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# The General Data Protection Regulation and the rise of certification as a regulatory instrument

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## A B S T R A C T

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The endorsement of certification in Article 42 and 43 of the General Data Protection Regulation (hereinafter GDPR) extends the scope of this procedure to the enforcement of fundamental rights. The GDPR also leverages the high flexibility of this procedure to make of certification something else than a voluntary process attesting the conformity with technical standards. This paper argues that the GDPR turned certification into a new regulatory instrument in data protection, I suggest to call it monitored self-regulation, seeking to fill the gap between self-regulation and traditional regulation in order to build a regulation continuum.

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## 1. Introduction

The Economist<sup>1</sup> has suggested a meaningful comparison on the progress made by computing power during the last decades. “If cars and skyscrapers had improved at such rates since 1971”, it said, “The fastest car would now be capable of a tenth of the speed of light; the tallest building would reach halfway to the Moon”. Nordhaus<sup>2</sup> notices that chips produced today are 400 000 times more powerful than it was at the beginning of the 70s. In the meantime, the capacity of data storage available

has rocketed<sup>3</sup>. Within the last 15 years, “hard disks had increased their capacity 1,000-fold<sup>4</sup>”. The success met by the TCP/IP protocol made of the Internet something more than a simple technical innovation. As quoted by the Internet founders<sup>5</sup> themselves, “the Internet is at once a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location”.

The above technological breakthroughs enhanced and broadened the capacity of businesses to collect, store and exchange

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<sup>1</sup> ‘The future of computing’ The Economist, Mar 12th 2016. Last accessed 3<sup>rd</sup> August 2017. <http://www.economist.com/news/leaders/21694528-era-predictable-improvement-computer-hardware-ending-what-comes-next-future> “Intel CEO Brian Krzani.ch explained that if a 1971 Volkswagen Beetle had advanced at the pace of Moore’s law over the past 34 years, today “you would be able to go with that car 300,000 miles per hour. You would get two million miles per gallon of gas, and all that for the mere cost of four cents.” in Moore’s Law Keeps Going, Defying Expectations Annie Sneed for the Scientific American May 19, 2015. Last accessed 3<sup>rd</sup> August 2017. <http://www.scientificamerican.com/article/moore-s-law-keeps-going-defying-expectations/>.

<sup>2</sup> Nordhaus, W.D. (2001). The Progress of Computing. Cowles Foundation Discussion Paper No. 1324, 28 Available at SSRN. Last accessed 3<sup>rd</sup> August 2017. <http://ssrn.com/abstract=285168>.

<sup>3</sup> “Toshiba: hard drives will be 40TB by 2020, SSDs will be 128TB by 2018” by Matthew Humphries on [Geek.com](http://www.geek.com) Aug. 28, 2015. Last accessed 3<sup>rd</sup> August 2017. <http://www.geek.com/chips/toshiba-hard-drives-will-be-40tb-by-2020-ssds-will-be-128tb-by-2018-1632425/>.

<sup>4</sup> Walter, C. (2005). “Kryder’s Law”. Scientific American. August 2005 issue.

<sup>5</sup> Leiner, B M. et al. “Brief History of the Internet”. Available on the website of the Internet Society. Last accessed 3<sup>rd</sup> August 2017. <http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet>. <http://dx.doi.org/10.1016/j.clsr.2017.09.002>

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digitized data from any location around the world. The growing complexity of data processing<sup>6</sup> widened the asymmetry of information existing between the data controllers<sup>7</sup> and individuals and gave birth to new data types born from the interactions between individuals and machines, and machines to machines. This metadata<sup>8</sup> can be very sensitive when they are derived from individuals' behavior and their body conditions. The sanction policy suggested by Directive 95/46/EC in case of non-compliance<sup>9</sup> never ensured a deterrence effect on data controllers. The national data protection authorities do not have enough time, money, and competence to enforce more than a limited volume of processing. Moreover, the territorial scope on which the Directive is based<sup>10</sup> limits the rights of European citizens<sup>11</sup> to the borders of the Union and does not offer a satisfying response to the growing volume of cross-border data flows<sup>12</sup>. The self-regulatory instruments set up, in this area, to complete the legal framework have never demonstrated their effectiveness in the absence of real enforcement<sup>13</sup>.

The long awaited General Data Protection Regulation<sup>14</sup> (hereinafter GDPR), enacted in April 2016, intends to address

<sup>6</sup> Arbesman, S. (2016). *Overcomplicated: Technology at the Limits of Comprehension*. Penguin.

<sup>7</sup> Article 2 (d) of Directive 95/46/EC defines the data controller as the natural or legal person which alone or jointly determines the purposes and means of the processing.

<sup>8</sup> "Metadata is structured information that describes, explains, locates or otherwise makes it easier to retrieve, use, or manage an information resource. Metadata is often called data about data or information about information." NISO (2004) *Understanding Metadata*, NISO Press, 1 <http://www.niso.org/publications/press/UnderstandingMetadata.pdf>.

<sup>9</sup> Article 24 of Directive 95/46/EC suggests the Member States establish their own sanction policy.

<sup>10</sup> Article 4 of Directive 95/46/EC.

<sup>11</sup> See law case: *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*. See law case: *Weltimmo s. r. o. v Nemzeti Adatvédelmi és Információszabadság Hatóság* and comments on the law case in "EU court ruling outlines which countries' data protection laws apply to businesses with interests in multiple EU countries" Outlaw blog entry of the 2 October 2015. Last accessed 3<sup>rd</sup> August 2017.

<sup>12</sup> Even if Article 25.1 requires that the country in which the data is transferred to ensure adequate level of protection.

<sup>13</sup> Nielsen, N. (2013). Hundreds of US companies make false data protection claims. *EUobserver.com* blog entry of 8 October 2013. Last accessed 3<sup>rd</sup> August 2017 <https://euobserver.com/justice/121695>.

<sup>14</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) The GDPR is completed with two dedicated data protection Directive applying to the individuals under prosecution and travelling by plane. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

these shortcomings and, among other improvements, it makes data controllers and processors accountable of their compliance<sup>15</sup> and encourages companies to use certification procedures<sup>16</sup> for demonstrating their compliance with the new framework. Within this context, the paper questions how the GDPR contributes to the rise of certification as a regulatory instrument. The first section defines the regulatory nature of certification and demonstrates its scope progressively extended over time. The second shows that the European lawmaker, by endorsing certification in the GDPR, purposely planned to turn this instrument into a regulatory instrument; I suggest calling it *monitored self-regulation*, seeking to ensure a regulatory continuum between self-regulation and traditional regulation.

## 2. Regulatory nature of certification

The regulatory nature of certification is still in discussion and scholars do not agree on the approach to adopt. Moreover, the high flexibility of this procedure, allowing endlessly to arrange and rearrange the schemes, makes any attempt of taxonomy a moving target. Defining certification from its purposes sounds easier and more fruitful. However, the analysis of the certification's scope shows it continuously broadened over time. Its endorsement in the GDPR contributes to extend it again to the enforcement of legal provisions.

### 2.1. Moving target

Some authors<sup>17</sup> define certification as a conformity assessment process. They argue that certification is a voluntary assessment process realized by an external and accredited auditor,<sup>18</sup> based on requirements issued by a recognized authority. The assessment, if successful, leads to the issuance of a formal attestation of conformity<sup>19</sup>, sometimes accompanied

<sup>15</sup> Article 22 of the GDPR.

<sup>16</sup> Article 42 of the GDPR.

<sup>17</sup> "Certification is a method of (conformity) assessment" Eijlander, P. et al. (2003). *De inkadering van certificatie en accreditatie in beleid en wetgeving* [The framing of certification and accreditation policies and legislation]. A study commissioned by the Ministry of Economic Affairs. Instituut, Centrum voor Wetgevingsvraagstukken, Universiteit van Tilburg, 2003 - 194 pp, 12.

<sup>18</sup> "Certification is the (voluntary) assessment and approval by an (accredited) party on an (accredited) standard" Meuwissen, M. (2003) Technical and economic considerations about traceability and certification in livestock production chains, In Jahn, G. et al. (2005) *The Reliability of Certification: Quality Labels as a Consumer Policy Tool*, Journal of Consumer Policy, 28, 57.

<sup>19</sup> 'Certification schemes . . . provide assurance (through a certification mechanism) that certain characteristics or attributes of the product or its production method or system, laid down in specifications, have been observed' EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuff (2010/C 341/04).

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