

# *Cyberlaw: Finally getting its Act(s) together?* - A Selection of Articles from the 2023 Annual BILETA Conference

## Editorial

*“Cyberlaw: Finally getting its Act(s) together?”*: this was the title of the 38th edition of the Annual BILETA Conference, which we had the honour to host at ALTI, the Amsterdam Law and Technology Institute of the Vrije Universiteit Amsterdam, from the 12<sup>th</sup> to the 14<sup>th</sup> of April 2023. This special issue of the European Journal of Law and Technology offers a sneak peek into the conference, with a collection of articles selected among those presented in Amsterdam.

In our view, the title for this edition of the BILETA conference encapsulates the growing tensions - and the thrilling potential - of the field of law and technology over the last few years. It starts with a reminder of where we come from, a reference to the early days of *‘cyberlaw’*. This is not just an ‘Easter egg’, but a reminder of how far we have come: from the criticism of The Law of the Horse<sup>1</sup> to a protagonist in today’s policy making and legal scholarship.

Over twenty years ago, when PCs and the internet ushered in an era of unprecedented connectedness and datafication, experts started asking questions: what does this mean for the relationship between citizens and the state? How is communication changing? What will our rights look like online? One of the core questions of this era regarded access to the internet, and its importance for citizens especially in the Global South. Fast forward twenty years, and in 2020 this question assumed a whole new dimension, as highlighted in the article by Bukola Faturoti. Considering the effect of COVID19 on growing online dependency in social and civil services, Faturoti argues that the right to Internet access should be recognised as a

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<sup>1</sup> Lawrence Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 *Harv. L. Rev.* 501.

standalone human right in his article "*Post COVID19 World, Internet Access as a Human Right and the Justiciability Question*". While considering core arguments against such a determination, Faturoti also analyses the core hurdle of justiciability as resistant states may not create adequate redress mechanisms. Through engaging with critical challenges both theoretical and practical, Faturoti asserts that ultimately the right to Internet access is too important in contemporary life not to be realised.

The core part of the conference title, "*Finally getting its Act(s) together?*", hints at the unprecedented explosion of legislative initiatives regulating digital technologies over the last three years. While many countries have issued new legislation focused on technology, the EU Commission has been busy working on a dizzying number of proposals for new Regulations and Directives, as well as Guidelines and drafts to reform existing ones. The EU has sought to be at the forefront of shaping tomorrow's technology policy, with ground-breaking initiatives such as the world's first Artificial Intelligence Act, the proposed package reform of the Product Liability and AI Liability Directives, and the innovative Digital Services Act (DSA) and Digital Markets Act (DMA). But do all these new acts bring order to the chaos of online platforms, digital services, and AI-powered products, or might they risk greater confusion in the ever-growing complexity of their dense legislative web? Some critical profiles are already emerging, especially with the multiplication of provisions to which companies must comply, and of potential enforcement conflicts within the Union.

We can consider the challenges of this regulatory landscape in relation to dark patterns. In their article "*Dark Patterns, Enforcement, and the Emerging Digital Design Acquis: Manipulation beneath the Interface*", Mark Leiser and Cristiana Santos offer an analysis of the nuances and implications of the 'digital design European acquis' - that is, of the many norms prohibiting the use of manipulative techniques and 'tricks' (i.e. dark patterns) in the design of user interfaces. Their analysis offers a state-of-the-art overview of the new provisions on dark patterns introduced by the AI Act, DSA, DMA, and Data Act. They also analyse both doctrine and enforcement decisions, synthesising a new conceptual framework: based on the level at which dark patterns operate, they can be divided into visible dark patterns (those that operate mainly at the interface level) and darker dark patterns. These latter patterns are more insidious to regulate, as they operate at deeper levels, often combining AI, profiling, and other elements.

Another important thread in the European Union's legislative frenzy concerns the Internet of Things (IoT). What emerged during the 2023 BILETA conference is a clear change of course in Europe regarding regulation of the IoT. Where the industry around the IoT was often overlooked by policymakers, it has now become the key to unlocking the potential of the European Energy Strategy<sup>2</sup>, the European Strategy for Data<sup>3</sup>, and the renovated interest for cybersecurity and technological resilience.

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<sup>2</sup> The European Energy Strategy <[Energy strategy \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/2022/05/12/P12223_en.pdf)> accessed 25 March 2024.

<sup>3</sup> The European Data Strategy <[European data strategy - European Commission \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/2022/06/09/P12224_en.pdf)> accessed 25 March 2024.

Mattis van 't Schip's article "*The Regulation of Supply Chain Cybersecurity in the NIS2 Directive in the Context of the Internet of Things*" elucidates how the increasingly sophisticated network of actors involved in IoT products can lead to cybersecurity vulnerabilities. Van 't Schip thereby analyses whether the recent NIS2 Directive adequately addresses the inherent dangers in the growing complexity of ICT supply chains. Despite finding the Directive well-aligned with established risk management guidelines, van 't Schip posits that definitional simplicity and misplaced responsibility may undermine the Directive's ultimate efficacy.

The IoT, specifically the data generated by it, plays an important role in two new Regulations - the Data Governance Act and the Data Act.<sup>4</sup> The European Data Strategy represents another change of course for the EU: after over twenty years focused on the protection of its citizens' personal data, the Union's strategy is now primarily geared towards bridging the gap that separated our digital markets from the markets of the USA and China. The aim is to foster innovation, and to make data (both personal and non) circulate within and without the Union, in order to also attract private investment and boost competitiveness.<sup>5</sup> It seems, however, difficult to square the circle. How are we to reconcile a strong personal data protection regime with the free flow of data? In his article "*The influence of the Data Act on the shifting balance between data protection and the free movement of data*", Pieter Wolters analyses to what extent the Data Act can shift the balance in favour of the free flow of data. His conclusion is that while the Data Act is unlikely to make a difference, due to the relatively limited incentives it offers, it is an important foundation - a first step towards a stronger flow of data in the future. It is up to other instruments to build upon this foundation. An important role will be played by the practical implementation of the European Data Spaces. These are another novelty introduced by the Data Governance Act, and will consist of governance models and technological platforms that will enable access to data for a number of public and private stakeholders within a sector, offering a more horizontal distribution of the benefits (and duties) deriving from such data.

Andrés Chomczyk Penedo also asserts the importance of the role of data spaces in his article "*The regulation of data spaces under the EU Data Strategy: towards the 'activation' of the 5th European freedom for data?*". The article gives an overview of the challenges and market failures that are currently affecting the development of the European internal digital market, specifically with regard to the dominant role of online platforms and big intermediaries who control the majority of the data and create barriers to data sharing. The analysis then focuses on the role that the fundamental freedoms have played in developing the internal market, affirming that

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<sup>4</sup> See, for instance, Recitals 1 to 5 of the Data Act, that is Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828.

<sup>5</sup> See, for instance, Recitals 2 and 3 of the Data Governance Act, that is Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724.

times are maturing to identify, especially thanks to these new legislative initiatives, a fifth fundamental freedom: the free movement of data.

Finally, we are thrilled to present Barbara Lazarotto's 2023 BILETA-EJLT prize-winning commentary - "*The right to data portability: A holistic analysis of GDPR, DMA and the Data Act Proposal*". Amidst the litany of new European technology legislation, it is becoming ever more complicated to unpack how protections function across distinct regulations. Herein, Lazarotto tackles differing functionalities of the nascent right to data portability across the General Data Protection Regulation, the Digital Markets Act and the Data Act Proposal, elucidating "a series of technical and legal interpretation-based obstacles that block its full implementation."

Across these contributions, the increasing complexity of the European techno-regulatory landscape is made glaringly apparent, as we are faced with new challenges in developing functional and future-proofed European technology law each coming year. We therefore feel grateful for our scholastic communities tackling these critical contemporary issues, and for the opportunity to present the trenchant analysis herein.

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