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MONETIZATION AS A RIGHT: A NEW-LEGAL ECONOMIC PARADIGM UNDER FRAND PRINCIPLES

Abstract

Data is vital to the modern worldwide economy functioning. Data is produced by people and by machines owned by people. Data gets collected and processed, hence used (exploited and monetized) by the industry in a proportion of 100% and above as data is an infinite resource which can be used and reused indefinitely. This property creates a disproportionate advantage for those which are equipped with advanced, integrated powerful processing capabilities, storage space and efficient algorithms to extract information from large dataset.

Against this background, this contribution explores the role that FRAND principle can play to address the information asymmetry arising between businesses and individuals in the gathering of data.

JEL CLASSIFICATION: K0, K11, K20

Data is vital to the modern worldwide economy functioning. Data is produced by people and by machines owned by people. Data gets collected and processed, hence used (exploited and monetized) by the industry in a proportion of 100% and above as data is an infinite resource which can be used and reused indefinitely. This property creates a disproportionate advantage for those which are equipped with advanced, integrated powerful processing capabilities, storage space and efficient algorithms to extract information from large dataset.

Personal data (data which is associated to an individual) is protected by specific laws and regulations almost everywhere in the world and in a stricter way in some regions and countries of the world (e.g. GDPR and privacy in the European Union but also data protection laws in India and privacy and consumer protection laws in California etc). In some regions of the world we also assist to efforts by governments to rule how data gets used by the market and some governments have decided to adopt specific market regulations to this end. In Europe, the Digital Market Act (DMA), the Digital Service Act (DSA), the Data Act (DA) and the Data Governance Act (DGA) entered all into force in the

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last 2 years. Other countries are gearing similar data market regulations under the view that a monopolistic concentration of data may harm competition, consumers and market proper functioning (e.g. United Kingdom, India etc).

With the rise of Artificial Intelligence (AI) also new sectorial regulation have been considered to apply to data collection, processing and reuse by companies and between companies, especially if personal data is at stake. The AI Act in Europe has paved the way to such an approach.

Since the beginning of Internet, companies have never paid people/users/consumers for their data. Companies do not consider data collected from individuals in need of being paid. Companies collect data (as first party) and or agree to source it from third party suppliers (e.g. data brokers) or exchange it directly like in a barter model with another company (business partners). In these transactions the end users are not participating nor made aware of the value at stake. End users are unlikely given any element of cost benefit analysis to appraise the value of their 'handed out' data. In economic terms users suffer from economic asymmetric information.

Generally speaking, the data assets that companies exploit and monetize is usually made of first party data, collected directly from the end users/customers from different touch points in the digital or physical world and/or second and or third-party data, sourced from third parties that can be partners and or suppliers. Companies have a proven tendency to dilute the data protection level when they exchange data at business-to-business level as they presume the 'personal data consumer protection' component is not at stake under a B2B relationships. This happens in particular for companies which operate business to businesses to consumers services (B2B2C).

End-users/consumers (data subjects as defined by EU GDPR) are not even aware of the rights they can assert under privacy regulation where privacy has been defined as a fundamental right. More notably, end-users are not conscious of the incremental value generated by their data sharing. They ignore the long value chain tail behind their interaction with the devices' screens they engage with 24/24 hrs. They also ignore the stiff competition that exists between companies in quest of good contextual first party data and racing to win user's attention and time to monetize it. Simply put: end users/consumers remain blind on the data economy functioning, their data protection rights, data monetization processes and more broadly how digital value is created, how data is used and exchanged, and which rules apply to the data economy between business stakeholders. They simply ignore that data is what fuels the gig economy wealth. For a very long time, the narrative put into the consumer space was that if the service is offered for free there is a balanced right from the service provider to monetize the data (this was the traditional argument for publishers and social media) but in reality also paid services monetize customer data in a very aggressive way and do not really make a big difference whether the service is paid or free. Spotify and Netflix are two platforms which offer paid services (with Spotify also offering a free service level). Both are also advertisement



platforms. Spotify in particular offers the profiled data extracted from their audience to Facebook which reuses it to target with ads their users. So, the assumption under which if the service is free the user is paying with data and if the service is paid the user is paying for it and he/she is not going to be monetized again through advertisement is a false myth. Companies harvest and monetize data in a continuum - individuals keep ignoring how that is managed and the value that is extracted. The information asymmetry suits well businesses.

If we are to think of web 3.0 and beyond and a full interconnected society, based on AI technology and services adoption, we must think of new models of digital value (wealth) creation and redistribution to include the excluded: end-users/consumers. Hence this redistribution of wealth shall be fair and proportionate as a modern democratic approach to digital. FRAND could be an interesting concept to explore in an evolved consumer-to-business relationship context where the information asymmetry would be balanced by enhanced digital rights management capability on the user's side.

It is a sign of democracy to design such a new model, whereby people do not get considered mere consumers to be exploited but be recognized as key 'contributors and trusted partners' by businesses. In a model like this the recognition to the end-users would not be measured against the upstream data value but the ex post incremental value achieved thank to user' cooperation. An end-user well deserved in-kind or cash back compensation (computed on a FRAND ex post basis) would not be based on the principle that 'data is as raw value input' like if the end-user was to be seen as a commodity supplier but through the lens of his/her cooperation degree (to share data) and the incremental value achieved (and measured) thank to such cooperation.

Even if personal data deserves to fall under a special protection scheme and unless anonymized cannot be commercially exploited and traded (at least under EU GDPR), there is a vast amount of other type of data (non-personal and metadata) which could be traded and exchanged, subject to the fulfilment of certain pre-conditions and which the end-user ignore how commercially it can become an attractive proposition for companies. This notion of 'data use' through digital rights management also resonates well with the broader concept of secondary data reuse and share where the agent determining the re-use time interval and purpose can be the individual rather than the company (service provider).

Establishing by the law a system where the end-users could unilaterally control data rights permission management such as to change how the data get allocated to the market has the potential to significantly impact how wealth is generated in digital and redistributed.

Data subjects have many rights in digital space, especially under EU GDPR. But no explicit right to monetize data until DMA and DA entered into force. This allowed in Europe to do a shift from right to agree to share or to oppose to share, right to view data held by the platform and right to delete such data (e.g. EU GDPR) to right to export and right to

switch service (and carry over the data held by the platform) under EU DMA and also under the EU Data Act.

So we in the European Union now have the legal basis to enable end-users to participate as business partners in the value chain but monetizing someone's personal data remain particularly difficult for players outside the data value chain (like end- users are) as there is no transparent information available to them to help define the 'right' market price or to expose the catalogue of data that could be made available under this scenario.

It is a fact that in current modern societies no business can flourish without data so we can already work under the core assumption that data is always valued more than 0 including for an end user who has no understanding of the data market value nor of the stakeholders on the data demand side which by competing (against another stakeholder) could take that presumed value from zero to higher than zero. And assuming there could be a bidding system the two companies would face, to access the data of the same end user, the price would probably go up if one of the companies would be willing to pay a premium for obtaining exclusive right of use of that individual's data for a longer period of time.

So how can we facilitate a more competitive system between companies when sourcing data and have a pivotal role assigned to the end-user such as to enable him/her to claim a fair compensation and play as a partner in the relationship with businesses? One option is to automate how the end-user can effectively assert his/her 'willingness' to participate in a data sharing 'contract' and prevent companies from opting out from honouring it.

Blurring the difference between personal and non-personal data for monetization purpose is one of the aspects to explore in this paper along with giving some practical examples of why we believe the system could work well.

1. The first key assumption being that there should not be a difference between personal and non-personal data monetization opportunities by the end-user (while there would always be for the service providers if they qualify as data controllers or join controllers);
2. End-users should be left free to allocate the data they generate based on market demand in a dynamic way. To this end a mobile experience is probably more desirable.
3. If the data is generated by a human (through a machine interface eg smartphone, set top boxes laptop, connected cars, EV chargers), the data subject should have full rights to decide on the intended usage and re-usage of such generated data, hence the need to define a common etymology for the 'purposes' that the industry could expose to the users. In such a scenario the user would assert his/her rights under a regime of '*rights of use by purpose*'. Such rights of use would be defined technically through specific attributes (technically readable by machines) e.g. time, geography, purpose and eventually provide for specific limitations of use of



the data, plus include the expected form of compensation (in kind or cash back) and enable the businesses to compete by placing their bids.

How this compensation could be calculated and expressed is also falling in the paper as we assume that it should be FRAND based and paid *ex-post*. This means that no companies could transact with an end user for less than a minimum compensation (in-kind or in cash) and that 3-5% should be based on FRAND terms and should be paid *ex-post* such as that the 'commitment by the end user to cooperate' (share) would be respected but also verified through the end of the 'time interval'.

As the intended use of data generated by end-users and consumers are multiple and also sometimes not competing with each other it's conceivable that different usages for different time intervals and different geographies would equate to different level of compensation for the end-user. The benefit for the end-user would be significant as the same dataset would be monetized several times, bringing his/her gains to a level of attractiveness.

Examples:

- 6 month committed consent to personal data sharing for programmatic purpose (e.g. targeting) by a social media = user entitled to not less than 3-5% FRAND cashback calculated on incremental advertisement ROI by the social media company;
- 6 months committed consent to personal data sharing for use by an AI agent (for training purpose) = end user entitled to not less than a FRAND 3-5%;
- 6 months committed consent to share devices usage time for use for product enhancement purpose = end user entitled to not less than a FRAND rate (3-5%) for the product improvement only achievable thank to the received data by the manufacturer (can applied to device wholesale price).

Now, at the beginning of AI era and at the sunset of Big Data and Web as we have known it for 20+ years, it's time to think bold to a new digital societal model taking more into account wealth creation and redistribution as we see the AI massive adoption impacting jobs and how human being produce.

We are in the belief that a FRAND based system, incentivizing end-users to allocate more efficiently data through digital rights management, entitling the end users to a fair and proportionate compensation for agreeing to cooperate under pre known and defined variables (time, geography, purpose for example) could benefit the whole ecosystem as companies need data, users would have the option to choose more consciously to which companies sharing it with and the downstream effect could be measurable.

Europe can capitalize on existing laws and regulations to put in place such system, including GDPR and eprivacy, plus the newly adopted specific regulations applying to VLOPS and Gatekeepers under sector specific EU legislations aiming at curbing gatekeepers' dominance and opening to data reuse and reshare paradigms under privacy compliance (e.g. DMA, DSA, DGA, AI Act and Data Act).