

Big Data, Algorithms and Democracy

9 March 2018

University St Louis Brussels

Programme

- 9.00-9.40 Indra Spiecker, *Big Data and democracy – dangerous fragmentarization or helpful user-friendliness?*
Discussant: Christophe Lazaro
- 9.40-10.20 Christophe Lazaro, *The “divinatory” power of algorithms: from prediction to preemption of behaviours*
Discussant: Indra Spiecker
- 10.20-10.35 Coffee break
- 10.35-11.15 Alain Strowel, *Big Data and data appropriation in the EU*
Discussant: Alexandre de Streel
- 11.15-11.55 Alexandre de Streel, *Big Data and market power*
Discussant: Anne-Lise Sibony
- 11.55-13.00 Lunch break
- 13.00-13.40 Enguerrand Marique, *Between Greyball and Ripley: Uber’s deceptive data practices*
Discussant: Alexandre de Streel
- 13.40-14.20 Chris Docksey, *Data protection under the GDPR and ePrivacy: lessons to be learned for and from consumer protection*
Discussant: Alain Strowel
- 14.20-15.00 Anne-Lise Sibony, *Can EU consumer law protect consumers against algorithms? A preliminary enquiry*
Discussant: Chris Docksey

Venue

Université St Louis Bruxelles
Boulevard du Jardin Botanique 43, 1000 Bruxelles
Room: Salle du Conseil (when entering the building, take the lift on your right-hand side, immediately after the “secrétariat general” to top floor).

Abstracts

Indra Spiecker, Big Data and democracy – dangerous fragmentarization or helpful user-friendliness?

Fragmentarization is commonly described when talking about effects of digitalization with keywords like “filter bubble”. I will explore whether fragmentarization is indeed a threat to democracy and will concentrate on the effects of personalized services which are made possible by big data analysis.

Christophe Lazaro, The “divinatory” power of algorithms: from prediction to preemption of behaviours

The spectacular development of algorithmic systems capable of collecting, analyzing and processing massive quantities of data have arguably bestowed humans with new prediction devices. These devices allow to optimize decision-making processes, anticipate risks and to exercise control over individuals. In the era of big data, applications based on new machine learning methods are developed in various fields such as security, marketing and entertainment. These algorithmic systems, we contend, have to be understood as original modes of prediction and preemption of human behaviors. Drawing inspiration from divinatory practices of classical Antiquity, we shed light on the contemporary beliefs in the predictive power of algorithms. By deploying a three-folded approach, we ask: what is the nature of algorithms and of their correlational logic? What are the modes of knowledge production they rely on? Finally, what is their normative impact on individuals’ capabilities and subjectivities.

Alain Strowel, Big Data and Data Appropriation in the EU

This paper reviews the various EU laws that allow private parties to control the use of data widely considered as a new and valuable resource. Relying on the view that property is an institution for organizing the use of resources, the paper shows that the EU legal framework creates various property-like protections around data. Intellectual property rights, such as copyright or the database right, contribute to data appropriation. In addition to contracts, possibly combined with technical and organizational protections, data protection and trade secrets regimes also facilitate data appropriation of respectively personal and confidential data. The chapter also summarizes the 2017 Commission’s initiatives concerning the free flow of non-personal data and argues against the introduction of a new data property.

Alexandre de Streel: Big Data and market power

Data are collected, stored and analysed. In certain cases, these activities may give rise to market power. This topic has come to the attention of the French and German competition authorities, who have sought to develop an analytical framework to assess whether in any given case control over a data set gives rise to market power. The main relevant variables for this analysis are (i) the scarcity (or ease of replicability) of data and (ii) whether the

scale/scope of data collection matters to competitive performance. More generally, it is important to assess the effects of possible entry barriers at each of the main steps of the value chain. The paper focuses on barriers to entry at the stage of data collection and data analysis, where they are the most likely to emerge.

Chris Docksey, Data protection under the GDPR and ePrivacy: lessons to be learned for and from consumer protection

Overlap and differences to consumer protection, areas where each could learn from the other such as enforcement authorities with powers to fine, scope for cooperation, and interesting current research on user empowerment, using dashboards or natural speech analysis of websites.

Enguerrand Marique, Between Greyball and Ripley: Uber deceptive data practices

Practices within the sharing economy raise many issues in terms of trust. The questions are usually examined under the prism of role of the platform in the relationship between the service providers and the users who do not know each other: it supports the parties in creating the necessary trust to contract with each other. We propose in this presentation to examine the trust and distrust relationships between platforms and public authorities in data collection, transfer and management.

We will illustrate our presentation with two episodes of the 2017 Uber saga. Firstly, the Greyball software was used to prevent public authorities to access the actual location of Uber drivers. Secondly, the Ripley software helped Uber in disconnecting the data from computers located in business premises in which criminal enforcement bodies were intervening.

These two situations lead us to ask what tools are available for public bodies in accessing data in the framework of their sovereign tasks (in particular: criminal investigations, taxation and other public policies) and also what are the liabilities that platforms can face for trying to evade the rules.

Anne-Lise Sibony, *Can EU consumer law protect consumers against algorithms? A preliminary enquiry*

This presentation of work in progress will outline how consumer law views what consumers need to be protected against in their online life, with a view to reflect on whether consumer protection as it stands complements other branches of law (in particular competition law and data protection) or whether the EU legal arsenal leaves blind spots that could be identified. It will then review the main categories of tools which EU consumer law typically relies on and ask whether the current toolbox is suited to the challenges posed by algorithms. Concluding that this is only partly the case, the paper will on to ask how the current toolbox could be improved. Based on a selection of examples, it will explore the notion of “fairness by design” and ask whether a joint analytical and procedural framework could serve both consumer law and data protection.

Speakers

Alexandre de Streel is Professor of European law at the Universities of Namur and Louvain in Belgium and the Director of the Research Centre for Information, Law and Society (CRIDS) at U Namur. His research focuses on Regulation and Competition Law of network industries. He is also Joint Academic Director at the Centre on Regulation in Europe (CERRE) in Brussels, member of the Scientific Committee of the Florence School of Regulation (FSR) at the European University Institute in Florence, Research Fellow at European Institute of Public Administration (EIPA) in Maastricht. Alexandre regularly advises international organisations (such as the European Commission, European Parliament, OECD, EBRD) and national regulatory authorities on regulatory and competition issues in network industries. He is also an Assessor (member of the decisional body) at the Belgian Competition Authority.

Christopher Docksey, Hon. Director-General EDPS, is the immediate past Director of the EDPS, the EU data protection authority. Before that he was the Commission Legal Advisor on Data Protection. He is a member of the Advisory Board of the European Centre on Privacy and Cybersecurity (ECPC) at the University of Maastricht and the Editorial Board of the Industrial Law Journal. He has recently published articles on Article 16 TFEU in the Commentary on the TFEU (Springer, 2018), on Privacy and Security in the Maastricht Journal of European and Comparative Law (2018), and on finding the balance between privacy, security, freedom of expression and transparency in International Data Privacy Law (2016). He is presently editing the Commentary on the GDPR to be published by OUP, together with Christopher Kuner and Lee Bygrave.

Christophe Lazaro is an Associate Professor of “Law & Society” at the Centre for Philosophy of Law of the University of Louvain (CPDR), where he is conducting an interdisciplinary research on the legal and social impact of new technologies on human agency and subjectivity (prosthetics, robotics, artificial intelligence). After a long collaboration with the Research Centre Information, Law and Society of the University of Namur (CRIDS), he went abroad and received his PhD in Law from the European University Institute (EUI). He also has a post-graduate degree in Anthropology and a graduate degree in Philosophy. He is a member of CERNA, the French Ethics Committee addressing value conflicts and uncertainties in the field of digital sciences and technologies research (robotics, machine learning, etc.). He is also an affiliated researcher at the Laboratory for Prospective Anthropology of the University of Louvain (LAAP). His research interests in anthropology include sciences and technologies studies, enhancement technologies and transhumanism. His last book, *La prothèse et le droit* (IRJS Editions), dedicated to prosthetic technologies and the legal fabrication of hybrid bodies, won in 2016 the French Law Book Award.

Enguerrand Marique holds a Master of Transnational, Comparative and Foreign Law (MA, UCLouvain, Belgium, 2016). During his master, he spent one year on exchange at Durham University (UK). Enguerrand also read International Commercial Law in the United States of America (ICL LLM, UC Davis, California, 2016). Enguerrand started his doctoral research in September 2016 and focuses mainly on the legal means to build trust in the platform economy with a multidisciplinary focus (law, economics and sociology).

Anne-Lise Sibony is Professor of European Law at the University of Louvain (Belgium) since 2015. Before that, she taught European Law for eight years at the University of Liège

(Belgium). She read law and economics in Paris, graduated from the École Normale Supérieure (Paris) and holds a Master's degree in Regulation from the London School of Economics. Anne-Lise's PhD, on the judicial use of economic reasoning in EU and French competition law, was published as *Le juge et le raisonnement économique en droit de la concurrence* (2008). Anne-Lise's main research interest lies in how scientific knowledge (mainly economics and psychology) is used in the legal sphere. Her current focus is on behaviourally-informed law making at EU level. On the integration of behavioural sciences in rule-making, she co-edited with A. Alemanno *Nudge and the Law: A European Perspective*. She publishes regularly on EU internal market law, competition law and consumer law. She is a member of the editorial board of *Cahiers de droit européen* and *Revue trimestrielle de droit européen*. Anne-Lise is a guest professor at University Paris II and at KULeuven.

Indra Spiecker is Professor of public and administrative law, information law, environmental law and legal theory at Goethe university Frankfurt/Main, Germany since 2013. She is also director of the Data Protection Research Institute and Ineges, Institute of European Health Politics and Social Law, thereof. Prior to joining the university of Frankfurt, she was Professor of public and administrative law, telecommunications law, data protection law at Karlsruhe Institute of Technology, Germany (2007-2013), where she also served as director of the Institute on Information Economics. Prior to these appointments, she started her career as Assistant Professor MaxPlanck Institute on Common Goods (Bonn, Germany, 2000-2007) after earning her Ph.D. at the university of Bonn (1999). She read law at Bonn University, Mainz University, Heidelberg University and Georgetown Center of Law, USA (1990-1996). She also clerked at the Court of Appeals Koblenz (1997-1999). Indra is co-editor of the European Data Protection Law Review as well as *Computer und Recht und Verwaltungsarchiv*. She has given advisory opinions to the German Bundestag and several federal ministries as well as several state parliaments, NGOs and companies.

Alain Strowel is Professor at the University Saint-Louis, Brussels and at the UCLouvain where he teaches courses in intellectual property and media law. He also teaches in two advanced master programmes in intellectual property (KULeuven Advanced Master in IP/ICT and Munich IP Law Center program).

Alain is also a practicing lawyer. He has been a member of the Brussels bar since 1988. He has worked with several law firms and was for 13 years with a U.S. leading firm, Covington & Burling LLP (2001-2014). His experience focuses on intellectual property and Internet law. He has conducted several studies for the European institutions and in Belgium in the field of digital copyright. He is an arbiter for domain names dispute resolution systems and manages the (peda)blog www.ipdigit.eu.

Alain graduated in law, economics and philosophy at the UCLouvain and the University of Amsterdam. He has authored more than 200 articles and several books, including *Droit d'auteur et copyright*, (Bruylant, LGDJ, 1993, 722 p.), *Quand Google défie le droit* (De Boeck-Larcier, 2011, 238 p.) et *Droit des médias et de la communication* (with F. Jongen and E. Cruysmans, Larcier, 2017, 896 p.).

He has edited several collections of essays including: *Of Authors and Origins* (with B. Sherman, Cambridge UP, 1991), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Edward Elgar, 2009); *Net Neutrality in Europe - La neutralité de l'Internet en Europe* (Bruylant, 2013, 178 p.); *Droit, Economie, Valeurs* (with. A. Autenne and V. Cassiers, Larcier, 2014, 741 p.).