



International Exploratory Workshop on Data Ownership

Workshop Summary

From 6 to 8 July 2017 a group of international experts in the field of law and computer science have investigated issues related to the topic of «Data Ownership» at a workshop organized and led by ITSL in Schaffhausen. The workshop is part of an ITSL research project on Data Ownership funded by the Hasler Stiftung and was sponsored by the Swiss National Science Foundation (SNSF).

The participants were DANIELE DELL'AGLIO (University of Zurich), ALFRED FRÜH (ITSL, University of Zurich, AF), GLORIA GONZÁLEZ FUSTER (Vrije Universiteit Brussel), NADIA KUZNIAR (University of Zurich), YEE FEN LIM (Nanyang Technological University Singapore), ALEXANDRE LOMBARD (ITSL, University of Zurich), KYUNG-SIN PARK (Korea University), KENTO REUTIMANN (University of Zurich), TERESA SCASSA (University of Ottawa), ELISABETH STAUEGGER (University of Graz), FLORENT THOUVENIN (ITSL, University of Zurich, FT), ANTONIO VETRÒ (Nexa Center for Internet & Society, Torino), ROLF H. WEBER (ITSL, University of Zurich, RHW), ANDREAS WIEBE (University of Göttingen), KLAUS WIEDEMANN (Max Planck Institute for Innovation and Competition Munich) and NICOLO ZINGALES (University of Sussex).

The participants engaged in lively and often controversial discussions on all aspects of Data Ownership. Some of the main insights gained and shared by most participants were the following:

1. Rationale and Values

A first part of the Workshop was dedicated to identifying rationales for a potential Data Ownership right and gauging their validity. Besides economic and utilitarian arguments, the participants also considered possible values that such a right could implement.

- 1.1 Governmental intervention is justified if a suitable rationale for regulatory action is given. Such a rationale can be based on economic reasons or individual/social reasons.
- 1.2 In theory, ownership rights could be introduced to prevent or correct a market failure. There is no evidence showing a lack of incentives for data collection or processing. Likewise, no solid quantification

as to transaction costs is available. The endowment effect attributed to a Data Ownership right that could potentially correct the misallocation of costs and benefits in today's data markets does not play a significant role in these markets.

- 1.3 The utility function is difficult to assess for both consumer and producer welfare. Moreover, neither the property nor the liability rule sufficiently contributes to an overall social welfare and to legal certainty.
- 1.4 Besides the free flow of data and the protection of investment, values such as the empowerment of individuals, informational self-determination, non-discrimination, freedom, dignity and autonomy need to be particularly taken into account in the context of personal data. Other values worth considering are the protection of the individual from physical and financial harm and the unhindered distribution of knowledge. However, these values do not seem to justify a broad Data Ownership concept.

2. Characteristics

Another core issue were the characteristics of a potential Data Ownership right.

- 2.1 The subject matter of protection is hard to define as the notion of “data” remains unclear. Distinguishing syntactic and semantic level and requesting that data be protected on either level is not practicable.
- 2.2 The attribution to a right holder could involve individuals, corporations and the State. However, the potential criteria for attribution are ambiguous. In addition, data often concerns more than one person but joint ownership does not appear to be a workable solution.
- 2.3 The scope of protection has not been discussed in detail due to problems with the above mentioned characteristics. Nevertheless, it seems clear that a wide range of limitations would be necessary in order to allow for access and third party uses. The unclear interplay with data protection law will also prove hard to solve.
- 2.4 Concluding, even if there was a convincing rationale for a Data Ownership right “across the board”, the design of such a right seems to be overly complex and hardly feasible given the fundamental

problems with regard to assessing the subject matter and the attribution.

3. Practical Problems

Whether a Data Ownership right should be introduced depends on whether currently existing problems could be remedied by such a right.

- 3.1 There are no general problems, only relatively specific ones such as (i) succession, (ii) data portability, (iii) bankruptcy, (iv) loss of physical devices, (v) access to and use of data in smart industry contexts and (vi) scraping of website content. Specific practical problems, however, seem to call for specific solutions, not for an introduction of a Data Ownership right “across the board”.
- 3.2 There are also problems that do not call for a solution, for instance the inaccurate use of the term “data ownership” in contracts and even by the European legislator. Other issues can be solved by data protection law.

In addition, participants discussed whether a future Data Ownership right could also cause new and unexpected practical problems.

- 3.3 The impact of a Data Ownership right is highly uncertain. Potential areas of concern are transaction costs and a negative impact on innovation and on the data economy.
- 3.4 Technology, industry and behavior of individuals change rapidly. A regulation at this point in time would have an unforeseeable and uncontrollable impact on these developments. However, given the fast changing environment (for example Blockchain infrastructure), developments should be monitored closely. Under different circumstances, the introduction of a Data Ownership right may appear in a new – and possibly more favorable – light.
- 3.5 Data markets are exposed to an increased risk of monopolization. Competition law, and foremost antitrust procedure, is not apt to deal with this risk in the fast developing technological environment. A further antitrust problem could occur in the interoperability context.
- 3.6 The most critical part of a future Data Ownership right concerns its implementation. A potential register would not be a feasible instrument and the distributed

ledger technology (Blockchain) also still has its limitations. Consequently, the infrastructure might be confronted with major administrative obstacles which would lead to legal uncertainty. Lastly, the enforcement would represent further challenges.

4. Factual Control and Access

Based on the insight that the introduction of a Data Ownership right is subject to substantial concerns, the participants also discussed whether factual control over data is sufficient and/or if and under which circumstances factual control can go too far and should consequently be remedied by access rights.

- 4.1 If a person or a legal entity has factual control over data and if certain preconditions are met, access should be granted to that data. Whether such access rights should be implemented in a specific sector only or even “across the board” must be further investigated.
- 4.2 There is no technical limitation to access rights; access rights of all kinds can be specified.
- 4.3 Access rights could be granted in at least two constellations: To access data of public interest and to access data of competitors.
- 4.4 Regarding access to data of public interest, it would be granted to someone acting in the public interest, most likely the government. However, the preconditions and the advisability of remuneration for the access remain unclear.
- 4.5 Regarding access to data of competitors, it would be granted in order for the competitor to either enter the same market or an aftermarket (based on a compulsory licenses regime). The preconditions of this access right are still to be discussed; however, it should not be based on competition law standards, and it would only be granted against remuneration, most likely to fair, reasonable and non-discriminatory (FRAND) terms.
- 4.6 In respect of the fast-changing environment, a cautious approach is needed.

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