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Evaluating the EC Private Data Sharing Principles: Setting a Mantra for Artificial Intelligence Nirvana?

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SUMMARY			
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On April 25, 2018, the European Commission (EC) published a series of communications related to data trading and artificial intelligence. One of them called “Towards a Common European Data Space”¹, came with a working document: “Guidance on Sharing Private Sector Data in the European Data Economy”². Both the Communication and the guidance introduce two different sets of general principles addressing data sharing contractual best practices for business-to-business (B2B) and for business-to-government (B2G) environments. On the same day, the EC also published a legislative proposal to review the Public Sector (PSI) Directive³. These two simultaneous actions are part of a major package of measures aiming to facilitate the creation of a common data space in EU and foster European artificial intelligence technologies’ development.

The present paper focuses on the first action, the “Guidance on Sharing Private Sector Data in the European Economy”. First, because it is one of its kind. So far, the discussion on data sharing in Europe has been less intense than for data transfer. Maybe because the legal basis for a transfer can be a sale, lease, rental, while data sharing legal basis is more intricate, as we are looking at network structures and co-operation. Second, because, although these principles do not qualify as soft law (lacking binding force but having legal effects) the Commission’s communications set action plans for future legislation. Third, because the ultimate goal of these principles is to boost European artificial intelligence (AI) development. However, do these principles set a viable legal framework for data sharing or this public policy tool is merely a naïve expectation? Moreover, would these principles set a successful path toward a thriving European AI advancement? In this contribution, I try to sketch some answers to these and related questions.

It is crucial to mention that EC private data sharing principles evaluation has clear connections to the data ownership debate⁴. This paper will neither re-examine this aspect nor the introduction of other

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a Common European Data Space”, COM (2018) 232 final.

² Commission Staff Working Document “Guidance on Sharing Private Sector Data in the European Data Economy”, SWD (2018) 125 final.

³ See <https://ec.europa.eu/digital-single-market/en/proposal-revision-public-sector-information-psi-directive>

⁴ For an overview on the data “ownership” debate see: T. Hoeren, “A New Approach to Data Property?”, AMI 2018/2, p. 58-60, available at: <https://www.ami-online.nl/art/3618/a-new-approach-to-data-property> (accessed on October 15, 2018); B. Hugenholtz, “Data property: Unwelcome guest in the Houses of IP”, available at: https://www.ivir.nl/publicaties/download/Data_property_Muenster.pdf (accessed on October 15, 2018); J. Drexler, “Designing Competitive Markets for Industrial Data - Between Propertisation and Access” 8 (2017) JIPITEC p. 257;

possible doctrines⁵ no review any other ramifications, such as the right to information privacy and personal data protection⁶. Finally, the assessment of these principles will also stay away from specific consumer law issues related to the use of personal data, including “counter performance” as proposed in the Digital Content Directive⁷.

This contribution is structured as follows: The first part presents the problems at stake: what is the current state of AI development in Europe, the availability of data for AI and the Internet of Things (IoT) research and development, and the current legal framework of data trading. The second part evaluates the principles from an overall perspective focusing on their underlying goals. The evaluation is addressed separately: first, the principles for business-to-business (B2B) and next, the principles for business-to-government (B2G) data sharing are considered.

The paper concludes that these two sets of principles on private data sharing, despite of their simplicity, put on the table an important question for reflection: *Should Europe move away from discussing about a regulatory approach to data property and access to data, and rather focus on elaborating on the problem of how to foster data sharing and data collaboration to find better solutions?* Furthermore, these basic principles are an approach very worth considering, but we need more. Moving toward a data sharing mantra is urgent to encourage not only further quality datasets training collaborations, but to boost the development of AI-enabled technologies in Europe. Additionally, the development of instruments within the context of freedom of contract aiming at protecting the weaker party (or a third party) from unfair exploitation, need to be taken into account. Therefore, the approach needs to include more than recommendations and models for how the parties can design their own contractual arrangements. Europe needs a normative approach with strong regulators, in order to protect both parties’ freedom of contract.

H. Zech, “A Legal Framework for a Data Economy in the European Digital Single Market: Rights to Use Data”, 11 Journal of Intellectual Property Law & Practice (2016), p. 460-470.

⁵ For an overview see: M. Dorner, “Big Data und “Dateneigentum””, (2014), Computer und Recht, p. 617-628; Osborne Clarke LLP, *Legal Study on Ownership and Access to Data*, Study prepared for the European Commission DG Communications Networks, Content & Technology (2016), available at: <https://publications.europa.eu/en/publication-detail/-/publication/d0bec895-b603-11e6-9e3c-01aa75ed71a1/language-en> (accessed on October 15, 2018).

⁶ See N. Purtova, “Do property rights in personal data make sense after the Big Data turn? Individual control and transparency”, 10(2) Journal of Law and Economic Regulation November (2017); Tilburg Law School Research Paper No. 2017/21. Available at SSRN: <https://ssrn.com/abstract=3070228> (accessed on October 15, 2018).

⁷ Proposal for a Directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content, COM (2015) 634 final; see A. Metzger, “Data as Counter-Performance – What Rights and Duties do Parties Have?” 8(2017) JIPITEC 2 p. 2; A. Metzger, Z. Efroni, L. Mischau, J. Metzger, “Data-Related Aspects of the Digital Content Directive” 9(2018) JIPITEC 90 p. 1