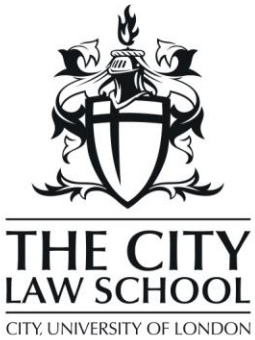

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A Future for Binding Law in Global Data Governance?

CLS Working Paper Series 2025/05

Marco Almada, Michael Veale, Jose Camarena Lopez, Elaine Fahey, Gabriela Zanfir-Fortuna, Mira Burri, Cornelia Furculita, Sylvia Chen, David HenigClaude Moraes, Elif Mendos Kuşkonmaz, Elif Biber, Joseph Dunne

* The City Law School, City St George's, University of London, London, EC1V 0HB

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A FUTURE FOR BINDING LAW IN GLOBAL DATA GOVERNANCE?: AN INFORMAL SCOPING WORKSHOP

Marco Almada, Michael Veale, Jose Camarena Lopez, Elaine Fahey, Gabriela Zanfir-Fortuna, Mira Burri; Cornelia Furculita, Sylvia Chen, David HenigClaude Moraes, Elif Mendos Kuşkonmaz, Elif Biber, Joseph Dunne

Abstract

This report summarises the Conference 'A Future for Binding Law in Global Data Governance?: An Informal Scoping Workshop' that took place on 1 July 2025 at the City Law School.

It is a longstanding view across disciplines that the future of global governance lies in understanding the interaction between the three major actors- of the EU, US and China. Yet in some of the most salient data governance challenges of our times, from data privacy to artificial intelligence, major disruption is in place where Europe, not limited to the EU, but also including the Council of Europe (CoE) has been the global first movers in binding hard law. Few want to regulate AI, privacy or content moderation using binding hard law- bar Europe. Soft law digital partnerships in international economic law have become highly fashionable, involving many countries and regions. Moreover, informal organisations increasingly emerge tasked with solutions to data governance, generating a wealth of soft law. Where do international organisations, regions and states fit within this emerging matrix? The workshop focused upon the harms of rising levels of global data governance through soft law and IO responses to this.

The EU increasingly seeks to portray its GDPR, AI Act and content moderation rules as a global blueprint to influence global standards yet their interoperability is much disputed, particularly as to privacy. Increasingly international organisation initiatives at WTO, CoE and UN level demonstrate downwards pressures upon standards and values. A rising use of soft law by the EU may impact upon its regulatory first-mover position or operate to dilute its standards and values. Soft law leaves less capacity for individual rights, enforcement, accountability and scrutiny. The workshop asked who policy makers see as the subject and object of the emerging soft law quagmire? It re-evaluated global data governance as a concept amongst international organisations 'IOs'. It critically reflected upon the EU as a first-mover – but exclusively-, on the increasing dominance of 'soft' law in international economic law and its exclusion of e.g. parliaments and civil society through the adoption of frameworks outside of the EU treaties and whether/ where such developments are mirrored.

Participants considered how a shift to digitisation poses substantial challenges to mankind and its threat along with its complexities are increasingly understood by international organisations such as the UN to be devastating. Yet is digitisation framed as a global regulatory challenge in most of its regulatory settings? In many academic as much as political and policy perspectives, hard law (specifically legally-binding treaties) is often perceived more favourably as a regulatory and governance outcome to any challenge, than soft, non-binding legal instruments, on account of hard laws precise wording and enforceable obligations. The open-textured nature of key aspects of trade and data are for some the

primary reasons for an emerging shift to soft law. Nowhere is this as obvious as in the domain of the digitisation shift with respect to data law and digital governance, an area initially evolved to be law-free, now the subject of considerable regulatory attention as a global challenge.

To this day, key debates in the regulation of data and digital governance struggle with the effects of stifling innovation, future fore-casting and appropriately responding to emerging technologies. There is little shared agreement on the concept or definition of data, its monetisation or appropriate commercialisation. These debates are far from academic or purely scholarly. One key element of a US legislative package of the 'Trump 2' administration relate to provisions prohibiting US states from regulating or enforcing AI for a decade in eagerly watched legislation ongoing through parliament, a measure 40 US state attorneys general labelled as an "irresponsible" federal measure. Such developments have not appeared from the ether- rather digital 'partnerships' and standalone digital agreements have proliferated as the challenges of negotiating binding trade agreements have mounted rendering them unattractive, inflexible and complex. A proposal for an AI liability directive has been withdrawn by the EU in response to concerns as to the depth and breadth of its legislative agenda.

Where the centre-of gravity lies is a thorny question and necessitates detailed mapping of regions, countries and IOs, as well as the locus of regulatory conflict where this arises if it might at all going forward. For some United Nations is uniquely positioned to host such a framework, and learning from history, the opportunity available to solve a global problem, for others, it is the site of a tremendous disappointment as to digital governance, sitting at odds with key developments at the Council of Europe and adopting voluntary and less rigorous frameworks than key regional regulators such as the European Union.

The workshop in this iteration considered three cross-cutting themes more generally:

1) Europe as a first-mover in data governance: From Europe to IOs with love?

The EU's General Data Protection Regulation (GDPR) on the protection of natural persons with regard to the processing of personal data and the free movement of such data is a landmark law. It has ignited a global wave of compliance with EU law, with over 100 jurisdictions copying it (Bradford 2020; 2023). Yet its acceptance in IOs is less understood. The EU increasingly seeks to portray its GDPR, AI Act and content moderation rules as a global blueprint (Fahey 2022). This leads to the question of regions and IOs in the future of data governance. Do developments in EU practice at the WTO, UN and Council of Europe and any acceptance of 'binding law' constitute salience sources? How are they evaluated?

2) Informal organisations proliferation and soft law rise in international economic law:

There is a rising use of soft law in the realm of global challenges e.g. migration, climate, data and cyber issues. 30-40% of all international organisations (IOs) are asserted to be informal organisations (Roger 2020). Digital partnerships and soft law frameworks in lieu of trade agreements are increasingly common led by the EU, Asia, US and UK (Claussen 2022). Soft law of data governance outside of Europe also exponentially rises in e.g. data governance, content moderation and digital platform liability. How does IO informality compare as to the scale of soft law use in the digital realm?

3) The data governance ‘race’ amongst IOs in an age of data sovereignty:

This workshop considers the drivers of ‘races’ to regulate and contestation in an era of peace, where metrics of cooperation are understudied. The EU’s and CoE human-centric model of regulation can certainly be contrasted with the US market-driven approach and China’s state-driven approach (Bradford 2023). Yet China increasingly copies the GDPR and US States one by one adopt comprehensive privacy laws. Data sovereignty is emphasised by countries such as Russia and Vietnam, US as much as the EU (Aaronson 2019). The perceived global ‘race’ to regulate (AI) at multilateral, international and regional level intensifies across the globe according to scholarship (Bradford 2023). The EU’s Artificial Intelligence Act adopted looks set to see the EU as the first global leader in the development of secure, trustworthy and ethical AI using binding hard law, along the Council of Europe cooperating intensively. How do IOs view each other in data governance text, practices and policy? China is making data an asset whereby the Chinese government has allowed all Chinese companies to register data as assets on their balance sheets. Its implications are likely to be highly complex and with implications for the place of soft and hard law framing, where more consequences arise from regulation and governance.

Keywords: Data; Governance; Digitalisation; Trade; Law-making; Soft law

Part I. Future of data

‘Soft law and the emergence of regulatory monocultures in artificial intelligence’

Marco Almada, University of Luxembourg

Global governance of artificial intelligence (AI) is at a crossroads. In the current geopolitical context, a top-down regulatory framework at the international level appears to be increasingly unlikely. At the same time, mechanisms that would otherwise promote governance alignment, such as the Brussels Effect, are substantially weakened. Nonetheless, Marco Almada’s presentation posited that the emerging patchwork of AI soft law instruments contributes to the emergence of regulatory monocultures. Based on the doctrinal analysis of recent hard law on AI, the speaker identified concepts and assumptions shared among regulations worldwide, even if they result in sharply different legal instruments. Shared elements include their delineation of the regulatory targets, an actuarial framing of risk, technology-neutral regulation, and extensive reliance on co-regulatory approaches. This conceptual convergence is not explained by mere transplantation of hard law, following instead from shared agreement at a global level that is consolidated in instruments such as international technical standards and non-binding recommendations of international organizations. After mapping these soft-law sources of monocultures, the presentation concluded with a discussion of how the emergence of regulatory monocultures affects the implementation and accountability of AI regulation at the national and regional levels.

‘The legal implications of data analysis without data access’

Michael Veale, University College London

It's commonly thought that companies with access to large amounts of data and the ability to accumulate more of it can gain power against competitors and wield significant influence in society. However, these assumptions, which are often baked into legal instruments explicitly, are not reflective of the increasing numbers of technologies that allow data analysis to be decoupled from data access. Encrypted computation technologies enable companies to use their amassed infrastructures to analyse populations and environments without having access at all to individual pieces of data. This is undertaken using forms of distributed and encrypted computation, and infrastructures that enable these techniques are only available to a select number of very powerful actors. In this presentation, the speaker Michael Veale looked through some recent law that may fall into these traps and gave a guide on how to build law that is more truly technology-agnostic when it comes to the power that large informational actors do and can wield in society. They drew upon examples from major companies already

using and deploying these technologies to their own advantage, and attempted to reframe the discussion and introduce a broader and deeper way of thinking around what data actually looks like in the biggest tech today.

‘A sustainable infosphere: the underlying tensions in EU data law and their interplay with Copyright law’

Jose Camarena Lopez, City St George’s, University of London

In this presentation, the speaker Jose Camarena Lopez looked into the underlying tensions in EU data law and their interplay with copyright law. While the EU continues to posit itself as the data regulator of the world, the evolving European data law is not an entirely cohesive and coherent system. European data law is spread across various established domains, among which data protection law and intellectual property law may be the more prominent pillars. EU data law is crossed by many tensions, but a salient one regards its dual approach to information and its conflated treatment of information concepts. On the one hand, information is conceived as a communicative act, supported by a fundamental rights rationale, but on the other hand, a reified notion of information has been recently adopted, particularly in the context of the current data technologies and the data-driven economy. EU data law faces the challenge of treating information as an act of communication or as an object or commodity. This tension, at some point, spurred a debate within the data protection domain, but it is also present at the core of copyright law. The current emergence of synthetic information and Generative AI offers an interesting juncture to explore how these tensions have informed recent issues in copyright regulation on the datafication of works of authorship, as well as to evaluate the role of copyright, as an integral part of EU data law, in achieving the key goal of information ethics in this context: a sustainable infosphere.

‘The chicken and/or the egg?: Drivers for the future of soft trade and technology cooperation from the EU’

Elaine Fahey, City St George’s University of London

The talk of Elaine Fahey mapped the content of digital external relations law of the EU and the space of digital strategic autonomy therein if at all. Global challenges increasingly permeate all areas of EU action beyond conventional external relations law. Although a field where the EU has had undeniable first-mover advantage, digital law, policy and governance arguably appears no different as a global challenge. Yet EU digital policies are replete with references to global leadership but contain often minimal references to international law and are mostly heavily rooted in internal competences. The EU is understood to be asserting its

own digital policy approach rooted in human rights against the global influence of the market-centred approach of the US and China's state-led model. Despite being understood to lag behind, it has also demonstrated the global successes of its first-mover stance and high standards. However, a sharp distinction may be seen towards the highly regulated 'hard' internal EU laws as to the digital and the emerging morass of soft external relations law on digital matters in digital partnerships and the 'hardening' edges of EU sanctions law. In between lie many key legal concepts such as data transfers, not per se part of the EU's iconic GDPR but referenced increasingly in external relations e.g. trade agreements- but to a degree also digital strategic autonomy. The talk also mapped the span of digital strategic autonomy, a term with minimal use in EU law. It explores its span with ranges directly and indirectly to a variety of fields from the CFSP, industrial policy, to the external effects of the internal digital governance transformation including digital value chains competition enforcement. It argued that a considerable mismatch between trade and technology in external relations law as well as competition law characterises EU digital external relations. Digital strategic autonomy does not eclipse digital external relations however irrespective of its offensive character nor form part of its content easily.

'How the AI race and geopolitics are shifting paradigms of international data transfers'

Gabriela Zanfir-Fortuna, Global Privacy

The AI race is not only pushing the boundaries of the legal regimes governing international data transfers, but it is shifting paradigms altogether. The issue of personal data related to a population crossing sovereign borders has historically triggered policy responses varying from prohibitions (strict data localization mandates) to different levels of restrictions (instruments introduced to allow personal data to cross borders), to no conditions altogether (free flow of data). Data, including personal data, is universally recognized as one of the key fuels of AI. The race among countries to nurture AI champions is starting to trigger surprising policy responses and, in some cases, even reversal of long held policies related to how personal data can cross borders. Gabriela Zanfir-Fortuna's presentation identified the novel policy responses in cross-border data flows, underpinned by geopolitical tensions of the AI race, and which can be categorized in three buckets. Protectionist approaches – more legal barriers, especially where there were none in the past; cluster approaches – where geopolitical actors recognize the need to come together and pool data; and vacuum approaches - the novel idea of policies mandating the absorption of data into a jurisdiction from outside of it, rather than conditions to move data out of that jurisdiction.

Part II. Future of international economic law, policy and dispute resolution

‘Digital Economy Agreements: The virtues of soft law in global data governance’

Mira Burri, University of Lucerne

The presentation by Mira Burri explored Digital Economy Agreements (DEAs) as a new tool of digital trade regulation. It examined their legal nature and compatibility with the law of the World Trade Organization but also look at the substance of the legal provisions and their evolution over time. Questions around the geopolitics of DEAs’ adoption, as well as their value as digital trade regulatory instruments were addressed. The contribution then linked to broader debates of the interaction between soft and hard law and asked whether there is some virtue in DEAs as predominantly soft instruments to navigate the technologically and regulatorily fluid environment of global data governance.

‘A future of data governance in WTO law: Reflections based on personal data protection norms from the Agreement on E-Commerce’

Cornelia Furculita, Universität Speyer

After years of negotiations within the World Trade Organization (WTO), 82 Members reached consensus on the stabilized text of the Agreement on E-Commerce. This landmark document has the potential to become a WTO plurilateral agreement and the first stone in building global data governance rules. While the agreed text currently lacks ambition in this respect, it does include positive norms and notably an exception on personal data protection. In their presentation, Cornelia Furculita critically focused on the analysis of these provisions and ponder on the future of the Agreement on E-Commerce and whether it could reconcile the inherent tension between the need for cross-border data flow and data protection. The presentation explored the breadth of the data protection exception, especially its prospect to hinder and nullify any possible more complex future data governance rules. It compared this provision with pertinent exceptions provided by the GATS agreement, major Free Trade Agreements, as well as Digital Economy Agreements, in an attempt to explore possible better alternatives.

‘Soft law and informal organisations are insufficient to govern digital trade in a Trumpian world’

Sylvia Chen, Trade Experettes

Although digital partnerships and soft law frameworks have increasingly replaced formal trade agreements in the EU, Asia, the US and the UK (Claussen 2022), they are insufficient to deal with digital trade issues, such as digital taxes, in a volatile trade policy environment. During the first Trump term, the United States responded to digital service taxes (“DST”) by the EU and EU countries, the UK, India, and Turkey with Sec. 301 investigations and tariffs (USTR 2020). What temporarily resolved the Section 301 DST tariffs was the soft law framework - the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, in which one hundred forty-one jurisdictions participated. As soon as President Trump swore in his second term, the United States withdrew from the OECD/G20 tax framework and soon after, threatened to re-enact the Sec. 301 DST taxes. According to the speaker, Sylvia Chen, in this volatile policy environment, a formal agreement would guarantee predictability in digital governance. A formal trade agreement requires time, effort, processes and procedures necessitated by each country’s laws and regulations, resulting in a governing framework that is not as easy to overturn or discard. Differences in digital taxation could be negotiated in bilateral tax treaties, most of which were concluded and ratified before the digital economy became a prominent part of our daily lives. Another solution, in Chen’s view, can be found in the novel, the first of its kind, digital trade agreement between the EU and Singapore (“EUSDP”) to address pressing issues in the digital economy (the EUSDP does not include a chapter on digital tax because both the EU and Singapore are committed to the OECD framework).

‘Country and company relations in the modern age of trade’

David Henig, ECIPE

David Henig focused on country and company relations in the modern age of trade. Trade talk has gone mainstream as a result of President Trump’s actions. On top of reporting costs and uncertainty to business this has meant numerous bold statements like the world never being the same again. Look closer and what we see are the complex realities of world trade play out in real time, defeating the always optimistic hopes of bringing back manufacturing through tariffs. Bipartisan US thinking since 2016 is failing alongside narratives of deglobalisation. Underlying reactions to Trump are trade trends evident before this daily saga. This is particularly the struggle of governments to find their role after global commerce was transformed by the internet in a way that only previously happened with the coming of the railways. How to balance openness with economic security, regulation with competitiveness,

and large corporate against other interests should be the questions we ask. Contrary to widespread views, trade was always intently political. Governments know of its disruptive power and potential to stir anger. Populism is the warning sign of confused response rather than offering serious solutions. While this time is different because it is the world's largest economy rejecting almost all norms, trade professionals have seen most of the elements before – not least the weakness of international law and institutions, and the strength of global supply chains.

Part III. Futures for regulation and governance ambitions, synergies and convergences

‘Recent approaches to data security and general data issues in the EU and UK: State of play in EU and UK data cooperation post-Brexit: conflicts, synergies and convergences’

Claude Moraes, House of Lords

The speaker Claude Moraes was a Group Coordinator then Chair of the European Parliament’s LIBE Committee during the period of GDPR trilogues until the AI White Paper and involved in negotiations for the EP in key data adequacy and data security agreements including EU PNR and TFTP (Swift), until Brexit. Now in the House of Lords observing the UK Parliament’s approach to data security issues and general data issues and post Brexit how the EU/UK Trade and Cooperation Agreement (TCA) is affecting security cooperation between the two. In this contribution, the speaker discussed recent approaches to Security Agreements in the UK and EU prior to Brexit. Post Brexit - how is the Trade and Cooperation Agreement (TCA) operating in relation to EU-UK adequacy discussions, and the EU-UK PNR Agreement and wider police and judicial cooperation. Taking the EU PNR agreement as an example – PNR has always been controversial but has evolved into several highly controversial agreements between the EU and a range of third countries and shows no sign of slowing down. The law applying to PNRs seems to be evolving, with an increasing number of actors becoming involved in its governance, generating controversies and challenges. Moraes discussed these and the way PNR has most recently formed a lengthy chapter in the TCA. He discussed what this latest development means for the evolution of PNR and the development of the EU AFSJ and security relationships with non-EU countries including the UK. More generally, the speaker revisited their time in the LIBE Committee to discuss how various stakeholders in the EU currently see its traditional portrayal of GDPR, AI Act, content moderation rules, its data adequacy and security agreements with third countries as a global blueprint in the current political and legal context.

‘Navigating the Legal Maze of Global PNR Surveillance’

Elif Mendos Kuşkonmaz, University of Essex

The global expansion of Passenger Name Record (PNR) systems exemplifies the struggle to govern data transfers and the subsequent data processing.

Once used solely by commercial airline providers, PNR data and its automated analysis have become crucial for pre-emptive counter-terrorism and border security actions. This shift has occurred not only within national and international legal frameworks but also through soft law instruments and informal arrangements. For example, UN Security Council Resolutions mandate states to develop PNR systems, and their global implementation has been supported by capacity-building and experience-sharing arrangements. Against this backdrop, the presentation examined the diffusion of PNR systems to explore the interplay between binding international obligations, soft law, and informal governance in global data policy. Ultimately, in creating global surveillance infrastructures, it considered the legal gaps and governance harms associated with PNR regimes, particularly regarding legal oversight and human rights protections. The contribution reflected on the EU's role as the actor behind the first comprehensive normative regime on the matter within the fragmented but ever-expanding PNR systems.

‘European Digital Constitutionalism in Evolution: Rising within a constellation of legalities’

Elif Biber, University of Luxembourg

In recent years, rapid advancements in digital technology have profoundly transformed everyday life and redefined the boundaries of individual rights and public power. While digital innovation has fostered new opportunities for expression, business, and social interaction, it has also introduced complex challenges to fundamental rights such as privacy, data protection, and non-discrimination. In this contribution, Elif Biber examined the evolving European legal response to these tensions, tracing a shift from a liberal economic model to a constitutionally grounded approach known as digital constitutionalism. Through an analysis of key court decisions and legal instruments – particularly those of the CJEU and European institutions – it explored how digital constitutionalism seeks to limit digital power and safeguard democratic values. The presentation focused on three constitutionalist perspectives – liberal, societal, and global – and how they are embedded within recent European digital rules. It argued that the European approach has fostered a “constellation of legalities,” enabling dynamic interaction among diverse normative actors. This framework holds promise for addressing emerging gaps in the governance of the digital age.

‘Uses of AI in regulatory governance’

Joseph Dunne, George Washington University

We already know that AI has the potential to revolutionize how lawmakers and rule-making agencies deliberate and adopt laws and rules. At the same time, trust in government is at an all-time low. It is well established that provision of evidence for government action is a key contributor to legitimacy and public trust, which ‘Better Regulation’ initiatives in different jurisdictions have long sought to tackle. AI, particularly machine-learning, can help the consultation process by facilitating the processing of the input received: summarizing and synthesizing the responses from stakeholders or members of the public. AI can also make it possible to reach broader target audiences with a combination of traditional methods (e-consultations; tailored consultation to different groups; multiple methods) and newer methods (social media). There are risks too: AI can provide the means to undermine consultations through mass, malattributed or computer-generated comments. The presentation reviewed the situation in different jurisdictions (United States, European Union and Brazil), examining to what extent, and to what effect, AI tools are being deployed in consultation processes.

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