Editorial

Data Regulation: A Race to...?

From the era of codification, where the law was thought to be ‘just’ a code, to today’s hybrid world where (computer) code seems to become law – at least in the eyes of those who seem to have an interesting misconception about what ‘law’ actually means or should mean – it is about two centuries time difference. The change in approach, however, took less than 20 years. It leaves the law, law makers and lawyers looking at the backlights of the technology train, waiting on a platform that together with the railway station itself is already in a state of demolition. We look at the reality around us no longer as we did before with our senses, but we look at a screen in front of us and assume that reality is only there. If what we see around us is different from what we see on the screen Hegel’s famous phrase is applied “Umso schlimmer für die Tatsachen” (too bad for the facts). In today’s language what we see on the screen are then the supposedly more correct ‘alternative facts’.

Fortunately, it is now more and more beginning to be realised not only by law makers, but also by the general public that the law has an impact on human relationships that stretches far beyond what computer code makes us believe. Sometimes one might get the impression that, for example, profiling of persons as if they are nothing more than their amalgamated data, under the condition, of course, that the data are properly analysed by Artificial Intelligence (with capitals AI), is the new image of human beings. It is, therefore, to be fully supported that the forthcoming Portuguese EU Presidency will promote the acceptance of a ‘Fundamental Digital Rights Charter’, stressing the importance of human intervention also in computer code driven systems and decision making processes.¹ Fundamental human rights are the outer shell of the rule of

1 Cf. the private draft of a Digital Charta by the Zeit-Stiftung and Buccerius: https://digital.charta.eu/wp-content/uploads/Digital_Charter_english_2018.pdf.

law. But there is more to the rule of law than fundamental rights. Also at a more technical level questions of principle are being decided, because fundamental rights are, by necessity, open-textured and abstract, sometimes even vague because resulting from political compromise, and need more concrete applications. From that perspective it is almost reassuring to see that the European Union is becoming very involved. In the past weeks (and more is to come) the European Commission and the European Parliament have been very active. The European Commission took several initiatives and published a 'Digital Finance Package', aimed among other areas at regulating markets in crypto-assets and mitigate the risk of cyber threats.² The Commission also published several reports in this area, focussing on the use of innovative technologies in civil and criminal justice.³ Very interesting to read is also the European Commission's policy paper on 'Data governance and data policies at the European Commission', among other areas discussing 'data ownership' and 'data stewardship', taking the approach that these are problems of a managerial nature.⁴ The approach that 'data ownership' is not about traditional concepts or notions of ownership, which are too historically and intrinsically connected with physical assets, but about management is what I also argued in recent papers.⁵ Furthermore, work is going on to enact a Digital Services Act (initiatives taken by both the European Parliament and the European Commission), a Data Act, a Data Governance Act and a Data Markets Act, although it is not really clear yet what the latter three Acts will contain or even whether they are only different names for the same Act.⁶ Most likely, the Data Act will focus on sharing of

2 https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en.

3 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice/relevant-studies_en.

4 https://ec.europa.eu/info/sites/info/files/summary-data-governance-data-policies_en.pdf.

5 Most recently in a chapter of a book that was published as the result of cooperation between European private lawyers, wanting to make clear that fragmentation of Europe as a result of measures to combat the Covid-19 pandemic cannot undo decades of inspiring and productive exchange of views and ideas within an integrated European academic community. See my contribution on 'Who "Owns" the Data in a Coronavirus Tracing (and/or Tracking) App?' in: Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst and Fryderyk Zoll (eds.), *Coronavirus and the Law in Europe* (Intersentia, open access): <https://www.intersentiaonline.com/publication/coronavirus-and-the-law-in-europe/76?version=v-2f6f01ec-324e-637b-c7ca-a6bc0e384e16#Ho>.

6 For the proposals concerning a Digital Services Act see: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA\(2020\)649404_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf) (European Parliament study) and <https://ec.europa.eu/digital-single-market/en/digital-services-act-package> (European Commission). Regarding the possible content of a Data Act see the Communication on a European Strategy for Data: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0066&from=EN>.

non-personal data in Business to Business (B2B), Business to Government (B2G) and Government to Government (G2G) transactions in data. However, when looking at developments at the level of EU Member-States the limitation to non-personal data might not apply to G2G transactions: Government base registries (about personal status, address etc.) cannot function without data exchange. I need only refer to the Irish Data Sharing and Governance Act 2019.⁷ Also, the Covid-19 epidemic made it abundantly clear that in a situation of a pandemic privacy and the need to act in the general interest, protecting public health, might come into conflict. The Data Markets Act seems to be aimed at protecting Europe's sovereignty as to who controls data flows, particularly non-personal data transactions. In the latter area the European Law Institute (ELI) has been very active in a joint project with the American Law Institute (ALI) on 'Principles for a Data Economy'.⁸ The ELI, furthermore, is also active in such areas as the drafting of principles on blockchain technology and smart contracts, and principles on access to digital assets.⁹ And finally, the newly founded European Association of Private International Law (EAPIL) is preparing a draft EU regulation to consolidate private international law, although it is not clear yet whether the initiative will also deal with conflict of laws in the area of Internet (Communications) Technology (ICT) and the law.¹⁰

All of these initiatives are extremely relevant, interesting and should be pursued with great intensity. Nevertheless, I also do have some major concerns. Within Europe it looks as if suddenly we realise what is going on in our now hybrid ('real' and 'virtual') society, and all at once we now take several initiatives, but they do not seem really well coordinated. Other major jurisdictions are also taking initiatives and at a global level there are proposals to be expected from UNCITRAL and UNIDROIT.¹¹ Data, by their nature, are non-rivalrous, fluid and cross-border. This requires and even demands that all of these initiatives, by the EU, by other economic integration areas and by global institutions, are coordinated at a global level. The only organisations we have

7 <http://www.irishstatutebook.ie/eli/2019/act/5/enacted/en/print.html>.

8 See for more information <https://europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/data-economy/> (ELI) and <https://www.ali.org/projects/show/data-economy/> (ALI).

9 <https://europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/>.

10 <https://eapil.org/>.

11 See, for example, UNCITRAL's 'Report of the Colloquium on Civil Asset Tracing and Recovery (Vienna, 6 December 2019)', <https://undocs.org/A/CN.9/1008> and UNIDROIT's 'Exploratory Workshop on Digital Assets and Private Law', <https://www.unidroit.org/english/news/2020/200917-digital-asset-private-law/programme-e.pdf>.

for that purpose in the area of law are precisely UNCITRAL and UNIDROIT. Let us hope that both will follow-up on that responsibility.

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