This is a post-peer-review, pre-copyedit version of an article published in Comparative European Politics. The final authenticated version is available online at:
http://dx.doi.org/10.1057/s41295-021-00238-5

Interest Group Lobbying in the European Union: Privacy, Data Protection and the Right to be Forgotten

Authors:

George Christou and Imir Rashid

Abstract: The issue of trust and control of data online has become critical for many European Union (EU) citizens in an era where we are increasingly reliant on digital platforms across a plethora of everyday activities. Indeed, the future of the EU's Digital Single Market Policy is reliant on developing trust through robust legislation that ensures explicit control of data by EU citizens. This article explores the extent to which interest groups have been able to successfully achieve their goals through actions in the European Union institutional spaces that construct privacy and data protection legislation. Specifically, it investigates the intervention of interest groups utilising the 'right to be forgotten' (RTBF) in the EU General Data Protection Regulation (GDPR) as a case study. The article shows that issue salience and conflict, as well as institutional politicisation and lobbying by a union of 'strange bedfellows' are important factors in determining interest group preference attainment and success and ultimately, who the winners and losers have been in the RTBF decision-making process.

Key words: Right to be Forgotten (RTBF), General Data Protection Regulation (GDPR), privacy, freedom of expression, civil society organisations, industry, interest group lobbying.

Introduction

The General Data Protection Regulation (GDPR) was proposed by the European Commission in January 2012 to replace and update the existing data protection regime in Europe, the 1995 Data Protection Directive (DPD), given the challenges posed by the collection and processing of data online and the emergence of social networking services (Lindsay 2014: 290-291). The GDPR was agreed in December 2015 and it came in to force on 25 May 2018. An important part of the GDPR was the 'Right to Erasure', commonly referred to as the 'Right to be Forgotten' (RTBF). Viviane Reding, the then Justice and Rights Commissioner, was seen as the RTBF champion – the policy entrepreneur that drove the RTBF agenda (O'Hara 2015: 73). The revision of the 'right to erasure' into 'right to be forgotten', triggered contentious stakeholder debates which evolved around the balance between the right to privacy and data protection, and rights relating to freedom of expression; the rights of citizens to control through explicit consent how and when their data is gathered, retrieved, and used; and those of data controllers to retain and use data where there is a business case to do so and where consent is implicit. The RTBF then, was a critical issue which had implications for digital rights and more broadly, societal trust in using online platforms and therefore the future of the EU's Digital Single Market Policy.

We argue in this article that exploration of the agreement on RTBF from a lobbying lens is essential to provide us with a deeper understanding of what was at stake for the main actors involved, and importantly, in relation to the implications of lobbying representation and

outcomes for digital rights in Europe and beyond. To this end, we seek to extend and add value to the work on privacy and data protection lobbying through a focus on how interest groups lobbied in relation to the specific provisions of the RTBF within the GDPR. Assessing the role and success of industry and CSOs in RTBF lobbying adds to the emergent work on privacy lobbying (Lindh and Nolin 2017; Ruohonen 2019; Minkkinen 2019), and contributes – through the RTBF case – to the lobbying literature on when and how certain groups are successful (Baumgartner *et al* 2009; Chalmers 2011; Dür and De Bièvre 2007; Dür *et al* 2015; Klüver 2013a; Mahoney 2008) and the relationship between lobbying success and coalitions or unions of 'strange bedfellows' (Junk 2019; Beyers and De Bruycker 2018) in the EU context.

More specifically, we offer an in-depth account of how and under what conditions industry and CSOs were able to achieve their preferences for the RTBF Article in the GDPR. Following authors in the EU lobbying literature (Klüver *et al* 2015; Mahoney 2007a, 2008; Bunea 2013; Klüver 2013a; 2013b; Michalowitz 2007), we posit that contextual and institutional factors are critical in understanding and offering a more comprehensive explanation of the direction and types of change requested by industry and CSOs. We argue that the story of preference attainment and success in relation to the RTBF is more nuanced than the predominant industry versus CSO storyline found in the privacy lobbying literature, when it comes to relative winners and losers across the multiple dimensions of the RTBF issue. We show that issue salience and conflict, as well as institutional politicisation (political entrepreneurship) and lobbying by a union of 'strange bedfellows' are important factors in determining preference attainment and success. Moreover, our findings in relation to the RTBF confirm those in other lobbying studies on issue salience and strange bedfellows (Junk 2019, Beyers and De Bruycker 2018; Phinney 2017; Holyoke 2009; Mahoney 2007b) in demonstrating that diverse or strange bedfellows have significantly higher preference attainment and that EU institutional policy makers were sensitive to finding compromise that had broad support.

The article is structured in the following way. First, we provide an overview of the conceptual framework relating to interest group lobbying and success in the EU and elaborates on the methodology. Second, we analyse in more depth the role and success of interest groups in shaping the RTBF. Finally, we conclude by offering thoughts on the implications of interest group success relating to the RTBF and more broadly, debates on privacy, data protection and freedom of expression.

Interest Group Lobbying Success and the European Union

Existing research on lobbying relating to privacy and data protection issues has suggested that legislative proposals such as the GDPR are a good example of collective lobbying, given the considerable attention it has raised and the conflict it has generated, but also individual lobbying, given the technical nature of the policy field (Dialer and Richter 2019: 3). Others have focused on how large technology companies have constructed political discourses to legitimize their interests in privacy lobbying (Lindh and Nolin 2017), and some have argued that organized business interests, in absolute terms, are much better resourced to lobby for their privacy interests than civil society organisations (CSOs) (Ruohonen 2019). Others still have shown how issues such as the GDPR have led to industry and civil society coalitions promoting different storylines to achieve success within the EU; the former related to market liberalism and the latter to rescuing privacy with strict rules. Indeed, it is suggested by Minkkinen (2019) that the CSO coalition was 'relatively successful in influencing the GDPR'.

In the broader lobbying literature, the evidence of lobbying success attained by business vs CSOs is mixed. Some studies have shown that, overall, business groups can successfully promote their agendas and constrain policies that are costly even though potentially good for the citizen (Dür and De Bièvre 2007; Dür and Mateo 2016; see also Ruohonen 2019 on privacy

lobbying and business interests) and that they are more successful in attaining their preferences through their more frequent interaction with the Council (Dür and Mateo 2012; 2014; Klüver 2013b). Yet, other studies have detailed that business actors are less successful than their civil society counterparts when the policy at stake is less conflictual and the role of the European Parliament is restricted (Dür *et al* 2015).

Explaining Lobbying Success in the RTBF

Among the scholars that have focused on lobbying success, numerous factors have been identified as significant in achieving interest group preferences across a number of studies: individual, institutional, organisational and policy or issue related (Dür and De Bièvre 2007; Mahoney 2007a; 2008; Michalowitz 2007; Bunea 2013; Dür *et al* 2015; Klüver *et al* 2015; Klüver 2013a; 2013b). To this end, whilst individual factors such as actor and organisational type are important, and have been the focus of many studies on EU lobbying (Dür and De Bièvre 2007; Klüver 2011; Dür and Mateo 2012; Dür *et al* 2015; Dür and Mateo 2016), we argue that the when and how of lobbying success in this area cannot be fully understood unless contextual and institutional factors are taken in to account (Klüver *et al* 2015; Mahoney 2007a, 2008; Bunea 2013; Klüver 2013a; 2013b; Michalowitz 2007). More specifically, we ask how such factors impact on lobbying success over time relating to the multiple dimensions of the RTBF - the rights to privacy and freedom of expression, and the right to control, process, protect and erase data. This *single case* study seeks to build on the work on contextual policy elements when assessing the lobbying success of interest groups in the RTBF. We focus in particular on *salience, conflict and institutional* factors that a) create a structure and conditions that affects the behaviour of EU policy-makers and interest groups and b) influence how the RTBF was constructed, amended and agreed.

In order to do this, we first characterize the RTBF as a regulatory policy type (Lowi 1964) given that it is embedded within the GDPR. That is, a policy that is designed to shape behavioural practice and thus which also has implications in relation to the vested interests of CSOs and business in mobilizing around key issues to shape the RTBF towards their preferences. We assume a higher degree of conflict as observed in the literature in relation to regulatory policies (Dür and De Brieve 2007; Klüver *et al* 2015). In addition, the RTBF is multi-dimensional as well as legally and technically complex. We define complexity as the 'degree to which a given policy problem is difficult to analyze, understand or solve' (Klüver 2011: 487), and which creates variation in the access of interest groups (Klüver *et al* 2015: 451). Due to the complexity of the RTBF and broader GDPR we assume that there is a high degree of engagement from CSOs and business with the relevant expertise and interest in privacy and data protection issues.

Theoretical Expectations

Building on the existing literature certain theoretical expectations can be derived in relation to the effects of contextual factors on group preference attainment when analyzing the case of the RTBF. First, we argue that issue salience, in particular in the consultation stage, is a key factor in shaping (including labelling) the RTBF. To this end, we understand salience broadly as the attention an issue such as the RTBF gains among stakeholders as well as the overall public attention the issue receives (Mahoney 2007a; Bunea 2013; Klüver *et al* 2015). The literature suggests that if legislative proposals raise little attention from other interest groups or by the general public, interest groups should find it easier to move legislative proposals closer to their goals and preferences. However, if many interest groups mobilize, they may face considerable counter-lobbying. In the case of the RTBF, this raised considerable public attention and led to mobilization of interest groups in order to shape the legislation towards their preferences. Public attention was generated through a landmark European Union Court of Justice decision

in the Google Spain/Costeja case in May 2014. It ruled that search engine operators such as Google would have to address requests made under European Union (EU) Data Protection law by members of the public for the removal of search engine results that would otherwise appear when searches are done using their name. In addition, the Edward Snowden revelations of mass surveillance in 2013 triggered controversy and debate resulting in politicisation of RTBF in the broader context of the GDPR.

Second, we argue that the degree of conflict or level of polarization of preferences on an issue impacts on preference attainment. Where salience refers simply to how many interest groups pay attention to an issue and seek to achieve their goals by lobbying the EU institutions, conflict refers to how interest groups configure preferences (the degree of division) in relation to an issue area (Klüver *et al* 2015: 452). In cases of minimum conflict or polarization it is expected that interest groups face less competition and thus find it easier to influence EU policy-makers and attain their preferences. Conversely, if there is major opposition to a policy issue that creates competition and conflict between different groups (high levels of polarization), success through lobbying activity becomes more difficult as the EU institutions often pull in different directions. Watered-down compromises can often result from such situations and with this might come an absence of clear winners and losers (Mahoney 2007a; 2008; Bunea 2013; Klüver 2013a; Klüver *et al* 2015). In addition, within regulatory policies in particular there is a higher degree of conflict generated between competing stakeholders when business interests face either concentrated costs or concentrated benefits (Dür and De Bièvre 2007; Klüver *et al* 2015).

Beyond these issues or contextual dimensions, we take into consideration the *type of change* being sought by interest groups. There are two central types identified in the literature: 1. Directional, when interest groups want to change the core of a legislative act; 2. Technical, when minor changes are sought that do not touch the core content or political direction of

legislation. Two expectations are generated from consideration of types of change in relation to salience and conflict. First, the closer preferences are to decision-making institutions (and political and/or politicised positions of the European Commission and European Parliament), and the less conflict there is, the more likelihood of directional change. Second, the stronger the synergies between industry and CSO goals in relation to the issue area under discussion, the higher the chances of directional and/or technical change (Michalowitz 2007). This latter point is important, and connected to the arguments in the literature on 'strange bedfellows' and the success of industry and CSOs working towards similar preferences whether in organized coalition or simply in (coincidental) alignment or union. Moreover, such work also shows that on salient issues we can expect that more diverse coalitions have significantly higher preference attainment than those coalitions that are less diverse (Junk 2019, Beyers and De Bruycker 2018; Phinney 2017; Holyoke 2009; Mahoney 2007b). This is a conclusion that, also in line with Minkkinen (2019), is confirmed through our study of the RTBF, revealing in a more substantive and nuanced way the specifics of 'relative success' and its achievement through CSOs acting alone, as well as in union (if not formal coalition) with industry relating to certain RTBF conflict issues.

Finally, we must also pay some attention to what the literature refers to as institutional factors – in particular the actors and personalities that play key roles in any given policy issue area (Klüver *et al* 2015). Institutional factors in existing studies can include a variety of aspects varying between countries and lobbying venues. In our case, we have focused on the main EU institutional domains and main players (actors) to compare how receptive they have been to different positions related to the RTBF. Political institutions have been argued a major determinant of lobbying influence (Dür 2008a). Lobbying in the EU institutional domain has been conceptualised as a resource exchange relationship between interdependent actors (Klüver 2013b). From this perspective, EU institutions allow interest groups to exert a degree

of influence on policy-making in exchange for certain resources. This can include economic power, citizen support, political support, legitimacy, knowledge, and information (Klüver 2013b; Dür 2008a). While the bureaucrats in the Commission and Commissioners are not directly dependable on and accountable to the European electorate, re-election is a key aspiration for governments in the Council and Members of the European Parliament. Public sentiments and political occurrences are nevertheless important determinants for all the three institutions.

Klüver (2013b) has shown that the size of the effect of resources such as information supply, citizen support, and economic power is not similar across the two stages of policy-making in the EU, namely the policy formation stage in the Commission and the decision-making stages in the Parliament and the Council. The effects have been stronger in the policy formation stage; once the formal proposal is published, interest group influence diminishes significantly as it becomes much more difficult to amend the proposed content (Klüver 2013b). In the Council, member state support is a key determinant of lobbying success – the likelihood of an outcome closer to the preferences of the interest groups increases with the number of states supporting it (Klüver 2013b). Finally, as pointed out above, in the overall EU institutional policy-making process, interest group influence exertion becomes more probable in the cases when interest group lobbying does not run counter to the 'core' political interest of the policy makers expressed in their legislative proposals (Michalowitz (2007: 137). This is salient in the case of the RTBF and wider GDPR in the consultation and amendment stage - where the issue became of major political and personal importance for the Commissioner in charge and where the Rapporteur of the relevant European Parliamentary Committee yielded much influence due to political group affiliation and professional commitment to privacy and data protection online. Moreover, whilst it is beyond the remit of this article to provide detail in terms of national and European lobbying of the Council, it nevertheless recognizes the importance of this in the final

stages of decision-making, in particular in the context of what has been alluded to above in relation to the ability of business interests to exert their goals and preferences more successfully within this EU institutional space.

Methodology

In this article, we focus on the degree to which interest groups have been successful in achieving their goals on the RTBF in the EU's GDPR rather than how and why the actions of given interests have necessarily determined a particular outcome in the EU policy process. Success, in this context, is defined as 'the achievement of certain goals absent any claims about influence' (Dür *et al* 2015: 954). That is, we conceive of interest groups 'successfully lobbying decision-makers if the policy output converges with their policy preferences' (Klüver 2013a: 65). We are not seeking to establish causality based on the properties of an influential actor (see Dür 2008a; 2008b), but rather, the extent to which contextual factors provide a milieu for interest group success or failure. In doing this, we recognize the limitation that success could come about because interest group preferences coincide (through luck rather than influence) with those of EU institutions, but also posit that focusing on lobbying success can nevertheless create a more in-depth understanding of the impact of interest groups on the policy process (Klüver *et al* 2015: 65-66; Bunea 2013: 558; Dür 2008b: 568-569).

We follow others that go beyond analysing the material and knowledge resources offered by individual interest groups (Klüver *et al* 2015; Klüver 2013b; Baumgartner *et al* 2009) in the belief that contextual factors (see Massaro 2019 on radio spectrum) – in this case primarily salience (and variation therein) and conflict, as well as institutional factors, are important and decisive over time in understanding lobbying success. Moreover, focusing on industry and

CSOs we aim to unpack the nuance within and between the positions of these groups to offer a more complex explanation of the degree to which different groups win or lose across identified conflict issues (Dür *et al* 2015: 960; see also Beyers and De Bruycker 2018) in the case of the RTBF. Such an analysis takes us beyond pitting industry against CSOs, which whilst valuable, does not get to the potential similarities as well as differences in terms of the preferences of both groups and what this implies for success within the consultation and amendment phases of the EU policy process. Thus, whilst we recognize the limitations of this approach in relation to providing conclusions on causal processes beyond inference, it does provide, in our view, a contribution to the literature on preference attainment in the EU policy process using the (digital rights) case study of RTBF.

The case of RTBF was chosen because first, it is a highly distinct but typical (co-legislation) area for European decision-making. Second, given that it is located within the GDPR, it has a high potential to demonstrate variations in the degree of conflict, and types of interest exerted by CSOs and business actors. We argue that a single case study of this sort is insightful in terms of: a) consideration of representation and influence in relation to the RTBF and GDPR and providing further evidence on the factors that allow interest groups to achieve their preferences in the digital rights field b) providing a deeper exploration of EU policy outcomes and legitimacy and the implications for digital rights in Europe c) offering a more nuanced understanding of the public interest in relation to digital rights, where such an interest can be represented by enhancing privacy and data protection; maintaining freedom of expression; or, indeed, providing a platform through which industry (data controllers in particular in this case) can balance the necessary level of consent with growth and innovation.

We draw extensively on relevant primary and secondary sources to establish the preferences of interest groups and to establish and clarify conflict dimensions. Regarding documentary sources, data collection began with an assessment of the two public consultations initiated by the European Commission's DG Justice and conducted first between July and December 2009, and later between November 2010 and January 2011. Exploring the contributions on the consultative process enabled us to detect key interest groups with a stake in the revised regulations, as well as identify the originators of the RTBF proposals. Moreover, by extracting the policy preferences of interest groups from their consultation submissions and comparing them to the policy outcome, conclusions about the success of these groups in the EU's decision-making process could be reached. Extensive use of three types of additional written sources were also utilized to further qualify the positions and interventions of CSOs and business groups in relation to the GDPR and RTBF, specifically: La Quadrature du Net's Wiki site on GDPR lobbying; EDRi's GDPR document pool; and the news and blog sections of key stakeholders identified previously within public consultations.

In order to verify and achieve further clarity on interest group preferences and potential conflict dimensions relating to the RTBF over time, we conducted 15 semi-structured interviews between March 2016 and March 2017 with key stakeholders from interest groups and the EU institutions involved with the GDPR and RTBF.[1] Interviews were essentially used as a secondary, confirmatory methodology, as there were certain barriers to accessing all relevant stakeholders. Indeed, although many of the relevant organizations identified in the consultation and amendment phase were contacted, they declined to comment on their activities for various reasons, including lack of details on the process and loss of employees that were involved in the GDPR adoption process. This said, interviews were useful for identifying where certain stakeholders were located within RTBF conflict dimensions and indeed, for ascertaining the relative success of the main interest groups involved in lobbying on this issue.

Discussion: The RTBF and Lobbying Success in the EU

Degree of Conflict

In contrast to the GDPR more broadly (see Minkkinen 2019), conflicting interests in the specific case of the RTBF can be located at the level of technical rather than directional change, as well as between EU institutional actors and industry actors; consumer organisations and industry actors; consumer organisations and other CSOs; and EU institutional actors and CSOs. There was an overall directional agreement that digital rights should be strengthened but also conflict relating to the degree to which any such change would impact on multiple dimensions of the RTBF. Specifically, the conflict related to moving away from the right to erasure (RTE) in name and function already embedded in the DPD (1995) to a more explicit RTBF in the GDPR, achieving the right balance between the right to privacy and the right to freedom of expression, and the degree of liability (financial and the obligation to erase) that should be imposed on those that were deemed to control data (see Figure 1 below and Table 1, Appendix for summary of actor preferences and conflicts discussed below).

Major CSOs, such as Privacy International (2009) and groups such as AccessNow, Article 19, Privacy International, Initiative für Netzfreiheit, Bits of Freedom, united under the Brussels-based European Digital Rights Initiative (EDRi) (2009), raised the issue of strengthening individuals' rights to access to personal data processing and enhancing the Right to Erasure (RTE), stipulated in the 1995 DPD, without making a concrete proposal for explicitly introducing the RTBF.

Pro-privacy and anti-surveillance oriented CSOs such as the *German Action Alliance Freedom Not Fear* and consumer protection groups such as the European Consumers' Organisation (BEUC) supported and were in alignment with the Commission's (more specifically, Commissioner Reding's) preferences to create and promote a RTBF clause in order to

strengthen and maximize the privacy of data subjects. Most CSOs also expressed a preference for meaningful fines for those not complying with various aspects of the GDPR (see Minkkinen 2019: 993), including the RTBF.

However, there was conflict between the Commission and those CSOs united under EDRi, and the privacy and digital freedoms advocate Big Brother Watch, as well as the US-based Center for Democracy and Technology (CDT). They all agreed in principle with the introduction of the RTBF and indeed in terms of the GDPR, pushed for a model that did not see consumers bear all the risks, and the data controllers all the benefits (Big Brother Watch 2011; CDT 2011; EDRi 2011a). However, they did not embrace the RTBF in its proposed legislative form. EDRi, for example, pointed out that the RTE already existed in EU legislation, while CDT proposed a 'limited articulation' of the RTBF in the spirit of the American approach to freedom of expression, as opposed to the weight given to privacy in Europe (CDT 2011: 11). CDT and EDRi, also opposed increasing liability measures for intermediaries (e.g. social media platforms, search engines, ISPs) (Interview 07/07/16; Interview 11/07/16).

CDT framed the article as problematic in terms of freedom of expression and technical implementation, i.e. the identification of all third parties by the data controllers would technically be an almost impossible task to implement (CDT 2012). To improve the efficiency of the proposed rule, CDT argued that Article 17(2) should be narrowed to refer to deletion of data provided to a *particular* controller or processor to store or host. Most importantly, CDT pointed out that third parties receiving notifications would have the sole responsibility of assessing the 'conflicting privacy and free expression interests of the data subjects and the user who reposted the data, a task well outside these controllers' competency'. For EDRi, this entailed 'risks of over-implementation or over-broad interpretation of the provision' (email correspondence 02/08/16). More specifically, making online services liable for the availability of content over which they have no control, would introduce non-transparent regulatory

decision-making by private companies (mostly US) over 'measures (blocking, filtering, de-indexing, etc.) that contravene the freedom of communication' (EDRi 2012a: 16-17).

Not surprisingly, industry actors as represented by major online players[2] and EuroISPA in particular, favoured a minimalist liability and obligation model in relation to data controllers, which conflicted with the maximalist obligation preferences of Commissioner Reding in the first draft of the GDPR and that of consumer protection groups and certain pro-privacy groups. Similar to EDRi and CDT, industry actors preferred a narrowing of the scope of the right to erasure (as existed in the DPD). Moreover, such a model was preferred by industry as it offered more balance, from their perspective, between the interest of the user to be forgotten and the legitimate (market/ advertising) interests pursued by data controllers for data processing. Thus, in the lobbying of the EP committees (JURI and IMCO), both eBay and Facebook stressed how difficult it would be for data controllers to comply with the proposed obligations in Article 17(2) (eBay 2012) and the risk it posed to the right to others to know and remember, and to freedom of expression (Facebook, 2013). Facebook touched on the politically sensitive issue of online tracking and argued that the proposed 'provisions might generate unintended consequences in the online environment whereby, in order to meet such obligations, service providers would in practice be obliged to 'monitor' peoples' activities across the internet' (Facebook 2013). A stance very much aligned with CSOs under EDRi.

Both the association of European Internet Service Providers Associations (EuroISPA) and the EU-based office of American Chamber of Commerce (AmCham) suggested amendments that aimed at narrowing the scope of the obligations upon data controllers. The latter demanded that only the controller that has 'effectively and knowingly transferred' (AmCham 2012: 10,

emphasis added) data to third parties should be liable to inform those third parties of the request to erase, copy or replicate the personal data at stake (AmCham 2013: 24).

Insert Figure 1 here

This section has outlined the observed high degree of conflict and polarization expressed through the preferences of key stakeholders on the Commission proposed RTBF clause. In line with the literature discussed in the previous section, this did not make it straightforward for any single party to fully attain their preferences. Yet, the synergies between major stakeholders normally functioning on the opposing ends of the spectrum became clearly visible. As a result, this diverse unintended coalition coupled with high level of issue salience demonstrated below, shaped the adopted legislation with significant preference attainment for business and CSOs.

Issue Salience and Politicisation of the Right to Privacy

Despite arguments to convince the EU to narrow the right of individuals to request deletion of information online, Commissioner Viviane Reding ensured the proposal for the right in Article 17(2) was preserved. Politicisation of the right to privacy and thus erasure, therefore, favoured initially those CSOs pushing for an enhanced RTBF in the GDPR. In addition, as noted by Minkkinen (2019: 1000), 'contingent historical events were in favour of the…[civil society] coalition…The sense of urgency of establishing robust privacy rules may have been strengthened by Edward Snowden's revelations of government surveillance and the case initiated by Max Schrems, which led the European Court of Justice to invalidate the US-EU Safe Harbour agreement'. For Commissioner Reding it was of high personal and political priority to introduce the RTBF to the EU legislative framework, as a distinctive element of European privacy and data protection in contrast to the US model. According to an interviewee

representing European internet service providers, ‘already in the process before the draft proposals of the legislation appeared, she had insisted that two things would be there: 1) simplification of the legislation and 2) the ‘right to be forgotten’. … Commissioner Reding wanted to introduce the RTBF provision, and the decision was political.’ (Interview 13/07/16).

The Commission further justified its introduction of the RTBF as driven by a ‘widespread public perception’ of ‘significant privacy risks associated notably with online activity’ (European Commission 2012a: 7). Eurobarometer surveys showed that many citizens in the EU prior to and after Snowden, had low levels of trust in digital environments, with 67% admitting that they were worried about having no control over the information they provided online and only 15% feeling that they had complete control (Data Protection Eurobarometer 2015). Furthermore, 63% said that they did not trust online businesses and 62% that they did not trust phone companies and internet service providers. Moreover, 70% of Europeans were concerned that their personal data held by companies might be used for a purpose other than that for which it was collected (Special Eurobarometer 2011; Data Protection Eurobarometer 2015) and 75 % of the respondents that had an account on a social media networking site felt that they had no or only partial control over their personal data (European Commission 2012a: 23).

Therefore, the maximal rights based approach for RTBF (‘strengthen and expand individuals’ rights) was not driven solely by consumer groups, but also by issue salience and specifically the public concern relating to control and consent, as well as the political nature of the policy. In fact, the preferences of consumer interest groups were aligned with those of the Commission, and in particular Commissioner Reding. This was reflected in the proposed RTBF within the Commission’s GDPR draft (see Table 2, Appendix for summary of EU institutional positions and adopted outcomes).

This said, evidence shows a change from a transformative, broad RTBF to a narrower interpretation despite issue salience and Commissioner Reding as the RTBF policy entrepreneur. This was due to EU institutional conflict (see below), and conflict with industry and the US government, the latter supporting the preferences of major industry players. As one might expect, industry interests faced considerable concentrated costs from any maximalist model. To this end, heavy US government and industry lobbying (EDRi 2011b; Horten 2016: 51-52) successfully 'watered down' the strength of the RTBF article in the Commission's draft proposal (Bernal 2014). The amendments published in the final Commission proposal maintained the RTBF clause, but stipulated weaker obligations on data controllers on implementation of the RTBF (see Table 2, Appendix). Rather than ensuring the requested erasure of the personal data at stake, the new Article 17(2) required controllers to 'take all reasonable steps, including technical measures' to simply inform third parties of the data subject's request to erase any links to, copy or replication of that personal data (Bernal 2014; EDRi 2012b). Fines on failure to comply with the right were lowered to up to '500 000 EUR, or in case of an enterprise up to 1 % of its annual worldwide turnover' (European Commission 2012b). The observed outcome demonstrated the significance of lobbying in the policy formation stage, i.e. prior to the publication of the official proposal of the Commission (Klüver 2013b). Indeed, despite Reding arguing the proposal was how she 'wanted to have it' she also acknowledged lobbying from all sides was 'absolutely fierce' (Warman 2012). The quid pro quo for retaining the RTBF (in name) in Article 17 given such fierce lobbying, in particular from industry, was both weaker obligations on data controllers and reduced fines on failures to comply.

Institutional conditions

Following the Commission's publication of its GDPR proposal in January 2012, further lobbying efforts focused on convincing MEPs to address their concerns with regards to

(predominantly) Article 17(2). To this end, more broadly on issues of privacy, the internal configuration of the European Parliament was important in the amendment phase, as the left wing block (GUE/NGL, and S&D) and the Greens/EDA mostly made amendments that strengthened privacy and data requirements, and the remaining parties (ALDE, EPP, NI, ECR, EFD) mostly weakened them (Ruohonen 2019: 5). The EP's amendments, however, incorporated a political compromise which could have taken a more industry-friendly shape (i.e. closer to their maximal preferences), had it not been for Snowden's mass surveillance revelations (Horten, 2016). The implications on the general population and the public debate generated could not be ignored even by conservative MEPs who would normally be inclined to vote for a lighter touch data protection regulation (Horten, 2016). The issue salience of privacy and data protection in the light of Snowden's revelations, demanded a stronger tone from MEPs, which, in line with our theoretical expectation, strengthened the position of non-business groups.

In terms of the RTBF, however, MEP Jan Philipp Albrecht (Greens/EFA), appointed as the leading rapporteur for the GDPR, was in favour of stronger individual rights in terms of privacy and data protection, but also backed the freedom of expression argument by certain CSOs and industry players (European Parliament 2013: 201). His final Report obliged controllers to take all reasonable steps to ensure the erasure of data on those controllers who have published and transferred the data to third parties, or when this is done without a proper legal basis (i.e. is unlawful or not consented). In terms of the latter, the obligation was not going to cover cases where the data subject had initially given their consent to the publication or transfer of data, but subsequently withdrawn it (Lindsay 2014: 319). On the one hand, the Report seemed to strengthen individuals' rights in terms of third-party data processing, as it demanded having the illegitimately transferred or made publicly available content actually erased, as opposed to inform third parties of the data subjects request for erasure. On the other hand, it also restricted

the right by putting obligations on controllers to have the data erased only in cases where consent was not given and it was published unlawfully (Albrecht 2015). It 'watered down' obligations on controllers with regard to re-publication of data online (e.g. in terms of social networking sites), as once consent was given the data controller had no obligations in terms of third party processing or publication, even if this consent was subsequently withdrawn (Lindsay 2014: 319). In addition, the Albrecht Report included proposals that stressed the need for legal justification and validity to have the data erased, e.g. on the basis of a court or regulatory decision (European Parliament 2013, Amendment 112, (ca): 89-90).

These proposals seemed, on the one hand, attuned with civil society groups (e.g. EDRi, CDT) that argued for stronger legal basis for controllers' decisions on erasure. Sanctions for non-compliance against companies were significantly increased (see Table 2, Appendix) – a proposal reportedly influenced by the independent privacy activist, Caspar Bowden (Microsoft's former chief privacy adviser). To this end, interviews also confirmed that Albrecht was 'willing to listen to civil society' and that 'they were mostly successful as regards information requirements, fines and consent' (Interview 11/07/16; Interview 13/0716).

On the other hand, however, in response to industry arguments about the risks of financial and legal overburden on controllers, Albrecht's Report removed obligations on controllers whose 'storage technology [did not] allow [i.e. was old] for erasure and [was] installed before the entry into force of this Regulation' (European Parliament 2013, Amendment 112 (da): 90). In addition, Albrecht addressed the concerns of CSO and industry groups, warning of the potential risks of the Commission's proposal for creating 'chilling effects' on the internet, by putting private parties in a position to 'police' the internet (Lindsay 2014: 320). In trying to avoid the technical and legal burden on data controllers or third party processors, and thus ensure stronger protection for counter-rights such as freedom of expression, Albrecht had effectively 'render[ed] the Article 17 right much more like a strengthened erasure right than a right to be

forgotten' (Lindsay 2014: 320). This was an outcome that CSO groups, led by EDRi in Europe, as well as industry groups, had advocated, even though the latter's rationale for this (i.e. market competition) was very different to that of EDRi and the CDT.

In the Council, most member states took an 'economic approach' (Interview 13/07/16). Germany, Spain, Denmark, and the UK were sceptical of the idea of introducing a right 'which would go beyond the right to obtain from the controller the erasure of one's own personal data' (Council of the European Union 2015a). Other states such as Austria, Belgium, Lithuania, Netherlands and Sweden, on the other hand, expressed concerns that this would negatively impact EU companies' positions in terms of competitiveness (Council of the European Union 2015a). In line with its protectionist regulatory approach, France was the only member state that pushed for strengthening the right explicitly in terms of minors (Council of the European Union 2015b). Stronger member state support towards economic interests brought the Council's final agreement closer to the original version of Article 17(2) introduced by the European Commission (2012b) than the subsequent amendment of the European Parliament. The Council aligned with industry and reversed the strength of the obligation on data controllers from making sure the data at stake was deleted to only informing other data controllers (changed from third parties) of the data subject's request of erasure. The geographical scope of the GDPR obligations, however, was extended to cover data controllers and data processors dealing with EU citizens' data outside the EU (Keller 2015); an outcome that reflected the impact of the revelations of mass surveillance in Europe that most governments and politicians could not ignore. Thus, fines for infringement of the RTBF were significantly increased in comparison to the Commission proposal, yet decreased in comparison to the EP's report to 20 million euros or up to 4% of a company's worldwide annual turnover, a compromise that meant such fines remained both meaningful and proportionate.

Conclusions

An interviewee pointed out during the course of this research that 'if a law makes everybody in Brussels unhappy, it is a good law' (Interview 13/07/16). That is, it indicates that it has achieved the best possible compromise. In the case of the RTBF many compromises were made, and whilst there was relative industry success based on its preferences, winners and losers were not clear-cut on the key technical conflict dimensions (Figure 2, below). Our study confirmed that policy compromise in the case of RTBF came as a result of factors such as issue salience and conflict, as well as the congruence of interest groups with EU institutional actors, and certain CSOs with industry, throughout the institutional process.

Whilst those CSOs representing consumers and advocating for more robust privacy rights and maximal obligations for data controllers did not achieve their overarching preference, industry actors and certain CSOs lobbying for balanced rights, a right to erasure and reduced obligations for data controllers were relatively successful in attaining their preferences. However, this does not tell the full story. For industry, this did come at the price of higher fines at the final stage of agreement and expansion of the territorial scope of the RTBF. The outcome was shaped as a result of issue salience and conflict between the Commission (Reding as RTBF entrepreneur in particular) and other industry and EU institutional actors.

Our study adds to the general civil society vs industry storyline in the EU privacy lobbying literature, by highlighting the alignment of interests on certain RTBF conflict dimensions, between pro-freedom of expression groups and industry actors calling for technical change. Calls for such change sought to balance the right to privacy and data protection (through erasure) with the right of freedom of expression, and to limit the obligation of data controllers in the RTBF. Thus, whilst there was conflict, more broadly, between private (tech industry) stakeholders and certain institutional actors (e.g. Reding administration within the

Commission) and consumer groups (BEUC), the specificity of the 'right' brought into play a distinct group of stakeholders – a union of 'strange (normally conflictual) bedfellows'. In this respect, CSOs such as EDRi and CDT were also successful in attaining their preferences which happened to be aligned with industry demands for narrowing the data controller's obligations. Such a finding reinforced those of other studies on issue salience and strange bedfellows (Junk 2019, Beyers and De Bruycker 2018; Phinney 2017; Holyoke 2009; Mahoney 2007a) in showing how strange bedfellows increased their propensity to attain their preferences and that EU institutional policy makers, in this case, were sensitive to finding compromise that had broad support.

Insert Figure 2 here

Finally, what have we learnt more broadly from our focus on this single case of the RTBF? What does this case say about the legitimacy of the EU policy process and public interest in relation to digital rights? Interest group lobbying in the RTBF proved complex, precisely because key stakeholder positions were convergent directionally, even though there were subtle nuances related to technical preferences. We can argue that the public interest was enhanced through the inclusion of the Right to erasure ("right to be forgotten") in the GDPR, in line with the core interests of key institutional decision makers. However, we can also observe that lobbying by industry together with CSOs led to a watered-down final agreement that ultimately provided more ambiguity and less stringent obligations and conditions for industry, including derogations that allowed controllers to evoke, on legal grounds, a business case for keeping data as a key asset. Whilst we acknowledge that certain constraints have not allowed us in the article to explore fully and in depth all contextual and institutional factors, we can, albeit tentatively, propose that taking these factors into account in a single case study does lead to, at

the very minimum, more nuanced accounts of winners and losers and the legitimacy of the EU lobbying process in digital rights cases such as the RTBF.

Funding

This work was supported by the ESRC Grant no: ES/M00953X/1.

Acknowledgments

We express our gratitude to all interviewees. In addition, we thank Dr Monica Horten, for her invaluable insights on GDPR-related lobbying. Finally, we would like to thank the anonymous reviewers for their insightful comments and constructive feedback which undoubtedly assisted us in further honing and improving the clarity of our argument in this article.

Endnotes

[1] Oral information exchange and written communication was conducted with members of EDRi (AccessNow, Article 19, Privacy International, Initiative für Netzfreiheit, Bits of Freedom), representatives of EFF, La Quadrature du Net, Digital Europe, EuroISPA, Eurofinas, as well as a number of MEPs (shadow rapporteurs for the GDPR).

[2] Including not-for-profit organisations such as the European Privacy Association, a lobbying group backed by Google, Microsoft, Yahoo and GSI.

References

Albrecht, J. (2015) The EU's Data Protection Reform.Available at https://www.janalbrecht.eu/fileadmin/material/Dokumente/20151211-JPA-Datenschutzreform-ENG-WEB-01.pdf (accessed 2 December 2019).

AmCham (2012) AmCham EU position on the General Data Protection Regulation. Available at https://dataskydd.net/sites/default/files/wp-content/uploads/2013/01/AmCham-EU_Position-Paper-on-Data-Protection-20120711.pdf (accessed 13 November 2019).

AmCham (2013) AmCham EU Proposed Amendments on the General Data Protection

Regulation. Available at https://wiki.laquadrature.net/Lobbies_on_dataprotection#AmCham.2C_January_2013 (accessed 1 November 2019).

Baumgartner, F. R., Berry J.M., Hojnacki, M., Kimball, D.C. and Leech, B. (2009) Lobbying and Policy Change: Who Wins, Who Loses, and Why. Chicago, II: University of Chicago Press.

Bernal, P. (2014) The Right to be Forgotten in the Post-Snowden Era, available at https://ueaeprints.uea.ac.uk/60298/ (accessed 12 November 2019).

Beyers, J. and De Bruycker, I. (2018) Lobbying Makes (Strange) Bedfellows: Explaining the Formation and Composition of Lobbying Coalitions in EU Legislative Politics. Political Studies 66(4): 959–984.

Big Brother Watch (2011) Big Brother Watch response to Communication from Commission Consultation. Available at: http://ec.europa.eu/justice/news/consulting_public/0006/contributions/not_registered/big_brother_en.pdf (accessed 1 November 2019).

Bunea, A. (2013) Issues, Preferences and Ties: determinants of EU interest groups' preference attainment in the environmental policy area. Journal of European Public Policy 20(4): 552-570.

CDT (2011) Comments to the European Commission in the matter of Consultation on the Commission's Comprehensive approach on personal data protection in the European Union. Available at: http://ec.europa.eu/justice/news/consulting_public/0006/contributions/not_registered/cdt_en.pdf (accessed 1 November 2019).

CDT (2012) CDT Analysis of the Proposed Data Protection Regulation. Available at https://cdt.org/files/pdfs/CDT-DPR-analysis.pdf (accessed 13 November 2019).

Chalmers, A.W. (2011) Interests, Influence and Information: Comparing the Influence of Interest Groups in the European Union. Journal of European Integration 33(4): 471–486.

Council of the European Union (2015a) Proposal on GDPR: Note from CZ, DE, IE, NL, AT, PL and FI delegations on Chapters III and VIII. Available at http://data.consilium.europa.eu/doc/document/ST-7586-2015-INIT/en/pdf (accessed 1 November 2019).

Council of the European Union (2015b) Proposal on GDPR: Note from Presidency on Chapters III and VIII. Available at http://data.consilium.europa.eu/doc/document/ST-7526-2015-INIT/en/pdf (accessed 1 November 2019)

Data Protection Eurobarometer (2015), 24 June 2015. Available at: http://ec.europa.eu/justice/newsroom/data-protection/news/240615_en.htm (accessed November 2019)

Dialer, D. and Richter, M. (2019) Lobbying in the European Union: Strategies, Dynamics and Trends. Cham, Switzerland: Springer Nature.

Dür, A. (2008a) Interest Groups in the European Union: How Powerful Are They?.West European Politics 31(6): 1212–1230.

Dür, A. (2008b) Measuring Interest Group Influence in the EU: A Note on Methodology. European Union Politics 9(4): 559–576.

Dür, A., Bernhagen, P. and Marshall, D. (2015) Interest Groups Success in the European Union: When (and why) does business lose?. Comparative Politics 48(8): 951-983.

Dür, A. and De Bièvre, D. (2007) The Question of Interest Group Influence. Journal of Public Policy 27(1): 1–12.

Dür, A. and Mateo, G. (2012) Who lobbies the European Union? National interest groups in a multilevel polity. Journal of European Public Policy 19(7): 969–987

Dür, A. and Mateo, G. (2014) Public opinion and interest group influence: how citizen groups

derailed the Anti-Counterfeiting Trade Agreement. Journal of European Public Policy 21(8): 1199–1217.

Dür, A. and Mateo, G. (2016) Insiders versus Outsiders: Interest Group Politics in Multilevel Europe. Oxford: Oxford University Press.

eBay (2012) Position on Legal Affairs Committee draft opinion on the GDPR. Available at https://wiki.laquadrature.net/images/1/12/Position-paper_eBay-Inc_JURI-opinion-on-data-protection-regulation.pdf (accessed 13 November 2019).

EDRi (2009) Response to EC Consultation on the legal framework for the fundamental right to protection of personal data. Available at http://ec.europa.eu/justice/news/consulting_public/0003/contributions/organisations_not_registered/edri_en.pdf (accessed 1 November 2019).

EDRi (2011a) Response to EC Consultation on the review of the DPD. Available at http://ec.europa.eu/justice/news/consulting_public/0006/contributions/not_registered/edri_en.pdf (accessed 1 November 2019).

EDRi (2011b) US lobbying against draft Data Protection Regulation. Available at https://edri.org/us-dpr/ (accessed 12 November 2019).

EDRi (2012a) Position on the Regulation 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). Available at https://edri.org/files/1012EDRi_full_position.pdf (accessed December 2019)

EDRi (2012b) EDRi Initial Comments on the Proposal for a Data Protection Regulation, available at https://edri.org/commentsdpr/ (accessed 12 November 2019). European Commission (2009) EC Consultation on the legal framework for the fundamental right to protection of personal data. Available at http://ec.europa.eu/justice/newsroom/data-protection/opinion/090709_en.htm (accessed 1 November 2019).

European Commission (2012a) Impact Assessment. Available at http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_en.pdf (1 November 2019).

European Commission (2012b) Proposal 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), COM (2012) 11 final, 2012/0011 (COD), Brussels 25.1.2012

European Parliament (2013) Report on the 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) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)), Brussels 21.11.2013

Facebook (2013) Facebook recommendations on the IMCO draft opinion on the EC's proposal for GDPR. Available at http://www.lobbyplag.eu/docs (accessed 1 November 2019).

Holyoke, T. (2009) Interest Group Competition and Coalition Formation. American Journal of Political Science 53(2): 360–375.

Horten, M. (2016) The Closing of the Net. Cambridge and Malden: Polity Press.

Junk, M.W.(2019) When Diversity Works: The Effects of Coalition Composition on the Success of Lobbying Coalitions. American Journal of Political Science 63(3): 660-674.

Keller, D. (2015) The final draft of Europe's "Right to be Forgotten" Law. Available at http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law (accessed 17 September 2019).

Klüver, H. (2011) The contextual nature of lobbying: Explaining lobbying success in the European Union. European Union Politics 12(4): 483–506.

Klüver, H. (2013a) Lobbying as a collective enterprise: Winners and losers of policy formulation in the European Union. Journal of European Public Policy 20(1): 59-76.

Klüver, H. (2013b) Lobbying in the European Union: Interest Groups, Lobbying Coalitions, and Policy Change. Oxford: Oxford University Press.

Klüver, H., Braun, C. and Beyers, J. (2015) Legislative lobbying in context: towards a conceptual framework of interest group lobbying in the European Union. Journal of European Public Policy 22(4): 447-461.

Kuner, C. (2012) The European Commission's Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law. Available at https://www.huntonprivacyblog.com/wp-content/uploads/sites/18/2012/02/Kuner-EU-regulation-article.pdf (accessed 1 November 2019).

Lindsay, D. (2014) The 'right to be forgotten' in European data protection law. In: N. Witzleb, D. Lindsay, M. Paterson, Sh. Rodrick, (eds.) Emerging Challenges in Privacy Law Comparative Perspectives. Cambridge: Cambridge University Press, pp. 290-337.

Lindh M. and Nolin, J.M. (2017) GAFA Speaks: Metaphors in the Promotion of Cloud Technology. Journal of Documentation 73(1): 160-180.

Lowi, T. J. (1964) American Business, Public Policy, Case Studies, and Political Theory. World Politics 16(4): 677-715.

Mahoney, C. (2007a) Lobbying Success in the United States and the European Union. Journal of Public Policy 27(1): 35-56.

Mahoney, C. (2007b) Networking vs. Allying: The Decision of Interest Groups to Join Coalitions in the US and the EU. Journal of European Public Policy 14(3): 366–383.

Mahoney, C. (2008) Brussels versus the Beltway: Advocacy in the United States and the European Union. Washington, D.C.: Georgetown University Press.

Massaro, M. (2019) Is business lobbying in the European Union Context-Dependent? Evidence from the Policy Field of Radio Spectrum. Telecommunications Policy 43 (10): 101827.

Michalowitz, I. (2007) What determines influence? Assessing conditions for decision-making influence of interest groups in the EU. Journal of European Public Policy 14(1): 132-151.

Minkkinen, M. (2019) Making the Future by Using the Future: A study on Influencing Privacy Protection Rules Through Anticipatory Storylines. New Media and Society 21(4): 984-1005.

Phinney, R. (2017) Strange Bedfellows: Interest Group Coalitions, Diverse Partners, and Influence in American Social Policy. Cambridge: Cambridge University Press.

O'Hara, K. (2015) The Right to Be Forgotten: The Good, the Bad, and the Ugly. IEEE Computer Society 19(4): 73-79.

Privacy International (2009) Response to the EC Consultation on the legal framework for the fundamental right to protection of personal data.Available at http://ec.europa.eu/justice/news/consulting_public/0003/contributions/organisations_not_registered/privacy_international_en.pdf (accessed 1 November 2019).

Ruohonen, J. (2019) David and Goliath: Privacy Lobbying in the European Union. Available at: https://arxiv.org/pdf/1906.01883.pdf (accessed December 2019)

Special Eurobarometer 359 (2011) Attitudes on Data Protection and Electronic Identity in the European Union. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_359_en.pdf (accessed November 2019)

Warman, M. (2012) EU fights 'fierce lobbying' to devise data privacy law. Available at http://www.telegraph.co.uk/technology/internet/9069933/EU-fights-fierce-lobbying-to-devise-data-privacy-law.html (accessed 1 November 2019).