**ELI Digital Law SIG**

**Issues for possible examination by the Data Economy working group**

Scoping paper prepared for the SIG meeting in Vienna, 8 September 2017[[1]](#footnote-1)

# A. Background

On 10 January 2017, the European Commission published, within its Digital Single Market strategy, a Communication on the ‘Building of a European Data Economy,[[2]](#footnote-2) accompanied by a staff working document[[3]](#footnote-3) and a public consultation. Apart from some liability issues raised by the emerging Internet of Things and autonomous systems, which seem to have ended up in this package by some rather strange logic,[[4]](#footnote-4) the documents have a dual focus: In the first place, they address the **“free flow of data”** in the EU and its restrictions by hindrances such as data localisation requirements. In the second place, they discuss different possible avenues for boosting the European data economy, implicitly or explicitly starting with the assumption that the European data economy has to catch up with other big players in order for Europe to meet the challenges of the global economy in the 21st century. It is in this spirit that the Commission documents suggest a series of potential steps to be taken, most of which are directed towards **making more data available for the European data economy and/or providing more investment protection and legal certainty concerning transactions**.

Searching for points of reference concerning transactions in the data economy there are, in the first place, the **model contracts for data transfers outside the EU/EEA**[[5]](#footnote-5) as well as the **EU-U.S. Privacy Shield Framework Principles**.[[6]](#footnote-6) They address both controller-to-controller as well as controller-to-processor transactions.

In a certain sense, also the 2015 **Proposal for a Digital Content Directive**[[7]](#footnote-7) sets the course for contracts in the data economy, at least as far some general concepts are concerned. At the end of the day, digital content is nothing but data, and thus the DCD Proposal includes the suggestion to treat the supply of data as something that is not a sale, but to which a sale-like contractual regime can normally be applied. In its original version, the Proposal did not differentiate between the supply of digital content and the provision of digital services, whereas the revised version prepared by the Council Working Group[[8]](#footnote-8) draws a line between digital content and digital services but still subjects both to the same sales-like regime of contractual rights and remedies. On the other hand, the DCD also includes the concept of “**data as counter-performance**” even though this concept has been somewhat watered down in the Council version as a reaction to the critical opinion issued by the European Data Protection Supervisor.[[9]](#footnote-9)

# B. Past and Ongoing ELI Work in the Field

The first ELI project dealing with issues of transactions in data – in the form of digital content – was the project on the **Common European Sales Law (CESL)**, with a Statement of more than 300 pages published in 2012 and supplements addressing, in particular, digital issues published in 2014 and 2015.[[10]](#footnote-10) The same Working Group, but with a fair number of additional members, then took on the work on the proposed **Digital Content Directive**, resulting in an ELI Statement on the said Proposal published in 2016.[[11]](#footnote-11)

In late 2016, a Feasibility Study for a potential joint project between the American Law Institute (ALI) and the ELI on **ALI-ELI Principles for a Data Economy** was launched. A kick-off workshop took place in Vienna in March 2017, and since then discussions have taken place between the project leaders on the European and the American side (Christiane Wendehorst and Steve Weise) about the best project design. For the purpose of discussions at the 2017 ELI Annual Conference a “Draft Framework for Discussion” was prepared whose aim is not to suggest what potential ALI-ELI Principles for a Data Economy should ultimately be but rather to show that it is both feasible and useful to draft such Principles at this point in time. The idea is to launch a wider discussion with the ELI membership about the topics to be addressed and the methodological approach to be taken. Critical feedback by the members of the SIG sub- group on the data economy is highly appreciated.

# C. Potential Objectives for this SIG Sub-Group

## (i) Free movement of data

This SIG sub-group could engage in the further development of “free movement of data”, which comes on top of, but is also intertwined with, the four Freedoms under the Treaties. One of the tasks that could possibly be useful at this point is the development of a set of Principles that could guide legislators in deciding when data localisation requirements and similar restrictions of the free flow of data may be justified by compelling reasons of national security, resilience of IT systems, etc. Needless to say the task would be highly challenging, quite political, and it would ultimately be the Court of Justice that has the last say when it comes to compatibility of national restrictions with EU primary and secondary law.

## (ii) Data rights

The discussion on “data ownership” had dominated the discussion about the data economy for the past few years. Recently, the majority of scholars and practitioners seem to have opted against either introducing new intellectual property rights or recognising entitlements in copies of data as something akin to tangible property. Rather, there is a tendency towards a **more sophisticated scheme of investment protection and access rights**. As the discussion has moved away from the schematic “pro or contra data ownership” debate it is time for the European legal community to engage in a new debate about what kind of tailor-made investment protection and access, portability and vindication rights is required for the European data economy. To a certain extent, these issues will also be addressed by the Group that is currently working on the Feasibility Study concerning ALI-ELI Principles for a Data Economy.

## (iii) Default contract rules for transactions in data

The Group that is currently working on the Feasibility Study concerning ALI-ELI Principles for a Data Economy will look in detail at what kind of **default contract rules** are required in order to make European and global data economy work. Taking the law as it stands as a starting point the Group will seek to conceptualise them and to explore what kind of additional rules would be required in order to provide a high level of both legal certainty and fairness. In this context, the Group will probably also seek to develop a “black list” and/or “grey list” of **unfair contract terms** with regard to data, both for business-to-consumer and for business-to-business relationships even though it is unclear to what extent such lists can become a part of the ALI-ELI Principles as such. The SIG sub-group is invited to support and inspire the Group in their endeavours to draft contract rules that are tailored to meet the specific requirements of the data economy. It would be particularly welcome to receive suggestions as to how model contracts or model licences could be designed.

**(v) Reconciling data protection and the data economy**

The Commission documents released on 10 January 2017 largely refer to non-personal data when it comes to the building of a European data economy. However, given the broad definition of personal data in the GDPR, and in the light of technological progress, the bulk of data are probably personal data. This means that it is of utmost importance to find ways how to reconcile strong data protection in the EU with a flourishing European data economy. This could, in part, be achieved by the **standardisation of data** **anonymisation** techniques, to a larger part by developing **new technologies**, but arguably also by new and innovative frameworks such as **Data Trusteeship**,[[12]](#footnote-12) a model presented by the undersigned at the ELI conference on digitalisation in Hull in March 2017 and the last Digital Law SIG meeting.

1. Prepared by Christiane Wendehorst, University of Vienna, christiane.wendehorst@univie.ac.at. [↑](#footnote-ref-1)
2. Communication of 10 January 2017 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Building a European Data Economy’, COM(2017) 9 final. [↑](#footnote-ref-2)
3. SWD(2017) 2 final. [↑](#footnote-ref-3)
4. Note that this had also been looked into by SWD(2016) 110 final and was addressed by a parallel, and partly overlapping, consultation on the evaluation of the Product Liability Directive. [↑](#footnote-ref-4)
5. Commission Decision 2001/497/EC of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC (notified under document number C(2001) 1539) OJ L 181, 4.7.2001, p. 19–31; Commission Decision 2004/915/EC of 27 December 2004 amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries (notified under document number C(2004) 5271), OJ L 385, 29.12.2004, p. 74–84; for controller-to-processor agreements see Commission Decision 2010/87/EUof 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (notified under document C(2010) 593) OJ L 39, 12.2.2010, p. 5–18. [↑](#footnote-ref-5)
6. Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) OJ L 207, 1.8.2016, p. 1–112. [↑](#footnote-ref-6)
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/2015/0634 final - 2015/0287 (COD). [↑](#footnote-ref-7)
8. Council working group, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (First reading) – General approach – ST 9901 2017 INIT – 2015/0287 (OLP). [↑](#footnote-ref-8)
9. European Data Protection Supervisor, Summary of the Opinion on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, OJ C 200, 23.6.2017, p. 10 [↑](#footnote-ref-9)
10. Available at http://www.europeanlawinstitute.eu/publications/eli-publications/. [↑](#footnote-ref-10)
11. http://www.europeanlawinstitute.eu/fileadmin/user\_upload/p\_eli/Publications/ELI\_Statement\_on\_DCD.pdf [↑](#footnote-ref-11)
12. See, e.g., *Christiane Wendehorst*, Of Elephants in the Room and Paper Tigers – How to Reconcile Data Protection and the Data Economy, in: Reiner Schulze/Dirk Staudenmayer (eds.), Trading Data in the Digital Economy: Legal Concepts and Tools, 2017 (forthcoming). [↑](#footnote-ref-12)