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European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?

By David Erdos

Oxford University Press 2019, 480 pp.

£70.00; Hardcover

Paddy Leerssen*

David Erdos' new book, *European Data Protection, Regulation, Journalism and Traditional Publishers*, is a rich, meticulous contribution to the study of data protection law and its complex interactions with the media and with freedom of expression and information. In a time when new-fangled tech giants and Artificial Intelligence (AI) applications suck up most of the available attention, the role of more traditional actors, which remains nonetheless pivotal, risks being underappreciated. Thankfully, Erdos' new book does a remarkably comprehensive job of mapping the state of play in this area, critiquing its ongoing challenges and uncertainties, and charting a way forward. It marks a first, promising entry in the new Oxford University Press series on Data Protection and Privacy Law.

A central and inspired choice in this book is to consider journalism alongside other forms of publishing, such as the work of writers, artists, and academics. As argued persuasively, these other forms of publishing raise comparable fundamental rights concerns to journalism, though their treatment under data protection law diverges at times. The discussion is accordingly divided into four parts: Part I sets the stakes by reviewing the legal foundations of freedom of expression and data protection law in Europe. Part II then discusses how this framework applies to professional journalism, while Part III turns to a discussion of 'non-journalistic' traditional publishers, including a deep-dive on the uneasy position of academic publishing. Part IV contains concluding remarks and an expansive set of appendices.

Erdos approaches these topics from an empirical, comparative perspective, at once with a grand scope and a painstaking level of detail. Across the European Union (EU) and European Economic Area (EEA) Member States, he consults a wide range of materials including not only statutory law and regulatory guidance but also self-regulatory codes of ethics, annual reports from Data Protection Authorities (DPAs) and information from their websites, and, perhaps most valuably, a DPA questionnaire that probes their legal understandings and enforcement records. These materials are reviewed in a broadly chronological order, starting with the first-generation patchwork of national and Council of Europe standards developed since the 1970s, the second-generation under the EU's 1995 Data Protection Directive (DPD), and the third, current generation heralded by the General Data Protection Regulation (GDPR).

This wealth of empirical evidence, buttressed by its generous appendices, is valuable first of all as a reference work on this complex and multifaceted topic. But the book also offers a quantitative analysis

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at several points in order to distil broader trends and currents. Various deftly-designed typologies are introduced in order to code national policies in terms of stringency, so that they can start to be quantified and charted. For instance, the national implementation of journalistic derogations under the DPD and the GDPR is charted along a seven point scale, ranging from complete exclusion to full applicability. Comparing these two generations of law, a slight but significant harmonization can be observed, with the extreme cases at the poles of this spectrum moving towards the centre. A stark regional divide persists, with Northern Europe favouring relatively broad journalistic exemptions and Southern and Eastern Europe applying data protection more extensively – a pattern which Erdos convincingly links to Hallin and Mancini’s typology of media systems and corresponding cultural differences.¹

This meticulous and no-doubt labour-intensive coding method allow several such analyses to be made, not only between the GDPR and its predecessors but also, for instance, between the stringency of laws on the books and DPA guidance and enforcement in practice. A key finding is that DPAs appear to display a high level of deference to journalistic ethics: on issues covered by journalistic codes, such as undercover journalism, the mapping exercise reveals a relatively permissive attitude amongst DPAs. But on issues that are left unaddressed in professional codes, such as data subject access rights, DPAs seem more likely to apply data protection in full. Another recurring theme is the general paucity of enforcement, which can be attributed largely to the chronic underfunding of DPAs but also appears to be influenced by ideological factors. The analysis of non-traditional publishers reveals largely similar trends as for journalism, albeit with even less detailed guidance and enforcement on the part of DPAs.

These quantified approaches have their limitations, of course. The coding of complex legal rules into strict categories necessarily collapses relevant nuance and complexity, and leaves much room for further quantitative investigation. Nonetheless, they offer a clear contribution in helping to render legible the mass of European laws and standards in this space and provide a starting point for further analysis.

Some of the book’s most remarkable findings relate to the particular status of academic publishing, which faces a ‘potentially serious lacuna’.² Under the DPD, academic publishing was not expressly included in the special expression carveouts for ‘journalistic purposes’ or ‘artistic or literary expression’, and instead risked being treated under the more restrictive regime for scientific research. But as Erdos argues convincingly, academic research routinely contributes to public debate – if you will in a quasi-journalistic fashion -- particularly in the context of the social sciences and humanities. Indeed, the European Court of Human Rights (ECtHR)’s case law offers a particularly high level of protection to academic expression in particular. From this perspective, an outcome where academic publishers are treated more restrictively than other forms of publishing seems ‘perverse’.³ Especially since DPAs report a notably higher rate of enforcement action against social scientists than for other forms of publishing. In theory, the GDPR ought to have resolved this issue, by expressly incorporating ‘academic’ research into the special expression regime.⁴ But as Erdos observes, most Member States have failed to explicitly reflect this in the necessary national implementations.

¹ Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge University Press 2024). Erdos also explores the relationship between this typology and national cultural differences as observed in the survey research of Gerard Hofstede.

² David Erdos, *European Data Protection, Regulation, Journalism and Traditional Publishers* (Oxford University Press 2019), 271.

³ *ibid.*

⁴ GDPR, art 85(2).

Although the bulk of this work is descriptive and empirical, Erdos also reserves space for normative analysis and critique. Drawing on ECtHR case law, he argues for a ‘contextual balancing’ approach which resists categorical, bright-line rules in favour of either free speech or data protection. Instead, the ideal of contextual balancing points towards a tailored, nuanced approach aimed at reconciling these at times competing principles on a more case-by-case basis. The book observes a trend in the right direction. With each iteration of law gradually developing a more nuanced and balanced approach, it would seem that the long arc of data protection historically bends towards contextual balancing. But it’s not all good news, of course. The paucity of enforcement and guidance from DPAs is cause for concern, not only for journalists, but particularly for non-journalistic publishers.

In this light, much of the book’s policy recommendations focus on the appropriate relationship between DPAs and professional self-regulation. Who is after all to perform this contextual balancing? Recognizing the respective limits of both DPAs and professional organizations, Erdos argues for a co-regulatory approach. Professional standard setting has historically played a central role in media governance, given its particular constitutional and political sensitivities. Furthermore, DPAs are not only chronically underfunded but, as a privacy-oriented regulators, may be ill-equipped to fully appreciate the free speech interests at stake.⁵ Far from romanticising professional institutions, however, Erdos also reckons with their shortcomings and potential conflicts of interests. Therefore, standard setting in this space may still require credible threats of intervention from DPAs to give these frameworks ‘real teeth’. Erdos advises therefore co-regulatory initiatives. The media being a largely national sector, this could be done primarily at the national level with the European Data Protection Board’s limiting itself to a non-coercive, advisory role – broadly mirroring, though this comparison is not made expressly, the role of the European Regulators Group for Audiovisual Media Services (ERGA) in the context of media governance.

As Erdos is the first to admit, this critique is not radical, but immanent. Taking the project of EU data protection law largely as given, this book’s aim is not to critique its goals or premises. This leaves much room for further research into the factual circumstances of journalism today, its ongoing datafication and the challenges it raises. For instance, the rise of algorithmic personalization tools within journalism remains largely out of scope.⁶ Nonetheless, for those seeking to understand the policy and practice of GDPR as it currently exists, and how it can be applied to these challenges, the contextual balancing approach provides a useful and coherent frame.

Of course, in this age of platformisation and datafication, the challenges of media and data protection go far beyond journalism and publishing alone. The work of journalists and publishers is increasingly dependent on, and intertwined with, ‘the growth of new media actors including, at one end of the scale, individual online publishers, and, at the other, powerful corporate outfits such as Internet search engines’.⁷ The author’s next book, he announces, will turn to consider data protection as it applies to these new media actors. The concluding section reflects briefly on these developments, and argues for the continuing and distinct relevance of journalists and other publishers as key actors in media ecosystems.

This book arrives at a critical time. In the flurry of law-making around online media governance, a recurring theme is the aim to empower journalists, academics and other civil society actors with access

⁵ Erdos (n 2) 193.

⁶ See eg Sarah Eskens, ‘A right to reset your user profile and more: GDPR-rights for personalized news consumers’ (2019) 9(3) *International Data Privacy Law*. Max van Drunen, Natali Helberger and Mariella Bastian, ‘Know your algorithm: what media organizations need to explain to their users about news personalization’, (2019) 9(4) *International Data Privacy Law*.

⁷ Erdos (n 2) 206.

to more (personal) data – raising novel and urgent data protection issues in the process. To name a few examples, these include the European Commission’s calls for European Digital Media Observatory;⁸ the governance of data sharing regimes such as Social Science One, research APIs, and public advertising archives;⁹ and the use of GDPR data access rights for research purposes.¹⁰ Indeed, the European Data Protection Supervisor (EDPS)’s new draft opinion on Data Protection and Scientific Research explicitly argues for a co-regulatory approach in this space.¹¹ In these and countless other debates at the intersection of data protection, journalism, and other forms of expert expression, Erdos’ book is directly relevant.

Overall, given its breadth and depth, this is an impressive feat of scholarship with relevance for both media law and data protection law, and for both policy and practice. For practitioners, it may serve as a valuable international reference work in this complex and divergent field of law. For scholars and policymakers, it offers a rigorous and comprehensive commentary on its past, present and future.

⁸ European Commission, ‘Commission launches call to create the European Digital Media Observatory’ (7 October 2019) <https://ec.europa.eu/digital-single-market/en/news/commission-launches-call-create-european-digital-media-observatory> accessed 12 March 2020.

⁹ eg Axel Bruns, ‘After the ‘APIcalypse’: social media platforms and their fight against critical scholarly research’ (2019) 22(11) *Information, Communication & Society*. Paddy Leerssen et al, ‘Platform ad archives: promises and pitfalls’ (2019) 8(4) *Internet Policy Review*.

¹⁰ Jef Ausloos, ‘GDPR Transparency as a Research Method’ (SSRN Working Paper, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465680 accessed 12 March 2020.

¹¹ European Data Protection Supervisor, ‘A Preliminary Opinion on data protection and scientific research’ (6 January 2020)

https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf accessed 12 March 2020. Arguably, this opinion shares some of the same pitfalls that Erdos’ identifies in national standard-setting: it declines to differentiate strongly between natural and social sciences, and gives only limited attention to the role of special expression regimes in this space.