Legal validity of the consent by means of software agents for Personal Data Processing

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PRIAM meeting, St Malo 22-23/05/2008

Motivations and objectives

- Necessity to "delegate" the consent to an automatic tool in Internet and specially in AI context
  - Automatic tool used on behalf of the subject and expected to reflect its will

- Verify the validity of the consent manifestation for PD processing through automatic tools

Plan of the talk

1) The consent
- Nature
- Validity

2) The software agents
- Definition of software agents (legal aspects)
- Context of personal data protection
- Proposal for a software agent model (PRIAM)

3) Conclusions

The consent (I)

- Nature
  - Civil Law (different opinions, debates…)

  - Context of Personal Data Protection
    - Interpretation proposed
      - Criteria: compliance to new technologies; effective protection of the subjects, compatibility with the EU legislation; proposals for an improvement

The nature of consent in Civil Law

➢ absence of specific definition

- The notion of consent is used in both the meanings of an agreement of at least two persons (*negotium stricto sensu) or of a single* manifestation of will;
  - Art 1109 FR CC; Art 1321 IT CC

- The main doctrine adopts an **unilateral** conception of consent as manifestation of individual will, coming from the main regulation (civil codes and special law)
  - Heredity of the subjectivist theories linked to *Consensualism*

  V. Forray (*Le consensualisme dans la theorie générale du contract*), 2007 ?

The nature of consent in Data Protection context

➢ Directive 95/45/CE: " data subject consent is any …indication of his wishes in which <u>he signifies his agreement to</u> personal data related to him being processed"

- Doctrine: instrument of « controlled deregulation »

  R. Acciai, *Il diritto alla protezione dei dati personali*, 2004

- Dispute about the nature of the consent as
  a) <u>contractual</u> manifestation of will or
  b) an <u>unilateral act</u>

Doctrine of contractual nature

➢ Relationship between subject and controller: contract

- personal data become assets, object of transactional operation (transfer of rights on them), due to its scarce nature

- Evidence: data are often collected after a compensation (products, service…) and in the context of a contract (to obtain whatever)

Z. Zencovich, *Il consenso informato e l'autodeterminazione informativa*…Corriere Giuridico,1997;

S. Bibas, A contractual approach to Data Privacy, Harvard J. L. P. 1994;

Dragon, Etude sur le statut juridique de l'information,Dalloz, VII Cahier, 1998;

Doctrine of unilateral nature

➢ Consent as a permission-authorization
- Evidence: *ratio* of the data protection regulation
  - We find conditions for the *admissibility* of the processing
  - It explains cases of derogation from the consent and those in which it is not enough (sensitive data)
  - Opposition for legitimate grounds or for marketing purposes not compatible with a contractual structure (no link with the behaviour of the other 'party'-controller)
  - In the general conditions of a contract we have to distinguish the clause that asks for the consent from the consent-act"
    - DP law asks for a specific consent = separate context
  - system of sanctions in case of non-fulfilment by the controller of his obligations

Poullet, *Le fondement du droit à la protection des données nominatives: proprietés ou libertés*, 1991;

Messinetti, *Circolazione dei dati personali e dispositivi di regolazione dei poteri individuali*, 1998;

Sica-Stanzione, *La nuova disciplina della privacy*, 2005

Effective Protection of the subject I

- The doctrine of unilateral act appears the most convincing and the most protective one
  - Systems of remedies and sanctions (administrative or criminal) more similar to collective interests
  - Mechanism of the protection doesn't need the event of *damage* to start but the breach of the law by the controller (or third parties)
  - sanctions could be applied also <u>independently</u> from a judicial action of the subject, but on the initiative of the Authorities (*ex officio*)
  - role as controller of the indipendent Authorities
    - Consent as part of a complex <u>procedural</u> mechanism of protection to compensate for the lack of real parity

Effective Protection of the subject II

- Avoid the indirect effect to open the doors to interpretation of the data protection right as a more 'available' right
- The subject's rights must be ensured by the controller for a prevision of law not for a contractual engagement
- Advantages of the action for the recognition of illicit processing (not action of annulment as for a contract):
  - Better terms for prescription and evidences
  - Can be started before and from the Authority (better terms and costs)

The consent (II)

- **Validity**
  - Civil Law
    - Qualities and Vices
    - Formal Requirements

  - Context of Personal Data Protection
    - Interpretation proposed
      - Criteria: compliance to new technologies; effective protection of the subjects, compatibility with the EU legislation; proposals for an improvement

Validity of consent in Civil Law: qualities and vices

➢ complex notion linked to that of *integrity*

- Doctrine: The consent to be valid must be *clear, free, aware:* the product of "unlighted" personal decision

    This conception explains the approach to the notion typical of the civil codes, where it is defined through <u>its vices</u> (error, violence, wilful misrepresentation) = situations in which integrity is jeopardized and the consent is not valid

    J Carbonnier, Les obligations, Droit civil PUF, 2004

- Error: determinant and recognizable (appearance)
- Violence: physical or moral (menace)
- Wilful misrepresentation: determinant for the personal decision

- Importance of information (general obligation)

Validity of consent in Civil Law: formal requirements

- ➢ Prevalence of mild *Consensualism* in Civil Law systems with elements of *Formalism*
  - Manifestation of autonomous will and respect of <u>specific formalities</u> in some contexts (written document):

    - Required for the <u>validity</u> of the act or just for the <u>evidence</u>
    - Form became the mean to protect the weak part (worker,consumer)
    - Doctrine: *forma ad validatem* or *ad probationem*
  - (document as content –functional- and as support -instrument)
  - Features of the content: those of the information expressed
  - Features of the support: authenticity and integrity

Formal requirements and new techologies I

➤ Doctrine: juridical features and needs are common to traditional and to electronic "written" (immanent juridical nature)

- new technologies could affects the efficacy of a document when the law connects the validity or the evidence to specific form

- Equivalence between paper or electronic written document (directive n. 1999/93 and directive 2000/31)
  - Compliance with the functional aspects of the document (paternity and integrity)
  - Ex: 1316,1-4 FR CC (*ad probationem*); 1108-1 (*ad validitatem)*
- Formalities required by the law are important to ensure the juridical security = technical security
  - concerns for formalities in electronic "written" = signature's features
  - Different probationary value of electronic signatures

Formal requirements and new techologies II

- *Ad probationem*

➢ 1316, 1-4 FR CC: « L'écrit sous forme électronique est admis en preuve au même titre que l'écrit sur support papier, sous réserve que puisse être dûment *identifiée* la personne dont il émane et qu'il soit établi et conservé dans des conditions de nature à en garantir *l'intégrité* ».

➢ « Lorsqu'elle(signature) est électronique, elle consiste en l'usage d'un procédé fiable d'identification garantissant son lien avec l'acte auquel elle s'attache »

- *ad validitatem*

➢ 1108-1 FR CC « Lorsqu'un écrit est exigé pour la *validité* d'un acte juridique, il peut être établi et conservé sous forme électronique dans les conditions prévues aux articles 1316-1 et 1316-4;
« Lorsqu'est exigée une mention écrite de la main même de celui qui s'oblige, ce dernier peut l'apposer sous forme électronique si les conditions de cette apposition sont de nature à garantir qu'elle ne peut être effectuée que par lui-même ».

Consent (II)

- Validity
  - Civil Law
    - Qualities and Vices
    - Formal Requirements

  - **Context of Personal Data Protection**
    - **Interpretation proposed**
    - **Criteria: compliance to new technologies; effective protection of the subjects, compatibility with the EU legislation; proposals for an improvement**

Qualities and vices of consent in DP context (I)

- Directive 95/45: *freely* given, *specific*, *informed* and *unambiguous*
  - Indication of <u>Art 29 (WP 114, 25/11/2005)</u>:

    a)
    - a positive act (not principle of appearance as in contract)
      - nowadays in praxis often is given without reflection
    - genuine choice on consequences (no *fait accompli*)
    - Without constrictions (weak position)
      - pressure and conditionings something more then the contractual *ratio* (error, violence…)
      - Consent given because "needed" (marketing purposes in the same context of general conditions of contract)

Qualities and vices of consent in DP context (II)

b)

- Information obligation for the controller (nature, modalities, aims)
  - Aware consent can be better ensured through new technologies conformed to this obligation?
    - Subject could be ensured to receive complete information

c)

- Specific: not referred to a generic but determined processing
  - Different purposes require different (separate) consent

  - Directive 2002/58: unsolicited communications admitted without consent if referred to same products or services
    - Extensive interpretation: consent could be expressed automatically by new technologies for <u>same categories</u>

Formal requirements in DP context: how to express the consent?

➢ Directive: flexibility on the form→*esplicit* consent for sensitive data
  - meaning of the terms used at the national level (*express, documented in writing, written consent*)
    - Different terms can affect the use of new technologies?

  - <u>Fr law</u> Art 7 : - simple consent for ordinary data ("reçu le consentemeent de la personne concernée");
    - *express* consent for sensitive data ("la personne a donné son consentement exprès");
    - express consent → for doctrine and jurisprudence= written
      - sent Conseil d'Etat 5/06/87 Kaberseli
    - *ad validitatem*?

  - <u>It law</u> Art 23 : - free and *documented in writing* for the ordinary data ("documentato per iscritto")
    - interpreted also as "by electronic document" (*ad probationem)*
      - *written consent* for sensitive data ("manifestato in forma scritta")
    - interpreted as signed consent *ad validitatem* (Bianca, '07; Sica '04)

Valid manifestation of consent in DP context

- ➢ Art 29 WP is for a functional modality to give the consent
  - WP 5/2004 recommends the use of boxes on-line to be ticked

    - No doubts about electronic consent if *ordinary* data
    - Less clear if it is possibile for *sensitive* data (« written »)
  - requirements indicated for the validity of juridical act on electronic support: qualified electronic signature
  - Could be considered enough also a secure 'clickitis' ?
            (Bain-Subirana *Computer and security Report* n 4 2003)
    - It will be enough an interpretation of the current legislation?
      - → "Written" in functional sense: assure authenticity, integrity

  - (a secure transmission in case of sensitive data seems to be also required)

Sofware agents

- ➢ Definition
    - Aspects techniques
    - Aspects juridiques

- ➢ Data Protection Context
    - Legal aspects

Software agents: definition

➢ Properties:

- <u>Autonomy:</u> operation without the direct intervention of humans

- <u>Social ability</u>: interaction with other agents

- <u>Reactivity:</u> perception of the environment and reaction

- <u>Pro-activeness:</u> initiative of interactions

Software agents: definition (legal aspect)

➢ Different theories on the juridical status of an agent
  ● Autonomy and social ability → necessity of a special Law?
    • Classification in - passive agents (fully controlled by the subject)
                        - active and transaction agents (act autonomously)

  ● subjectivist theories: what is relevant is the real will
    • Agent as a simple *medium* to manifest the consent : the will
      is referred always to the subject: no necessary new law
                        L.A. Bygrave, International J. Law and IT, 2001
                        Finocchiaro, Computer law and security Report 2003
              (UNCITRAL model law on e-commerce NY 1997)

  ● Objectivist theories: what is relevant is the external will
    • Princ. of appearance (contractual vision, to protect the third parties)
    • Agent as a *delegate* of the subject with own juridical capacity
      and personality: necessity to modify the law
                        E. Dahiyat,Computer law and security Report UK 2006

Software agents: DP context

➤ **Summary of juridical criteria for a valid consent:**

- Unilateral act rather then a contract

- Freedom of consent (absence of pressure, separation of contractual clauses)

- Specific consent (expressed determined purposes)

- Unambiguous consent: clear language of communication

- Informed

  - the agent should ensure that the controller has sent all the necessary information on the processing

Software agents as a *medium* of PD consent I

➢ Our interpretation: valid consent until is referred to the subject's will

- Active agent (autonomy under the subject's control)
  - there is no transaction effect in the PD consent
- The agent doesn't acquire a juridical status: it is just a software, "a thing" (Finocchiaro, *Computer Law and security Report* 2003)
  - actions not completely predefined or known would be useful for the subject only if entering in its (even large) prevision
  - Liability for consent defects attributed to subject
  - Liability for dysfunctions attributed to the producer (contractual relationship with the subject)
- (Different agents? One for Security and one for authenticity…?)
- Residual liability as for "facts of the things" (art 1384 FR CC)?

Software agents as a *medium* of PD consent II

➢ The authorization act (consent) expressed by the agent contains subject's privacy preferences: it can be programmed by the subject

➢ Appearance principle partly applicable (controller protection):
- The agent acting without direct input reflects a subject's choice
  - → necessary <u>information</u> (complete and clear)
    - Limits? range of eventual aims and categories accepted *a priori* by the subject
    - Otherwise it should ask the confirmation of the consent
    - To be reminded (directive) the possibility to give the information at the moment of the recording of the data or at the I communication when the data are collected not by the subject

➢ Possibility to apply the same *ratio* of unsolicited communications (no consent is required if same products and services)?
- A *fortiori*: it should be possible to express the consent for same categories of services

Software agents as a *medium* of PD consent III

➢ Authority's authorization and precautions can adapt better to new technologies (Sica-Stanzoione, 2005):

- The conformity of the agent to these indications can already assure the lawfulness of the processing and the subject's trust (kind of presumption)
- Avoiding the praxis of "merchandising" of data

➢ Law improvement:

- Indicate better the modalities of the information obligation (controller)
- Avoid ambiguous norms on the use of electronic tool
- Encourage the adoption of codes of conducts
- Encourage the participation of the Authority in the definition/ certification of the technical standards of the agents