Data Protection Authorities in Central and Eastern Europe: Setting the Research Agenda

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Data Protection Authorities (DPAs), sometimes also referred to as Privacy Commissioners or Privacy Commissions, are authorities established for protecting privacy and monitoring personal data processing. DPAs are crucial actors in data protection. Flaherty argues that "under the broad rubric of ensuring privacy, the primary purpose of data protection is the control of surveillance of the public, whether this monitoring uses the data bases of governments or of the private sector" (1989:11). There are a number of different models for regulating surveillance "including regulation by national governments (executive, legislative, and judicial); extra-governmental organizations (watchdogs, ombudspersons and commissions); international agreements; and self-regulation by industry" (Regan 2012: 397). Data protection regime with establishment of DPAs as regulatory authorities is one of such models, characteristic for the member-states of the European Union and the neighboring countries. In the European Union, this regime is based on the Directive 95/46/EC that is the "most significant privacy protection legislation since the 1970s", according to Rule (2009:31). Together with the Council of Europe's Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data from 1981, it provides grounds for enacting Data Protection Acts and establishing DPAs. The Directive 95/46/EC obliged the EU member-states to set Data Protection Authorities and also gave rise to the Article 29 Data Protection Working Group which provided the platform for cooperation and communication between DPAs at the EU level.

Since DPAs have been set up in the Western Europe and the North America since 1970s, the research has focused to a large extent on DPAs in these contexts. DPAs in other regions have been established relatively recently. In Central and Eastern Europe, DPAs were established in the 1990s and later, after the change of socialist regimes. DPAs in Central and Eastern Europe region, including both EU member-states and non-mem-

ber-states, provide an excellent case for examining workings of DPAs in contexts other than West European and North American ones. Specific features of the region discussed further may contribute more nuanced understanding of DPAs workings.

This paper aims to set the agenda for future research on data protection authorities. It summarizes briefly the previous research on DPAs highlighting what is already known about DPAs and articulating gaps in knowledge, proposes to focus on DPAs in Central and Eastern Europe and suggests research agenda for further exploration.

Previous research on Data Protection Authorities

The research on Data Protection Authorities has mainly dealt with the following areas of inquiry. First, there are studies analyzing functions, responsibilities and roles of DPAs. Networks of privacy advocates, including DPAs, and their engagement in international privacy protection regimes are the second area of concern. Third area are issues connected to independence of DPAs. This subsection summarizes briefly the research on these three areas.

What DPAs are supposed to do and what they indeed do

The research on DPAs has focused on the history of data protection, as well as functions and responsibilities of DPAs (e.g. Banisar & Davies 1999, Bennett 1992, Burkert 1981, Flaherty 1986, 1989, Greenleaf 2015). Bennet summarizes the research on DPAs as focusing on "the content of law and the powers and responsibilities of privacy and data protection authorities" and on "what works and what does not" for effective data protection (Bennett 2012:412). While functions and responsibilities of DPAs have been analyzed to a large extent, the research on what DPAs indeed do is not extensive. How DPAs find their ways around their responsibilities and functions that are outlined in Data Protection Acts and what kind of roles they take on when they implement their function is less known.

Two factors have been said to shape work of DPAs. The first factor is personalities involved in DPAs work, in particular DPAs head and management. Heads of DPAs may perceive their roles differently. That may influence how they set priorities in implementing tasks of DPAs. Bennett notes that Flaherty in his seminal work from 1989 put forward the role of "a single privacy advocate at the head of the agency who knows exactly when to use the carrot and when to use the stick, and who is not concerned with

balancing data protection with other administrative and political values" as a "recipe" for effective data protection (Bennett 1992:239). Righettini examines the role of leadership in evolution of the data protection regulative policy style (2011). The second factor that shape work of DPAs are structural challenges and opportunities. Hustinx argues that for DPAs to make a difference there is a need for legal framework that would make it possible, thus highlighting importance of structural environment of DPAs (2009). In a similar line, Bosco et al investigate DPAs perspectives on legal framework and regulatory challenges regarding profiling techniques (2014). Apart from legal framework, organization of business and politics matters for outlook of data protection in a specific country (Newman 2008). Although these two factors have been argued to be important for shaping work of DPAs, the research has mainly focused on DPAs from structural, or in other words institutional, perspective – the second factor (e.g. in the works by Flaherty, Bennett, Raab, Jóri and Schütz).

As institutions, DPAs are primarily engaged in shaping and applying data protection law, "they are advocates, ombudspersons, and administrative authorities" (Jóri 2015). Schütz defines the roles of DPAs even broader stating that DPAs implement privacy policies, raise awareness, and provide consultancy services and network (2012a). The works of both Jóri and Schütz demonstrate that DPAs could deal with an immense number of issues. DPAs have to set priorities. Priorities are set according to perceptions of what is considered most important or most efficient to do. That implies that activities of DPAs are not only regulated by the Data Protection Acts and other documents, but they are shaped in the course of DPAs work and interaction with various actors in society.

If DPAs and specifically commissioners go beyond the defined set of responsibilities and take on an active position and advocate for privacy protection, there is a better chance to set privacy protection on the agenda, according to Flaherty (1989). "In order to be effective watchdogs over public administrations, data protectors have to adopt a functional, expansive, and empirical, rather than a formal and legalistic, approach to their statutory tasks" (Flaherty 1989:385). In line with that, Bennett argues that: "We perhaps need more data protection and privacy commissioners who take less of a "strict constructionist" approach to data protection law, and who are willing to push the boundaries of their statutory responsibilities and jurisdictions" (2015:6). However, taking on the role of privacy advocates may come with consequences. "Although many commissioners might see themselves as advocates, they cannot easily imitate these activists lest

they risk being ignored – or perhaps not being renewed in office – by hostile governments or parliaments, or written off by powerful groups which they must often cajole, rather than hector, into more privacy-protective practices" (Raab 2011:196). Jóri argues that the focus on one or another role is related to the state of data protection in a country (2015).

To sum up, the research on how DPAs are set up and what kind of functions and responsibilities they have is vast. Grounds for the analysis of how DPAs work is shaped by personalities of DPAs head and management and institutional structures have been established. At the same time, DPA's implementation of their functions requires further exploration.

International networks of privacy advocates

Apart from the domestic level, DPAs have been active at the international level. They have united their efforts together with each other and other actors advocating for privacy protection in order to bring concerns about privacy higher on the agenda. International cooperation of privacy advocates has received much scholarly attention (Bennett 2008, Galetta et al. 2016, Greenleaf 2015, Kohnstamm 2016, Newman 2008, Rauhofer 2015, Yesilkagit 2011, Zalnieriute 2015) because collective actions of transnational networks raising privacy higher on the international agenda.

Mechanism that makes the cooperation of DPAs at the EU level possible —the Directive 95/46/EC, has been a theme of the previous research on DPAs. Newman focuses on the role of the Directive 95/46/EC in shaping international privacy regulation regime (2008). Greenleaf agrees that the EU Article 29 Working Party, under which DPAs develop policy jointly and set up by this Directive, is one of the most important institution where cooperation of DPAs take place (2015). On a similar note, Raab distinguishes the role of the Article 29 Working Party in bringing "national DPAs together to adopt positions and opinions on prominent issues on policy agendas in Europe and between the EU and elsewhere" (2011:201). The work of Raab, among others, demonstrates that the influence of the Directive extends beyond the EU member-states. Although it has been studied to some extent, the study of this influence in new contexts may bring new perspectives to it.

Another theme about transnational privacy networks is the interaction between domestic and international levels. Zalnieriute considers it striking that international privacy governance takes place through cooperation of privacy commissioners placed at the domestic level (2016). Developing on that, Zalnieriute questions deliberative capacity of transnational networks of

DPAs that, if present, could bring new quality to international privacy governance (2015). Bennett argues that trust is an important factor in co-operation between DPAs (2015). Cranor adds another dimension pointing at formal and informal channels for cooperation. She emphasizes that interaction through formal and informal channels of cooperation could be beneficial for timely solution of rising issues (2002). The other theme includes cooperation between DPAs on the matters of enforcement. While Bennett argues that there are legal, economic, organizational and cultural barriers for enforcement cooperation between DPAs (2015:5), Kloza and Mościbroda propose some conditions and means for effective international enforcement cooperation (2014).

To sum up, transnational cooperation between DPAs and also other actors advocating for privacy protection has been much in focus. The rise of DPAs worldwide brings a new light to transnational cooperation of DPAs. More actors in transnational networks of privacy advocates could increase ability of these networks to bring change in data protection. Therefore, transnational networks and cooperation remains on the research agenda due to new circumstances.

Independence of DPAs

Independence is the third area of inquiry regarding DPAs (e.g. Greenleaf 2012, Schütz 2012b). To what extent authorities dealing with data protection are independent has been an important research question because independence is crucial for DPAs for doing their job properly. DPAs are taken as an example of regulatory agencies, although the one with potentially higher pressure from state, business and society than other regulatory agencies (Schütz 2012b). Schütz demonstrates that independence is a multi-faceted concept where formal independence does not necessarily mean that DPAs are independent in practice (2012b). Moreover, meanings of independence could vary between different stakeholders, DPAs, politicians and non-state actors (Jackson 2014).

Schütz makes an attempt to separate formal independence from independence in practice on the example of DPAs in four EU member-states (2012b). In order to do so he assesses how independence is defined in the law, how DPAs are connected to ministries and other governmental agencies, who has the right to appoint and dismiss the head of the DPAs, how funding of DPAs is organized. Jackson distinguishes two dimensions of independence: structural mechanisms and behavioural quality that are characterized as processes outside and inside of DPAs respectively (2014).

Therefore, the question of independence is crucial not only from the perspective that DPAs need independence for making a difference in protecting privacy but also from the perspective of what is understood by independence. The research of Schütz is particularly spectacular in this respect as his findings reveal that the DPA in Poland is more formally independent than others while that is not the case when independence in practice is assessed. The question of independence could be even more substantial in the countries that have recently gone through the change of political regime.

To sum up, independence of DPAs is a highly relevant issue in privacy governance and data protection. The study of DPAs in the countries other than established democracies may bring new perspectives to issues concerning independence of DPAs. The region of Central and Eastern Europe provides an interesting case in this respect with relatively recent transformations of political regimes, including processes of democratic transition and Europeanisation.

Specificity of Data Protection in Central and Eastern Europe

Historically, data protection institutions have developed in the Western European and North American countries and from there spread to other contexts. These countries as pioneers of data protection have received considerable scholarly attention. Most of the findings in the field are made on the case of Western European and North American countries. While Western European and North American countries have shared similar conditions of being established democracies and developed economies, other regions may have different conditions and challenges of data protection. The findings of the previous research on data protection authorities need to be verified in other contexts. The context of Central and Eastern Europe is chosen here because the research on DPAs in Central and Eastern Europe is generally scarce and the region has several specific features that may be of interest for understanding the development of data protection in Europe within and beyond the European Union. Central and Eastern Europe is understood here as constituted by the countries to the east of Germany, to the south of the Baltic sea, to the west from Russia and to the north of Greece.

After the fall of the Soviet Union and the collapse of the socialist and communist political regimes, the countries in Central and Eastern Europe have gone through the processes of political transformation. While in case

of some countries the democratic transitions have been relatively successful, other transitions are still unfinished. The scientific discussions have begun to question whether political processes in these countries should be at all called democratic transition or they should be discussed in some other analytical terms. Political turbulence in the region may matter for governing data protection and work of data protection authorities, for instance, in questions concerning interaction of DPAs with other governmental bodies, their independence and general "fitting into" political systems.

Central and East European countries have been influenced by Europeanisation processes, understood as "penetration of the European dimension in national arenas of politics and policy" (Börzel 1999 in Featherstone & Radaelli 2003). Newman argues that "[a]s a result of the EU enlargement process, countries [in the CEE] have adopted data privacy legislation far in advance of any domestic economic need for personal information rules" (2008:115). Newman means that the establishment of data privacy legislation may be more externally driven by Europeanisation processes of the region and less driven by internal challenges, in particular through adaptation of the EU model of data protection which he calls comprehensive model of data protection (he distinguishes comprehensive and limited data protection regime (2008:32). Moreover, Newman continues saying that "[b]ecause of the relative immaturity of information-intensive industries in these countries, opposition from the private sector has been minimal" (2008:115). Conditions for establishing data protection institutions thus differ in the context of Central and Eastern Europe from the context of the Western Europe. That yields for the question to what extent and in what ways processes of Europeanisation (building relations with the European Union) have influenced the development and practices of DPA in the Central and Easter Europe, including countries that are not EU members.

The specificity of the region is expressed as well in low levels of trust in society (Boda & Medve-Bálint 2012, Sztompka 1996). That is an important contrasting feature of the countries in Central and Eastern Europe contrasting to the context of Western Europe. As Bennet notes that trust is important for cooperation between DPAs (2015), low levels of trust may lead to different configuration of relations between DPAs and with other actors in society in Central and Eastern Europe. The argument of Bennet about importance of trust for cooperation between DPAs (2015) can be taken further. Trust is not only needed for establishing cooperation between privacy advocates but it is also needed for success of domestic activities of DPAs. For the adequate implementation of their functions, DPAs need to

be trusted by society. While questions about trust seems to be less of an issue in the Western European countries with the established institutions of data protection and higher levels of general trust in societies, it is certainly more relevant in the Central and East European context. Research inquiries may include questions about connections between general levels of trust and society and activities that DPAs carry out and whether they take on the role of privacy advocates.

Further research

The examination of the previous research on DPAs has revealed that there are a number of issues that could be investigated further, including how DPAs implement their functions and what kind of roles they take and under what conditions, how DPAs interact within transnational networks and cooperate with other actors engaged in advocating for privacy protection, to what extent DPAs are independent and how independence of DPAs could be understood. The analysis of these issues, while investigated to some extent in the context of Western European and North American countries, in other regions is limited. The further exploration of these issues on the example of Central and Eastern Europe may provide a more nuanced understanding of responsibilities, functions and roles of DPAs, their engagement in international privacy networks and various aspects of their independence. The specific contribution of the case of Central and Eastern Europe would lay in scrutinizing DPAs in the contexts characterized by recent political transformations, Europeanisation processes and lower levels of trust. These factors investigated all together or in separate studies can contribute new perspectives to understanding working of DPAs and data protection in general.

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