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How legal design can improve data protection communication and make privacy policy more attractive.

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Abstract

This article addresses the problem of communication of privacy policies, usually written by lawyers for lawyers using complex language and technical legal terms (so-called "legalese"). As such, data subjects barely read them or are not able to fully understand their meaning. In this scenario legal design may offer innovative solutions to draft and communicate more accessible and efficient privacy notices. In particular, legal design draws on the application of design mindsets and methodologies to the legal environment in order to make it more creative, communicative and user-centered.

Keywords: data protection; privacy notice; consent; transparency; GDPR; legal design.

Summary: Introduction. – 1. Legal design: an overview. – 2. The problem of clarity of law and the main communication challenges for data protection. – 3. Legal design applied to privacy policies. – Conclusions.

Introduction.

On 4th January 2021 WhatsApp, the world-leading instant messaging app, notified its users an update of its terms of service (T&Cs) in relation to its privacy policy. The new T&Cs were meant to take effect from 8th February 2021 with the alert that users could not have continued to use the service without accepting the new terms.[1]

A few days later, on 15th January, WhatsApp announced to postpone the application of the new T&Cs for European users until 15th May 2021. The decision followed the intervention of the Italian Data Protection Authority ("Garante per la protezione dei dati personali" or simply "Garante") that contested the lack of clarity and intelligibility of the new privacy policy as far as it did not allow users to understand what changes had been introduced and, therefore, to make fully informed and free choices about the use of personal data.[2] The Italian DPA raised the issue before the European Data Protection Board (EDPB) so that a uniform position could have been taken by EU DPAs. As a result, WhatsApp decided to postpone the application of the new terms in order to have time to review the Garante's announcement and clarify the policy updates.[3]

What is most surprising about the WhatsApp case is that the Italian DPA did not criticise the content of the new privacy policy but rather the lack of clarity in its communication and the confusion it had caused among EU users, especially in relation to the sharing of data with the parent company Facebook. In particular, users got worried that under the new terms WhatsApp could have weakened the encryption of chat messages and would have shared them with Facebook. In reality, under the new terms personal messages between users remain end-to-end encrypted by default (meaning that only recipients can read them) and WhatsApp is not able to access users' chats nor share them with Facebook. The only personal data that WhatsApp can share are users' account information like phone number, access logs, device identifiers, IP addresses, and other details about the device. Yet, such data have been shared with Facebook since 2016 and nothing has changed under the new T&Cs. The update has only affected optional business features (when customers message a business through WhatsApp their data may be stored on Facebook's servers

[1] See WhatsApp's new Privacy Policy at https://www.whatsapp.com/legal/updates/privacy-policy/?lang=en.
[2] https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9519943#english_version.
[3] See WhatsApp's declaration on the WhatsApp Blog at https://blog.whatsapp.com/giving-more-time-for-our-recent-update.

and used for advertising).[4] There has been, thus, a clear communication failure.

The question is why a leading company as WhatsApp with billions of users and enough economic resources did not take care of developing a good privacy policy (not only in terms of content but also) in terms of form and did not invest in an effective communication campaign to announce it.

The most likely explanation is that the majority of companies today are not really interested in providing users with clear and transparent information about the services they offer and the way they process personal data. Their main interest is to look like formally compliant with the legal requirements imposed by the applicable legislation. Unfortunately, even today, three years after the GDPR come into force in May 2018,[5] data protection requirements are still considered just as formalistic swallow obligations, as boxes to tick in the "to-do list" to disclose to data protection authorities in the event of an audit. It follows that legal document like privacy notices, although addressed to data subjects, are often written in a language full of jargon and complex sentences (so-called "legalese") not really meant to be understood by the layman. The consequence is that data subjects generally ignore them entirely and, thus, are completely unaware of what really their personal data is used for, by whom and in what way, with the consequence that they cannot exercise an effective control over their data nor take meaningful and free decisions about it.

To deal with this practice, not only in the field of data protection but in the legal environment in general, a new discipline known as legal design is gaining attention. The concept of legal design was born around 2013 when a joint venture between Stanford's School of Design (commonly known as the D.School[6]) and the Law School was founded by Margaret Hagan[7] under the name of Legal Design Lab.[8] However, it is especially over the last few years that this discipline has started growing and developing in Europe thanks in particular to the work of Helena Haapio[9] and Stefania Passera.[10] Indeed, only

[4] See WhatsApp's clarifications about the new Privacy Policy at https://faq.whatsapp.com/general/security-and-privacy/answering-your-questions-about-whatsapps-privacy-policy.

[5] The Regulation (EU) 2016/679 was adopted on 14 April 2016 and became enforceable in all EU Member States on 25 May 2018.

[6] See at https://dschool.stanford.edu/.

[7] Margaret Hagan is a lawyer and a designer based at Stanford University. She is the Director of the Legal Design Lab, hosted at Stanford Law School's Center on the Legal Profession, and a lecturer at the Stanford D. School. Her work focuses on applying design to law in order to create more accessible and engaging legal services, and it is based on experimentation and a human-centered approach. See https://www.margarethagan.com/ .

[8] The Legal Design Lab is an interdisciplinary team based at Stanford Law School and D. School with the aim to build a new generation of legal products and services. It is based on human-centered design and empirical research to reimagine how the legal system could work. For more details see https://law.stanford.edu/organizations/pages/legal-design-lab/.

[9] Helena Haapio is a lawyer, contract innovator, and a pioneer of the proactive approach based in Helsinki. In her work she helps clients to use contracts and the law proactively to achieve better business results, balance risk with reward, and prevent problems. Her current multi-disciplinary research focuses on ways to transform contracts from legal instruments to valuable business tools. For more information see http://www.lexpert.com/our_team/more-about-helena_haapio/. Among her works see H Haapio, 'Next Generation Contracts: A Paradigm Shift' (2013) Doctoral dissertation, Lexpert Ltd.

[10] Stefania Passera is a designer, consultant, and researcher based in Espoo, Finland. She is specialized in contract design, simplification, and legal design, helping private and public organizations make their contracts, T&Cs, contract guides, policies, etc. user-friendly, visual, clear, and effective. She is also the creator of Legal Design Jams, the first workshop format aimed at innovating legal documents and prototyping hands-on. For more information see https://stefaniapassera.com/about/.

recently companies have begun to understand how important it is being clear and transparent with users in order to establish with them a relationship based on trust rather than on tricks.

As it will be explained more in-depth in the following sections, legal design can be generally defined as an interdisciplinary field of research and practice that tries to apply design-based methods, skills, and attitudes to the legal system in order to enhance legal communication and solve legal issues.[11] To that end several methods have been developed meant to pinpoint the main challenges of an area of law (e.g. data protection) and identify the best solutions to solve them.

In the present paper I will analyse the application of legal design to the field of data protection, in particular in relation to drafting and communicating privacy policies. The goal is to evaluate whether this approach may be effective in this area of practice and, if so, to what extent and how it can help legal practitioners to make privacy-related documents easily understandable and enjoyable to data subjects.

The paper is structured as follows. Section 1 will introduce the concept of legal design with a brief reference to its origin, its methodologies and the phases of the design process. Section 2 will then examine the state of the art in the process of designing and communicating privacy notices in order to identify the main problems currently existing in this field. In particular, the difficulties that data subjects usually face when approaching a privacy notice will be analysed to assess how they impact on the relationship between data controllers and users/data subjects and on the company reputation. Section 3 will dive into the application of legal design to the field of data protection and different tools will be examined that could help making privacy notices more attractive and understandable to data subjects and, thus, solve the problems posed by the traditional use of "legalese". Finally, the conclusions will suggest a reflection on the role of legal design in the development of more transparent privacy notices and its future in the field of data protection.

1. Legal design: an overview.

Legal design is a discipline that combines law, technology, and design to create user-friendly legal documents and, more in general, make the legal system closer and more accessible to people. The origin of legal design cannot be fixed on an exact date since broad discussions about applying some skills and methodologies of design to the field of law date back to the first decade of the new millennium.[12]

The concept of legal design draws on design thinking, a methodology to solve problems in a creative and human-centric way.[13] However, it was in the academic environment that these ideas were developed and brought forward.

[11] A Perry-Kessaris, 'Legal Design for Practice, Activism, Policy and Research' (2019) 46(2) Journal of Law and Society, 185-210.
[12] See, for instance, RL Martin, *Design of Business: Why Design Thinking is the Next Competitive Advantage* (Harvard Business Review Press, 2009); T Brown, *Change by Design: How Design Thinking Transforms Organizations and Inspires* (Harper Collins, 2009).
[13] On the history of design thinking see https://designthinking.ideo.com/history.

In particular, the first milestone is 2013, when Margaret Hagan founded at Stanford Law School and D. School the Legal Design Lab. Later on, the movement grew in Europe as well, in particular in Finland thanks to Helena Haapio, pioneer of proactive law,[14] and Stefania Passera, information designer expert in contract visualisation. Hagan, Haapio and Passera, together with other legal designers, created the Legal Design Alliance (LeDA), [15] an interdisciplinary network of academics and practitioners from both law and design that published on its website a manifesto of legal design.

Margaret Hagan in her e-book *Law by Design* defines legal design as "the application of human-centered design to the world of law, to make legal systems and services more human-centered, usable, and satisfying". [16] This definition makes it clear that the core of legal design is human-centeredness, meaning that any legal products should be designed and developed from a user perspective, i.e. thinking on what could be more engaging and accessible to the intended user. [17] Additional features of legal design, as outlined in the manifesto drafted by the LeDA, are proactivity and prevention, given that its purpose is driving desirable outcomes and preventing problems rather than dealing with the consequences of failure and trying to resolve conflicts already arisen.[18]

To achieve this result, the legal system should be rethought with an approach open to innovation and creativity and willing to collaborate with experts from different areas, in particular designers. In other words, designerly ways should be deployed to address lawyerly concerns [19] and lawyers themselves should develop creativity and communication skills. The starting point should be no longer what a legal document shall include to comply with the law, but rather how it can be organised and displayed in such a way to be understandable and usable by its recipients.[20]

Legal design may be referred to any area of law like legal research, access to justice and governmental policy.[21] However, so far it has been mostly deployed for legal documents like contracts, terms of service and privacy policies that, being addressed to common citizens (i.e. non-lawyers) pose major problems in terms of visualisation and communication.

In her book Hagan identifies three goals of legal design: (i) Helping the lay person and the legal professional; (ii) Creating a better front-end to the legal system and a better back-end; and (iii) Working for incremental short-term

[14] Proactive law is a legal approach that focuses on achieving positive goals and outcomes: it tries to prevent problems and disputes from arising rather than to resolve conflicts afterwards. To that end it stresses the importance of the needs and relationships of all those who use the law, not only legal experts but also laypeople.
[15] See Legal Design Alliance website, at <https://www.legaldesignalliance.org>.
[16] M Hagan, *Law by Design* (2017) at https://lawbydesign.co/.
[17] https://medium.com/astec/legal-design-and-the-challenges-of-innovation-in-law-cb9608132940.
[18] R Ducato *et al.*, 'Legal Design Manifesto' v1, available at https://docs.google.com/document/d/1FOLI4jHy6-rpEop9aOeY7BFZFPq_rRL8vzCB92s1a6c/edit?usp=sharing.
[19] A Perry-Kessaris, 'Legal Design for Practice, Activism, Policy and Research' (n 10).
[20] D Sless, 'Designing Documents for People to Use' (2018) 4(2) The Journal of Design, Economics, and Innovation, 125-142.
[21] For instance, for legal design in legislative drafting see L Aulino, 'Legal Design and Artificial Intelligence in support of legislative drafting during crisis' (2020) EJPLT.

improvements and breakthrough long-term change.[22]

As mentioned before, legal design relies on design thinking, a process that uses design to solve problems (of any kind, not just legal) from a human-centric perspective. As such, legal design is based on designerly mindsets and methodologies, with the consequence that lawyers have to set aside the traditional legal approach (quite conservative and focused on the essence of the rules more than on the accessibility to the intended recipients) and embrace a designer's mindset. This does not mean that lawyers need to become designers themselves, but they should combine skills, knowledge, and attitudes that are both designerly and lawyerly. In particular, lawyers should learn from designers the importance of communication and experimentation as means to pinpoint the issues faced by users, identify their expectations and find solutions to meet them.

Legal design has borrowed from design thinking not only its mindset, but its methodology as well, thus paying particular attention on exploration and experimentation.[23] Although several methodologies exist and different sets of methodologies may be combined in different ways, it is possible to define the basic flow of the legal design process[24] and the following stages can be identified.[25]

- Stage 1: Discovery and Understanding. This phase is meant to understand the main challenges of the area of interest, namely the major problems that users usually face when dealing with a certain task (e.g. reading the terms and conditions of a service, or a privacy notice). The most effective way to achieve this aim is getting in contact with the parties involved in order to understand their perspective through interviews, observations, data gathering, and exploratory workshops.
- Stage 2: Synthesize. After all the information has been gathered, the second step requires to select only the most relevant ones in order to identify only the main challenges upon which the rest of the design process will be focused (indeed, too broad topics cannot be effectively dealt with). To that end, it is necessary to limit the target users and prioritise the issues that have been raised.
- Stage 3: Brainstorm and Build. The third stage is generative and constructive since it aims at coming up with new ideas and prototyping them out. In this stage brainstorming and creativity are crucial: all the members of the team have to start thinking together about possible solutions to the challenges previously identified. Brainstorming should be

[22] M Hagan, *Law by Design* (n 38).

[23] Different methodologies exist in the field of design thinking, yet they are mostly based on common elements. For example, the Design Council has identified four phases of the design process: Discover, Define, Develop, and Deliver. On the other hand, the D. School at Stanford offers a hexagon-based vision of design thinking composed of five phases: Empathize, Define, Ideate, Prototype, Test (see D. School, 'A Virtual Crash Course in Design Thinking', at https://dschool.stanford.edu/resources-collections/a-virtual-crash-course-in-design-thinking).

[24] The stages as described in this section have been identified and developed by M Hagan, *Law by Design* (n 38).

[25] A more detailed description of the process can be found in T Brown, *Design Thinking* (Harvard Business Review, 2008); L Kimbell and J Julier, *The Social Design Methods Menu* (Fieldstudio, 2012), 1–56; L Carlgren *et al.*, 'Framing Design Thinking: The Concept in Idea and Enactment' (2016) 25(1) Creativity and Innovation Management», vol. 25, 38–57.

based not only on the invention of something completely new, but also on the research and analysis of existing patterns, models, and templates that may become remarkable sources of inspiration. Once enough ideas have been put forward, the team has to choose the one(s) to pursue.[26] Only the ideas that have been chosen will be prototyped. Prototypes are tested for usability, experience, and feasibility and through continuous testing and brainstorming they are gradually improved to get closer to the solution of the challenges concerned.

- Stage 4: Test, Iterate and Scale. In this stage the ideas that have been selected and prototyped must be tested to refine them and get closer to the final version. Testing means implementing the ideas into the real word towards the targeted users and analyse how they react and welcome them. The users' feedback becomes essential to understand whether the intended recipients will approve the prototyped idea, will be willing to use it and will find it useful and in accordance with their needs. This is the only way to know whether the ideas that have been brainstormed are promising and able to solve the identified problems and, thus, avoid wasting time and resources on unsuccessful paths.
- Stage 5: Scaling, Evolving and Implementing. If the feedback has been positive, it is possible to start thinking on how to turn the prototype into a real thing. To that end it is important to develop a plan of implementation that defines the main features that the final outcome should have and the timing to implement them. Such a plan would require the engagement of all the team members but also of external partners.

As seen, the core of the design process described above is experimentation. Designers cannot think to come up with the final version in the first stage of the process but, on the contrary, the starting point is a brainstorming where multiple and different ideas are proposed. Only a few of them will be considered good enough to meet the users' expectation and, thus, will be further developed and prototyped. Even less will be actually put in practice and tested and, anyway, they will be continuously refined and improved, also on the basis of users' feedback, to reach the final and definite version. Only this process of continuous testing and modifying can lead, in the end, to build the optimum solution. On the contrary, lawyers tend to put great effort in the first phase to find immediately the best solution and then implement it without prototyping and testing it. On this regard, Hagan observes that if lawyers <<think of everything [they] do as a prototype rather than as something that must be perfect, [they] can act more creatively and tap into others' creativity and expertise … It will also save [them] from falling too in love with ideas before they have figured out if they're workable>>.[27]

Some criticisms have been moved to legal design based on the fact that law is traditionally a verbal language, meaning that it expresses concepts by means of words. As a consequence, some scholars argue that the use of visual elements (e.g. icons, images, graphics) would enhance rather than reduce the

[26] Different strategies can be used to make this choice. For example, Margaret Hagan proposes the difficulty/importance matrix as a tool to evaluate which ideas are the best ones to pursue according to their feasibility, priority, and viability.
[27] M Hagan, *Law by Design* (n 38).

risk of misinterpretation and misunderstanding of legal documents given that they are not as precise as words to express legal concepts.[28] In addition, visual elements do not have a unique and certain meaning and different interpretations could arise depending on the context and the background of the recipients (e.g. geographical area, cultural background).[29] On the other hand, the supporters of legal design clarify that while in some cases visual elements may be even more precise and immediate than writing (e.g. traffic signs), in other cases they are not meant to replace words but rather to accompany them in order to clarify their meaning and help navigate the text.[30] As for the problem of interpretation, the same applies to legal words whose interpretation is not certain, on the contrary it is often disputed. In any case, it is not excluded that a common interpretation of visual elements can be developed and learnt over time.

Another criticisms to legal design is the risk of differentiation and potential discrimination between the recipients who read the written document – and understand technical legal terms – and those who rely on the visual elements. The latter could be penalised because the information delivered through visual design is more synthetic than the concepts expressed with words. Even this argument seems flawed firstly because visual elements may help lay people to better understand the meaning of legal words – thus becoming a support to the text – and secondly because people who do not have the expertise to understand legal writing – and, as such, would have no information at all – may at least rely on visual elements to grasp the meaning of the text.

2. The problem of clarity of law and the main communication challenges for data protection.

Legal design as described in the previous section may represent a paramount instrument to re-think the role and the function of privacy notice not only in relation to the structure and content of the document, but also its visualisation and presentation in order to provide data subjects with clear information and allow them to maintain effective control over their personal data. More in general legal design may help legal practitioners to face the issues of clarity and understandability of the law. This theme has old roots and has long been discussed among legal and linguistic scholars, especially in the United States.

The first modern massive study on the failure of law language was carried out by David Mellinkof, lawyer and professor of law at UCLA School of Law who wrote several books and articles attacking the excessive verbosity and impenetrability of legal writing. His first and most famous work is the 1963

[28] See for example S Esayas et al., *Is a Picture Worth a Thousand Terms? Visualising Contract Terms and Data Protection Requirements for Cloud Computing Users* in International Conference on Web Engineering (Cham, Switzerland, Springer, 2016) and JA Mitchell, 'Whiteboard and Black-Letter: Visual Communication in Commercial Contracts' (2018) 20 University of Pennsylvania Journal of Business Law, 837–43.

[29] See for instance S Isherwood et al., "Icon Identification in Context: The Changing Role of Icon Characteristics with User Experience," Human Factors 49, no. 3 (2007): 465 and R Dewar, "Design and Evaluation of Public Information Symbols," in Visual Information for Everyday Use: Design and Research Perspectives, ed. Harms Zwaga et al. (London: Taylor & Francis, 1999), 285–303.

[30] H Haapio and S Passera, *Contracts as Interfaces: Exploring Visual Representation Patterns in Contract Design*, in Legal Informatics, ed. Daniel Katz et al. (Cambridge: Cambridge University Press, 2016).

book "*The Language of the Law*" that analyses the history of English legal words and the evolution of a language that is technical, formalistic and obscure to lay people and lawyers themselves, thus causing misunderstandings and disputes.[31] On the same note is "*Plain English for Lawyers*" by Richard C. Wydick, an article published in 1978 that critics the incapacity of lawyers to write in plain English and the use of arcane and redundant phrases to express common concepts thus making the legal writing style "(1) wordy, (2) unclear, (3) pompous, and (4) dull".[32] These themes were further developed in the next years by the so-called "plain English movement" born in 1975 in the United States with the aim to make legal documents understandable by consumers who sign them.[33] Within this movement the concept of "information overload" was firstly elaborated referring to the accumulation of disclosed information that make it less available to consumers and thus useless.[34] According to the movement providing consumers with information is not sufficient: such information should also be understood by its intended recipients to be effective. The emphasis, thus, is shifted from information to communication.[35]

Since the abovementioned studies the issue of understandability of law and clarity of information has recurred in legal debates both in the Unites States and in Europe widening from contracts to any other area of law, including data protection. This explains the central role that the principle of transparency and the information duties play within the EU data protection legislation.

Indeed, the EU General Data Protection Regulation (GDPR)[36] adopted in 2016 and applicable in all the EU Member States since 25th May 2018 has introduced, among other things, a series of fundamental principles that any processing of personal data should be based on. One of those is the principle of transparency set forth by Art. 5 (1)(a)[37] that imposes on the data controller an obligation to keep data subjects informed about how their data is being used. The principle is further clarified in Recital 39 according to which transparency implies that data subjects are made aware that personal data concerning them are collected, used, consulted or otherwise processed, and such information should be easily accessible, easy to understand, and provided in a clear and plain language.[38] In addition, natural persons should be informed of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing.[39]

The principle of transparency is further elaborated in several other provisions of the Regulation. First of all, Art. 12 states that any information and

[31] D Mellinkoff, *The Language of the Law* (Little, Brown and Co. 1963).
[32] RC Wydick, 'Plain English for lawyers' (1978) 66(4) California Law Review, 727-766.
[33] The beginning of the plain English movement dates to January 1, 1975, when the Citibank of New York introduced a plain English consumer promissory note leading New York to became in 1977 the first US state to pass legislation requiring plain English in consumer contracts and leases. See C Felsenfeld, 'The Plain English Movement in the United States' (1981-1982) 6 Can. Bus. L.J. 408.
[34] C Felsenfeld and AM Siegel, *Writing Contracts in Plain English* (St. Paul, West Publishing Co. 1981).
[35] *Ibid.*
[36] 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) [2016] OJ L119/1.
[37] Art. 5 (1)(a) GDPR states that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
[38] Recital 39 GDPR.
[39] *Ibid.*

any communication that the controller shall refer to the data subjects under the Regulation must be provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for information addressed specifically to children. The provision adds that the information may be provided in writing or in any other means, including, where appropriate, by electronic means and, when requested by the data subject, may be provided orally, provided that the identity of the data subject is proven by other means.[40]

Secondly, Arts. 13 and 14 GDPR list the information that data controllers and processors should provide data subjects with when personal data is collected, respectively, directly from the data subject (Art. 13) or from third parties (art. 14) in order to inform them about the processing. The required information includes, in particular, the identity of the data controller, the kind of data processed, the purposes of processing, the legal basis to process data, the period of storage of data, the existence of automated decision-making, including profiling.[41]

Furthermore, the principle of transparency applies in relation to consent, when it is used as the legal basis for processing. Indeed, a valid consent must be informed, meaning that the data subject must receive all the information about the processing to meaningfully decide whether or not to give his/her consent.[42] Transparency also concerns the way in which consent is required: when consent is given in the context of a written declaration that also concerns other matters, the request for consent should be clearly distinguishable and presented in an intelligible and easily accessible form, using clear and plain language.[43]

The principle of transparency has also been analysed by the Art. 29 Working Party (WP29) in its "Guidelines on transparency under Regulation 2016/679" adopted on 29 November 2017.[44] The WP29 explains that the concept of transparency under the GDPR is strictly linked to the principles of fairness and accountability – both set forth by Art. 5(1)(a) as well – and may refer to three central areas: (i) the provision of information to data subjects related to fair processing; (ii) how data controllers communicate with data subjects in relation to their rights under the GDPR; and (iii) how data controllers facilitate the exercise by data subjects of their rights.

The rationale behind the principle of transparency, as confirmed by the WP29 itself, is to reduce the information asymmetry naturally existing between data controllers and data subjects when personal data is processed.[45] To that end data subjects should be made fully aware of the processing of personal data related to them and, thus, be empowered to exercise control over their data and exercise the rights granted to them by the GDPR.[46]

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[40] Art. 12 (1) GDPR.
[41] Arts. 13 and 14 GDPR.
[42] Recital 32 GDPR.
[43] Art. 7 (2) GDPR.
[44] WP29, "Guidelines on Transparency under Regulation 2016/679", 11 April 2018, WP260 rev.01.
[45] A Rossi, R Ducato, H Haapio, S Passera, 'When Design Met Law: Design Patterns for Information Transparency' (2019) 1 Droit de la consommation – Consumentenrecht (DCCR), 79–122.
[46] The same technique is used in the field of consumer protection law. See, for instance, GK Hadfield, R Howse, MJ Trebilcock, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998)

However, in spite of the EU legislator's attempt to regulate the matter, this goal has been poorly achieved causing what has been considered a regulatory failure.[47] Indeed, although almost all data controllers have drafted or updated their privacy notice in accordance with the Regulation requirements and they usually provide data subjects with it, it could be hardly said that data subjects are actually aware of the processing of personal data related to them. The reason is that they usually do not read privacy notices but simply skip them, give their consent whenever it is required (even when it would not be necessary) and accept any terms of service. As such, it is not surprising that the sentence "I agree to these terms and conditions" has been called the "biggest lie on the internet".[48] The reason is twofold.

On the one hand, users are overwhelmed by T&Cs and privacy notices since anytime they access a website or ask for a service receive a notice explaining the terms of the service, the privacy policy and, for websites, the cookie policy. The result is that there are so many notices that it would be incredibly time-consuming reading all of them and no one has the time nor the willingness to do it.[49] On the other hand, privacy notices, just as any legal documents, are traditionally written in a language though by lawyers for lawyers and extremely difficult to understand for laymen, the so-called "legalese" which uses jargons, uncommon words, technical terms and long sentences. It follows that reading a privacy policy requires a lot of time, strong attention, and technical knowledge, with the result that users are discouraged from reading it and, even when decide to do it, do not really understand the meaning of what they read.

This practice is likely based both on the traditional idea that lawyers shall use their own language not accessible to non-lawyers as a symbol of their professional role, and on the traditional view that legal documents must be accurate, precise, and specific and only legal terms can effectively reach such a result, having an exact meaning that can describe a given concept without requiring other words. In this perspective, lawyers spend much time and effort to write long and comprehensive privacy policies in order to accurately describe the data processing and all the existing rights and obligations as required by the GDPR. However, in such a way the pursued aim may only be achieved when the documents are addressed to expert recipients who understand the legal terms and know how to interpret them (actually, even in this case, problems of interpretation can arise). On the contrary, this approach becomes completely flawed when the document is addressed to people who are mostly not lawyers and, as such, cannot understand the terms and the jargon used in the text.

This approach fails because it only focuses on the black letter of the law while does not take into account the needs and abilities of the individuals who the law aims to protect. In other words, this approach pays more attention to

21(2) Journal of Consumer Policy», 131-169. See also A Oehler, S Wendt, 'Good Consumer Information: The Information Paradigm at Its (Dead) End?' (2017) 40(2) Journal of Consumer Policy», 179-191.

[47] On the same topic, although in a different context, see O Ben-Shahar, CE Schneider, 'The failure of mandated disclosure' (2011) 159(3) University of Pennsylvania Law Review, 647-749.

[48] JA Obar, A Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (2016) TPRC 44: The 44th Research Conference on Communication, Information and Internet Policy», 1-37.

[49] In 2008 two researchers published a paper suggesting that reading all of the privacy policies an average Internet user encounters in a year would take 76 workdays. For more details, see AM Mcdonald, LF Cranor, 'The Cost of Reading Privacy Policies' (2008) Journal of Law and Policy for the Information Society.

formalistic requirements than to the substance of the rules, with the consequence, in fact, to water down the rules themselves.[50] Indeed, rules are meaningful as long as they are instrumental in achieving their goals and, in the field of data protection, the goal is to protect data subjects and allow them to exercise full control over their personal data. Therefore, it is crucial that privacy notices are clear and easily accessible: they may be regarded as instructions meant to explain data subjects how their personal data is going to be processed, what rights they can exercise in relation to the processing and how they can exercise them.

In this perspective the WP29 outlined in its Guidelines that the principle of transparency and the information duties in the GDPR are "*user-centric rather than legalistic*" meaning that "*the quality, accessibility and comprehensibility of the information is as important as the actual content of the transparency information, which must be provided to data subjects*".[51] To that end the Regulation includes specific and practical information requirements imposed on data controllers and processors. For instance, Art. 12 requires using a concise, transparent, intelligible and easily accessible form as well as clear and plain language and gives directives on the means to provide the information. In addition, it acknowledges the importance of visualisation and promotes the use of icons to enhance transparency.[52]

Such practical requirements are a way to guide data controllers and processors in providing data subjects with all the relevant information about the processing and ensure that such information is delivered in an efficient and effective way, so that the rationale behind the information duties (i.e., empowering data subjects to exercise control over their personal data) may be achieved.

Unfortunately, most data controllers and processors still consider these practical information requirements as formalistic obligations that they must strictly apply to be compliant with the law. The consequence, as seen in the WhatsApp case, is that controllers make a great effort to design complete and comprehensive privacy notices that include all the information listed in Arts. 13 and 14 GDPR and are formally and juridically correct. Yet, they do not consider at all the visualisation of the privacy policy, namely its structure, the way it is presented to data subjects and whether it is enough clear and accessible to them.

The result is a substantial violation of the GDPR provisions. Indeed, the human-centric perspective adopted by the EU legislator and outlined by the WP29 shifts the attention from legal compliance (i.e., an external application of the rules) to individuals' protection and, from this point of view, the information duties imposed by the GDPR are really complied only when the required information reaches the intended recipients. This means that if the privacy notice includes all the elements prescribed by Arts. 13 and 14 GDPR but

[50] S Passera, 'Beyond the wall of text: How information design can make contracts user-friendly', in A Marcus (ed.), *Design, User Experience, and Usability: Users and Interactions*, (Lecture Notes in Computer Science, Cham, Springer, 2015), 341-52.
[51] WP29, "Guidelines on Transparency under Regulation 2016/679", 11 April 2018, WP260 rev.01.
[52] Art. 12(7) GDPR states that "The information to be provided to data subjects pursuant to Articles 13 and 14 may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing". See also Recital 60.

does not catch data subjects' attention so that they don't read it or, even after reading, they cannot understand the meaning of the text, then the data controller should be considered substantially breaching the information obligation imposed by Art. 12 GDPR. Shouldn't that be the case, the principle of transparency would become a void concept in contrast with the principle of accountability that holds data controllers accountable for the measures adopted to ensure an adequate level of protection of personal data.

This is what happened to WhatsApp that, despite developing a correct privacy notice, has not been able to clearly communicate the update to its users who have thus misinterpreted the new terms and have got worried for a processing that, in reality, does not concern their personal messages, but only optional business features. There is no doubt that in this case the aim of the information duties has not been achieved due to a communication failure.

Communication failures in the field of data protection are, unfortunately, quite common and may be related to several issues. Haapio et el. have identified the most recurring hurdles to effective legal communication.[53] I will list below some of the most relevant hurdles classified according to their relation to (i) language, (ii) structure and visualisation, and (iii) presentation and communication of the privacy notice.

(i) When language is concerned, the main mistake commonly made by data controllers is the use of a highly technical and complex language difficult to understand without legal advice,[54] and the use of vague terms open to multiple interpretation (e.g. «might», «may», «reasonable effort»).[55]

(ii) As for the visualisation of privacy notices, the main problem is the well-known "wall of text",[56] a practice whereby the notice is structured as a column of words written with small font size without any spaces between the lines, any (or minimal) paragraphs and headlines, any images representing and exemplifying the meaning of the text. In addition, the text is often small-printed and excessively long, causing an information overload. The consequence is that data subjects are discouraged from reading it – since the text is perceived as impenetrable[57] – or, if reading, cannot keep the attention on the whole text because are not guided in the navigation and, as such, are not able to find the most important information in the text.

(iii) When it comes to the presentation and communication of the privacy notice, the main issue is the widespread use of standard (sometimes

[53] H Haapio *et al.*, 'Legal Design Patterns for Privacy' in E Schweighofer, F Kummer, W Hotzendorfer and G Borges (eds.), *Data Protection/LegalTech. Proceedings of the 21st International Legal Informatics Symposium IRIS 2018* (Editions Weblaw, 2018), 445–450.

[54] B Fabian, T Ermakova, T Lentz, 'Large-scale readability analysis of privacy policies', (2017) Proceedings of the International Conference on Web Intelligence (WI '17). Association for Computing Machinery, 18–25. See also C Jensen, C Potts, 'Privacy policies as decision-making tools: an evaluation of online privacy notices' (2004) Proceedings of the SIGCHI conference on Human Factors in Computing Systems, 471-8; JA Obar, A Oeldorf-Hirsch, 'The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services' (n 23); N Robinson *et al.*, 'Review of the European Data Protection Directive' (sponsored by the ICO) (2009) RAND Europe.

[55] I Polloch, 'A typology of communicative strategies in online privacy policies: Ethics, power and informed consent', (2005) 62(3) Journal of Business Ethics, 221-235. See also JR Reidenberg *et al.*, 'Ambiguity in privacy policies and the impact of regulation' (2016) 45(2) The Journal of Legal Studies, 163-90.

[56] S Passera, 'Beyond the wall of text: How information design can make contracts user-friendly' (n 25).

[57] European Data Protection Supervisor, Opinion 4/2015 Towards a New Digital Ethics, 2015.

even pre-filled) documents that do not differentiate the targets and, as such, do not take into account the specific information needs and cognitive capabilities of the notice's addressees. Indeed, especially when a service is offered to different categories of users (e.g. children, elderly people, people with different socio-economic status and educational background), as it is the case, for instance, with social networks, the same language – in particular when it is complex and technical as seen in the previous point (i) – may not be adequate to all of them since they have different approaches towards the notice and different exigencies that cannot be ignored.[58] A further problem is the wrong timing of presentation of the privacy notices, given that they are usually presented when users are accessing to the service (e.g. they are entering on the website or concluding the purchasing process). In such a way the privacy notice is perceived by users as an obstacle that stands between them and the achievement of their purpose. Therefore, it is quite obvious that data subjects will ignore the notice and accept anything as long as they can quickly carry out their task and avoid any further disturbances.[59]

3. Legal design applied to privacy policies.

In accordance with the methodologies presented in Section 1, over the years legal designers have developed different solutions that can help solving the most recurring problems that people face when dealing with legal documents. Such solutions can be customised and re-used in different areas of interest according to the given problems. For this reason, they are known as "design patterns", a sort of best practices and standards shared among practitioners to provide the best solution to a recurring problem.[60] Their function is helping practitioners to make the legal document efficient and user-centered and, in such a way, to build general legal principles and create a common and unitarian legal practice. Over the last few years, several legal design patterns have emerged and many of them have been collected in open pattern libraries (freely accessible to anyone).[61]

In particular, several legal design patterns have been developed in the field of data protection or, even though developed in other fields, may be applied to it, especially to privacy notices, in order to solve the most recurring problems as listed in Section 2. The aim is to make the notice more user-friendly, namely

[58] H Haapio *et al.*, 'Legal Design Patterns for Privacy' (n 28).
[59] B Friedman, P Lin, JK Miller, 'Informed consent by design' (2001) Security and Usability, 503-530.
[60] The idea of patterns has originally been conceived in architecture by Christopher Alexander et al. (C Alexander *et al.*, *A Pattern Language – Towns, Buildings, Construction* (Oxford University Press, 1977). Then, design patterns have extended to many other fields, such as computer science, interface design, information systems, and biology.
[61] For an overview of legal design patterns, see for example H Haapio *et al.*, 'Legal Design Patterns for Privacy' (n 28); A Rossi *et al.*, 'Legal Design Patterns: Towards A New Language for Legal Information Design', in E Schweighofer, F Kummer and A Saarenpää (eds.), *Internet of Things. Proceedings of the 22nd International Legal Informatics Symposium IRIS 2019* (Editions Weblaw, 2019), 517-26; H Haapio, S Passera, 'Contracts as Interfaces: Exploring Visual Representation Patterns in Contract Design, in DM Katz, M Bommarito and R Dolin (eds.), *Legal Informatics* (Cambridge University Press, in press), 213-238.

easier for data subjects to understand. As a result, data subjects would be more willing to read the information and take meaningful decisions about data processing rather than just skip it and unconsciously provide (or refuse) any consents.

Design patterns as well may be classified depending on whether they relate to (a) the language used in the privacy notice, (b) the structure of the document, (c) the way the notice is presented and communicated to data subjects and, more generally, the user experience. I will analyse below some of the most interesting design patterns for each category.

a) The first element to consider is the language. Given that the notice is addressed to data subjects and is meant to explain them under which terms their personal data is going to be processed, the language should be tailored on the knowledge and the cognitive capacities of the intended recipients. Therefore, given that data subjects are (in most cases) common people (i.e. non-lawyers) and don't know legal technical terms (i.e. "legalese"), the language should be plain and intelligible, with short sentences and commonly used words. Special attention should be paid when the notice is addressed also or only to young people and/or children. In that case the language should be used accordingly, with children-friendly words and grammatical structures.
b) Structure as well has a huge impact on the comprehension of the notice. In order to avoid the wall of text seen in Section 2, the document has to be organised in a handful and intuitive manner, in such a way that data subjects can easily navigate the text and find the topics they are looking for. In particular, the sections (e.g. data controller's details, categories of data, purposes of the processing) should be clearly identified with meaningful headlines and spaces between the paragraphs. In addition, at the beginning of the document (or on one side) it may be helpful to include a table of contents with hyperlinks to the paragraphs that allow the readers to have an overview of the notice and go directly to the paragraph of interest. Another remarkable way to make the privacy notice more effective in terms of structure is building a layered notice.[62] This means that the relevant information is not provided at once, but it is layered based on the data subjects' cognitive capabilities, available time and willingness to read it and further information is displayed at users' request (for example, by pressing the button "Read more"). At first only the most important information is provided (e.g. the purposes of processing, the identity of the controller, the description of data subjects' rights), in a very synthetic and easily understandable form, in such a way that data subjects can rapidly grab the main points and have an overview of the data processing. Then, if they are interested in knowing the processing more in-depth, additional information will be provided (even using more technical terms addressed to expert readers like lawyers and supervisory authorities).[63]

[62] The importance of layered notices has also been outlined by the WP29 in its guidelines on transparency. See WP29, 'Guidelines on Transparency under Regulation 2016/679', 11 April 2018, WP260 rev.01.
[63] A good example in the European panorama is offered by the UK startup Juro that developed its privacy policy based on a layered approach. When opening Juro's website, the short version of the privacy policy (called "Your privacy at a glance") pops up as a modal window displayed on just one screen of a typical

In any case the first layer, although more accessible and synthetic, needs to include all the information necessary to make data subjects understand the data processing in its entirety, including its risks. Thus, it cannot include only fair terms, whereas unfair or risky practices are hidden in the other layers.[64]

c) When drafting a privacy notice, the way it is presented and communicated to the intended recipients cannot be overlooked. Assuming that the information is written in plain language and the text is coherently structured, if its presentation is not enough "catchy" data subjects will hardly read it. As explained by the cognitive load theory,[65] when reading a text the human brain tends to avoid an information overload and, to that end, tries to find strategies that minimise the information process and make the text comprehension easier, for example by associating new information to pre-existing models, or by skimming the text to find just the information needed. Good designers are able to structure the document in such a way to reduce the brain workload and eventually make it less stressful and exhausting to read the text. For this reason it is important to include visual elements that may immediately catch the reader's attention and that the brain can easily associate to broader concepts.

Several design patterns exist to improve document visualisation. The first solution is the provision of illustrative examples that apply the abstract and vague legal concepts to a factual situation which the readers can more easily relate to and, thus, understand. Another useful tool is the FAQs section, where the most common and foreseeable questions are listed, and a brief and synthetic answer is provided for each of them. This system allows data subjects to immediately find the information they are likely looking for without having to read the whole document, but also to understand what the most relevant topics in the notice are.

One of the most interesting and innovative tools are icons, namely graphical elements usually added at the beginning of a paragraph that, through simple images, can attract attention, give an idea of the content of that paragraph and help finding and memorising the information they relate to. Icons usually are not used alone but more commonly accompany the text, given that they are not self-explanatory; nevertheless, they are incredibly useful to help users navigate the text and have at a glance an overview of the information provided in the document and the paragraph where it is displayed. Indeed, images are easily and immediately processed by the human brain without causing a work overload and, in addition, they usually catch the reader's attention by interrupting the wall of text. Thus, it is more likely that data subjects will look at them (and reading the accompanied text).

The use of icons in the privacy notice is allowed by the European legislator itself; in fact, Art. 12 (7) GDPR, in relation to the provision of transparent

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browser. It only includes the key facts and users have the chance to click through to the full policy if they want to read more. See Juro's website at https://juro.com/policy.html.

[64] On this point see the Norwegian Consumer Council in the case of the presentation of Facebook's facial recognition feature, see Norwegian Consumer Council, 'Deceived by Design', (2018), at https://fil.forbruker-radet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf.

[65] The cognitive load theory (CLT) was originally developed by Sweller while studying problem solving. See J Sweller, 'Cognitive Load During Problem Solving: Effects on Learning' (1988) 12(2) Cognitive Sci., 257–285.

information and modalities for the exercise of data subjects' rights, states that "*The information to be provided to data subjects pursuant to Articles 13 and 14 may be provided in combination with standardised icons in order to give in an easily visible, intelligible and clearly legible manner a meaningful overview of the intended processing*".[66] On the same line, national Data Protection Authorities (DPAs) are encouraging data controllers to deploy icons in their notices in order to make them more intelligible and enhance data subjects' control over personal data. In particular, it is worth a mention the recent initiative of the Italian Garante that in March 2021 launched a contest calling for creative solutions to make information notices simpler, clearer and immediately understandable through icons, symbols or other graphic elements. The three datasets of symbols and icons that will be considered especially effective will be selected and made available on the Garante's website for use by all stakeholders, specifying the author's name.[67] Such an initiative confirms that attention is being paid even by institutions on the fact that the information notices used so far by most companies, websites, social networks, and other controllers are often too lengthy and complex and, thus, unable to fulfil their essential function (i.e., informing data subjects about how their personal data are used and allowing them to maintain control over such data). Moreover, the fact that a DPA has launched a contest for the creation of icons means that legal design has been acknowledged as an effective instrument to make privacy notices more accessible and, thus, closer to their function.

As far as document visualisation is concerned, additional solutions exist to make privacy notices more attractive, especially when they are addressed to young people. In certain cases the content of the notice may be represented as a cartoon that, with a combination of images and text, makes the legal concepts much easier and even fun. The risk of this solution is an oversimplification of concepts, given that it is difficult to cover all the topics relevant to the data processing by means of cartoons.[68] Therefore, it may be useful to explain basic concepts to children but cannot replace a textual notice for adult data subjects.

Finally, a peculiar way to provide data subjects with the information notice is through gamification, meaning that the information related to the data processing is displayed in a gamified environment.[69] Game-based learning is a technique – already used in other fields like cybersecurity – that integrates games into instructional content by incorporating the characteristics of computer games to engage users.[70] Data subjects can interact in a virtual

[66] Art. 12 (7) GDPR.

[67] https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9561395#english_version.

[68] RG Anaraky *et al.*, 'Testing a comic-based privacy policy' (2019) The 15th Symposium on Usable Privacy and Security.

[69] One of the first experiments in this field was "PrivacyVille", a gamified experience launched in 2011 by the game developer Zynga to provide users with its privacy policy in form of a game, where users were rewarded of the relevant information when completing all the steps of the game. However, such a privacy policy was removed in 2017.

[70] J Hamari, T Nousiainen, 'Why do teachers use game-based learning technologies? The role of individual and institutional ICT readiness' (2015) The 48th Hawaii International Conference on System Sciences, 682–691.

world with avatars, and information is provided step by step during the game through entertaining and appealing mechanisms, e.g. in form of points or rewards. This method still needs further investigation, but several benefits have already been identified, given that it makes the notice much more attractive (especially for young people) and motivates data subjects to read it.[71] Clearly the virtual environment cannot completely replace the plain text that in any case should be provided at data subjects' request with full information.

Conclusions.

In the previous sections I have analysed some of the most recurring data protection communication hurdles that data controllers face when designing and displaying their privacy policy. As seen, such hurdles give rise to communication failures that, in the end, water down the substance of the principle of transparency set forth by the GDPR. Indeed, data controllers are more interested in a formalistic application of the information duties imposed by the Regulation, while do not pay enough attention to the function of such duties, that is to empower data subjects and allow them to maintain full control over their personal data and exercise their rights. In practice, the information duties imposed by Arts. 13 and 14 GDPR result in long and complex documents written with legal technical terms and hardly understandable by the layman. The consequence is that data subjects do not really read privacy notices and, therefore, are completely unaware of the processing of their personal data and unable to take meaningful decisions about it.

However, it seems that things are slowly changing. Indeed, today's digital innovation is embracing all the fields of knowledge, including law. This entails, on the one hand, that users are gaining more awareness about both the risks posed by the digital environment and their rights, with the consequence that no longer accept that companies process their personal data in an opaque and confusing way (the WhatsApp case referred to in the introduction confirms that). On the other hand, lawyers themselves (or, at least, many of them) start to understand that the legal system needs to change in accordance with the outside world. Indeed, the current digital transformation is not just technological but social and cultural as well and imposes changes also in lawyers' mindset and perspective.

In particular, for the legal system this means rethinking the way lawyers interact with other stakeholders (clients, companies, and the society as a whole): while, so far, law has always been seen as austere and distant from people – and this is reflected by the use of "legalese" to write legal documents – now it should become closer and more accessible. Herein, more emphasis should be placed on communication and design and a more interdisciplinary

[71] See for example RJ Baxter, DK Holderness, DA Wood, 'Applying basic gamification techniques to IT compliance training: Evidence from the lab and field' (2016) 30(3) Journal of Information Systems, 119–133; E Dincelli, I Chengalur-Smith, 'Choose your own training adventure: designing a gamified SETA artefact for improving information security and privacy through interactive storytelling' (2020) 29(6) European Journal of Information Systems, 669-687.

approach should be adopted.

Design should not be considered just as aesthetics and graphics, but it may become a tool to improve the disclosure and communication of legal products, so that they can effectively reach the intended recipients. To that end lawyers should work together with computer technicians, IT experts and designers to offer a service that can actually meet needs and expectations of different targets of users. Rather than designed by lawyers for lawyers, law should be designed for its actual recipients.

In particular, in the field of data protection and privacy notices, several design patterns have been examined that can help practitioners to make the privacy policy more attractive and understandable to data subjects. Many of them, like icons and layered notices, are already in place and are gaining much attention in the data protection panorama. Others, like cartoons and gamified experiences, still need more investigation to ensure that the relevant information is provided in an adequate manner, but may lead to significant benefits, especially to deliver the required information to young users.

As for the forthcoming years, legal design is expected to play a crucial role in the development of transparent and effective privacy notices and, thus, to put data subjects at the centre of the processing of personal data. Further design patterns will likely be realised based on an interdisciplinary approach in order to make privacy notices more tailored on the intended recipients and, in such a way, more coherent with their substantial purpose.