

## BOOK REVIEWS

### *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty*

Federico Fabbrini, Edoardo Celeste and John Quinn

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The invention of the internet has seen exponential growth in the volume and flow of personal data around the world and beyond jurisdictional borders. This data explosion occurred in the context of both an increasingly commercialised online environment and demonstrably insecure and a vulnerable data management system. This has led to a public increasingly concerned about privacy which has catalysed legislative reform in many nations with the European Union (EU) and United States of America (US) pioneering such efforts. While significant progress has been made, a right to privacy or protection of personal information is by no means a universal or well-established right; further, the application of such a right to the claims of wronged persons or indeed its interaction with other rights and legal frameworks is yet to be fully realised.

Perhaps, the most significant problem faced by legislators, law -enforcement and victims alike is attempting to apply the inherently territorial-based law to the borderless nature of online data. Lacking any international treaties or uniform data protection laws, it is difficult for victims to enforce their rights and vindicate wrongs. This makes it increasingly important for law-makers and law-enforcement agencies to be aware of the current legal frameworks of other nations and how they interact jurisdictionally, as well as the key trends that are currently influencing such law-making and will continue to do so into the future.

Enter Fabbrini, Celeste and Quinn's timely comparative study of the data protection efforts of the EU and US.<sup>1</sup> While many nations are beginning to introduce data protection laws, the EU and US have been the most ambitious actors in this space with their extraterritorial applications making their legal regimes the most impactful for individuals and business. This book attempts to analyse the dynamics between the EU and US as regards their respective data protection operations and the inherent tensions created by the cross-border extraterritorial application of those laws. The editors document and

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<sup>1</sup> *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* in Edoardo Celeste Federico Fabbrini, and John Quinn (eds) (Hart Publishing, 2020) (*Data Protection Beyond Borders*).

compare the key trends, legislation, case law and policy developments in the EU and US to present a clear and curated understanding of the current legal framework. This is done by considering the major transatlantic legislative reforms including the General Data Protection Regulation,<sup>2</sup> the CLOUD Act,<sup>3</sup> and California's data privacy legislation.<sup>4</sup> As well as the emerging case law attached to them, such as the European Union Court of Justice's (ECJ) judgements against Facebook,<sup>5</sup> Google<sup>6</sup> and the *Schrems II* case,<sup>7</sup> as well as the US Supreme Court's *Carpenter* case.<sup>8</sup> After considering these two emerging data protection regimes on opposite sides of the Atlantic, the authors conclude that these regimes are increasingly divergent in law and clashing in jurisdiction.

Not only have recent decisions such as *Schrems II* seen the EU and US diverge greatly in their attitudes on data privacy as regards the EU-US privacy shield, but both states are increasingly applying an extraterritorial application to their laws, while maintaining a strong sovereign claim over their own data.<sup>9</sup> This is becoming increasingly unworkable as both states attempt to maintain sovereignty over their own data while claiming a right to the data of other states.

This dynamic is further complicated by the economic and technological realities of both states. The US is largely considered the leader in tech companies, particularly in Silicon Valley, and therefore, the application of data laws falls largely under the purview of American jurisdiction. The EU, in defiance of this monopoly, however, is launching a significant grab for

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<sup>2</sup> *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* [2016] OJ L 119/1 ('GDPR').

<sup>3</sup> *The Clarifying Lawful Overseas Use of Data Act*, Pub L No 115-141, § 18 stat (CLOUD Act).

<sup>4</sup> *California Consumer Privacy Act* 24 Cal Civ Code § 1798.1 (Deering, 2018)

<sup>5</sup> Ashurt 'Around 3 to FCO: Landmark German Facebook data collection ban reinstated' (Overview, 30 June 2020) <<https://www.ashurst.com/en/news-and-insights/legal-updates/competition-law-newsletter-may---june-2020/cn10---round-3-to-fco-landmark-german-facebook-data-collection-ban-reinstated/>>.

<sup>6</sup> *Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez* (C-131/12) [2014] ECR 317.

<sup>7</sup> *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* (C-311/18) [2020] ECR 559.

<sup>8</sup> *Timothy Ivory Carpenter v United States of America* 585 138 S. Ct. 2206, 201 L. Ed. 2d 507 (Mich, 2018).

<sup>9</sup> *Data Protection Beyond Borders* (n 1) pt I.

digital sovereignty in order to bring EU data back into the EU market. This is creating an increasingly hostile clash of the titans between two data heavyweights, which has the potential to be a project of great collaboration, but is currently trending towards an arm-wrestling match.

The book is structured in four parts, with significant contributions from leading legal scholars in EU data protection law and US data protection law. Part I contextualises the current situation by looking at the legal developments in the field of data protection in the EU and US. This is done by mapping the legal architecture of the protection of personal data in the EU and its extraterritorial application, as well as the US' data privacy framework.<sup>10</sup> Part II analyses the tensions created by the extraterritorial application attached to these laws, with both states increasingly encroaching on the perceived jurisdiction and data sovereignty of the other. The authors consider the 'right to be forgotten'<sup>11</sup> through the recent decision in *Google v CNIL*<sup>12</sup> and the German Federal Constitutional Court's jurisprudence,<sup>13</sup> as well as the impacts of data protection regimes on data sovereignty and the trans-border flow of data.

Part III examines the current transatlantic collaborative efforts, particularly as it concerns law-enforcement. This largely focuses on the impacts of data protection regimes on law-enforcement authorities, specifically through the US CLOUD Act, the practices of Irish-based online service providers,<sup>14</sup> the historical collaborative efforts between EU and US law-enforcement agencies, and the potential place for international trade law in lubricating this collaborative process.<sup>15</sup> Part IV then goes on to consider the future prospects for such laws and the implications for the US-EU data clash moving forward. This chapter is largely based on the theoretical underpinnings of these laws

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<sup>10</sup> Data Protection Beyond Borders (n 1) pt II.

<sup>11</sup> GDPR (n 2) art. 17.

<sup>12</sup> *Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés* (C-507/17) [2019] ECR 15.

<sup>13</sup> Bird & Bird, 'German Constitutional Court creates a new fundamental "IT Privacy" right' (Overview, September 2008) <<https://www.twobirds.com/en/news/articles/2008/german-constitutional-court-creates-a-new-fundamental-it-privacy-right>>.

<sup>14</sup> Bart Custers et al 'The Irish DPA and its approach to data protection' in David Wright and Paul de Hert (eds), *Enforcing Privacy: Regulatory, Legal and Technological Approaches* (Springer, 2016).

<sup>15</sup> Data Protection Beyond Borders(n 1) pt III.

and concepts, such as data sovereignty and the right to privacy, and how this basis can be understood in the trends moving forward.<sup>16</sup>

‘Data Protection Beyond Borders’ attempts, and in my opinion succeeds, in outlining the current status quo of data protection globally. This is done in an holistic and analytical manner that examines the historical development of such laws and policies, the political and economic elements that influence the legal agendas of both the EU and US and their interaction, as well as the insights that our current trajectory gives into the data protection space moving forward. The authors have taken a snapshot of our current situation through numerous lenses creating a robust piece of legal scholarship that can benefit law-makers, law-enforcement agencies, and individuals.

*Ella Hilder\**

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<sup>16</sup> Data Protection Beyond Borders(n 1) pt IV.

\* BA/LLB (Hons I), School of Law, University of Tasmania and Editor of the *University of Tasmania Law Review* for 2021.