

Data protection and the cross-border exchange of data in private international law

Abstract

One could have thought that the new Regulation concerning personal data had eliminated all issues of private international law that existed under the Directive. After all, 28 national implementations were replaced by a single set of provisions that applies across the European Union. But the Regulation refers on several points to the national law of the Member States, that can opt for more stringent national norms. That raises delicate questions of choice of law, especially as the provisions of the Regulation (and therefore apparently also the complementary provisions of national law) have a strong mandatory nature. But the mechanism used in the Regulation seems to be exactly the opposite from the one used when private international law adds mandatory rules to the applicable law.

In the relationship with third states the Regulation imposes itself extraterritorially. Maybe the Regulation itself does not apply in all cases (but it applies explicitly in a number of cases where data are treated outside the EU and when foreigners present in the EU are concerned), but in all cases it imposes its norms and level of protection. The foreign norms need to be an equivalent.

All of this fits in rather awkwardly with basic principles of private international, such as territoriality, comity and the mutual recognition of norms.

In addition, when one moves away from personal data to commercial data, such as trade secrets and public sector information for re-use, the picture changes dramatically. A more traditional private international law approach applies and trade secrets are treated *mutatis mutandis* as a form of intellectual property (rights).

The paper sets out to examine the new regime put forward in the Regulation and to compare it with the (more traditional) approach for commercial data. In doing so it will look at the advantage and disadvantage of either approach and at the question whether the new approach could be extended to other areas. It does so mainly from a doctrinal perspective, but the socio-legal aspects of the matter will also be discussed.

References

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+ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31.

+ REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.