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Conference Summary

As legislators around the world are making their best efforts to regulate the reality shaped by the advancement of new technology and the expansion of the data universe, the various actors within society, economy and in the legal profession itself will have to adapt to the new legal framework surrounding them. The rapid growth of the internet and the immense amount of data uploaded and downloaded on a daily basis give rise to questions on how to deal with data protection and privacy regulation. Due to the disproportionate relationship between rapid advancement in technology and the time consuming matter of enforcing appropriate regulation, legislators must consider constructing more technically neutral legislation.

New regulation in the technology field is being interpreted by courts and previous, existing legislation is being applied to new technological matters and hence desirable guidance is being provided. In the field of electronic communication, corporations must be on the lookout for guidance regarding data retention and co-operative measures with national law enforcement. Corporations in the field of medical equipment will have to deal with issues pertaining to finding the balance between doctor/patient confidentiality and patient privacy on the one hand, and the efficiency and utilization of cloud based storage of patient journals on the other. Different areas of regulation which previously seemed completely separated, such as anti-trust law and data protection regulation, will have to adapt and find ways to converge.

The main mission for lawyers around the world is not merely to advise clients on the new legislation but also to understand the purely technical aspects such as AI, drones, cloud services and big data. Only then will lawyers and clients alike be able to find a way through the regulatory jungle and contribute to the development of the future legal system.

In addition, the contracting society is experiencing a transformation in the way contracts are being written and used. Transactions are increasing in number but decreasing in size and the technical complexity of matters covered by contracts is increasing. In such a scenario, lawyers must take responsibility and ascertain that the contracts are understandable and not overly complicated.

As regards cybersecurity on a global level, speakers at the conference discussed the importance of regulating cyber arms and making efforts to harmonize the regulations between states, as the use of the internet and data privacy is a matter of cross-border relevance.

The matters mentioned above are some of those which were discussed during the 2017 European Conference in Stockholm, Sweden. Summaries of a selection of the sessions are set forth below.

Keynote: ICANN: What Is Our role In The Internet?

John Jeffrey, ICANN

In his keynote, John Jeffrey explained the role of the Internet Corporation for Assigned Names and Numbers, ICANN, in the world of the internet and what challenges the organization will face due to the adoption of GDPR and the expansion of the internet. ICANN is a global, private-sector led organization with the mission to ensure a stable and secure operation of the internet's unique identifier systems. By coordinating with a number of different organizations, ICANN helps to make the internet work.

Mr. Jeffrey also informed the audience about the rapid growth of the internet and the immense amount of data uploaded on a daily basis. The digital universe is doubling in size every two years and as one minute elapses, 31.5 million Facebook messages are posted, 350,000 tweets are tweeted, 48,611 Instagram pictures are posted, 300 hours of video are uploaded to YouTube and 70 new domain names are registered. From a regional perspective, the expansion of the digital universe will result in the digital economy having a significant impact on the GDP in each of the world's regions in the years to come.

Mr. Jeffrey concluded by urging the audience to participate and engage in ICANN. The organization consists of a collection of global stakeholders that work together to find solutions to problems which may arise within ICANN's mission and scope. By participating in ICANN each member is provided with a unique opportunity to interact with, and learn from, representatives from different sectors. It is easy to get involved, e.g. by attending an ICANN public meeting, by taking free online courses or participating in an ICANN community group on the ICANN website.

Regulation - Trying to Hit the Moving Target

Moderated by Mark Rasdale, A&L Goodbody

Steven de Schrijver, Astrea

Joanne Vengadesan, Penningtons Manches LLP

Rob Sumroy, Slaughter and May

Marc Warner, ASI Data Science

The panel discussed the ethical use of different types of technology and the regulatory lag which is caused by the rapid advancement of new technology. Joanne Vengadesan and Steven de Schrijver opened the session by discussing issues concerning the use of drones and informed the audience about how the regulatory framework surrounding the use of drones is formulated within the EU member states and how the legislation differs between the EU and the US. The European Commission is currently working on a proposal to establish common rules for all types of drones. By 2019, the Commission aims to achieve a uniform level of safety for all drones in the EU and to develop regulation of the drone market. The speakers further discussed the issues concerning data protection and the GDPR and how to protect individuals from intrusive drones. The speakers proposed that data minimization, transparency by information and privacy by design should be regarded as key factors in the use and regulation of drones.

Rom Sumroy and Marc Warner continued the presentation by discussing superhuman resources and the responsible deployment of AI in business situations. The transformative potential of AI is immense and with regard to the legal practice, AI is already being used when performing due diligence tasks. In order to provide clients with adequate advice concerning the legal aspects of AI, Mr. Sumroy discussed how lawyers need to understand the technology behind it. In relation thereto Mr. Warner introduced most of the audience to the fundamental theories and ideas surrounding AI. The speakers argued that the key principles for responsible deployment of AI are good governance, quality assurance and legality. As regards the legal concerns, the speakers argued that it is possible to render the use of AI in big data cases compliant with the privacy demands provided by the GDPR by adapting an approach of privacy by design.

Licensing and Contracting

*Moderated by Lau Norman Jørgensen, Kromann Reumert
Clive Davies, Fujitsu Services Limited
Kaisa Fahllund, Hansel Ltd
Toby Crick, Bristows LLP
Michael Peeters, DAC Beachcroft LLP*

In this panel, Clive Davies opened by discussing digital outsourcing and the Internet of Things, IoT. He argued that even though the benefits of outsourcing are consistent, digital outsourcing is causing a shift in context. The infrastructure of outsourcing is in transition and, according to Mr. Davies, the main regulatory issues which arise from the use of digital outsourcing are matters of responsibility. The role of the CISO is continuing to expand and it is of the utmost importance to adapt to the changes in technology and to develop new methods for IT-security and data liability both in terms of outsourcing and within the company itself.

Focusing on public ICT, Kaisa Fahllund spoke about the Procurement Directive (2014/24/EU) and the different procedures for ICT procurement provided by the Directive. She argued that the choice of procedure should be evaluated on a case-by-case basis based on the subject of the procurement. When dealing with procurement of standard services or products, e.g. standard software or applications, an open or restricted procedure is recommended and negotiated procedures should be used in large, complicated deliveries. Due to the advancement of technological services, the use of negotiated procedures is likely to increase as it provides better mutual understanding of the subject-matter of the procurement. In addition, Ms. Fahllund spoke about the problem regarding substantial modifications during the term and how it may be avoided by covering all future needs for modification in the contract with clear, precise and unequivocal review clauses.

Concentrating on the issue of software audits, Toby Crick explained that software audit provisions, a standard right in many software license agreements, are traditionally overlooked but seem to have become a particularly lively area for IT law and practice. This trend is likely to continue due to the advent of cloud delivery models and the overall accelerating pace of technological change. It is necessary for lawyers to adapt to these changes and to start negotiating the audit provisions and be ready to deal with audits if the rights of the licensors are invoked. In addition, lawyers should be extra cautious when working on deployment of new technology that interfaces with systems licensed on old terms. These issues are particularly likely to occur in relation to cloud agreements, and particularly SaaS agreements.

Michael Peeters concluded the session by discussing how to best deal with the decreasing use of on premise and private cloud solutions and the corresponding growth in public cloud adoption. Whilst the public cloud offers more flexibility, it is accompanied by a higher legal and contractual risk and the main task for lawyers and clients alike is to define the resultant risk of public cloud services. By gathering information about the different cloud services on the market and the risks pertaining thereto, lawyers must find ways to balance the risk and present adequate risk analysis to clients.

Interactive Workshop: Do We Need Platform Regulation

Ramak Molavi, iRights Law

The subject of the workshop held by Ramak Molavi was the use and regulation of platforms. She spoke of how the use of platforms may be beneficial to businesses and customers alike at the same time as it may imply downsides for both parties. Platforms provide businesses with an efficient tool for reaching new audiences and it allows user feedback to be integrated as a service. The customer benefits from the use of platforms by easy access to a wide range of services supplied supported by trusted payment processes. One discussion that arose focused on the question of whether or not there is a disproportionate exchange between the amount of big data gathered by the platforms on the one hand, and the services provided by the platform to the customers on the other. Ms. Molavi was of the opinion that the customers stand on the losing side of the transaction and that the amount of data gathered by the platforms exceeds the value of the services provided - a view which was not shared by parts of the audience.

Although the use of platforms may, in some ways, result in downsides for businesses and customers alike, as in one-sided terms and conditions which are seldom read by the customers and how businesses are dependent on the enforcement of the platforms, Ramak Molavi does not support the way legislators try to solve the problem and according to her, the GDPR is already obsolete. Due to the rapid advancement in technology and the time it takes for regulations to enter into force, it will be impossible for regulators to be aligned with the technological development. Hence, legislators should focus on constructing more technically neutral regulations.

Applied Data Protection

Moderated by Azmul Haque, Collyer Law LLP

Philip Nolan, Mason Hayes & Curran

Daniel Lundqvist, Advokatfirman Kahn Pedersen

Maria Wasastjerna, Nokia

The session, moderated by Azmul Haque, focused on the legal situation within the context of privacy law. Philip Nolan opened the session by discussing the case *Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems*. According to Mr. Nolan, the case not only focuses on data protection but also on EU constitutional law, and it may potentially have a significant impact on both European businesses and businesses outside of the EU. Mr. Nolan further explained how the case may have potential impacts on the GDPR, the privacy shield, binding corporate rules and ex-EEA exports.

Daniel Lundqvist followed by speaking on the subject of datadriven marketing, i.e. personalized marketing based on personal data. The efficiency of datadriven marketing, when as much data as possible are collected and profiles are targeted based on the gathered data, is superior to other marketing tactics and constitutes the heart of the marketing strategies in the majority of today's organizations. However, due to the emerging GDPR and ePR, the future of datadriven marketing is uncertain and according to Mr. Lundqvist, the EU is trying to construct the regulation of the internet in order to allow the data subject to be in charge of his or her own data and even to enable the individual to make online payments using personal data. Even though the thought is intriguing, he emphasizes that there are large commercial interests at stake and that the proposal is likely to be revised before adoption.

Putting data protection and privacy in the context of competition law, Maria Wasastjerna spoke of how the issue of competition law should be approached in a situation where customers are getting more and more used to receiving online services for free. She explained how the digital economy gives rise to less competition and less consumer choice and how the competition authorities are starting to wake up to this new challenge and to the issue of how competition law should be applied in the digital era. The data economy demands new approaches to anti-trust laws and although the past has showed a division between competitive rules and data protection law, the development is moving towards a convergence of the two areas of regulation.

A Corporate Perspective on Data Protection

Moderated by András Gurovits, Neiderer Kraft & Frey

Steve Mutkoski, Microsoft

Richard Kemp, Kemp IT Law

Stefan Backman, Tele2 AB

Martin Johansson, Advokatfirman Vinge KB

András Gurovits moderated a panel discussing relating to the impact that data protection laws may have on the practice of corporations. Focusing on healthcare corporations, Steve Mutkoski discussed patient confidentiality and the implications of a requirement of patient consent to the use of different types of medical technology. Moving past the initial obstacle of confidentiality regulations imposing criminal liability on physicians using cloud based storage, the development of cloud based storage of health data provides a more secure option compared to traditional techniques. However, the use of cloud based services still poses a threat to patient data security and practitioners need to ensure pragmatic restrictions on access and usage. Even though most things will remain similar or indeed the same after the enforcement of GDPR, the Directive provides new data subject rights, e.g. data portability, and substantial fines, which physicians and lawyers must bear in mind as IT and data governance are often left to affiliates. Keeping to the subject of data protection in the medical world, Richard Kemp spoke of the DeepMind case and its implications. Mr. Kemp explained that, as AI may be used as a tool to identify patients at risk of different types of deceases, the care provider needs to comply with GDPR and identify when patient consent is needed as well as what use of AI is permitted when patient consent may or may not be at hand.

Martin Johansson and Stefan Backman followed by speaking about data retention by providers of electronic communication services based on the CJEU's judgment in the joined cases C-203/15 and C-698/15, Tele2 Sverige and Watson and others. Although the judgment corroborates the right to private life and the protection of personal data in an age of digitalization by limiting the situations when retention is allowed, data retention is less effective as a tool for crime reduction when it comes to serious criminality. In addition, communication of gathered data could also be valuable to law enforcement authorities in investigations which do not concern serious crime, e.g. missing person cases, which may not be possible given the rules set out in the judgment. According to the speakers, the CJEU did not consider the important practical issues of limiting the use of data retention and whilst the judgment has clarified certain points of interest, others have been opened, which means the rules set out in the judgment will need to be refined.

Cybercrime and Cybersecurity

Moderated by Haakon Opperud, Thommessen Krefting Greve Lund

John Beardwood, Fasken Martineau DuMoulin LLP

Edward Roche, Columbia Institute for Tele-Information, Columbia University

Peter Hagström, Stockholm School of Economics

The panel discussed the importance of cybersecurity, both on a national and global level, and the major concerns with the construction of adequate and comprehensible regulations of cybersecurity. John Beardwood addressed how privacy legislation often reverts to high level principles in outlining privacy security obligations and that organizations seeking direction from the law are left with little clear guidance. He explained to the audience the importance of the OPC report and the FTC opinion and how they provide practical guidance to organizations about what measures will be considered to be reasonable and appropriate in the meaning of the law. However, it remains incumbent upon the regulators to provide greater guidance as to what physical, organizational and technological measures will meet the reasonable and appropriate standard for privacy safeguards.

Focusing on the legal frameworks of cyber arms control, Peter Hagström and Edward Roche provided an interesting and amusing discussion on the issue whereby Mr. Roche presented proposals on how to regulate the use of cyber arms and Mr. Hagström adopted the role of the skeptic and pointed out the flaws in Mr. Roche's proposals. Mr. Roche explained how international law evolves over time and how in the cyber world there already exist a system of unwritten rules, which are in place but not codified. Over time, those unwritten rules are the way to start and hopefully it will not take a cyber-Hiroshima in order for the appropriate regulations to be put in place. Mr. Hagström objected to the main definition of cyber weapons and explained that espionage programs and hacking events do not only take place in relation to countries but that the culprits also consist of individuals, e.g. the lonesome hacker. If we are not able to define the source of the attack, then how are we going to regulate it? As Mr. Roche continued to propose international conventions on cyber arms, Mr. Hagström emphasized that efficient means for defining who the culprits of the cyber-attacks are do not exist and that international conventions will not fill their purpose unless the states themselves assume responsibility for the attacks, which is not very likely to happen.

Interactive Workshop: Contracts 2.0 – Simple, Visual and Understandable: Dawn of a New Era?

Michael Bywell, Arnold & Porter Kaye Scholer LLP

Carmen de la Cruz, de la Cruz Beranek Attorneys at Law Ltd.

Kristian Foss, Bull & Co

Johan Hallen, Setterwalls Advokatbyrå AB

David McIlwaine, Pinsent Masons LLP

The panel discussed how to make contracts clearer and how to ease the process for those drafting such contracts. By means of introduction, Michael Bywell spoke of how the use of clear chapters, a plain language and model clauses may lead to costs savings, more useable contracts and fewer disputes. Kristian Foss explained the process of writing contracts from a Norwegian perspective. He spoke of how we live in a changing world where the pace is higher and the transactions are increasing in numbers but decreasing in size. In this changing world, lawyers need to reduce transaction costs and shorten the length of the contracts. This can be managed by writing for the target group's understanding, to write shorter and to avoid trying to impress with a complicated language. Carmen de la Cruz followed in the same spirit and gave a Swiss perspective on the matter.

The opinion of the audience was that contracts are not of practical importance to most clients in their day-to-day work and that they do not even take the time to read through the contracts. However, some of the audience objected to the use of shorter contracts based on the opinion that shorter contracts often take more time to write and may cause misinterpretation. The discussion which followed focused on how to ensure that the contracts and the reality align and how to make contracts of more practical use to the clients. As lawyers, we need to continue to adopt an advisory function and to work with the clients so that they can focus on practical issues. This may be achieved for instance by providing the clients with contractual handbooks or by presenting the key contract terms and conditions as factors in PowerPoint presentations.