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Data in the Public Sector and Data Valorisation

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1. *Legal Issues relating to Data in The Public Sector and The Process of Technological Modernisation Through the Lens of Data Valorisation*

The analysis of legal issues relating to data in the public sector covers several topics, all of which are of particular relevance, both on their own and as part of a global vision, leading to the identification of (i) the new set-up of public-private relations, (ii) the new balance between public powers and citizens' rights, (iii) the emergence of new duties for public sector bodies and new rights for individuals and companies, (iv) the new role of public administration in the data-driven society and economy. Looking at the phenomenon from another perspective, these are issues that highlight the new dimension of *data valorisation*, which poses new questions and new challenges to jurists and scholars.

The process of technological modernisation that has been taking place in the public sector throughout Europe in recent years poses a major challenge to the parameters within which the academic debate in the field of Public Law has been taking place. It can even be argued that there is a latent tension between the parameters on which the Public Administration is conceptually based and the demands of adaptation to change, innovation and learning capacity that are required today.

From a legal point of view, the important challenges facing European society have been highlighted by the assertion that it is essential to rely on a clear legal environment that encourages innovation and facilitates fairness and balance between the various actors involved. However, the legal guarantees on which regulation and its doctrinal analysis have traditionally been based have not kept up – at least not with the necessary agility and intensity – with the dizzying pace imposed by technological innovation.

In many cases, the fashion for technological innovation only presents us with mere labels imposed by advanced marketing and communication strategies. On the other hand, however, we are witnessing a paradigm shift that should be the object of greater legal attention, particularly in terms of academic analysis. Otherwise, we may find that technological innovation ends up dazzling us and prevents us from perceiving the changes that are actually taking place, so that legal guarantees frequently become a burden and are therefore undervalued in their true value; or even that we fail to notice their actual importance in an ecosystem of continuous innovations that only consider the limits of technology as their only limit, turning the Law into a lesser evil that has to be complied with only from the point of view of mere formalism.

2. *New Scenarios in The Age of Datification and New Roles for Public Administrations within the "European Strategy for Data"*

Globalisation has led to a crisis in the sovereignty of nation-States and to new and multiple forms of 'digital sovereignty',[1] in the face of which new dynamics in the relationship between the public and private spheres are emerging.[2] The processes of identification and recognition of the identity of individuals also take on new connotations in the digital environment,[3] in which the action of the nation-State – in the field of digital identity – appears recessive compared to the role played by the large private companies, which manage services and technological infrastructures, including data platforms, on a planetary level.[4]

[1] L. Floridi, *The Fight for Digital Sovereignty: What It Is, and Why It Matters, Especially for the EU*, in *Philosophy & Technology*, 2020, 33, 369–378.

[2] See L. Cluzel-Métayer, C. Prébissy-Schnall and A. Sée (eds.), *La transformation numérique du service public: une nouvelle crise?*, Paris, Mare & Martin, 2021; A.G. Orofino, *La solidarietà in diritto amministrativo: da strumento di protezione dell'individuo a parametro di disciplina del rapporto*, in *Il diritto dell'economia*, 2020, 2, 571-598.

[3] G. Alpa, *L'identità digitale e la tutela della persona. Spunti di riflessione*, in *Contratto e impresa*, 2017, vol. 33, 3, 723-727; G. Finocchiaro, *Identità personale (diritto alla)*, in Vv.Aa., *Digesto delle Discipline Privatistiche*, Torino, Utet, 2010, 721-738.

[4] J. Eynard (ed.), *L'identité numérique - Quelle définition pour quelle protection ?*, Bruxelles, Larcier, 2020.

In this scenario, the public administration has long been called upon to play a new role, which has recently been outlined with decidedly innovative features in the new European legal framework on data governance, open data and data spaces.[5]

The public administration now also acts as a data intermediary and facilitator in the circulation of the personal and non-personal data it holds, ensuring that such data can be reused by data users for commercial and non-commercial purposes.[6] These aspects have to be balanced with the right to personal data protection, in a delicate balance of interests that is not always easy to reconcile.

In the new technological context, that of the pervasive transition to digital technologies based on the massive use of data (with an impact that is unprecedented in history),[7] we are experimenting with new directions, which lead us to take untrodden paths, without knowing whether the point of arrival is a harbinger of advantages or disadvantages.[8]

Some fears are becoming more and more substantial, including, for instance, those about the risks arising from the use of artificial intelligence, the excessive centralisation of data in the hands of a few parties, mass surveillance, data manipulation, progressive loss of freedom, exposure to the inhuman logic of the algorithm.[9] Alongside the fears, however, deep hopes are nurtured for a significant improvement in economic and social conditions, benefiting the community as a whole, as well as individuals, due to the advantages of using the vast amount of data available today.

In this perspective, the discourse on the valorisation of data emerges strongly and presents us with new challenges that we should be able to grasp. The increasing datafication of society, economy and institutions is a phenomenon that is now well established and is at the centre of important strategic choices of both the EU and nation-States (also in relation to other strategic choices made by third countries, such as the United States and China). The current scenario sees the majority of personal and non-personal data concentrated in the hands of a few Big Players, mostly private multinational companies, of US origin, operating in an oligopoly regime, if not a substantial monopoly, as it is sometimes the case if we consider specific services.

The European Commission, in its 2020 Communication on "*A European Strategy for Data*",[10] estimated that 80 per cent of data are centralised on the servers of major ISPs and the remaining 20 per cent are decentralised within citizens, companies and institutions. However, the European Commission predicted that by as early as 2025 the situation could be reversed, with 80 per cent of data controlled and managed at the peripheric level by those who produce the data (i.e. citizens, businesses and institutions) and only the remaining 20 per cent remaining on the central servers managed by ISPs. According to the European Commission, this paradigm shift will be driven by several factors, such as (i) a significant increase in the volume of data 'produced' by citizens, businesses and institutions; (ii) the development of new technologies and new products and services based on data, which may lead to greater control by the new 'producers' of data.

Therefore, a significant overturning of data business models is expected, with the possibility of disrupting the current oligopolistic centralisation in the management of data-related services, currently concentrated in a few ISPs. To enable this,

[5] J. Valero Torrijos, *Datos abiertos y reutilización en el contexto de la Estrategia europea de datos*, in *Tábula*, 2021, 201-213; G. Resta, *Pubblico, privato e collettivo nel sistema europeo di governo dei dati*, in *Rivista trimestrale di diritto pubblico*, 2022, 4, 971-995.

[6] F. Bravo, *Intermediazione di dati personali e servizi di data sharing dal GDPR al Data Governance Act*, in *Contratto e impresa Europa*, 2021, 1, 199-256; D. Poletti, *Gli intermediari dei dati*, in *European Journal of Privacy Law & Technologies*, 2022, 1, 46-51.

[7] J.-B. Auby, *Administrative Law Facing Digital Challenges*, in *Erdal*, 2020, Vol. 1, Issue 1-2, 7-15.

[8] See, for instance, H. Gimpel and F. Schmied, *Risks and Side Effects of Digitalization: a Multi-Level Taxonomy of the Adverse Effects of Using Digital Technologies and Media*, in *Proceedings of the 27th European Conference on Information Systems (ECIS)*, Stockholm & Uppsala, Sweden, 2019; D. Lupton, *Digital risk society*, in A. Burgess, A. Alemanno and J.O. Zinn (eds.), *Routledge Handbook of Risk Studies*, Oxon-New York, Routledge, 2016, 301-309; M.U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 in *Harvard Journal of Law & Technology*, 2016, 29, 2, 353-400; A. Barone, *Amministrazione del rischio e intelligenza artificiale*, in *Erdal*, 2020, Vol. 1, Issue 1-2, 63-67.

[9] S. Rodotà, *Il mondo nella rete. Quali i diritti, quali i vincoli*, Roma-Bari, Laterza, 2014.

[10] European Commission, *A European Strategy for Data*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2020/66 final.

however, it is necessary to review the rules on the governance of data, which is necessary for their exploitation, whether they are in public or private hands.

3. *The (Polysemic) Value of Data*

This paradigm shift is part of the European Commission's aforementioned Communication, which aims to implement a new strategy for the valorisation of data in an anthropocentric and value-oriented perspective that does not renounce the protection of individuals and their fundamental rights, without neglecting the opportunities for citizens, companies and institutions.

What stands out in this discourse is the recognition of the value of data, where 'value' and 'valorisation' are polysemic terms that do not necessarily have an economic connotation:

(i) with reference to personal data, they constitute a 'value', first and foremost, because, in application of the personalistic principle, they represent aspects of the personality of the individual to whom they refer and, therefore, are attributes of the person and expressions of all that is linked to that person;

(ii) in another respect, it is well known that data have economic value, but it is important to bear in mind that the economic value of data does not exist in itself. It exists because of their use. In other words, it is not the personal data (*ex se*) that have economic value, but it is the processing of the personal data (i.e. the set of operations that can be performed with these data) that enables the user to derive economic benefit from the personal data. Personal data can be processed by data controllers only for a limited period of time and for a specific purpose, therefore personal data are not owned by data controllers and are not the property of data controllers. Data controllers do not own the personal data they process. Data controllers only have the right to use them for a limited period of time and for a specific purpose, provided there is a legal basis – such as the consent of the data subject or another legal basis – under Articles 6 and 9 of the GDPR. They have the right to use them, also for economic purposes, but this right is not a property right.[11] Attempts to reify and frame personal data as a legal good to be sold or traded are not allowed in the European legal system. Obviously, the temporary availability of personal data held by data controllers for specific purposes allows data controllers to provide services based on such data within the scope of those purposes;

(iii) however, data also constitute value in other senses: their processing enables the attainment of the purposes intended by the data controller, so that they carry within themselves the value expressed by those purposes. In this perspective, the value of the personal (and non-personal) data is equal to the value that the data controller would achieve through processing of the data. This value could be economic and non-economic;

(iv) again, data enable the achievement of a public interest and a relevant public interest within the meaning of Articles 6(1)(e) and 9(2)(i) GDPR. Thus, the valorisation of data, especially when processed by public authorities, is linked to the realisation of such "public interest", understood as the good and interests pursued by the actions of public sector bodies for the benefit of the community;

(v) the value of personal and non-personal data can be extended in an ultra-individual (ultra-egoistic) direction even when the processing is carried out by private parties, who may direct the data to be processed to fulfil altruistic purposes. This is constantly the case, for example, when processing is carried out by non-profit organisations, such as associations and foundations, but it can also be the case when the altruistic interest is pursued by a party, including the data subject, who wishes to make available the data they have in order to satisfy interests that go beyond those relating to himself or herself, by altruistically pursuing the satisfaction of interests relating to other parties (*data altruism*);

(vi) finally, the European Commission stressed another aspect that is directly linked to technological development: processed data, both personal and non-personal, are useful – and this is where they have an enormous value – also in an instrumental sense, because they make it possible to take more efficient, more targeted and sometimes even personalised decisions. The use of data to support decision-making – through automated decision-making

[11] F. Bravo, *Il "diritto" a trattare dati personali nello svolgimento dell'attività economica*, Milano, Wolters Kluwer-Cedam, 2019.

processes – is certainly another relevant aspect to be taken into account in the perspective of data valorisation, which is also often used by public authorities (and which may also involve significant disadvantages for the data subject, if the automated decision has a negative impact on his or her person or infringes on his or her fundamental rights and freedoms).

It should be noted that for a full valorisation of data, especially by public administrations, it is extremely important to establish common *European Data Spaces* in the EU, in all strategic societal sectors and domains of public interest. According to the European Commission's Communication on "a European strategy for data", Data Spaces are envisioned as sovereign, trustworthy and interoperable data sharing environments where data can flow within and across sectors, in full respect of data subjects' fundamental rights and interests.

4. *From Data Protection to Data Governance*

To this end, a coherent, global and systematic treatment is essential for overcoming the fragmentation and biases that have been detected up to now. Even more, this perspective will make it possible to provide appropriate answers, specific to the technological field in which challenges arise.

From the perspective of document management, technological modernisation entails a consequence that cannot be underestimated from the perspective we are dealing with here: it is not enough to limit oneself to a mere change in the medium and simply replace the management of paper documents with their electronic equivalents. Indeed, the advanced use of electronic means requires data to be detached from the original document in which they may be contained and thus to be processed independently.

In this respect, automation allows greater possibilities for information use and, above all, demands efficiency in administrative action to overcome this model since data revolution represents a major opportunity for management to improve the public sector.[12] Thus, information must be generated by design and by default in a format that allows its subsequent automated processing based on the submission to interoperability standards that, in short, facilitate its use for purposes other than those that initially justified its collection and processing. The importance of data in this context makes it essential to face the restrictive inertia that, both at doctrinal and practical levels, implies an absolute pre-eminence of an excessively-formalistic vision of personal data protection.

In short, the data held by the public sector – and those generated, managed and handled by private parties linked to it – are becoming a tool of great significance in the process of digital transformation that is currently being experienced. Consequently, the adaptation of the regulatory framework to the challenges and singularities it implies not only is imperative but urgent as well. To this end, it is essential to move from data protection to data governance, a broader and more flexible approach that, necessarily and from the perspective of the European Union model, must be based on the effective respect for fundamental rights and public freedoms… including personal data protection.

[12] S. Goldsmith and S. Crawford, *The responsive city. Engaging communities through data-smart governance*, San Francisco, Jossey-Bass, 2014, 118.