



The Rule of Law in the Technological Age

Challenges and opportunities for the EU

ACELG's Annual Conference 2016, 4 November 2016
Conference Centre De Bazel, Koningszaal, Vijzelstraat 32

Organized by the [Amsterdam Centre for European Law and Governance](#)

Technological innovations are crucial drivers of economic, social, and environmental progress. Law and regulation are expected to enable innovation while protecting society from unintended consequences, such as risks to public health and the environment, privacy, data protection and other protected interests. However, law is often considered either as an obstacle to innovations or as unable to protect society from their risks. While law's inability to keep up with technological progress has been extensively discussed, the implications of technology for law remains under-examined.

This ACELG annual conference will explore the ways in which technology transforms the very nature of law as an institution including its key concepts of the rule of law, legal certainty and rights protection. In particular, it will engage with challenges and transformations triggered by technological progress in relation to the rule of law in the EU. In what way do new technologies change the nature of legal protection in the EU? How does the scientific complexity of technology regulation and the increasing reliance on both non-legal expertise and non-state actors affect the nature of law-making and enforcement including the task of judicial control and rights protection?

The relationship between law and technology is more complex than one-directional accounts are able to tell. By framing technology regulation in a certain way law itself is able to shape technological innovations thereby encouraging or discouraging different types of innovations. The EU often frames technology as a market commodity and innovation as a perspective for growth in the EU economy. Ethical and fundamental rights perspectives remain subsidiary. This raises questions about the nature of the EU legal intervention in technological progress. In contrast, EU data protection has recently witnessed an increasing importance of fundamental rights as well as the introduction of new legal concepts to ensure their protection in the digital age. In what ways does Big Data transform concepts of fundamental rights and their enforcement?

This ACELG annual conference will address these and related questions by bringing together leading experts from both academia and practice.

Preliminary Programme

09.00 – 09.30 Arrival and Registration

09.30 – 09.40 **Opening:**

Christina Eckes, Amsterdam Centre for European Law and Governance

09.40 – 10.00 **Rules of Law, the Rule of Law, and Technological Management**

Roger Brownsword, Centre for Technology, Ethics and Law in Society, King's College, London

10.00 – 11.30: **Rights in the Digital Age**

Chair: **Deirdre Curtin**, Amsterdam Centre for European Law and Governance

- The Personal Data Processing Puzzle: Time for a new perspective?
Orla Lynskey, London School of Economics
- The Impact of New Technologies on Privacy and Data Protection
Wojciech Wiewiórowski, European Data Protection Supervisor's Office

Discussant: **Christina Eckes**, Amsterdam Centre for European Law and Governance

11.30 – 11.50 Coffee break

11.50 – 13.20 **EU Law on Technology**

Chair: **Ramses Wessel**, University of Twente

- The Rule of Law in EU's Innovation Society: Framing technology
Tamara Hervey, University of Sheffield
- On a Need to Have Basis: The innovation principle, the rule of law, and EU regulation of new technologies
Geert van Calster, KU Leuven; King's College; Monash University

Discussant: **Maria Weimer**, Amsterdam Centre for European Law and Governance

13.20 – 14.30 Lunch break

14.30 – 16:00 **Technology as a challenge to law making and enforcement**

Chair: Thomas Vandamme, Amsterdam Centre for European Law and Governance

- Fast Lane Competition v Slow Lane Enforcement: How the Rule of Law struggles to keep up with e-commerce
Ariel Ezrachi, University of Oxford
- Uncertainty in Technological Regulation: How law making and law enforcing matters
Indra Spiecker gen. Döhmann, Goethe University Frankfurt am Main

Discussant: **Katalin Cseres**, Amsterdam Centre for European Law and Governance

16:00 – 16.15 **Wrap up by Roger Brownsword**

16.15 Drinks

Abstracts

Roger Brownsword – Rules of Law, the Rule of Law, and Technological Management

When smart technologies that are incorporated in products, places, and people, serve the regulatory purposes previously served by legal rules (when ‘technological management’ replaces rules), is the Rule of Law of continuing relevance and what is the future for rules of law?

With regard to the first of these questions, it will be suggested that the Rule of Law continues to be of critical importance. The Rule of Law expresses a founding compact between those who govern and those who are governed, calling on the one side for legitimate governance and, on the other, for responsible citizenship. The fact that technologies replace rules as the instruments of governance in no way diminishes the significance of the compact.

With regard to the second question, rules will be replaced by technological management and some laws will be redundant. For example, road safety will be secured by on board vehicle technologies rather than by the provisions of road traffic laws or the highway code. However, each community will need to determine for which purposes technological management may be used. One possible answer to this question, it will be suggested, is that technological management might be the instrument of choice where the regulatory purpose is to secure the ‘commons’ (the essential conditions for humans, who are prospective agents and who have moral aspirations); but, where the regulatory purposes are contested, and particularly where the purposes are morally contested, rules might be the preferred instrument.

Orla Lynskey – The Personal Data Processing Puzzle: Time for a new perspective?

The exponential increase in personal data processing over the past two decades has significant implications for fundamental rights. It has, for instance, eroded the tangible boundaries that assisted individuals to compartmentalise their public and private life (or lives) and has made effective ‘informational self-determination’ meaningless in practice. This phenomenon has also challenged the nature of law as an institution in a number of ways. Most evidently, it has confirmed the suspicions of early cyberlibertarians that the borderless nature of digitised data flows would challenge the traditional territorial application of law. The ongoing disputes regarding jurisdiction over personal data processing operations in the EU will only be solved once the shift from decentralised to ‘Europeanised’ data protection law is complete under the new General Data Protection Regulation. However, the personal data processing phenomenon poses two more serious challenges to law as an institution. First, the shift from public power to private power that this processing entails exposes gaps in existing legal and regulatory paradigms and undermines fundamental rights protection. Moreover, the disconnect between law and technical reality, and the inability of regulators to ‘look under the hood’ to examine the legality of data processing practices, challenges the law’s authority in this arena. These broader legal challenges cannot be remedied by data protection authorities alone: a broader perspective on this data processing puzzle is needed.

Wojciech Wiewiórowski – The Impact of New Technologies on Privacy and Data Protection

No abstract available

Tamara Hervey – The Rule of Law in EU’s Innovation Society: Framing technology

It is often claimed that EU law’s approach to novel technologies is framed by notions of the market. In terms of its technical legal status, much of EU law on novel technologies falls within the EU’s competence to regulate the internal market. A variant of the ‘constitutional asymmetry’ argument (Scharpf 1996) is often made here: the constitutional centrality to the rule of EU law of market

creation and sustaining the internal market inhibits the scope of EU law, and forces the market to be legally framed as the ‘rule’. Other values are legally framed as outside EU competence and/or as exceptions to that rule.

This paper will argue that, while there is some force in this dominant claim concerning the rule of EU law in framing new technologies, it is far from the whole picture. Using the examples of medical devices and novel pharmaceuticals regulation, the paper shows that other values are also present in the ways in which EU law frames technologies. These values include the constitutional position of human rights; human dignity; and the notion that the EU’s market is a particularly safe and particularly ethical market, when considered in global contexts.

Geert van Calster - On A Need to Have Basis: The innovation principle, the rule of law, and EU regulation of new technologies

Adopted by the Council in May 2016 the “Innovation Principle” remains undefined. The principle has to fit in with EU efforts in areas such as smarter regulation, innovation, the circular economy. This will determine how the EU balances technological development and competitiveness, with public interests such as environmental and public health protection. On the one hand the EU’s circular economy efforts, its prioritisation of Limits to Growth etc. imply that it is not because we can produce something that we should. On the other, it is imperative that the EU remain competitive. One key area that needs to be researched is how the innovation principle will fit into the EU’s circular economy and limits to growth objectives; one potential answer, which to date has not been considered, may be the adoption of a “public needs analysis” for technological innovations: *‘Regulating on the basis of what is needed, not what is craved or marketed.’* In regulating new technologies, the EU so far has focussed on addressing what might be public health risks. On a good day, we have also contemplated environmental protection. What though would happen if we were to regulate on a ‘need to have’ basis? Is there a possibility to device a regulatory regime which weeds out B2C products in particular which grant little true advance? Are there examples of needs-based regulation which could guide us in this respect? Can a regulatory regime offer selection without offending the rule of law and equal opportunity?

Ariel Ezrachi – Fast Lane Competition v Slow Lane Enforcement: How the Rule of Law struggles to keep up with e-commerce

Computer algorithms, artificial intelligence, and machine learning have transformed our online environment. On its surface, e-commerce seems to deliver more in terms of customer welfare and competition. Yet, it also given rise to new market dynamics - new forms of competition - which differ from the brick and mortar competition and include anticompetitive activities such as ‘AI powered tacit collusion’ and ‘behavioural discrimination’.

The fast changing market dynamics raise challenging questions as to the effectiveness of current competition law analysis which may fail to detect and deter anticompetitive activities. They also increase business and legal uncertainty as to the possible legality or illegality of certain activities, and as a result, risk chilling the process of competition.

Should competition law recalibrate its approach to take stock of new market dynamics, or shall it trust these dynamics, and the invisible hand, to remedy any transient anticompetitive? That question opens the door to a multitude of considerations – economic, legal, social and political. It draws attention as to the ‘sponginess’ of competition law and its susceptibility to intellectual and regulatory capture.

Indra Spiecker gen. Döhmann – Uncertainty in Technological Regulation: How law making and law enforcing matters

Regulation of innovative technologies is often thought to be problematic because of uncertainty: Where does the new technology lead to? How does it develop? Which problems arise? Will the chances, will the risks be fulfilled? How can this be tested and monitored? For the law, the principle problem is: How can the law govern this uncertainty? The presentation will give a short overview over central legal strategies and rules how to cope with uncertainty and thus introduce a first level of interdependence of law and technology.

What remains often unregarded, however, is the importance not only of rules and normative guidelines to govern new technology, but also of reliable and foreseeable enforcement of these. The presentation will show that legal uncertainty is often created by a lack of enforcement, among other factors due to a variety of institutions interpreting and enforcing the law enabling technology companies to strategically position themselves and their products. The influence of law on technology may therefore differ considerably depending on the enforcement mechanisms.

The presentation will use as illustrations the case of EU data protection legislation in reaction to IT developments and the case of chemical regulation in reaction to chemical innovation, i.e. the EU's new General Data Protection Regulation (GDPR) and the Regulation on Registration, Evaluation, Authorization and Restriction of Chemicals (REACH). While the GDPR now integrates 29 different data protection authorities in a consistency mechanism, REACH institutionalized a common European Agency, ECHA. Consequently, IT and chemical innovation processes have developed quite differently.

The speakers, discussants and chairpersons

Roger Brownsword holds professorial positions at King's College London and Bournemouth University, and he is Honorary Professor in Law at Sheffield University. Until his retirement in 2010 he was founding Director of TELOS, an inter-disciplinary research centre at King's College London that focuses on law, ethics, and technology. He was a member of the Nuffield Council on Bioethics from 2004–2010; and he was Chair of the Ethics and Governance Council for UK Biobank from 2011–2015. He has served as a specialist adviser to parliamentary committees (on stem cells and on hybrid embryos); he served on the Royal Society Brain Waves' Working Party on neuroscience and the law; and, currently, he is a member of the Royal Society's Working Party on machine learning. He has published more than a dozen books (most recently co-editing the *Oxford Handbook on Law, Regulation and Technology*, and now working on *In the Year 2061: Law in an Age of Technological Management*) and some 240 academic papers; and he is the founding general editor

(with Han Somsen) of the journal, *Law, Innovation and Technology*.

Geert van Calster is an independent legal practitioner at the Brussels Bar and full professor at the University of Leuven, where he chairs the Department of European and international law. He is also senior fellow at Leuven's Centre for Global Governance Studies. Van Calster is a visiting professor and senior fellow at Monash University's Law faculty (Melbourne), visiting professor at the China-EU School of Law in Beijing, visiting professor at King's College, London, and adjunct professor at the Brussels Campus of American University. He was previously i.a. a visiting lecturer at Oxford University. He was called to the Bar in 1999 after having worked as of counsel to a City law firm since 1995.

Katalin Cseres is Associate Professor of European Competition Law and Senior Researcher at the Amsterdam Centre for European Law and Governance.

Deirdre Curtin is Joint Chair European Law and Politics at the European University Institute in Florence and Professor of European Law and Governance at the University Amsterdam. She is the Founding Director of ACELG, which she headed as director until the beginning of 2016.

Christina Eckes is Professor of European Law and Director of the Amsterdam Centre for European Law and Governance.

Ariel Ezrachi is the Slaughter and May Professor of Competition Law at the University of Oxford and the Director of the University of Oxford Centre for Competition Law and Policy. He routinely advises competition authorities, law firms, and multinational firms on competition issues, and develops training and capacity building programmes in competition law and policy for the private and public sectors. He is the co-editor-in-chief of the *Journal of Antitrust Enforcement* (OUP) and the author, editor and co-editor of numerous books, including – *Virtual Competition* (2016, Harvard), *EU Competition Law, An Analytical Guide to the Leading Cases* (5th ed, 2016, Hart), *Global Antitrust and Compliance Handbook* (2014, OUP), *Intellectual Property and Competition Law* (2011, OUP), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011, Hart) and *Private Labels, Brands and Competition Policy* (2009, OUP).

Tamara Hervey, LLB, PhD, FAcSS, PFHEA is Jean Monnet Professor of EU Law at the University of Sheffield, UK. She researches, teaches, and writes on EU social and constitutional law, in particular its application in health fields; on equality law; on interfaces between biosciences and (European) law; on social rights; and on legal pedagogy.

Tamara is author/editor of 16 books/edited collections and over 80 articles and book chapters, including T Hervey and C Young with L Bishop, *Research Handbook in European Union Health Law and Policy* (Edward Elgar, 2017 forthcoming); T Hervey and J McHale, *European Union Health Law: Themes and Implications* (Cambridge: Cambridge University Press, Law in Context, 2015); S

Peers, T Hervey, J Kenner, A Ward, eds, *Commentary on the European Union Charter of Fundamental Rights* (Hart 2014); M Flear, AM Farrell, T Hervey, T Murphy, eds, *European Law and New Health Technologies*, (Oxford University Press 2013); AM Farrell, S Davaney, T Hervey, T Murphy, eds, ‘Regulatory “Desirables” for Health Technologies’ 21 (1) Special issue of *Medical Law Review* (2013); AM Farrell, S Davaney, T Hervey, T Murphy, eds, ‘Contextualising the Regulation of Health Technologies’ – Special issue of *Law, Innovation and Technology* 4 (2) *Law Innovation and Technology* (2012).

Orla Lynskey is an Assistant Professor in the LSE Law Department since September 2012. She teaches and conducts research in the areas of data protection, technology regulation, digital rights and EU law. Her PhD research focused on the dual dignitary and economic nature of personal data and the normative limits of individual control over personal data. This research has been developed into a monograph, *The Foundations of EU Data Protection Law*, published by OUP in 2015. She is currently working on inter-related projects on the fundamental rights implications of platform power in digital markets and the EU’s right to data portability. Orla is an editor of *International Data Privacy Law* (OUP) and the European Law Blog, and is a member of the Editorial Board of the *European Data Protection Law Review*. She holds an LLB from Trinity College Dublin, an LLM from the College of Europe, Bruges and a PhD from the University of Cambridge.

Indra Spiecker gen. Döhmann, Prof. Dr. iur. (University of Bonn), LL.M. (Georgetown Univ.), is one of Germany’s leading experts on information and IT regulation law. Since 2013 she holds the chair of Public and Administrative Law, esp. Information Law, Environmental Law and Legal Theory at the Goethe-University of Frankfurt/Main in Germany. She also is Director of the Research Institute on Data Protection thereof and member of the Competence Center on IT-Security (KASTEL) at the Karlsruhe Institute of Technology (KIT). She also heads the Research Institute on European Health Policy and Social

Law (Ineges) at Frankfurt. She previously held the chair of Public and Administrative Law, esp. telecommunications law and data protection law at Karlsruhe Institute of Technology (KIT).

Prof. Spiecker publishes in the entire field of Constitutional and Administrative Law with a special focus on information law as well as technology law. In her research, she integrates interdisciplinary aspects from (Behavioral) Law and Economics, the Technical Sciences and Legal Theory.

Her expertise is valued nationally and internationally; she regularly gives expert opinions on data protection, but also in environmental law, IT-security, health law and technology regulation issues for parliaments, governments, NGOs and private institutions and companies. Among others, she has been called into the work task force "research information standardization" of the German Council of Science and Humanities and the expert working group "Secure legal framework for Cloud Computing" of the Federal Ministry of Economics and Trade. She is co-publisher of the *European Data Protection Law Journal* (EDPL), the *Verwaltungarchiv* and co-editor of *Computer und Recht* (Computer and Law).

Thomas Vandamme is assistant Professor European Law at the University of Amsterdam. His research interests include several topics of European institutional law such as the role of national parliaments in the process of adopting and implementing EU law, the interaction between national constitutional law and European law and the role of federalism in EU institutional law.

Maria Weimer is Assistant Professor of European Law and researcher at the Amsterdam Centre for European Law and Governance.

Ramses Wessel is Professor of International and European Law and Governance and Co-Director of the Centre for European Studies at

the University of Twente, The Netherlands. He is Vice Rector (Dean of Educational Innovation) of the University and former Dean of the School of Management and Governance. Ramses Wessel is Editor-in-Chief and founder of the *International Organizations Law Review* and of the *Netherlands Yearbook of International Law*; Editor of *Nijhoff Studies in European Union Law* and member of the Editorial Board of the *CLEER Papers* series. His latest publications include *Judicial Decisions of International Organizations* (Oxford University Press, 2016) and *The European Union and International Dispute Settlement* (Hart Publishers, 2016). One of Ramses Wessel's research themes is the multilevel regulation of technology.

Wojciech Wiewiórowski has been Assistant European Data Protection Supervisor since December 2014. Before his appointment, he served as Inspector General for the Protection of Personal Data at the Polish Data Protection Authority, a position which he had held since 2010. He was also Vice Chairman of the Working Party Article 29 Group.

He previously held positions in public administration as e.g. adviser in the field of e-government and information society for the Polish Ministry of Interior and Administration and Director of the Informatisation Department at the Ministry of Interior and Administration, and in higher education.

Wojciech Wiewiórowski is the author of numerous studies, publications and lectures in the field of personal data protection, IT law, e-government and legal informatics. His areas of scientific activity include first of all Polish and European IT law, processing and security of information, legal information retrieval systems, informatisation of public administration, electronic signature and application of semantic web and legal ontologies in legal information processing.

Practical information

VENUE

Conference Centre De Bazel (the building also houses the Amsterdam City Archives)
Vijzelstraat 32 ([on Google map](#))
1017 HL Amsterdam

Room: Koningszaal (3rd floor)

From Central Station: For the most direct connection, take **tram 16** (on your left when you leave Central Station) until stop Vijzelstraat/Keizersgracht. De Bazel is across from the tram stop.

Other options are trams 9 and 14 to stop Rembrandtsplein or trams 1, 2 or 5 to stop Koningsplein combined with a short walk (see map on next page).

TRANSPORT IN AMSTERDAM

- **Travel information – website and app**

On the website [9292ov](#) you can find travel information for all sorts of public transport from and to every location in the Netherlands. A mobile version of the website as well as an app can be downloaded [here](#).

- **Arrival at Schiphol Airport**

From Schiphol airport, trains leave every few minutes to Amsterdam Central Station – see [railway journey planner](#). The journey takes about 20 minutes. Chipcards are sold in the airport's central hall, either at the counter of the NS (Dutch Railways) or at vending machines. See below for instructions on the use of the machines. Please note that **no supplement** is needed for the journey between Schiphol and Amsterdam Central Station.

- **Public transport within Amsterdam**

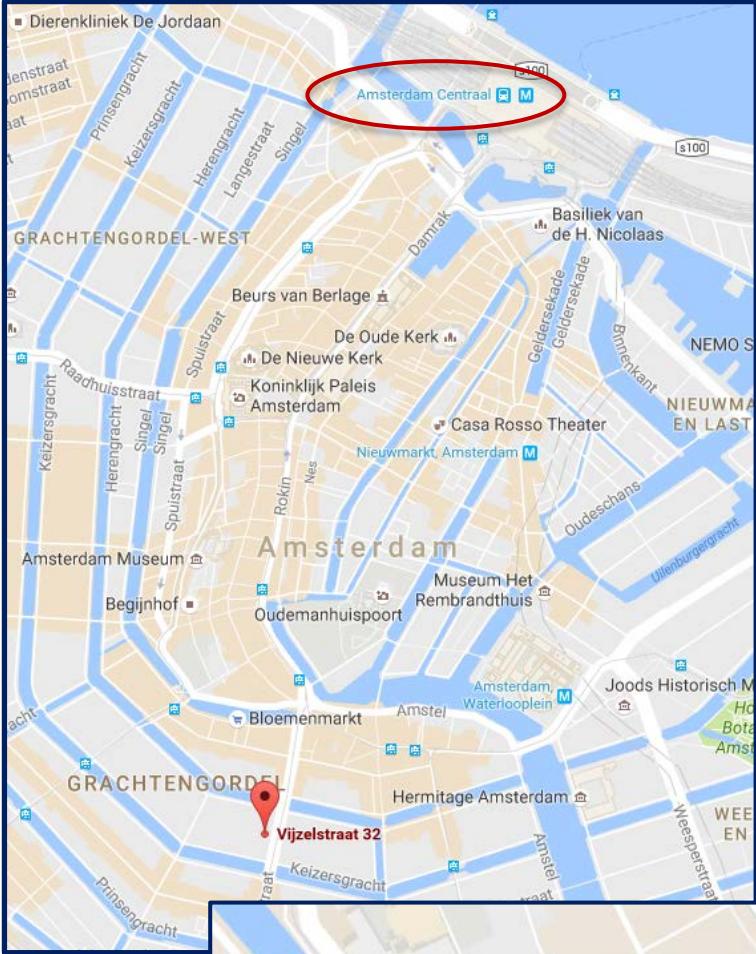
Disposable chipcards valid for 1 hour (EUR 2.90) or 24 hours (EUR 7.50) after check-in are sold

- at GVB vending machines in Central Station (look for the blue GVB logo)
- at the GVB Tickets & Info office in front of Central Station or
- at ticket machines in the metro stations.

The 1-hour card can also be bought on board of trams and busses (not in the Metro).

CONTACT

Angela Moisl, Management Assistant ACELG & Architecture of Postnational Rulemaking
University of Amsterdam, Oudemanhuispoort 4-6, 1012 CN Amsterdam
Tel.: 0031-20-525 2834 (every day except Friday)
Mobile: +31(0)6-36 193 087 (in case of emergency)
a.moisl@uva.nl



Tram 16 to stop Keizersgracht
(Vijzelstraat)
Trams 9 or 14 to Rembrandtsplein +
short walk
Trams 1, 2 or 5 to Koningsplein + short
walk

