

“Commodification bets” and competing legal futures

A European View on Legal Moral Hazard in the Digital Economy

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1. Introduction

1.1 The emergence of “personal data” has opened opportunities to shape and control individuals’ actions to an unprecedented scale for organizations having resources enough to deploy surveillance technologies. A new industry for the exploitation of a new resource was built upon sparse legal provisions so fragmentary and generally framed such to spark long existing uncertainty as to their actual tradability (Malgieri e Custers 2022; Swartz, 2004), as well as little visibility on the amount of legal transaction costs eventually emerging at key junctures of the personal data pipelines (Ballon, 2016; Ferretti 2022).

The *mere possibility* of a market for personal data set huge opportunity coupled with legal-economic uncertainty.¹ In the face of alternative legal scenarios (see Dewey, & Di Carlo 2021), economic agents could not anticipate how new activities would interrelate with the prevailing order of rights once put into action, or how courts would have eventually accommodated and balance out the commodification claims over the new “resource”, and the competing legal claims emerging from the prevailing order legal order.

Differing ways of balancing legal interests at the core of innovative transactions defines the entitlement structures over the use of newly emerged resource, bearing on the degree of costs being internalized within the innovative business, with direct impact on the profitability – and success – of innovative business models. As such, economic agents have since the early stage of the industry had to deal with uncertain futures both along the economic and the legal dimensions of their business models pointing to the commodification of previously unexploited resources (Giraudo, 2022a, 2022b).

To get through such uncertainty, the idea was that of leveraging private parties ingenuity to prototype various solutions to effectively exploit the new resources without harming the prevailing hierarchically superior rights - users’ fundamental rights, competitors’ rights, and democratic order at large (Giraudo, 2022, Klonick, 2018). Differing ways of balancing legal interests at the core of innovative transactions defines the entitlement structures over the use of newly emerged resource, bearing on the degree of costs being internalized within the innovative business, with direct impact on the profitability – and success – of innovative business models.

¹ J. Beckett – C. Musselin. *Constructing Quality: The Classification of Goods in Markets*. Oxford, 2013. See also Dekker and Kutchar, 2021. In context of real uncertainty, also the market for legal rules is exposed to the need to assess the legal qualities of legal rules. Which may take time and be subject to co-present views eventually collapsing to one over time. See below co-present legal futures infra.

The competition between these legal innovations would have led to the emergence of the most “efficient” one – i.e. best balancing between the legal interests and rights involved in the transaction. Efficiency being defined also taking into account “constitutional externalities” of each legal innovation. Such expansion of the competitive dynamics and entrepreneurship into the legal dimension of innovative business models (Pollman and Barry, 2017, Cohen, 2019) paved the way for multiple possible futures that have been temporarily co-present and in competition with one another for years (See Beckert, 2018). Each legal future has ever since been complementary to alternative business models, bearing on different prospects of profitability and success.

In such a context of pluralism of legal futures, alternative entitlements structures and transaction costs, economic agents had nevertheless to provide for legal innovation to ground their newly emerging economic activities (Pistor, 2019), with no guarantees to come up out of the legal innovations competition. For economic agents investing in the personal data commodification future to be successful they have to win a form of legal bets in order to ensure the *economic* success of their investments in such a *possible* market (See Kutchar and Dekker, 2022). In a nutshell, they have placed a *twofold bets* on legal economic futures, in the view of which they have made technological and economic investments.

These possible legal-economic futures remain such not until the implications of newly emerging legal solutions are revealed, as well as when stable consensus is reached within the courts systems as to how to balance new legal claims with the prevailing order of rights. The success of these legal economic-bets depend on many factors including users’, competitions’ reactions and expectations, but they ultimately depended on courts’ backing, as the keepers of the legal system. When the realizes, winners’ and losers’ payoffs are revealed and business models can eventually fail, because of their mistaken legal guesses.

Over the years, we have witnessed a glowing industry being edified upon commodification bets, juiced up by the initial success in managing some leeway from courts – if not temporary support (Langhanke, C. and M. Schmidt-Kessel (2015), Jougoux, P. (2022)). The absence of a clear rejection of the commodification consensus in courts, was perceived as greenlight to the industry. The pouring of investments on the multi building industry, as well as a policy consensus about the fact that personal data have long fed the expectations that the commodification bid was definitely successful. Such a belief is still widespread and deep seated up to the point that the prevailing common wisdom has it thatl personal data are the “new currency” of the internet. A currency, so liquid, valuable and freely transferable upon which economic growth and social progress could finally be secured (Zuboff, S. 2019).

However, both the EUCJ’ and ECHR’ – and also DPA²s - have let to a new rebalancing of legal rights, thus pointing to a substantial re-shaping to the legal foundations of the industry. In fact, increasing numbers of observers see the persistent flow of investments in an industry whose core resource is highly suspected not to “qualify as a commodity”, as highly problematic (Custers

² Data Protection Agencies under GDPR

Malgieri 2022:2). Even more so when AI powered technologies are being marketed with the economic exploitation of personal data at the heart of their functioning.

However, such a shift is only partially reflected on economic trends and seems in essence ignored by policy strategies brought about by top EU legislators and executive institutions (EU Commission, EU Council, and EU Parliament). Both companies and executive branches of EU and MS institutions are not really adapting their views and actions to the prospect of substantial limitation to commodification and the trade of personal data, nor to the shifting incentive structures that follows. Such inadaptation in the face of changing legal rules raises theoretical and practical legal-economic puzzles. As if both the economic agents and some policy makers assumed the emerging legal rejection of commodification bets was not to last. Such an overlook, in creating an enlarging divergence between the legal expectations embedded in the business models prevailing in the digital economy and the actual entitlements structure over personal data emerging in courts and outlined by DPA's. Such a ill-coordination between the order of actions and the order of rule is sending cyclical legal shockwaves across the industry (Giraud, 2022).

1.2 In this essay, we try to make sense of the institutional co-evolutionary dynamics shattering the legal foundations of the digital markets (Samuels, Calabresi and Melamed 1978, Vatiery, 2020). The approach is deeply interdisciplinary and it is aimed at proposing novel theoretical tools to better understand the implications of ill-coordinated legal economic institutions at the core of the legal foundations of markets. To do so, we elaborate on the growing literature on the legal fragility of the market for personal data (Custers and Malgieri, 2022, K. Yeung, and L. A. Bygrave, 2022:138), leading to economic anomalies in the "market" for legal rules (see Vatiery, 2020, Cohen, 2019)

We refer to the EU as a case study, however the core of the reflections aims to hold for the digital economy in general within the western legal tradition. We claim the extension of market dynamics to the legal plane of business innovation shall come about with the acknowledgment of the role of uncertainty, pluralism of legal futures, as well as the possibility of legal bets to fail. In fact, business model can *also* fail for their innovate legal foundations are eventually rejected by the courts system for their emerging legal incompatibility in terms of competition law, consumer law, and fundamental rights democratic public. The systemic failure to adapt to the newly emerging legal rules affirmed by courts across the EU, manifests a systemic overlook of such possibility opening up a period of legal economic instability.

We argue that economic agents' anomalous ill-adaptation to new balancing seems encouraged by EU Commission and Member states, which are implicitly reinforcing the expectations of tradability of personal data on the part of EU top *executive*. Systematic disregard fueled by EU policy agendas and attempts to shield the legal foundations of the industry from judicial review, which is creating strong friction with the rule of law. We suggest such a posture is eliciting a form of *legal moral hazard in the market for legal innovations*. That simmering tension may lead to unsettling constitutional overrides with constitutional shockwaves to come, or economically disruptive legal bubbles (Giraud, 2022, Fosh-Villaronga et al, 2023).

In other words, we argue the freedom to design legal rules without the possibility to face failure and rejection of legal innovations lead to the typical moral hazard problem. Instead of scrambling to broker the most balanced and least impactful legal innovation onto the prevailing order of rights,

economic agents are incentivized to quickly seize the market and impose the legal solutions maximizing their profits and externalizing costs onto society, competitors, and users.