

European issues

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Businesses in Europe and the data economy

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The market economy is changing and will change profoundly the business model of all activities. Hence we have to understand how to manage this raw material that data has become and how to regulate this new economy. The status of property is the focus of thought, the imperatives of competition and personal data protection likewise, whilst innovation in the supply of services and products will be a factor of economic development. Debate at European level has been launched.

I. THE ISSUES AT STAKE FOR BUSINESSES IN THE DATA ECONOMY

In the age of the digital revolution data has become a vital, precious resource. The data economy – which reflects the global impact of the profusion of information across the entire economy – is growing rapidly. It is deemed to be a vector of inevitable growth. Beyond the protection of personal data and consumers, the regulation of the market is therefore of great significance.

Michelin CEO Jean-Dominique Senard bore witness to this as he spoke in Le Figaro[1] in March 2016: "Of course the tyre is our know-how and we are trying to remain on the cutting edge of progress and innovation. But when we speak of the digital, which creates value, this means a player's ability to obtain all types of data, to process it and pass it on to his client." We might add: "according to the client's needs and the improvement of one's own service."

The Michelin CEO notes further that all of the major manufacturing groups are and will have to face this rationale. The same applies to major service groups.

Symmetrically grand scale access to this resource will boost pure players in the digital economy.

Two fantastic opportunities are now emerging from this. On the one hand there is the existing or created data which a priori belongs to the business and this will enable the completion of the offer of the latter via a series of services that will lead to the enlargement of the commercial offer. This exists of course already but the phenomenon will change dimension. The development of connected objects is also moving in this direction. Moreover, access to this data will generate and

is already generating the development of innovative offers carried by the pure players of the digital economy.

Hence, we have to try and understand how we should manage this raw material. What status does digital property have? Should we do away with the idea of property and therefore place all data in the public arena that a business might hold? Given that this data enables the formulation of a real offer of products and services, how should competition be considered in the hypothesis of total opening? Is data that is made to optimise the manufacturing process and to achieve company specific competitiveness, affected by an unlimited opening of databases? What is the value of the commercialisation of this data? Can regulation cover all aspects of this? Should more scope be given to contractual agreements? There are an infinite number of questions to be asked about this economy.

For industrial groups and services the strategy to implement should take on board this new dimension and anticipate the advent of new trends that do not form the core of their profession and which have not yet been identified in detail.

There is varying awareness of data production depending on the type of activity in hand. Hence public transport and parking sectors which collate a considerable amount of data are extremely vulnerable to the emergence of a multitude of services. But they are not the only ones of course. Energy, water and waste processing are in a similar situation. Banking and financial establishments will also be on the front line, although they will face a different problem, with the need to overcome major changes and a totally different relationship with their users.

Regarding businesses in the digital sector new offers have to

1. « Le numérique est aussi important que la première révolution industrielle », Le Figaro, 5th and 6th March 2016.

be invented – which is ongoing in the main – they will have to analyse how to introduce competition with actors in the traditional economy, in a word, anticipate a new organisation of the market and be able to influence it.

In short economic actors must innovate in terms of their strategies. But they will be able to do this as part of regulation that promotes growth and security from a legal point of view.

II. EUROPEAN REGULATION OF THE DATA ECONOMY

Given these challenges several initiatives are ongoing at European level.

The European Commission has just published a communication regarding so-called economic data, i.e. which are not personal. This communication[2] will be followed by a public consultation. It sets out a series of questions which enumerate in part the generic issues mentioned above.

Indeed this involves introducing a normative framework to foster the valorisation of this resource, to do away with obstacles preventing data trade, to initiate a truly common market in this area and to take on board a review of the situation from one country to another and also a review of European legislation as it stands today.

- The waivers provided for in various European texts regarding business secrecy allow a great deal of latitude of interpretation to the public authorities. But it is likely that excessive ease of access to data might be challenged in this context.
- The structure of databases is protected by copyright and the content of these can be protected by a sui generis right. These measures were formulated under the European directive 96/9/CE.

In real terms the present communication sets out the following guidelines:

1. It hopes to counter unjustified data location obligations in the Member States. This will remove the difficulties faced by start-ups and SMEs to store data in another State other than their own.

2. It hopes to foster the free movement of data by challenging national rules that prevent transnational transfers and by defining interoperability standards.

3. Given the development of connected machines and objects it hopes to analyse to what point free access of data generated by this dynamic and used by the same company can go. This obviously raises the issue of incentives to share data and therefore the perimeter of the definition of property.

4. The development of the Internet of Things (IoT) is leading to new liability issues. For example if an autonomous car causes an accident, at present there is no liability regime to cover this. Who is liable: the developer of the operating system, the car manufacturer, the user? The communication and the public consultation will launch debate so that the legal framework can be adapted to these issues.

5. The communication sets the hypothesis of the authorities being able to access private data, in the general interest, notably for statistic or research requirements. The opening of non-personal private machine generated data in certain B2B sectors is also being considered against remuneration and in the respect of business secrecy.

The European Commission's initiative is perfectly legitimate. On the one hand, it will be at European level that we shall be able to counter the American digital giants - the regulation of personal data has just proven this. On the other hand, it will be in a single market that a market power with competitive actors will emerge, which is both a factor of internal development for Europe and also a source of success in the world competition.

However the method seems incomplete since the remedies on offer involve the removal of obstacles between the various countries and the protection of personal data. It is also extremely legal with the aim of creating liability and property regimes for data. But the economic issues between the major industrial or services groups and the major digital companies cannot be addressed with these methods alone. It is by taking on board all of these aspects that regulation will be really effective.

From another point of view the Commission is being criticised by a certain number of Member States[3], MPs[4] and interest

2. <https://ec.europa.eu/digital-single-market/en/news/communication-building-european-data-economy>

3. 14 Member States called on the Commission to put forward legislation to prevent national data location obligations. https://mc.gov.pl/files/free_flow_of_data_-_non-paper_od_lm_eu_member_states_dec_2.pdf

4. https://www.contexte.com/article/numerique/les-eurodeputes-veulent-une-initiative-plus-ambitieuse-sur-la-libre-circulation-des-donnees_64234.html

groups[5] because the communication is unsatisfactory in terms of real legislative measures that enable the guarantee of the free movement of non-personal data in the Union. Although at the end of 2016 the Commissioner for Digital Affairs, Andrus Ansip, promised a draft regulation for the end of June 2017, the communication no longer makes reference to this.

All of this shows that we should mistrust any type of ideological approach proclaiming that "data is a common good" - the only limiting factor being the protection of personal data - or on the contrary - "circulation must be limited." This would obviously be an obstacle to the development of the digital economy.

The development of effective regulation will be a difficult exercise. French law bears witness to this[6] since it has introduced measures that are extremely favourable to the opening of data and which has undoubtedly not taken dialogue with other Member States adequately into account.

III. THE SO-CALLED FRENCH DIGITAL REPUBLIC LAW

In France the law in support of a Digital Republic entered into force on 9th October 2016, and develops quite extensively the opening of data. It provides for the on-line publication of a certain amount of "anonymous" data linked to public authorities and public services that are the focus of concession contracts. Over the next two years government agencies, as well as businesses responsible for public service tasks (transport, energy providers, waste collections and disposal etc.), will progressively have to provide the authorities with and publish on-line the source codes, databases, correspondence, and administrative documents generated as part of the public service task that has been delegated to them. This information will have to be published free of charge and according to an open standard that can be reused easily. Exceptions are being planned for on public safety grounds, confidentiality or for industrial secrecy reasons. However, the criteria for these exceptions are still unclear and proof has to be provided by the administration or business that wants to use them.

In the transport sector the opening of data useful to passengers (timetables in real time, prices, and network

incidents) has already been provided for in the Macron Bill[7] that was passed in the summer of 2015. The bill for a Digital Republic goes much further since it provides for the opening of all data regarding the completion of a public service task. The goal sought is not transparency and information for the users, which is akin to a B2C (business to consumer) opening. The aim of the bill is via B2B (business to business) opening to help start-ups use the data placed on-line to foster innovation.

Although the principle is appealing in theory this wholesale opening causes a problem for businesses which are subject to it on two grounds: economic competitiveness and security.

Firstly from an economic point of view, this bill will obviously affect all businesses (transport, energy, water etc.) whose core business is fed by databases and which have invested to develop algorithms to be able to use this data.

This opening will mainly affect French businesses which undertaken most of their activities in the competitive field, whether this is in France or abroad. The company involved might see their competitors achieve free access to key data such as pricing frameworks or user data (the collation and processing of which is the focus of investments).

This obviously benefits the direct competitors of the businesses involved, notably at international level. It is also an opportunity for businesses in the digital economy which would have a certain advantage in order to compete against incumbents.

The obligation to provide data regarding concession agreements in view of their publication online is all the more a problem, since some incumbents manage their concessions vertically ranging from infrastructures to user services. The main winners in this opening are in fact the GAFA and the major start-ups of Silicon Valley which are best placed to exploit a volume of data like this. These businesses no longer just offer services with traditional operators but go right back up the chain of added value and position themselves in direct competition with the latter.[8]

Secondly the distribution of certain data and documents raises real security questions that cannot be totally resolved by the planned exceptions. Access to transport or energy

5. The NGO Access Now, which defends user rights on the internet and Digital Europe, the digital businesses lobby, are criticising a communication which offers few tangible elements.

<https://www.accessnow.org/launch-digital-initiatives-eu-good-bad-ugly/>
http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=2339&language=en-US&PortalId=0&TabId=353

6. <http://www.economie.gouv.fr/republique-numerique>
7. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JO RFTEXT000030978561&categorieLien=id>

8. On this issue read La transition numérique des transports en commun, <http://barbares.thefamily.co/assets/etudes/Transports.pdf>

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data networks would certainly facilitate the use of their security loopholes.

Hence, with the Digital Republic bill, we might say that France has forged ahead. But by doing this it has anticipated the drafting of European legislation, which we have seen is now underway. Was this a good thing? In some respects this law is not in line with the existing European legal framework, directive 96/9/CE. To this we must add that the publication of correspondence is an infringement of article 8 of the European Charter of Fundamental Rights, whose protection also extends to moral people. Finally, the bill includes measures with which other Member States disagree and which might sometimes lead to strong opposition.

IV. EUROPE AND THE DIGITAL

The issues at stake are enormous for all actors.

For the industrial groups and services it means finding a balance between the opening of data and their protection to make the basic profession more competitive and to foster developments in associate services where competition will be fierce.

For the digital businesses, even though some of them do not want to put their own information on the market, the interest lies, on the contrary, in moving towards a maximum opening to foster start-ups of course and also the GAFA (Google, Apple, Facebook, Amazon).

For the European institutions and for the Member States the aim is to offer a normative framework that protects all players and consumers. But development also has to be fostered, along with the creation of jobs and growth

to arm Europe for world competition. We cannot just be content with addressing legally the things that make things safe, that protect and that liberate. We must also put forward measures and proceed to arbitration that will enable this development. As things stand right now it is up to the economic sector to make the necessary proposals to the European Commission. The consultation launched by the latter provides the first framework that will lead to the expression of these suggestions.

The European Commission's initiatives are therefore vital and are coming at a crucial time. The speed of technological development is such that those who are not dynamic will be the losers. It is true for economic players and it is also true for the European Union.

In the political world and notably in terms of the upcoming elections everyone like General de Gaulle is panicking, saying: "... the digital, the digital ...". However we still have to address this dynamically, pragmatically, in a neutral manner. This will only be possible with major involvement on the part of civil society via the contribution of businesses, associations, unions and NGOs.

The data economy is not just about business growth, it also and undoubtedly involves one of the ways that Europe can adopt real decisions to strengthen its cohesion via a true digital single market.

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