

The concept of Fairness in the GDPR

A linguistic and contextual interpretation

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ABSTRACT

There is a growing attention on the notion of fairness in the GDPR in the European legal literature. However, the principle of fairness in the Data Protection framework is still ambiguous and uncertain, as computer science literature and interpretative guidelines reveal.

This paper looks for a better understanding of the concept of fairness in the data protection field through two parallel methodological tools: linguistic comparison and contextual interpretation.

In terms of linguistic comparison, the paper analyses all translations of the word “fair” in the GDPR in the EU official languages, as the CJEU suggests in CILFIT Case for the interpretation of the EU law.

The analysis takes into account also the translation of the notion of fairness in other contiguous fields (e.g. at Article 8 of the EU Charter of fundamental rights or in the Consumer field, e.g. Unfair terms directive or Unfair commercial practice directive).

In general, the notion of fairness is translated with several different nuances (in accordance or in discordance with the previous Data protection Directive and with Article 8 of the Charter)

In some versions different words are used interchangeably (it is the case of French, Spanish and Portuguese texts), in other versions there seems to be a specific rationale for using different terms in different parts of the GDPR (it is the case of German and Greek version).

The analysis reveals three main semantic notions: correctness (Italian, Swedish, Romanian), loyalty (French, Spanish, Portuguese and the German version of “Treu und Glaube”) and equitability (French, Spanish and Portuguese).

Interestingly, these three notions have common roots in the Western legal history: the Roman law notion of “bona fide”.

Taking into account both the value of “bona fide” in the current European legal contexts and also a contextual interpretation of the role of fairness in the GDPR, the preliminary conclusions is that fairness refers to a substantial balancing of interests among data controllers and data subjects.

The approach of fairness is effect-based: what is relevant is not the formal respect of procedures (in terms of transparency, lawfulness or accountability), but the substantial mitigation of unfair imbalances that create situations of “vulnerability”.

Building on these reflections, the paper analyses how the notion of fairness and imbalance are related to the idea of vulnerability, within and beyond the GDPR.

In sum, the article suggests that the best interpretation of the fairness principles in the GDPR (taking into account both the notion of procedural fairness and of fair balancing) is the mitigation of data subjects’ vulnerabilities through specific safeguards and measures.

CCS CONCEPTS

- Applied computing → Law, social and behavioral sciences;

KEYWORDS

Fairness, Data Protection, GDPR, Linguistic Comparison

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1 Introduction

There is a growing attention on the notion of Fairness in the Data Protection framework and in the algorithmic regulation discourse. However, the principle of fairness in the Data Protection framework is still ambiguous and uncertain, [1] as computer science literature and interpretative guidelines reveal.

The lack of a clear interpretation of fairness concept in the FAT discourse can probably be solved through two parallel methodological tools: linguistic comparison and contextual interpretation. In terms of linguistic comparison, this paper analyses all translations of the word “fair” in the GDPR in the EU official languages, as the European Court of Justice requires for the interpretation of the EU law.

Section 2 addresses the notion of fairness in the context of the GDPR, while section 3 observes how the European Court of Justice addressed the concept of fairness in data protection. Then, Section 4 analysed Data Protection Authorities' understanding of fairness (in particular the French and the English one), while Section 5 has addressed a linguistic comparison of the term fairness in different European languages. The linguistic analysis takes into account also the translation of the notion of fairness in other contiguous fields (e.g. at Article 8 of the EU Charter of fundamental rights or in the Consumer field, e.g. Unfair terms directive or Unfair commercial practice directive). In general, the notion of fairness is translated with several different nuances (in accordance or in discordance with the previous Data protection Directive and with Article 8 of the Charter).

The analysis in this paper shows that approach of fairness is effect-based: what is relevant is not the formal respect of procedures (in terms of transparency, lawfulness or accountability), but the substantial mitigation of unfair imbalances that create situations of "vulnerability".

2 Fairness in the GDPR

The principle of fairness is introduced at article 5(1) point (a) of the GDPR as one of the main principles of data processing, in conjunction with lawfulness and transparency. Potentially, the notion of fairness could help prevent unfair imbalances between data subjects and data controllers, but the proper meaning of the fairness principle in the GDPR is still unclear and vague.

2.1 History of fairness concept in the Data Protection framework before the GDPR

To understand the meaning and usefulness of fairness we need to understand the origins of the fairness principle and its future developments. The notion of fairness has always been present in the data protection framework, since the very first international documents. The very first Council of Europe Resolutions (1973 and 1974) referred to *fair* collection of data and *unfair discrimination*. [2] The 1980 OECD guidelines on data processing also mentioned "lawful and fair data processing" of personal data. Analogously, the 1981 Council of Europe Convention 108 at Article 5 stated that "personal data undergoing automatic processing shall be: a) obtained and processed *fairly* and lawfully". [3] Subsequently, the Data Protection Directive already adopted the principle of fairness in data protection at Article 6(1) lett. a ("personal data must be processed fairly and lawfully") and recital 28 ("any processing of personal data must be lawful and fair to the individuals concerned").

In all the aforementioned provisions, "fairness" is mentioned in conjunction with "lawfulness" as two inherently connected principles. However, in several other provisions fairness is linked to transparency duties. Articles 10 and 11 of the Data

Protection Directive clarified that in addition to the information about the identity of data controllers and the purposes for data processing, the data subject should receive also other information "in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee *fair processing* in respect of the data subject" (emphasis added).

Also Recital 38 confirmed the link between *fairness and transparency*: "if the processing of data is to be *fair*, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection" (emphasis added).

The distinction between mere transparency and fairness is probably based on the references to specific "circumstances" of the data processing at stake. If transparency (e.g. at Articles 10 and 11) is mainly based on specific formal procedures to respect in terms of information disclosure, 'fair transparency' takes into account substantial interests at stake in a specific data processing (and the eventual need to communicate more information to the data subject). In other words, in the Data Protection Directive, while the mere notion of transparency adopts a formalistic-procedural approach, the notion of fairness applied to transparency required a substantial effect-based approach: what matters is not that data controllers' duties are (formally) respected, but that the data subjects (in practical circumstances) is concretely "in a position to learn of the existence" and of the details of data processing concerning him or her.

The principle of fairness in data processing is also mentioned in the EU Charter of Fundamental Rights. Article 8 (1) and (2) state as follows: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed *fairly* for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified" (emphasis added).

The legislator of the Charter had in mind the principle of fairness of the Data Protection Directive and its interpretation should be linked to the general interpretation of secondary law (the directive and now the GDPR) [4,5].

2.2 Fairness in the GDPR: the two nuances, i.e. *transparency and lawfulness*

Compared to the aforementioned legal texts, the GDPR is the legal text with the highest number of references to "fairness". Article 5(1) lett. a) (rephrasing Article 6 of the Data Protection Directive) mentions fairness as the first principle of personal data processing, together with lawfulness and transparency. The strong link with *lawfulness* and *transparency* is evident: the three different principles are mentioned together, as three interdependent notions.

This double link of fairness (with lawfulness and transparency) is confirmed also at recital 39, which first declares that “any processing of personal data should be *lawful and fair*” (emphasis added), and then affirms that the *transparency* principle “concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure *fair and transparent processing*” (emphasis added).

The other references to ‘fairness’ in the GDPR are either related to the link between fairness and *lawfulness* or to the link between fairness and *transparency*.

2.2.1 Fairness as transparency in the GDPR. As regards transparency, Articles 13(2) and 14(2) (similar to Articles 10 and 11 of the Data Protection Directive) foresee that data controllers, in addition to some basic information about data processing (identity of the controller, contact details, purposes, etc.), need to disclose to the data subject some additional information (e.g. storage periods, data subjects’ rights, etc.) “necessary to ensure *fair and transparent processing* in respect of the data subject” (emphasis added).

What makes processing not only transparent but also *fairly* transparent is that the data subject has an actual knowledge of the data processing concerning him or her and of its main characteristics (see recital 60, rephrasing recital 38 of the Directive).

The link between transparency and fairness is also rapidly confirmed at Article 40(2) about code of conducts. “Code of conducts” are self-regulatory and voluntary tools required to specify the application of the GDPR such as with regards to fair and transparent processing (see also recital 45: of the GDPR). Lastly, recital 71 also mentions fairness in connection with transparency, but under a new perspective: “in order to ensure *fair and transparent processing* in respect of the data subject, taking into account the specific circumstances and context in which the personal data are processed, the controller should (...) implement technical and organizational measures appropriate to” prevent errors and inaccuracies taking into account “potential risks involved for the interests and rights of the data subject”, such as discrimination (e.g. based on sensitive data). Here for the first time, fairness is not merely linked to substantial transparency, but to the organizational measures for the prevention of any adverse effect to “interests and rights” of the data subject, including discrimination. If Articles 13 and 14 reveal only that the notion of fairness should give a “substantial” approach to transparency duties (considering specific circumstances and effective awareness of the data subject), recital 71 gives a new additional perspective: fairness should be (also) aimed at *preventing significant effects* of the algorithmic-driven environment on individuals (e.g. discriminatory biases). We will address the idea of fairness as non-discrimination in a specific section below.

2.2.2 Fairness as lawfulness in the GDPR. As regards the link between fairness and lawfulness, we need to analyze first Article 6 (whose title is “lawfulness of processing”). Article 6(2) foresees that Member States may maintain or introduce more specific provisions in relation to data processing for legal obligations (Article 6(1) lett. c) or for public tasks (Article 6(1) lett. e). In these cases, Member States can determine specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX of the GDPR. As aforementioned, the concept of fairness is often linked to specific circumstances and practical cases (“specific processing situations”). In addition, the reference to “Chapter IX” is also noteworthy: Chapter IX of the GDPR (Arts. 85-91) refers to particular cases of *conflicting interests* which the protection of personal data could affect (freedom of expression and information, public access to official documents, archiving and research purposes, freedom of religious entities to process personal data) or sensitive areas in which national legislations could be very different (e.g., national identification number, employment law). Therefore, Article 6(2)-(3) suggests that Member States, when adopting measures to ensure lawful and fair processing (within legislations permitting data processing on the basis of legal obligations or public tasks), should take as an example the *balancing* provisions at Chapter IX. It seems clear that the reference to fairness here should also be understood as *fair substantial balancing* between conflicting interests.

A further reference to fairness in the GDPR is recital 129: Data Protection Authorities should exercise their powers “impartially, fairly and within a reasonable time”. Here the notion of ‘fair’ is different from the principle of fairness in data processing at Article 5. Nonetheless, comparing the use of the same word in one legal text but in different contexts might be a useful exercise to interpret the real meaning of legal notions.[5] The link between fairness and impartiality at recital 129 might be a further element revealing the link between fairness and non-discrimination, as we will show infra at Section 2.4.1.

2.3 Possible meanings of fairness in the GDPR

After this first overview, it seems clear that fairness cannot be reduced to a synonym of transparency or lawfulness, but has an independent meaning. That specific meaning can have different nuances if it is combined with the transparency principle or with the lawfulness principle.

The notion of fairness in the GDPR seems to refer to a substantial approach, aimed at preventing adverse effects in concrete circumstances situations, in particular when conflicting interests need to be balanced.

However, the idea of fairness can have many possible nuances: non-discrimination, fair balancing, procedural fairness, bona fide, etc.

2.3.1 Fairness as contextual implementation of transparency and lawfulness: procedural fairness. As we have observed in Paragraph 2.2, fairness in the GDPR is always associated either to transparency or to lawfulness. In this Section we will analyse how the notion of fairness has been developed (even by Article 29 Working Party) in these two different fields. The three concepts of fairness, transparency and lawfulness are mentioned together in Article 5(1) lett. a) and in the following provisions fairness is either associated to transparency or to lawfulness in “specific situations”, “circumstances”.

As we show below, sometimes even the translation of the world “fairness” in some EU language overlaps with the translation of the world “lawfulness”, in particular in the EU Charter at Article 8 [See in table 1, below, the Greek and Swedish translation of the world fairness at Article 8 of the EU Charter]. Moreover, in some EU languages fair is translated in two different ways, depending on whether it is associated to lawfulness or to transparency. For instance, the German version of the GDPR has two different terms for fairness: “Treu und Glaube” is used when fairness is associated to lawfulness and “Faire” is used when fairness is associated to transparency. The first one recalls the notion of “good faith”, while the latter is more related to the proper English concept of fair, loyal, equitable (see *infra*, §5.3).

Also Article 29 Working Party tends to associate the concept of fairness either to lawfulness or to transparency. This is clear in two different opinions: WP29 Opinion on Consent and WP29 Opinion on Transparency. As regards the link between fair and lawful, WP29 Opinion on Consent clarifies that the fairness principle imposes an attentive evaluation (and communication) of the lawful basis for data processing: e.g., sending out the message that data will be processed on the basis of consent, while actually some other lawful basis is relied on, would be fundamentally *unfair* to individuals.[7] Also, basing personal data processing on the consent of data subject does not allow the collection of data which “is not necessary in relation to a specified purpose of processing” and this would “be fundamentally unfair”.[7]

As regards the relation between fair and *transparent*, WP29 Opinion on Transparency often refers to fairness. In particular fair transparency seems to require additional efforts if compared to merely formal transparency, since it takes into account also “reasonable expectations” of data subjects. Fairly transparent data processing means expectable and foreseeable data processing[8] even “consider[ing] the circumstances and context of each situation”[8]. We can make an example of the difference between formal transparency and fair transparency. While Articles 13(1) lett. e and 14(1) lett. d states that in principle data controllers should communicate merely the “categories” of data recipients, the fairness principle imposes something more: to “provide information on the actual (named) recipients of the personal data”[8] and if the controller decides to disclose just the categories of recipients she would be asked to “demonstrate” why in that case it was

fair not to disclose the name of recipients.[8] As we show in paragraph X, also the European Court of Justice has reaffirmed the notion of procedural fairness as disclosure of personal data recipients, in particular in the public sector.[9,10,11,12] Similarly, the fairness principle imposes the data controller to explicitly mention all third countries to which the data will be transferred.[8]

According to WP29, the notion of fairness is also relevant in case of further processing of personal data. Indeed, the fairness principle imposes that the more intrusive (or less expected) the new data processing is, the earlier the data subjects should be informed in advance.[8] In case the data controller processes data for further purposes in compliance with the compatibility test at Article 6(4), “essential requisites of accountability and fairness under the GDPR” would impose “that data controllers should provide data subjects with further information on the compatibility analysis carried out under Article 6.4”.[8]

All these practical examples of fairly transparent and fairly lawful data processing are forms of what Clifford and Ausloos name “procedural fairness”.[5]

2.3.2 Fairness as fair balancing (based on procedural fairness). Analyzing the GDPR provisions, Clifford and Ausloos notice that the notion of fairness (combined both to transparency and lawfulness) can have two main concurring interpretations: fair balancing and procedural fairness.[5] Fair balancing is based on proportionality between interests and necessity of purposes, while procedural fairness is based on transparency duties, timeliness and burden of care of data controllers.[5]

The notion of fair balancing comes from several provisions in the GDPR. As aforementioned, Article 6(2)-(3) refers to measures to ensure (lawful and) fair processing of personal data in specific processing situations, such as the cases described at Chapter IX GDPR, which regulates complex balancing between conflicting interests, e.g. freedom of expression and information (Article 85), public access to official documents (Article 86), archiving and research purposes (Article 89), freedom of religious entities to process personal data (Article 91).

The idea of fairness as fair balancing between conflicting interests is also confirmed in the jurisprudence of the European Court of Justice as we will see in the following Section.

At the same time, the GDPR usually relates the notion of fairness to specific “*measures*” (Article 6(2) and (3), recital 45), “*procedures*” (recital 71) or *information duties* (Arts. 13(2) and 14(2), recitals 39 and 60) that the data controller needs to adopt. That is why Clifford and Ausloos refer to “procedural fairness”[5]: fairness should be practically implemented through specific procedures that can improve the level of transparency and lawfulness of a certain data processing in a specific context.

Actually, the GDPR does not always describe in details such fair procedures: the data controller is asked to choose and adopt

her own procedures in order to make a data processing “fairly transparent” and “fairly lawful”, in particular looking at the “specific circumstances and context in which the personal data are processed” (recital 60 and 71) or the “specific processing situations” (Article 6(2) and (3)).

In other words, the difference between “mere” transparency or lawfulness and “*fair*” transparency or lawfulness is the adoption of additional safeguards that can effectively rebalance the *unfair imbalance* between the data controller and the subject in specific circumstances. For this reason, it seems reasonable to affirm that the two components of fairness (procedures and balancing) are not separate but connected as means to ends: *procedural fairness* tends to *fair balance*.

In other words, procedural fairness might be an *obligation of results* rather than an obligation of means: the data controller is not asked to merely apply specific measures, but to reach a fair substantial balancing between interests in specific situations. Actually, some scholars argued that fairness at Articles 5 and 6 GDPR is an “*ex ante*” assessment on the average data subjects, while data subject rights such as right to object and erasure (Articles 17 and 21) are based on an “*ex post*” idea of fairness, tailored on specific circumstances [5].

The dualism of fairness as procedural fairness and fair balancing has been recently adopted also in the Council of Europe Modernized Convention 108.[13]

On the one hand Article 5(4) states: “personal data undergoing processing shall be: processed *fairly* and in a transparent manner” (emphasis added). On the other hand, the same article at paragraph 1 affirms: “data processing shall be proportionate in relation to the legitimate purpose pursued and reflect at all stages of the processing a *fair balance between all interests* concerned, whether public or private, and the rights and freedoms at stake” (emphasis added).

The relationship between fairness and *interests* is not new in the legal discourse: Bygrave in his interpretations of the Data Protection Directive related the notion of fairness to the consideration of interest and expectations of data subjects.[14] As we will show in Section 5.3, the link between fairness and real interests of the individuals is in line with the western legal history of the notion of fairness/loyalty.

The Explanatory Memorandum of the CoE Modernized Convention also takes into account a notion of fairness as respect of expectations of data subjects, in particular when it connects the idea of fairness to predictability and legal certainty.[15] The Explanatory Memorandum also mentions fairness in the *balancing* with the interests of law enforcement authorities processing data under a necessity and proportionality principle.[15]

In sum, in these first sections we observed how the notion of fairness in the EU Data Protection framework is related to the notion of significant imbalance between companies (data controllers) and individuals (data subjects). Fairness in the GDPR is linked both to transparency and to lawfulness: the principles of fair transparency and fair lawfulness impose to

the data controller adopting specific “procedures” in order to reach a fair balancing between different interests.

2.4. Fairness as *non-discrimination*

The notion of fairness is also often interpreted as non-discrimination, in particular in the FAT discourse [16,17, 18]. Indeed, Oxford English Dictionary defines “fair” as “impartial and just treatment or behaviour without favouritism or *discrimination*” (emphasis added).

The relation between discrimination and (un)fairness can be found also in the very first international documents on data protection. In particular, both Resolutions of Council of Europe on the protection of privacy in electronic data banks refer to “unfair discrimination”. [2]

While in the Data Protection Directive there is no direct link between fairness and non-discrimination, the GDPR seems to refer to the link between fairness and discrimination. In particular, recital 71 affirms that “in order to ensure *fair* and transparent processing in respect of the data subject, the controller should use appropriate mathematical or statistical procedures for the profiling, implement technical and organizational measures appropriate to” prevent “potential risks” for the interests and rights of the data subject, such as “*discriminatory effects* on natural persons on the basis of racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation, or that result in measures having such an effect” (emphasis added).

Similarly, WP29, in its Opinion on Automated Decision-Making, also associates unfairness to discrimination: “Profiling may be unfair and create discrimination, for example by denying people access to employment opportunities, credit or insurance, or targeting them with excessively risky or costly financial products”. In particular, WP29 makes also one examples of “cases which would not meet the requirements of Article 5(1)(a), illustrat[ing] how unfair profiling can lead to some consumers being offered less attractive deals than others”: the case of a data broker selling consumers’ profiles (based on consumers’ scoring) to financial companies for the offer of “non-traditional” financial services [19]. On the other hand, Recital 129 links “fairness” to “impartiality”, a concept close to non-discrimination in particular in the public sector.[20]

The CNIL (the French Data Protection Authority) in a recent report on Algorithms and AI has concluded that “a *fair algorithm* should not end up generating, replicating or aggravating any form of *discrimination*” [21].

The interpretation of fairness as non-discrimination is not common just in the EU framework but, e.g., even to other extra-EU comprehensive Data Protection frameworks. In particular, the Brazilian General Data Protection Law (Dispõe sobre a proteção de dados pessoais e altera a Lei nº 12.965, de 23 de abril de 2014 (Marco Civil da Internet)) takes largely inspiration from the GDPR.[22] Article 6 enlists all data

protection principles (necessity, finality, adequacy, transparency, accountability, integrity, etc.) but it does not mention “fairness”. As an alternative, it mentions only “non-discrimination” (§ IX). The Brazilian legislator, rather than adopting the general clause of “fairness”, preferred specifying it in the sense of non-discrimination.[22]

Computer Science literature generally understands algorithmic fairness as non-discrimination[16,17,18]. For instance, Lepri et al. recently defined fairness as “the lack of discrimination or bias in the [algorithmic] decisions”[16].

3 The European Court of Justice caselaw on fairness in Data Protection law

The European Court of Justice has never defined the notion of fairness in data protection law. However, the Court made several references to the principle of fair data processing. The Court has used the notion of fairness in two different contexts: fair balance and transparency.

As regards fair balance, the Court has firstly referred to fairness as an interpretative tool for balancing the different interests at stake,[23,24] or the data subject’s interests to data protection with the burden which the data protection obligations represent for the data controller,[25] or – more generally - the fundamental right to privacy and the interests requiring free movement of personal data.[26] A balancing is “fair” if it is not based on “an invidious choice between two such rights”[27]. More recently, the Court in the *Google Spain* Case said that a fair balance requires a specific consideration of the substantial circumstances and interests at issue: “that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life”.[28,27]

On the other hand, the Court has also interpreted the notion of fairness in data protection as inherently related to the implementation of the transparency principle in specific circumstances. In particular, when public administrative body transfers personal data to another public body [29,30,31], e.g. customs authority for the purposes of its subsequent processing [31] they must notify the data subjects about such further processing.

Clifford and Ausloos conclude that, in the reasoning of the Court, fairness gives a level of protection to the *inherent asymmetric data subject-controller relationships* and hence, the potential for *negative consequence* for data subjects stemming from personal data processing even in the absence of a controller intent to deceive.[5]

4 The Effects-based approach of ICO and CNIL: Fairness as substantial rebalancing of asymmetric relationship

Recently, the English and the French Data Protection Authorities have elaborated on the notion of fairness in the GDPR.

In particular, the Information Commissioner’s Office, in a report on Big Data, AI and data protection,[32] has proposed an original interpretation of the fairness principles.[33]

According to the ICO, fairness involves three elements: 1) considerations of *effects* on individuals; 2) consideration of *expectations* of data subjects; 3) *transparency* of data processing.

While the link between fairness and transparency is clear in the wording of the GDPR, the connection between fairness and *expectations* is more implicit, but not new in the legal discourse. [14,15,5] Article 29 Working Party opinion on Transparency has also associated fairness with the considerations of reasonable expectations of and effects on data subjects.[8]

The link between *fairness* and *effects* is innovative but in line with the aforementioned considerations: the GDPR seems to refer to fair processing as based on specific circumstances and situations, looking at the substantial balancing between different parties. In other words, what matters is the effect on the data subject, not a mere compliance to procedural duties.

In a recent report, also the French CNIL has proposed a similar approach: fairness principle should be interpreted as the prevention of unjust “outcomes” or “impacts”.[35] In addition, according to the CNIL the effects should be assessed not only on the data subject, but at a collective level [21].

This position is inherently linked to the fair balancing of positions between data controllers and data subjects. Taking for example, the case of algorithmic platforms, the French Conseil d’Etat (as rephrased by CNIL) affirms that “fairness consists of ensuring, in good faith, the search engine optimisation (SEO) or ranking service, without seeking to alter or manipulate it for purposes that are not in the users’ interest”.[36]

On a more general level, in the algorithmic environment, “fairness could well represent a solution to the problem of *unbalanced relations* between controllers of algorithms and users”[21].

In sum, this first analysis suggests that fairness is a corrective tool for rebalancing asymmetric or unbalanced relationships (i.e. situations of induced vulnerabilities) between controllers and subjects. We will come back on these conclusions infra.

5 Fairness in linguistic comparison: methodological remarks

To better understand the notion of fairness in the GDPR, a useful method might be the linguistic comparison between different official translations of the GDPR in several other EU official languages. The author is well conscious of the difficulties of a linguistic comparison, in particular because different translations might have ambiguities or different

nuances that might be understood just in that specific linguistic context.

However, the European Court of Justice has affirmed that a correct interpretation of EU law must involve a comparison of the different language versions, all equally authentic expressions of EU legislation.[6] In addition, the Court has clarified that Community law uses terminology which is peculiar to its own context. Accordingly, legal concepts do not necessarily have the same meaning in EU law and in the law of the various Member States.[6]

The linguistic comparison cannot be the only tool for understanding the proper notion of fairness in the GDPR: such comparison must be accompanied by systemic, contextual and teleological interpretation (as the one presented at Section 4)[6].

5.1. How other EU Languages translate the concept of fairness

The different translations of the fairness principle in the GDPR reveal different nuances and perspectives.

For this comparison, as shown in table 1, we have analyzed some of the most relevant official translations of the GDPR, considering different linguistic families: German, Dutch, French, Spanish, Portuguese, Italian, Romanian, Greek, Polish, Swedish and Slovenian.¹

The provisions taken into account are not only the GDPR articles and recitals mentioning the concept of fairness but also Article 8 of the Charter of Fundamental Rights, that mentions the concept of fairness as part of the fundamental right to data protection.

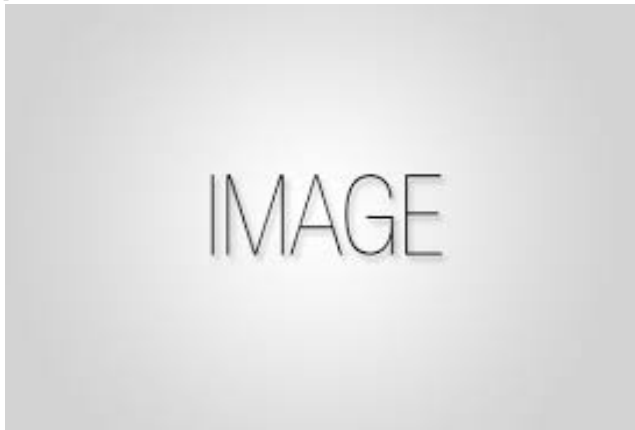


Figure 1: Linguistic comparison about the concept of Fairness

Before analyzing specific national translations, we can preliminary observe that the term “fair” in the majority of other European languages is translated in at least two or three

different words, referring to slightly different concepts/nuances. In addition, several translations have similar etymologies (e.g. Spanish and Portuguese versions; Italian and Romanian versions, etc.).

In the German version of the GDPR, fairness is translated as: “nach Treu und Glaube” (Articles 5(1) and 6(2)(3); recitals 39 and 45) and “faire” (Articles 13(2), 14(2) and 40(2); recitals 39, 60 and 71). There is even a third different word for “fair” at recital 129, “gerecht”, although we are aware of the different context of that recital, where fairness refers to the activity of the DPAs not to the data processing itself. Article 8 of the EU Charter also uses “Treu und Glaube” to refer to fair processing of personal data.

The two main words used are not properly synonyms. On the one hand, “treu und Glaube” is a legal milestone in the German legal history and refers to the roman concept of “bona fide”. [62] On the other hand, “faire” is semantically much more in line with the English “fair”. [37]

The use of the two different words is not random: “Faire” is used only in conjunction with transparency (“faire und transparente”), i.e. at Articles 13 and 14 on information duties or at Article 40 on code of conducts for “fair and transparent” data processing (recitals 60 and 71, where fairness is also in conjunction with the “transparency” principle).

On the other hand, “Treu und Glaube” is used for translating the fairness principle when it is linked to the notion of lawfulness (“*rechtmäßig und nach Treu und Glauben*”): it is the case of Article 5 and Article 6(2)-(3).

“Gerecht” (recital 129) is also a direct translation of the English fair, but under the perspective of impartiality and justice. [38] and so more in line with the translation of “impartially and fairly” at recital 129.

In the Dutch version of the GDPR, just one single word translates the English “fair”: “*behoorlijk*”. This term, referring to a notion of “decency”, “goodness” and of course “fairness” [39], is used both in conjunction with transparency and with lawfulness. However, Article 8 of the EU Charter uses a different expression: “*eerlijk*”, whose nuance is closer to the notion of “honest”, “plain”. [40] The Dutch version of the Data Protection Directive, also referred only to *eerlijk*. [41] Similarly, that term is used - often in the negative form (“*oneerlijke*”) - also in the Consumer protection framework. [42] The terms “*behoorlijk*” is, therefore, just a recent development in the GDPR. Understanding whether this linguistic evolution has led (or will lead) to a legal evolution is beyond the scope of this research, but it reveals the fluid and dynamic nature of the fairness concept in the EU framework.

The French version of the GDPR uses two different terms to refer to fairness: “*loyale*” (Articles 5 and 6, recitals 39, 45, 60) and “*équitable*” (Articles 13 and 14, 71 and 129).

Analogously, the Spanish and Portuguese versions of the GDPR use similar expressions: “*leal*” and “*equitativo*”.

¹ The author chose these languages (which are among the most representative ones of the European linguistic families) because he

could profit from different linguistic support from different national experts of those languages.

There is obviously a similar etymology for “loyale” and “leal”, on the one hand; and “equitable” and “equitativo”, on the other hand.

In particular, the notion of “loyale”/“leal” might be generally translated with the English “loyal”;[43,99,100] while “equitable”/“equitativo” are well translated with the English “equitable”.[44,101,102]

In the German version we noticed that the rationale for the distinction between the two terms (“*Treu und Glaube*” and “*Faire*”) was based on the different link of the fairness principle with transparency (*faire*) and lawfulness (*Treu und Glaube*). To the contrary, in the French, Spanish and Portuguese versions this is not the case, where apparently the terms are used interchangeably.

The French version generally uses “loyale”, while “equitable” is just used in few provisions (at Articles 13 and 14 and recitals 71 and 129). Similarly, in the Spanish version “leal” is generally used for fairness, apart from two cases (Article 6(2)-(3) and recital 129) mentioning “equitativo/a”. On the contrary, the Portuguese translation of fairness is largely based on the word “equitativo”/“equidade”, with just few but relevant exceptions: Articles 5(1)(a) and Article 6(2)-(3) use the expression “leal”, in line with the Portuguese version of Article 8 of the EU Charter. The two words have similar meanings, but while *loyalty* refers to honesty and constant allegiance to a person or an institution [45], *equitability* refers to “fairness and impartiality” but also – in strictly legal terms – to what is “valid in equity as distinct from law”.[46]

The (interesting) ambiguity of the term equitable (referring both to “fair” and to the legal notion of equity) needs to be investigated in more detail. In the following section, we will analyse the strong link between “equitable” as expression of equity and “*Treu und Glaube*” as expression of the Roman law notion of “bona fide”.

Even the Romanian translation of “fair” has the same etymology of equitable: “*echitabile*”. Interestingly, this word is just a recent acquisition of the GDPR: both the Data Protection Directive [47] and Article 8 of the EU Charter translated “fair” with the Romanian word “*corect*” (leading to the English “correct”[48]). The etymological reference to “correctness” can be found also in other two linguistic versions: Italian and Swedish.

The Italian translation of the GDPR has just one single word for fairness: “*corretto/a*”. The only exception is recital 129, “*equo*”, also translatable as equitable.[49] Interestingly, also the Italian version is different from the wording of the Directive and of Article 8 of the EU Charter. Article 6 of the Data Protection Directive translated fair with “*leale*” (loyal),[50] closer to the other aforementioned Romance languages versions (loyal/leal) and also to the Italian wording in the consumer protection directives.[51][52] The new translation of fair as “*corretto*” is a novelty of the Italian version of the GDPR.

Also the Swedish version refers to fairness at Article 5(1)(a) of the GDPR as “*korrekt*” (the principle is “*korrekthet*”).

Surprisingly, this term totally overlaps with another data processing principle: accuracy at Article 5(1)(d) is translated in the same way (“*korrekthet*”). However, this apparent ambiguity is clarified in the other provisions of the GDPR, where the word “fair” is always translated with “*rättvis*” (meaning “equitable”).[53] Actually, “*korrekt*” was used also in the Data Protection Directive, but the Swedish translation of Article 8 of the EU Charter had adopted the term “*lagenligt*” (“lawful”), which recalls the strong semantic link between fairness and lawfulness.

In Polish and Slovenian versions just one word is used to translate fairness, without any ambiguity or recent evolution: “*rzetelnie*” in Polish and “*pošteno*” in Slovenian. The Greek version of the GDPR uses two alternative terms for fairness: “*θεμιτή*” and “*δίκαιη*”. Apparently, the different use of the two terms is not random: the first word is used in all *Articles* referring to fairness, while the second word is used in all *recitals* referring to fairness. Since recitals should be meant as interpretative tools, while articles as normative sources,[54] we should refer to “*θεμιτή*” as the official translation of fairness, and to “*δίκαιη*” as the interpretative nuance to understand its meaning. *Θεμιτή* can be translated as “appropriate, fair, legitimate”,[55] while *δίκαιη* to “fair trade, fair opportunity or punishment”.[56] Surprisingly, the word fairness in the Greek version of the EU Charter (Article 8) has a very diverse etymological and semantic source: “*νομίμως*” (meaning “legality”[57]). It is different both from the translation in the Directive (article 6 also referred to “*θεμιτή*”) and in the aforementioned text of the GDPR. Similarly to the Swedish case, the Greek version of Article 8 of the Charter seems to refer to the notion of legality/lawfulness, rather than to fairness as loyalty/equitability.

Understanding the reasons and the consequences of this linguistic choice is beyond the scope of this research, but such differences well prove the semantic complexity and the diverse nuances of the “fairness” notion in all European languages.

5.2. Fairness as “bona fide”, “correttezza” and “equity” in Western legal systems

After this overview, we can preliminary conclude that the notion of fairness is translated with several different nuances (in accordance or in discordance with the previous Directive and with Article 8 of the Charter). However, three main semantic notions can be identified in all the European official translation of fairness in the GDPR: *loyal* (also in the German version “*Treu und Glaube*”), *equitable* and *correct*.

In some versions different words are used interchangeably, in other versions there seems to be a specific rationale for using different terms (e.g., in German when fairness is associated to transparency it is translated by “*Faire*”, while when it is associated to lawfulness it is translated by “*Treu und Glaube*”; in Greek all references to fairness in Articles are translated by *θεμιτή*, while all references in recitals by *δίκαιη*).

However, the notion of loyalty (or *loyauté*), equity and correctness have common roots in the Western legal history. They all originate from the Roman law notion of “bona fide”. In Roman Law, bona fide arose as a reaction to strict and formal application of rules (*summum ius, summa iniuria*) [58,59,60], an alternative to positivist structures. [61,62] The principle of good faith was based on the substantial balancing between the disputing parties rather than on the formal requirements of written law.

This has been translated into the modern private law systems in different ways. An analysis of the principle of good faith in the European private law is beyond the scope of this research. Here it is sufficient to understand the legal and semantic link of these concepts across Europe and how the private law discourse on loyalty/equity/correctness might be readapted to the data protection framework. The Code Napoléon introduced the principle of “*bonne foi*” at Article 1134, which states that contractual obligations must be executed in good faith. The similar notion of *loyalty* is not written in the law, but is now a consolidated principle in French case law and largely associated to “good faith”. [63,64] The principle of loyalty is meant as “*agir à armes égales*”, i.e. preventing asymmetric relationships between the parties. [65,64] The duty of loyalty in commercial relationships is intended to ensure a balance between the different actors and consists in the obligation to inform the interlocutor and refrain from using reprobated means. [66] Such notion of loyalty has been accepted also in the data protection framework. [67] The *Conseil d'Etat* has associated the idea of loyalty to the notion of “trust”: disloyal data collection is a damage to data subjects’ trust (“*confiance*”). [67]

In the German Bürgerliches Gesetzbuch (BGB), the notion of loyalty and “bona fide” was introduced at §242, according to which the debtor is obliged to carry out the contractual performance in accordance to what good faith (“*Treu und Glaube*”) requires, taking into account the specific trade at issue. [68] This provision is similar to Article 1134 of the French Civil Code, but more tailored on “the specific trade at issue”, thus revealing the substantial and contextual nature of “fairness”/“*Treu und Glaube*”. [69]

In the Italian Civil Code, the notion of good faith can be found both as “*correttezza*” (Article 1175) and as “buona fede” (Art. 1375). Both these provisions affirm that the parties (debtor and creditor or the two contracting parties) need to act in good faith: the two notions are usually conceived interchangeably as synonyms. [70] The Data Protection framework has adopted the word “*correttezza*”. Even the Italian jurisprudence has interpreted the notion of “*correttezza*” and “buona fede” as aimed at reaching *fair balance* and proportionality among the parties, [71] also seen as an *ethical* requirement to the parties’ behavior. [72,64] This notion was originally conceived in accordance with the principle of *solidarity*: [73] one party should take care of the *interests* of the other party. [73]

The link between good faith and *solidarity* has been broadly developed under the Constitutional notion of solidarity (Article 2 of the Italian Constitution) [74–81]. Accordingly, the consolidated notion of “*correttezza/buona fede*” in the Italian legal system must be understood as the party’s duty to “protect” also the “interests of the counterpart”, [82–85] so to reach a *fair balancing* (“*giusto equilibrio*”) [86] among opposite interests, [87,70] beyond a mere formal approach to positivist structures. [88]

In Common Law, the principle of good faith is close to the notion of *equity*. [61,89,90] In our aforementioned linguistic research the use of the word “equitable” is often used as a synonym of fair in the non-English versions of the GDPR (See in Table 1 the Spanish, French, Portuguese and Romanian versions of the GDPR). As noted, equitable means “fair” but also “valid in equity as distinct from law”. [46] Equity in Common Law has three main functions: “adapting the law to the facts of individual cases, fill gaps in the law and refuse to apply unjust laws”. [91] Equity is an interpretational tool that can tailor the strict formality of rules to individual cases, taking into account possible gaps or cases of unfairness. Analogously, the Data Protection discourse on fairness is indeed a flexible overarching tool that should inspire the interpretation of existing principles [92] and rules, even rebalancing asymmetric relationships. [14,5]

Therefore, it seems that the historical legal link between *bona fide* and *equity* is largely reflected in the different translations of the “fairness” principle across EU official languages (as equitability, loyalty and correctness). However, even the notion of “good faith” in common law countries, and in particular in the UK, is acquiring increasing importance [103, 104, 105, 106, 107, 108, 109] in particular under the perspective of rebalancing asymmetric bargaining power between the contracting parties. [110]

In all these legal traditions, the notion of fairness and good faith has been developed mostly in contract law. The Draft Common Frame of Reference for European Contract Law (DCFR) explicitly addresses this notions: ‘[t]he expression ‘good faith and fair dealing’ refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question’ (Article I-1:103). Even the European Commission (withdrawn) proposal for a Common European Sales law proposed the same definition of good faith and fair dealing of the DCFR.

Even the Swiss Data Protection Act, [93] whose last revision takes inspiration from the GDPR, [94] in the data protection principles does not explicitly mention fairness but “*good faith*” (“*Treu und Glaube*”, “*bonne foi*” and “*buona fede*”) and “proportionality” (Article 4(2) [93]). Among the three official translations, only the German one overlaps with the fairness translation in the GDPR (*Treu und Glaube*). Both the French and Italian versions of the Swiss Act refers to “good faith” (*bonne foi*, *buona fede*), while the GDPR versions refers to “loyauté” and “*correttezza*” but we have already argued *supra* that both

the notion of “loyauté” (used in the French version of the GDPR) and of “correttezza” (used in the Italian version of the GDPR) are generally considered synonyms of “good faith” in the respective legal systems.

The Swiss Data Protection Act links fairness (as “good faith”) and *proportionality*: although there is no textual link in the GDPR between these two principles several commentators have addressed the inherent link between proportionality and fairness as fair balance[5] as reflected also in the CJEU case-law (see *supra*) and in the relationship between Article 8 and 52 in the EU Charter of fundamental right.

In other EU legal fields, the link between fairness and equity or good faith is more explicit. In consumer law, Unfair Terms Directive defines “unfair” what is “contrary to the requirement of *good faith* [and] causes a *significant imbalance* in the parties’ rights and obligations arising under the contract, to the detriment of the consumer” (emphasis added)[95,51]. The link between *unfairness*, *good faith* and *significant imbalance* in consumer law is in line with the aforementioned reflections about bona fide and fair balance in the national legal histories [70][92] (see interestingly also Department of Justice of State of Victoria: “A term is unfair if: it causes a *significant imbalance* in the parties rights and obligations under the contract, it is not reasonably necessary to protect a *legitimate interest* of the trader, it would cause detriment to the consumer”[96]) but also in the data protection law [5]. In the field of intellectual property rights, the Directive 2004/48 explicitly links fairness to “equitability”. [97]

6 Preliminary conclusions on the notion of fairness in the GDPR

We have thus observed that fairness in the GDPR is a complex principle, embedding several different nuances and tasks. These nuances include the notion of transparency, lawfulness, non-discrimination, but also the concepts of proportionality and balancing.

Fairness in the GDPR goes beyond mere legality (*summum ius*, *summa iniuria*): it is aimed to the consideration of the substantial circumstances at stake. This means considering *expectations* of the individuals, *effects* on the data subjects, *actual interests* of the parties. Among possible unfair *effects* we need to include discrimination, but also any other risks to fundamental rights of individuals (e.g. manipulation).

In particular, the inherent link between fairness and good faith (as shown in the linguistic comparison), even considering the national legal traditions in terms of bona fide and equity, seems to suggest that fair should mean prevention of unfairly asymmetric relationships between subjects, balancing their substantial interests (or their “bargaining power”).[110]

In other words, fairness is an overarching interpretative principle, aimed at preventing situations of unfair imbalance. Also the CNIL, as already mentioned above, see fairness as a solution to “the problem of *unbalanced relations* between controllers of algorithms and users”. [21] Similarly, the Council

of Europe Modernized Convention 108 defines fairness as a tool for re-balancing different interests.[15]

Interestingly, Article 29 Working Party refers to “imbalance” when defining the notion of vulnerable data subjects.[112] Imbalance is inherent in most relationship between data subjects and data controllers, but we can argue that such imbalance becomes “unfair” when it is based on the exploitation of individual vulnerabilities from a dominant position.[19] In the algorithmic environment, such vulnerability might be translated as all cases of, e.g., potential manipulation and indirect discrimination, made possible through the great potentialities of predictive analytics and machine learning.

Accordingly, at least one way to articulate fairness might be the protection of individual vulnerabilities and the prevention of vulnerability exploitation, as consequences of significant power imbalance between individuals.

7 Conclusion

This paper has proposed an innovative understanding of the concept of fairness in the data protection field through two methodological tools: linguistic comparison and contextual interpretation.

Section 2 addressed the notion of fairness in the Context of the GDPR, while section 3 observed how the European Court of Justices addressed the concept of fairness in data protection. Then, Section 4 analysed Data Protection Authorities’ understanding of fairness (in particular the French and the English one), while Section 5 has addressed a linguistic comparison of the term fairness in different European languages.

In general, the notion of fairness is translated with several different nuances (in accordance or in discordance with the previous Data protection Directive and with Article 8 of the EU Charter of Fundamental Rights). In some versions, different words are used interchangeably (it is the case of French, Spanish and Portuguese texts), in other versions there seems to be a specific rationale for using different terms in different parts of the GDPR (it is the case of German and Greek version). The analysis has revealed three mean semantic notions: correctness (Italian, Swedish, Romanian), loyalty (French, Spanish, Portuguese and the German version of “Treu und Glaube”) and equitability (French, Spanish and Portuguese).

Interestingly, these three notions have common roots in the Western legal history: the Roman law notion of “bona fide”. Taking into account both the value of “bona fide” in the current European legal contexts and also a contextual interpretation of the role of fairness in the GDPR, the conclusion of this paper is that fairness refers to a substantial balancing of interests among data controllers and data subjects. The GDPR approach of fairness is, thus, effect-based: what is relevant is not the formal respect of procedures (in terms of transparency, lawfulness or accountability), but the substantial mitigation of unfair imbalances that create situations of “vulnerability”.

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