacy standards. Instead, the Directive led to the creation of new data protection agencies (see Table 2) and initiatives at both the domestic and EU levels.

The GDPR, successor to the 1995 Directive, was not spearheaded by the DG Internal Market or the then called DG Enterprise and Industry, but the DG Justice, Fundamental Rights and Citizenship under Viviane Reding. José Manuel Barroso, then President of the European Commission, had created the separate DG with a special brief on consumer rights, including privacy. Only with the 1993 Maastricht Treaty did consumer protection acquire explicit recognition as a legislative competence. In 1995, a separate DG within the Commission was created to take charge of Consumer Policy whose resources and powers were boosted in the wake of the 1997 'mad cow' crisis (Weatherill 2021). The DG Justice, Fundamental Rights and Citizenship benefited from this comparatively recent increased standing of 'consumer protection'.

Handing Reding's DG the GDPR portfolio broke new grounds for the EU's privacy regime which was previously led by market- and not consumer-oriented DGs (Seidl 2021). Reding (2012) set out to regulate companies *and* governments that 'continue to see data protection as an obstacle rather than as a solution; privacy rights as compliance costs, and not as an asset'. The key expert group of the emerging privacy regime, the Article 29 Working Party, was hosted (in EU jargon 'provided a secretariat') by the Directorate C Fundamental Rights and Union Citizenship of the European Commission, DG JUS. This meant that, according to a German Commissioner for Data Protection, it made 'political and legal sense to task the DG hosting the national DPAs with data protection reform' (Seidl 2021, p. 78).

The decision to put Reding's DG in charge of the GDPR needs to be appreciated against the DG's strengthened position under the Lisbon Treaty (Laurer and Seidl 2021, pp. 263f). In the formation of the EU's privacy regime, we encounter not merely the politics of trade-offs – which after all is ubiquitous in domestic and supranational policy-making. Article 16 of the Lisbon Treaty created an 'institutional opening' (Laurer and Seidl 2021, p. 265) for privacy protection, elevating the legal standing of data protection and privacy. Competition or market integration stands comparatively on a weaker footing given that data do not explicitly enjoy free movement within the EU under internal market law (Streinz 2021, p. 911). Indeed, the integration 'of a market integration rationale with a fundamental rights logic is remarkable against the backdrop of the history of European economic integration, which is said to have favoured economic integration with fundamental rights as an afterthought' (Streinz 2021, p. 910). Yet arguments surrounding the international market or competitiveness did not disappear altogether: 'A high level of data protection is also crucial to enhance trust in online services and to fulfil the potential of the digital economy, thereby encouraging economic growth and the competitiveness of EU industries' (Reding 2012). As Lynskey (2015) argues, the Directive served both 'economic and rights-based objectives'.

In 2020, Margrethe Vestager, Executive Vice President of the European Commission for 'A Europe Fit for the Digital Age' and Commissioner for Competition, was entrusted with a raft of EU legislation in the digital field with Thierry Breton, European Commissioner for the Internal Market serving as junior partner. The Commission's competition

law powers have been frequently cited as a powerful engine for European integration. The EU's competition regime is a child of Germanic Ordoliberal principles: market integration or the removal of *public* trade barriers between member states, so the guiding thinking posits, must not be replaced by *private* barriers (Aydin and Thomas 2012). Regulating big tech under competition law, the DMA shifted the Commission's approach from ex-post to ex-ante regulation after years of fine-non-payments and protracted legal battles. The DMA brought the Commission's long-standing experience in enforcing competition rules to the digital market (Cini and Czulno 2022). Privacy concerns were however not absent. In its assessment of negative effects of gatekeeping in the digital market, the European Data Protection Supervisor (EDPS) (2014) goes beyond the economic impact of dominant market positions and states that the 'data protection and privacy interests of end users are relevant to any assessment of potential negative effects of the observed practice of gatekeepers to collect and accumulate large amounts of data from end users' – an assessment that made its way verbatim into the final DMA regulation (2022).

Privacy concerns continued to be a key feature of the EU's approach to regulating data. For the EDPS and the European Data Protection Board (EDPB) (2021, p. 17), the pendulum swung back with DGA: 'Whereas the GDPR was built upon the need to reinforce the fundamental right to data protection, the [DGA] clearly focuses on unleashing the economic potential of data re-use and sharing'. Critical voices have pointed out inconsistencies between the GDPR and the DGA, particularly around issues of informed consent and how to maintain anonymity given growing re-identification risks (EDPB-EDPS 2021). Although stressing that the Act was 'not about having to share data', Vestager (2020) promoted the business-friendliness of the DGA as it would 'allow businesses, small and big, to benefit from easier access to data and from reduction both costs and time in acquiring data'. The discourse around the DGA thus shares a similar outlook to the Bangemann Report in its focus on the safe free movement of data for economic gain.

Growing concerns that big companies, especially platform companies, might have used privacy rules to strengthen unfair market positions were an important factor in tasking DG Competition with the privacy regime. The *public* barriers that were removed with the harmonization of domestic privacy rules under the 1995 Directive risked being replaced by *private* barriers that firms justified as GDPR-compliant. The EDPS (2014) pointed out how competition, consumer protection and data protection are three inextricably linked policy areas in the context of the online platform economy. An example for this strong link is apparent in the ad intermediation market for in-app advertising, which is characterized by lack of interoperability and single-homing of app publishers. As laid out by the DMA regulation (2022), the sector of online advertising is said 'to have become less transparent after the introduction of new privacy legislation'. Specifically, large platforms used privacy concerns to erect or fortify their walled gardens. The 'death of the cookie' is a key example thereof. Google (now Alphabet, 2020) announced its intention to phase out support for third-party cookies on its browser Chrome under the heading of 'building a more private web'. This move, although at face value compliant with the GDPR, would give Google as host of first-party data an advantage. This privacy gain for individual users was widely seen as a bane for independent non-vertically integrated Adtech providers lacking the possibility to accurately target users. The case of hashing shows a similar tension. Hashing refers to the scrambling of users' ID's characters based

on a mathematical formula (Srinivasan 2020).[9] According to Google, these hashed IDs increase consumer privacy. Yet for rival companies, hashed IDs are no longer useful identifiers, which makes multihoming more difficult. Google claims that hashing is in line with the GDPR, which left the Commission worried that the GDPRs privacy rules could have helped to further entrench their dominant market position in digital advertising. With increased market power, these platforms 'have the incentive and ability to increase prices, for example, or to overstate the quality and effectiveness of their advertising inventory' (CMA 2020). Privacy protection then would come at the expense of other aspects of consumer interest and of competition in the internal market.

This section has examined how DGs with different remits have been tasked with addressing competition and privacy challenges alike. This relay race of different DGs was an important feature in the productive tension within the Commission's regime building. In the following section we will consider how the European Commission used public opinion surveys to draw on consumer protection and competition concerns in advancing the evolution of the EU's privacy regime.

IV. Public Opinion

The European Commission has a longstanding track record of using its own opinion surveys, Eurobarometers, to support European integration. Launched in 1973, the original intention was not to legitimise a political agenda (Pausch 2008, p. 357). In its early years, Eurobarometer analyses have been scanning public opinion, but this was not done in a strategic or proactive manner. In his tenure as Commission President, Barroso increased the strategic deployment of special Eurobarometer surveys as a means of gauging public sentiment on targeted policy domains, oftentimes those in the pipeline (Haverland et al. 2018). Official documents and speeches around European policy initiatives began to increasingly mention Eurobarometer surveys. The Eurobarometer created a link 'between seemingly innocent survey findings and hidden political agendas' (Law 2009, p. 246). Indeed, some argue that suggestive questions are used to steer respondents towards desired answers (e.g., Haller 2009). From a regime perspective, these surveys can booster a regime's legitimacy. Public opinion has long been shown to be a powerful legitimation tool in regime creation: 'Far from regarding public opinion as something remote and irrelevant, regime theory [...] strongly implies that domestic public opinion may impel and constrain moves towards internationalized governance, whether those moves are comprehensive and robust [...] or poor and tentative' (Sinnott 1995, p. 29).

Building a regime, the Commission availed itself of the tested tool of public opinion surveys to demonstrate the need and want for further regulation. Privacy was first subject to Eurobarometer capture in a 2009 Flash Eurobarometer survey on 'Confidence in the Information Society' and from then on has been a recurring feature of various surveys; see Table 1. Two surveys feature particularly prominently in the Commission's privacy regime discourse, namely, the 2011 'Attitudes on Data Protection and Electronic Identity in the European Union' (which also covers opinion around the use of cookies) and the 2015 Special Eurobarometer on Data Protection. Both were sponsored by DG JUS, the

[9] A hash function converts any amount of data into a string of letters and numbers of a fixed, short length. The 'hash' cannot in practice be inverted to reveal the original input data. Hashing is a common technique in digital advertising.

Table 1: Eurobarometer Surveys Related to EU Citizens' Privacy Concerns.

Year	*Title*	*Number*	*Commissioned by*
2009	Confidence in the Information Society	Flash EB 250	DG INFSO
2011	Attitudes on Data Protection and Electronic Identity in the European Union	Special Eurobarometer 359	DG INFSO and DG JUST
2012	E-Communications Household Survey	Special Eurobarometer 381	DG INFSO
2015	Data Protection	Special Eurobarometer 431	DG JUST
2016	The use of online marketplaces and search engines by SMEs	Flash Eurobarometer 439	DG CNECT
2016	Online platforms	Special Eurobarometer 447	DG CNECT
2016	e-Privacy	Flash Eurobarometer 443	DG CNECT
2019	The General Data Protection Regulation	Special Eurobarometer 487a	DG JUST
2020	Europeans' attitudes towards cyber security	Special Eurobarometer 499	DG HOME
2020	Attitudes towards the Impact of Digitalisation on Daily Lives	Special Eurobarometer 503	DG CNECT
2021	Digital Rights and Principles	Special Eurobarometer 518	DG CNECT

Note: IDG INFSO changed its name to DG CONNECT in 2012.
Abbreviations: DG CNECT, Communications Networks, Content and Technology; DG HOME, DG Migration and Home Affairs; DG INFSO, Information Society and Media; DG JUST, Justice and Consumers.
Source: Eurobarometer 2022.

DG in charge of the GDPR, and both were frequently cited during different negotiation phases (COM 2011, 2012). The EDPS (2014) drew on the same survey in their opinion on 'Privacy by Design' as called for under Art. 25 of the GDPR. Similarly, the Digital Service Act Package made frequent use of Eurobarometer findings (COM 2017; Vestager 2019). A Eurobarometer survey was also used in the Commission's impact assessment on the DGA (COM 2020). Specifically, the Eurobarometer's majority view (503) that they 'would be willing to securely share some of their personal information to improve public services' aligned with the regulation's goals and boosted the claim that EU citizens were 'increasingly willing to share their personal data for the common good and research' (COM 2020).

Evoking the performativity of public opinion surveys (Law 2009), colleagues of Reding's powerful chief of staff Martin Selmayr, noting the timing of the Eurobarometer survey, reportedly joked that the process was an example of 'policy-based evidence-making' (Heath 2018). Public opinion has increasingly been shaped through survey research and statistical analysis since the early 20th century, redirecting it from a 'popular suspicion' towards the state to a 'popular mood' demanding state (or in our case EU) action (Rosanvallon 2008). The use of statistical methods and survey questionnaires are integral technologies of the modern social imagination, acting as an infrastructure to capture and govern (Law 2009). The performativity of these privacy-related surveys lies in their power to first document and in so doing to shape a set of privacy concerns and second to offer EU-level remedial regulations. Yet professed privacy affinity and revealed preferences are prone to mismatch. EU and national officials are aware of this so-called 'privacy paradox' (e.g., COM 2019). Specifically, respondents in surveys frequently indicate that they are concerned about their privacy, but do not behave accordingly – the almost automatic 'accept all' in cookie pop-up windows come to mind.

The pull of the single market has guided the evolution of the EU's privacy regime from its inception. Eurobarometer surveys were used to support the appeal of the growing privacy regime from both the competition policy and the consumer protection side by documenting consumer concern (esp. Special Eurobarometer 431 and 359). The White Paper on the 1995 Directive noted that 'without the legal security of a Union-wide approach (to privacy), lack of consumer confidence will certainly undermine rapid development of the information society' (Bangemann Report 1994). The GDPR initiative was motivated similarly: updating the privacy regime would 'help reinforce consumer confidence in online services, providing a much-needed boost to growth, jobs and innovation in Europe' (Reding 2012). What is more' '… a lack of consumer confidence in [online] shopping across EU borders means we are still not tapping into the full growth potential of the Single Market … [consumers] feel safer shopping at home' (Reding 2013). Relatedly, the concept of trust in the digital world has been repeatedly emphasised by Commissioner Vestager (quoted in Bertuzzi 2021): 'The development of digital technology holds the key to a large degree of our prosperity and competitiveness. That will not happen if we do not trust the technology.'

The 'informed consumer' emerges as a key figure in the Eurobarometer surveys examined here (cf. Table 1). These surveys follow what Law (2009, p. 246) termed the enactment of a 'neoliberal version of political economy' populated by ideally rational and informed consumers. The informed consumer plays a prominent role in landmark EU rulings where consumers need to be able to assess the strength of liqueur, pasta cooking time, or the fine print of car insurance (Weatherill 2021). The consumer discourse of the EU's privacy regime thus echoed that of the development of consumer law in the 1990s when the Commission became increasingly concerned with the lack of consumer confidence to shop in the internal market. Consumer confidence, and by implication European economic integration, was thought to be impaired by disparities in consumer protection laws (Stuyck 2013). The link between consumer confidence and the internal market thus predates the digital economy.

This section has documented how the Commission's Eurobarometer surveys were marshalled to support the creation of the EU's privacy regime. The newly measurable 'consumer confidence' (or a lack thereof) was used by Commission officials as a bridge between market integration and privacy. Yet, in the formation of the privacy regime, as in other areas of European integration, the Commission has not been self-sufficient. The input of expert groups outside of the Commission was an indispensable component of regime building. This external expertise mattered both on a practical workload level for a short-staffed Commission and on a tactical level as it allowed the Commission to bring in national bodies into the European regime.

V. Expert Groups

The role of experts in regimes has been widely studied, for instance regarding the input of the scientific community on the loss of stratospheric ozone, threats of biological diversity and the climate crisis more broadly (Susskind 1994). Particularly knowledge-focused theories of regime formation have shed light onto how epistemic communities, transnational networks of experts, can support policy formation (Sabatier and Jenkins-Smith 1993). Securing buy-in from national agencies has been a key EU strategy at large, especially considering possible tensions around the question of the territorial distribution of regulatory

authority. The role of experts goes beyond punctuated delivery of expertise. European integration has traditionally used secondment contracts across policy areas (Trondal 2004). The role of externally sourced expertise in building this regime is in line with EU policy-making where different Commission DGs have access to multiple channels to acquire expert knowledge.

In the beginning, there were national experts. Just as privacy law emerged first at the national level, so did national experts. This sequence is easy enough to explain where the formation of a new regulatory policy domain also gave rise to national epistemic communities, close to national data or consumer protection agencies, that spread across Europe (Table 2). Although these national agencies increasingly came to share a common outlook, their track record in enforcing privacy rules remains heterogeneous (Sivan-Sevilla 2022). National experts helped bring privacy concerns to the EU level and lent their knowledge to the 1995 Directive (Newman 2008). They facilitated consensus building by

Table 2: National Consumer Protection Authorities.

Name	*Country*	*Year*
Österreichische Datenschutzbehörde	Austria	1978
Commission consultative de protection de la vie privée[a]	Belgium	1983
Commission for Personal Data Protection	Bulgaria	**2002**
Croatian Personal Data Protection Agency	Croatia	**2016**
Commissioner for Personal Data Protection	Cyprus	**2002**
Office for Personal Data Protection	Czechia	**2000**
Datatilsynet	Norway	**1995**
Estonian Data Protection Inspectorate	Estonia	**2005**
Office of the Data Protection Ombudsman	Finland	1987
Commission Nationale de l'Informatique et des Libertés – CNIL	France	1978
Landesbeauftragter für den Datenschutz	Germany	1978[b]
Hellenic Data Protection Authority	Greece	**1997**
National Authority for Data Protection & Freedom of Information	Hungary	**2012**
Data Protection Commission	Ireland	1989
Garante per la protezione dei dati personali	Italy	**1996**
Data State Inspectorate	Latvia	**2001**
State Data Protection Inspectorate	Lithuania	**2001**
Commission Nationale pour la Protection des Données	Luxemburg	**2002**
Office of the Information and Data Protection Commissioner	Malta	**2002**
Autoriteit Persoonsgegevens	Netherlands	1958[c]
Urząd Ochrony Danych Osobowych	Poland	**1997**
Comissão Nacional de Proteção de Dados – CNPD	Portugal	**2004**
National Supervisory Authority for Personal Data Processing	Romania	**2001**
Office for Personal Data Protection of the Slovak Republic	Slovakia	**2002**
Information Commissioner of the Republic of Slovenia	Slovenia	**2005**
Agencia Española de Protección de Datos (AEPD)	Spain	1993
Integritetsskyddsmyndigheten	Sweden	1973

Note: Years in bold indicate establishment after the GDPR agreement.
Source: National Consumer Protection Agencies.
[a]Since 2018 Autorité de protection des données.
[b]Data Protection Agencies are organised at the regional/Länder-level in Germany; the first agency was created by the Land Hesse, which also pioneered data privacy law in 1970; the first conference of regional data protection agencies was held in 1978.
[c]Called College Bescherming Persoonsgegevens until 2016.

providing broader access to information and reducing the transaction costs of exchanges and negotiations identified in regime theory (Stein 1982). A key expert group in the EU's privacy regime is the Article 29 Working Party, which was established with the 1995 Directive's mandate to create an EU network of national regulators to oversee the implementation of the Directive.

In 2018, the Working Party was replaced by the EDPB an independent European body in charge of overseeing the application of data protection rules throughout the EU and of promoting co-operation between the EU's data protection authorities. The EDPB is made up of representatives of the EU national data protection authorities and the EDPS. The transition from the 29 Working Party to the EDPB embraced continuity. The Chair of the EDPB, Andrea Jelinek from the Austrian Data Protection Authority, was previously Chair of the Working Party. Strong ties and continuity with national agencies are also apparent at the EDPS, the EU's top privacy monitor, created in 2004. Its inaugural head, Peter Hustinx, has been a Chair of the 29 Working Party too (the EDPS has been a regular member), alongside his presidency of the Dutch Data Protection Authority. The cross-disciplinary reach of the DMA, which covered not only competition law but also privacy and consumer protection, is reflected in the establishment of a High-Level Group – a key venue for the 'cross-fertilization' (cf. Stark 2009, p. 7) of a regime with different poles. The wide range of this group accounts for the 'family ties' shared by competition, consumer and data protection law, which are particularly strong in the data economy (Botta and Wiedemann 2019).

As the complexity of the EU's privacy regulations increased, so did the number of expert bodies involved. This proliferation of actors brought new challenges with it. The EDPS and EDPB (2021, p. 50), for instance, feared that the European Data Innovation Board foreseen under the DGA would 'impinge' on their privacy turf. The proliferation of bodies matches broader patterns of European integration where new regulatory agencies and courts have sprung up to oversee market competition across issue areas. In parallel to the 29 Working Party and then EDPB on the regime's consumer protection side sits the group of national competition authorities and their 2003 European Competition Network (ECN) on the regime's competition side. The ECN is an enforcement network with the stated aim of ensuring the coherent application of EU competition rules across the member states (Monti and Rangoni 2022) and of lightening the Commission's workload (McGowan 2005). The ECN's role reminds us to look beyond the EU level and recognise the role of national anti-trust authorities to apply EU competition concurrently with the Commission. According to Vantaggiato et al. (2021), neither the Commission nor the national authorities fully control the network's activities or agenda.

This section has documented how the EU's evolving privacy regime was supported by EU-level and domestic-level expert groups. The proliferation of expert groups tasked with supporting the European Commission did not only provide needed knowledge on matters around privacy and competition but also helped to build consensus at the domestic level by creating networks across member states with numerous national regulatory and supervisory bodies.

Conclusion

This article presented an account of the EU's privacy regime. Contrary to expectations and seemingly contradictory requirements of privacy protection and market expansion,

we showed that rather than curtailing regime formation, simultaneous and innovative deployment of competition policy and consumer protection provided a fertile ground for incremental regime building. König (2022) characterises the EU's data governance regime as 'market-creating' through rules that seek to strengthen market integration, to limit anti-competitive behaviour and to bolster EU-based industries' global competitiveness. Our analysis comes to a different verdict, namely that this regime did not emerge out of the 'market creating' thrust of EU policy-making *alone*, but instead out of the interplay, what we call 'productive tension', between competition policy and privacy protection. Our argument on the productive tension of the EU's privacy regime contributes to important questions about the role of coherence in regimes and regime complexes.

Bucking a wider trend of regime theory, this article has been primarily concerned with regime formation *not its consequences*. Whether the privacy regime has been a success for either privacy or market integration will be questions left for future scholarship. Theoretically, the resource regime perspective is a particularly promising avenue to consider how regimes (dis)advantage different actors (see König 2022). A highly relevant dimension for this question, which we did not consider in this article, is the privacy regime's geopolitical implications. Moreover, the tension between competition policy and consumer protection, inherent to the formation of the EU's privacy regime, may well be relevant for other areas of European integration. Open questions are whether similar tension in these issue areas is a productive or benign one too, and in turn what the determinants of productivity are. It is widely accepted that the EU's privacy regime has been highly influential beyond its own geographical boundaries. This influence leads us to ask how a regime travels and whether the 'productive tension framework' also applies to that of regime diffusion. Our argument on productive tensions could be developed and tested in different contexts. For example, the regime complex literature has focused on multinational jurisdictions or agreements of discretion. This is of course not the environment we encounter in the highly legalised polity of the EU. An interesting question arising is that of how discretion interacts with regime complexity. This article has placed the European Commission at the heart of the EU's privacy regime, yet the Commission did not work in isolation and future scholarship may want to expand the cast of actors considered in this article, such as national governments, parliaments, private companies, or courts. For example, the literature on orchestration highlights the role of non-state actors in exploiting opportunities of regime complexity (Abbott et al. 2015). Future comparative work across time or between cases may also wish to consider whether the flipside of our argument holds, namely, whether a weaker tension leads to a weaker regime or hinders regime building.

Considering the role of the state in this emerging privacy regime, the value of digital privacy has expanded beyond the initial competition lens of the 1995 Directive. Competition policy is still a dominant lens to rein in unruly digital platforms, but the merit of this regulation extends beyond the principles of the single market and now also touches upon the political foundations of European integration. The Brexit referendum, where social media was employed towards the politics of disintegration, has brought this link into sharp relief. The EU's privacy regime is set to evolve to meet these challenges, for instance, in recent initiatives around political campaigning and digital echo-chambers. Challenges around e-governance bring the state back to the centre of privacy concerns

as the increasing use of digital governance tools will expand the data reach of the state. This means that future challenges to the EU's privacy regime are not only coming from the market side but are arising from and for governments alike.

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