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Section I: Articles

CONSENT TO THE PROCESSING OF PERSONAL DATA: A LEGAL AND BEHAVIOURAL ANALYSIS. INSIGHTS INTO THE EFFECTIVENESS OF DATA PROTECTION LAW

Lucilla Gatt, Roberto Montanari, Ilaria Amelia Caggiano *

Abstract:

The article discusses and questions the function of informed consent to personal data processing, as an effective tool for the protection of individuals' fundamental right to personal data (i.e. privacy), especially in the digital world. Based on an experiment conducted through detection techniques, such as eye-tracking, and a number questionnaires, it discusses some of preliminary results of the study in order to verify the awareness of individuals to the data protection issue and when they give consent to the processing of personal data.

The integrated methodological approach, which draws on empirical studies and behavioural analysis, leads to considerations on the relation between law and technology.

Key-words: consent to the processing of personal data; effectiveness of data protection.

Summary: 1. The reasons for a piece of research on the consent to the processing of personal data. – 2. The reasons for choosing a hybrid method of investigation and the relationship with technology. – 2.1. Legal analysis (L.A) and experimental investigation concerning the consent to the processing of personal data. 3. Consent to the processing of personal data and Behavioral Analysis (B.A.): introduction. – 3.1. The experiment and the B.A. of the data collected: objectives, materials, method, results. – 4. Legal analysis (L.A) of the intermediate results of the behavioral analysis: introduction. – 4.1. Legal Analysis (L.A.): critical issues. – 5. Interaction between L.A. and B.A.: a functional approach to legal rules and models of protection of personal data alternative to consent.

* Lucilla Gatt has written paragraphs 1 and 2, subparagraph 2.1, and paragraph 5; Roberto Montanari paragraph 3 and subparagraph 3.1; Ilaria Amelia Caggiano paragraph 4 and subparagraph 4.1.

1. The reasons for a piece of research on the consent to the processing of personal data.

In Italy the issue of consent to the processing of personal data (privacy) is mainly dealt with the traditional methodological perspective of legal studies, namely: 1) considering existing rules as a datum; 2) analyzing in *a de iure condito* perspective the legislation in force both at national and at European and international level, accentuating the differences in US / EU approach with ideological contents; 3) insisting on clarity and awareness of the information at multiple levels of usability and administration.

According to this perspective, it is hard to find awareness of the different articulations that the topic takes on in relation to specific cases or the type of “data” processed (eg the request for consent to the processing of health data at the entrance of an operating room appears different from the request for consent to the processing of data relating to one’s musical tastes placed at the opening of an APP to download songs, which in turn appears to be different from the information of video-shooting of one’s own image placed at the entrance of a pharmacy).

Likewise, by analyzing the current regulation, the aforementioned studies do not consider or undervalue actual and potential privacy problems related to the effective functioning of distinct devices in the digital and non-digital world¹.

Privacy seems to be disregarded, in practice, by the users who give consent to the processing of personal data.

2. The reasons for choosing a hybrid method of investigation and the relationship with technology.

With the *Privacy and the Internet of Things: a behavioral and legal approach* project, commissioned by an important technological partner, the researchers of Utopia² Living lab (a Laboratory set up at the Unisob’s Scienza

¹ The considerations expressed in the text are indicative of a general attitude of the Italian scholarshi. More problematic aspects of personal data protection, with particular regard to the relationship between the protection of privacy and technology there is, for example, are in G. Comandè, *Tortious Privacy 3.0: at quest for research*, in *Essays in Honor of Huldigungsbundel vir Johann Neethling*, LexisNexis, 2015, 121 ss., but v. infra also nt. 3.

² The Living LAB_Utopia develops research itineraries on the possible interactions between law and new technologies. Equipped with the most modern technological instruments, Utopia is a place of cooperation and collaboration between experts and researchers, in the legal and technological field, in the sign of the sought-after interrelationship between knowledge. The topics ad-

Nuova Research Center), has adopted a method of study of the issue of privacy consent, inspired by a widespread model in the Anglo-American area, in which the legal analysis is closely connected by a preliminary and / or contextual analysis of people's behavior, in an experimental environment. In the *Privacy* project we have tested the interaction of a number of users with electronic devices when they authorize / consent to the processing of personal data³.

The reasons for this methodological choice are to be found, on the one hand, in the acknowledgment of the impact of technology on traditional legal categories; on the other, in the awareness of having to proceed with an analysis, of rules which take for granted the capacity of data subjects to protect certain their interests.

We have pursued the goal to surpass the attitude of legal research from the 70s to present to develop in a *circular* more, instead of a linear one, as it tends to propose *ad infinitum* the same topics and issues with similar methods if not identical. Thus, such research is frequently found to be incapable of reaching scientifically original results.

This perspective induces to evaluate the meaning of originality (*alias* advancement with respect to the state of the art) of research activity, considering the possibility of affirming an idea of original "scientific result" (*ie* of point of arrival of research activity from which to start a further and different research) already present in other branches of knowledge⁴ and which, instead, appears opaque in the humanities field, with specific regard to the legal domain.

We intend to develop awareness among researchers about their contribution to effectively develop legal research, proposing problems and solutions truly functional to the needs of contemporary society. In this study, we also wanted to give the research an international attitude, to confront it, both on a methodological level and a substantive level, with research from other legal system.

dressed by Utopia's legal research group are different. By way of example, we highlight: protection of personal data in the era of computerization, civil liability and automatic devices, remotely piloted air systems (SAPR) and civil liability, bio-law and biotechnologies, protection of biotechnological inventions and patentability of living, law, computation and simulation, Online Dispute Resolution (so-called ODR), neuroscience and law (so-called neuro-law), digital inheritance, start-up and technology transfer.

³ *Ex multis*, Acquisti, Privacy, in Riv. pol. Econ, 2005, p. 319; Solove, Privacy self-management and the Consent Dilemma 126 Harv. Law Rev. (2013) 1880; Mantelero, Personal Data for Decision-Making in the Age of Analytics: 32 Computer Law & Security Rev. (2016) 238-255; Strahilevitz, Toward a Positive Theory of Privacy Law, 113 Harv. Law Rev. (1999) 1; Borgesius, Informed consent: We Can Do Better to Defend Privacy, IEE, 2015 (Vol. 13, p. 103 – 107); Id. Behavioral Sciences and the Regulation of Privacy on the Internet, Amsterd. Law School Research Paper no. 2014 – 54.

⁴ N. Irti, Un diritto incalcolabile, Torino, 2016, 137-151.

Finally, the research deals with technology in a twofold sense: having considered technology as the subject of study and as a tool for conducting it.

2.1. Legal analysis (L.A.) and experimental investigation concerning the consent to the processing of personal data.

The research undertaken intends to measure Italian users' awareness and their sensitivity towards privacy (measured by their consenting to data processing) when installing an operating system on a personal computer.

It aims to verify how the Italian and European legislation, focused on consent, and implemented in this operating system, can assure effective protection of users with regard to the processing of personal data and especially where the request for processing takes place in a digital environment.

It is worth-noting that the experiment, although conducted on a small number of subjects, has, however, a statistical and discrete relevance considering the degree of homologation in the functioning of software and devices.

It should also be emphasized that this research combines the empirical methodology well-developed in foreign studies with the observation of users' behavior, as a new approach. In fact, a sample of users, although numerically much lower than that used by other empirical studies on privacy⁵, was submitted an experimental protocol and a questionnaire divided into two macro-sections (a legal and a behavioral part). Each experiment lasted about an hour.

High-tech equipment (Eye-tracking) was used to verify the users' actions regarding privacy settings during the installing of the program and its use. A number of dimensions have been subject to evaluation: attention (can be analyzed through graphic representations of heat-map); task execution time; reading order within the screens (thanks to the gaze plot sequences); awareness and knowledge of privacy matters; usability.

Through this multi-instrumental analysis it is possible to verify whether the individual, to whom personal data refer, is able to understand, or is, in the act in which the information is given or to which he/she consents, genuinely interested in knowing the information supplied and whether he perceives this lack of understanding as a lack of protection, also considering the digital environment in which these operations take place as well as the device through which choices are put in place.

The methodological perspective adopted is that of the interrelation of law

⁵ This sample is representative of the Italian population by age, profession, income level, cultural level, level of interaction skills with digital environments and IT support.

with the analysis of behavior, based on cognitive psychology, with the aim of verifying the latter's results in the legal domain. The survey is therefore divided into two phases:

1. one highly experimental, as based on a complex examination of the relationship between user and technology as well as the use of the aforementioned Questionnaire and the collection and processing of data in digital format;

2. one analytical, as based on the examination and commentary of the data collected within the framework of the current legislation on privacy, both nationally and at European level in a *de iure condendo* (normative) perspective.

In a nutshell, by making use of the Behavioral analysis (B.A.) and analysis of the applied data (Legal Analysis L.A.), a functional perspective of legal analysis has been assumed in order to assess the legal efficiency of the measures (essentially founded on the so-called consent) adopted by legislation on the protection of personal data.

3. Consent to the processing of personal data and Behavioral Analysis (B.A.): introduction⁶

The behavioral analysis concerned the involvement of a sample of users, profiled according to different degrees of knowledge in relation to the topics of investigation, *i.e.* some users were aware of aspects related to privacy also from the legal point of view, others substantially unaware, although sensitive to the subject of data privacy for the social weight that the topic has. The sample was composed of volunteer individuals from the Suor Orsola Benincasa University, including students, teachers and non-teaching staff, as well as volunteers from outside.

The structure of the test follows the so-called usability test⁷, that is a controlled analysis experience in which the sample is asked to perform some tasks (*i.e.* operations to be performed on the interactive system presumably familiar to users). Data that highlights situations related to the use of the tool are collected

⁶ We thank Dr. Federica Protti for her contribution in the preparation of the research materials and for the management of the experiments. We would like to thank Andrea Castellano and Emanuele Garzia for their work in conducting the experiments. For the final part only, the experiment also made use of the contribution of Vincenzo Pascale, Marianna La Rocca, Ilenia Nigro, Valentina Platella, Marcella Capizzuto, Raimondo Casaceli. A special thank for the preliminary study, the preparation of the research questionnaires, the organization of the experiment goes to Maria Cristina Gaeta, Doriana De Crescenzo, Anita Mollo.

⁷ For a methodological account see: <http://www.usabile.it/212003.htm>

in order to understand the experience in terms of interaction, the degree of awareness about what has been done and the errors committed in a more or less systematic way.

In relation to the experience carried out in the project, we worked to understand, using qualitative and quantitative measures, both aspects of usability related to the use of the interactive system (ie effectiveness, efficiency and satisfaction expressed during use), and the degree of awareness that the system allows to make users informed use of their personal data.

3.1. The experiment and the B.A of the data collected: objectives, materials, method, results.

The tasks performed by the users concerned aspects related to the set up of the interactive/operating system, the activation of some connected functions and above all the request to operate with respect to the privacy requirements proposed by the system and in compliance with the legal requirements. In particular, we wanted to observe in this context what was the behavior of users and compare it with the indications expressed regarding privacy.

As for the dependent variables subjected to analysis, in addition to the questionnaire on the aspects of understanding the legal issues that will be discussed later, there is mainly ergonomic relevance:

- Achievement of the objective, including whether and how the user completes the assigned activity;
- Efficiency of the activity, in particular the time required to complete it;
- Attention of users during interaction with the system, detected through a device eye-tracking and in particular the construction of heat-maps;
- Reading order within the screens, detected by the allowed gaze plot by the Eye-tracking glasses;
- Level of awareness of the user in the moment of their actual performance of consent to the processing of personal data;
- Perception of usability by users at the end of the activities.

The research has taken a very articulated and complex character, requiring the combined use of different detection methods. In particular, the following were used:

- Detection of performance aspects such as execution times, degree of effectiveness of tasks, etc.
- Eye-tracking, or the use of a portable system for detecting eye movements;
- Questionnaires, necessary for profiling the sample with respect to socio-

graphic aspects, legal competences, perception of usability and assessments in legal subjects subject of study;

- Thinking-aloud, *ie* the collection of extemporaneous assessments but very useful as they are contextualized and performed by users during the execution of the experimentation activities.

In summary, the experimental phase intends to examine and evaluate the methods of interaction of the subjects and their level of awareness (*awareness*) during the execution of some tasks with the technological support under consideration, especially in the cases in which privacy setting choices emerge in light of current Italian legislation.

In this sense, this analysis provides support and elements for legal analysis. As will be described in detail and discussed in the next section, for example, with the performance analysis tools it was possible to detect the reduced number of subjects who disabled the “Quick installation” function or the equally limited number that did not read the privacy policy when proposed during the task by the user interface. From an interactional point of view this datum could open the field to activities of redesigning the interface itself based on the feedback of the users, prefiguring in this sense improvement scenarios for the interactional devices charged with proposing and presenting information on privacy, enriching with an ergonomic-interactional component of the recent approaches of the so-called privacy-by-design.

In order to strengthen the analysis with more accurate evidence, was used the innovative tool of *eye-tracking* glasses, which allow the examination of oculomotor behaviors in terms of number and time and lead to feedback based on actions and user performance, duration of fixations, time taken to process information on a fixed area, identification of the maps of interest to observe where the focus is most concentrated, identification of visual paths created by users and frequency of returns on portions already seen. These data will be examined in detail in the next phase of the experiment and compared with the performance data relating to the effectiveness and efficiency of the operations performed, as well as to the evaluation of the interactional experience carried out.

4. Legal analysis (L.A.) of the intermediate results of the Behavioral Analysis: introduction.

As already illustrated, the research carried out develops models and methods of investigation on information and on the consent to the processing of personal data already pursued in foreign and multidisciplinary literature.

However, with regard to the methodology and in particular the relevance of

behavioral analysis, it is worth-noting that the present study does not use the results deriving from the observation of subjects' behaviour, within an economic model of analysis of the legislation (such as normally occurs in the context of economic behavioral analysis) but interprets these results confronting them with the ideal behavior that the regulatory provisions intend to incentivize (informed consent to protect one' s personal data) .

This in order to provide an assessment of the effectiveness of the protection of the individual user-natural person.

By requesting users to reply to specific questions, which take into account a series of variables, the experiment aimed at testing the degree of efficiency of the “expression of consent to the processing of personal data” as a form of exercise of the individual' s right to data protection personal, laid down in the national and European law ⁸.

Below we will try to illustrate the results concerning the first 12 subjects analysed, after the completion of the pilot test (pilot). These are preliminary results that do not allow to reach meaningful conclusions on the overall results of the experiment.

The analyzed data, although not significant, therefore have the function of providing some initial reflections on the object of the research.

The experiment was carried out on 43 subject, among which:

- 12 were tested for the pilot test;
- 12 for the final test, whose results are subject to comment here;
- 19 tests were conducted and will be subject to further evaluation.

It should also be stated that the composition of the sample engaged in the experiment needs to be integrated, as the section so far scrutinized consists mainly of young people (aged between 18 and 24 years), the majority of whom declare to have received training in the legal field, or to have a certain familiarity with topics of a legal nature and with technology.

4.1. Legal Analysis (L.A.): critical issues.

The data collected from the sub-sample analyzed (as said, composed of young “millenials”) reveal inconsistencies between users' behavior and the preferences they declare, with regard to topics of privacy and technology.

1. The majority of the sample declares to be highly concerned with protecting their data, and even when the sample is asked to compare personal data pro-

⁸ The term “efficiency” is used in the sense of responsiveness, verified in action, of the legislation to the protection needs that it intends to protect.

tection and security, the majority tends to prefer the first over the second [yes see below tables 1 and 2]

2. However, only a small percentage (16%) has disabled the “Quick installation” function [tab. 3]⁹

3. In relation to the task of modifying the privacy and security setting chosen, or automatically set up at the time of installation, 58% of the sample does not read the privacy information, although they operate in an induced situation. In any case, 100% of this sample section changes the privacy settings anyway. The data reveals that there is no connection between information and user self-determination [tav. 4]¹⁰

4. As for the privacy options, geo-location, assistance software, voice recognition and handwriting were evaluated as being of some utility or fully useful by the same subjects. Overall, 75% of the sample had, in a previous question, expressed a judgment of some positivity or totally positive, in terms of usefulness, proper to the position detection and voice recognition functions¹¹.

On the assumption that definitive results cannot be inferred from the data in question, it is possible to make the following considerations.

From the answers collected and the behaviors observed, there is a general tendency to prefer the operational choice that involves the simplest and shortest way.

With specific regard to the understanding of the steps related to information and management on the processing of data in the analyzed context, many of these are not understood although the users perceive to be able to understand, control and modify autonomously the options of processing (privacy settings).

The experiment, although in its intermediate phase, highlights how even those who claim to have interest in protecting their personal data (supra n. 1), do not usually pay attention or, in any case disregard the privacy policy, even in a non-natural environment (the experiment) where the subjects are expressly required to perform this task. Decisions regarding the consent to the processing of personal data totally disregard the implications of data processing, as well as the very content of the information¹². This contrast may lead to consider how, on

⁹ It should be noted, however, that 50% of the sample states that they do not understand that it involves a choice in setting access to personal data

¹⁰ Moreover, as regards the self-assessment of the ability to manage personal data, 2/3 of the sample self-assesses themselves in a position to manage their data, although this data is then contradicted in answers to more general questions, and almost all (90%) recognize its usefulness.

¹¹ Regarding the activation of the assistance software with personal Digital Assistant functions, the sample is rather equally divided between those who understand that their personal data will be used (58%) and the remaining part that responds negatively.

¹² In this regard, it should be noted that the answer on the level of comprehension of the information does not appear to be discriminating, placing 50% of the sample on the intermediate

average, the abstract tendency of the individual to have his own privacy (concerning the processing of his own data) may (not) affect decisions concerning the performance of daily activities, also considering the cases of necessity of treatment, for some of these activities, as can happen in the digital environment.

The observed attitude towards reading or consulting the privacy policy as well as the more general connection with the individual activities to which the treatment refers can lead to consider how the improvement of information disclosure and consent mechanism, which also represents a constant objective of the EU and national policies also through the supervisory authorities, are reasonably not able to produce significant changes in the level of user awareness.

Actually, the ineffectiveness of warnings regarding privacy has been thoroughly demonstrated by studies of economic and behavioral analysis¹³, also taking into account the topic of aggregated data, *i.e.* the number of organizations which collect and use personal data, especially in the digital environment, which makes it impossible for the individual to manage and control the use of his/her personal data, in everyday activities¹⁴. These studies reveal that, in a more or less conscious way, the information is not read and therefore the consent given is not consciously provided.

As said, the experiment conducted, which is the lines with this literature, intends to analyze, with a relatively more complex experimental setting and in an induced environment, the behavior of users in terms of information and privacy settings and to verify how much the attempts of regulatory intervention that aim to enhance the freedom of choice of the individual (*i.e.* through the improvement of information) are prospectively able to achieve this purpose.

To complete the legal analysis (LA) on the protection of the individual's right to his/her own personal data, one must evaluate the remedies against damages deriving from a violation of the personal data protection rules.

Hence, beside the instruments of *ex ante* protection for the data subject (such as the expression of consent), the existing legislation foresees *ex post* remedies, which are, in the private law area, the compensation of damages for injury deriving from the misuse of personal data (art. 82 GDPR, and, previously art. 15 of the Italian Privacy Code)¹⁵. The case law in this regard is scarce¹⁶ and in any

level (3 on a scale from 1 to 5) of evaluation on the clarity of the information and a 30% further on a positive or fully positive assessment.

¹³ Ben-Shahar – Chilton, Simplification of Privacy Disclosures: An Experimental Test (April 13, 2016). University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 737. Available at SSRN: <https://ssrn.com/abstract=2711474> or <http://dx.doi.org/10.2139/ssrn.2711474> and in Journal of legal Studies (in course of publication 2016).

¹⁴ Solove, *op. cit.*

¹⁵ G. Comandè, sub art. 15 (damage caused by the treatment), paragraph. 1 °, in C. M. Bianca-

case ambiguous. From the provisions of substantial dismissal of the claims for damages (*i.e.* not deriving from procedural questions), it is worth-noting that data subjects fail to obtain relief for the injury of their right to personal data, as in most cases the prejudice suffered is difficult to be proven, if it does not concern the right to privacy in the strict sense (*diritto alla riservatezza*)¹⁷.

5. Interaction between L.A. and B.A.: a functional approach to legal rules and models of protection of personal data alternative to consent.

With the conclusion of the experimental phase, a complete and in-depth analysis of all the data collected has been launched, but already from the intermediate analysis – as illustrated above – a number of elements emerges for proposing a hypothetical scenario where the processing of personal data does not depend – at least not always – on the consent of the physical person.

The investigation carried out up to now highlights the limits of the prior consent both because it is unconsciously made and because – even when it is consciously given – it does not prevent a harmful processing for the user. On the contrary, the provision of prior consent could have a distortive effect because it tends to conceal *ex post* remedies on the basis of the belief that the sole granting of consent eliminates *a priori* the possibility of injury.

In other words, the prior consent can generate in the user a non-univocal understanding and probably a false conviction.

In addition, the digital environment and the technological support used, that is, in a broad sense, the context of human-machine interaction necessary for carrying out certain activities¹⁸, should be considered for measuring the efficiency of the legal rules and for promoting regulations, at least in principle, adequate to the aforementioned context and functioning.

F. Busnelli (curr.), Protection of personal data – Commentary on d. lgs. June 30, 2003, n. 196 (“Privacy Code”), Padua, Cedam, p. 362 ss.

¹⁶ 106 results have been recorded since the entry into force of the d. lgs. 196/2003 [source DeJure database].

¹⁷ In this regard, Cass. civ., section III, 05.03.2016, n. 4443, in DeJure: “From the violation of the legislation on the processing of personal data does not automatically derive a compensable damage but must be given proof of the prejudice suffered to his own image”.

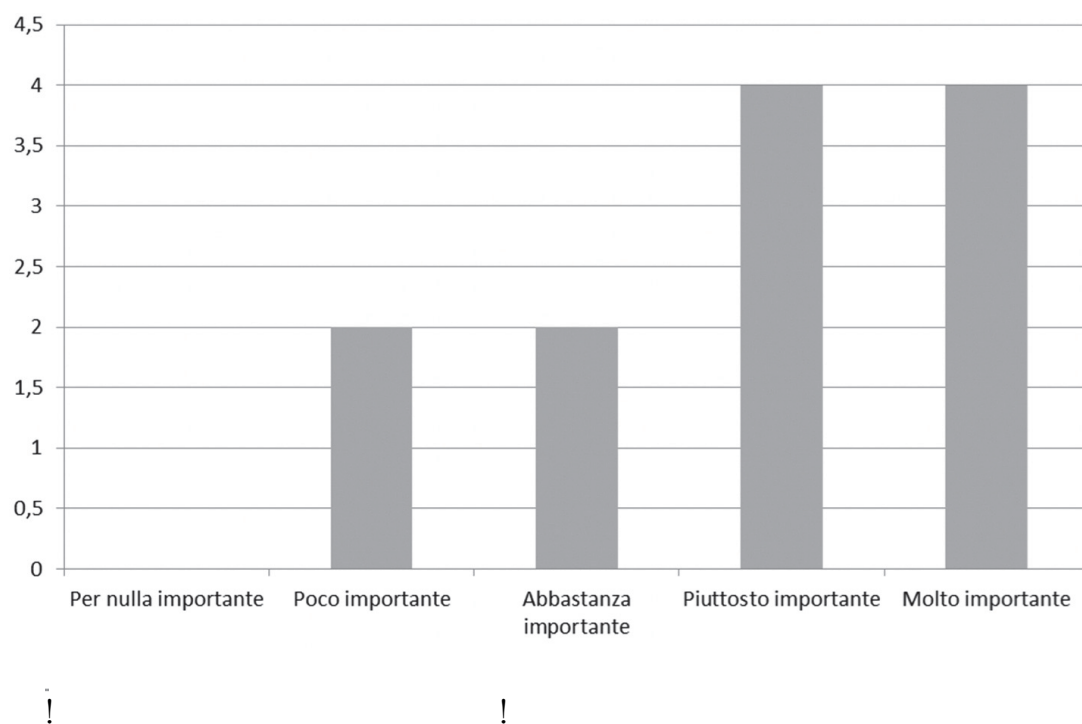
¹⁸ The processing of some personal data, in particular non-sensitive data, represents – almost always – a (pre) requirement for operation, in some cases for security purposes, of the device used. Think of the whole question of the c.d. telemetry whose radius of action inevitably affects that of the c.d. privacy, putting back into (apparent) discussions certainties achieved even and above all at the level of the latter’s regulation.

The experimentation conducted and the legal-behavioral analysis of the collected data highlight the inefficiency of an *ex ante* protection and lead to consider if an alternative model of regulation based on prohibition of data processing or special limitation on the processing of categories of data can be conceived, with the final aim of strengthening private remedies of compensation/restitution and deterrence to treatments harmful to the user, and more effectively protect the fundamental right to personal data.

RISPOSTA ALLA DOMANDA

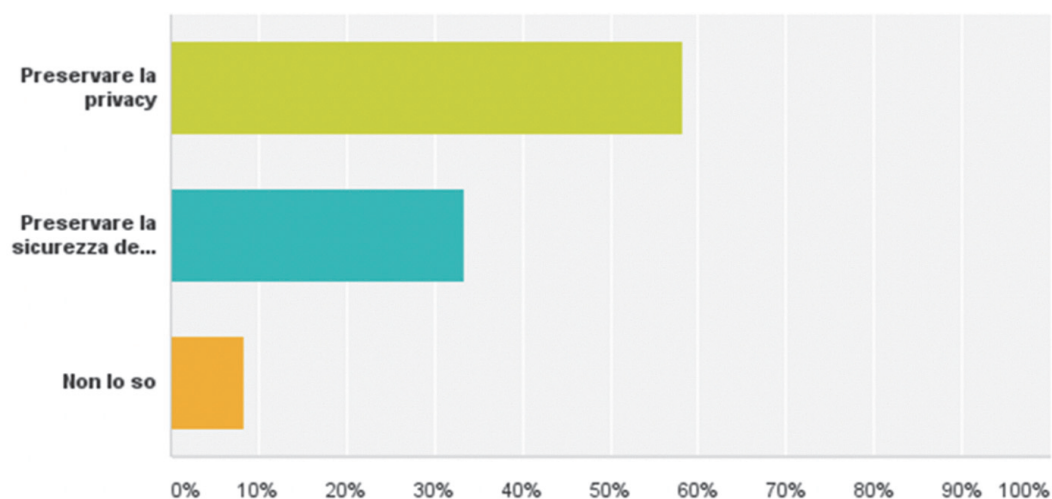
Quanto è importante per lei proteggere i suoi dati personali quando naviga in Internet?

Tavola 1. – Importanza di proteggere i propri dati



È più importante preservare la sicurezza del suo PC o preservare la privacy?

Tavola 2. – Importanza di preservare la sicurezza del suo PC e la privacy



Esecuzione del compito di installazione del sistema interattivo e gestione delle impostazioni veloci di privacy

Tavola 3. – Gestione delle impostazioni di privacy durante l'installazione

Partecipante	Tempo di esecuzione (min:sec)	Impostazioni veloci
1	00:09	Si
2	00:22	Si
3	01:30	No
4	00:04	Si
5	00:05	Si
6	00:30	No
7	00:20	Si
8	00:27	Si
9	00:22	Si
10	02:13	Si
11	00:03	Si
12	00:05	Si
Media	00:30	

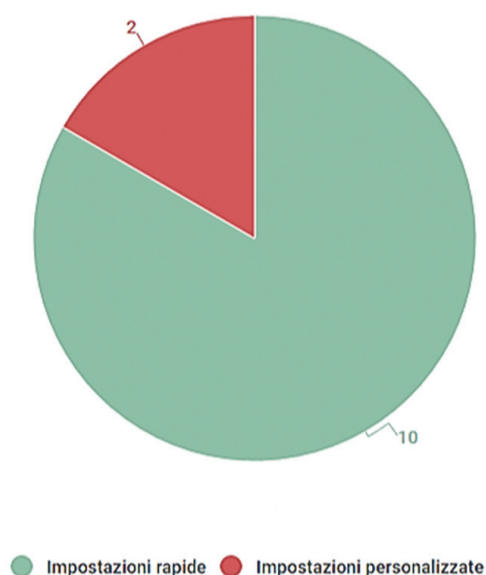


Tavola 4. – Gestione impostazioni di privacy

Partecipante	Modifica impostazioni di Privacy	Modifica impostazioni di Sicurezza	Rilegge informativa privacy
1	Si	No	No
2	Si	Si	Si
3	Si	Si	No
4	Si	No	Si
5	Si	Si	No
6	Si	No	No
7	Si	No	Si
8	Si	No	No
9	Si	No	No
10	Si	No	Si
11	Si	No	No
12	Si	No	Si