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**Privacy Policies in the US and the EU: Between Markets and Human Rights**

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There are privacy policies and Privacy Policies. The former, small “p” polices are the documents in which companies outline their practices regarding collection, usage and dissemination of consumers’ personal information. We all accept them whenever using apps or accessing websites. The latter, capital “P” Privacy Policies are the political decisions made by governments – whether to regulate or not, and if yes how – regarding data processing activities within their jurisdictions and/or concerning their residents. This paper explores the interplay between both, seen against the background of the global digital economy.

My ambition is to study and compare the role that privacy policies of websites and apps play in the personal data governance regimes (Privacy Policies) in the United States and in the European Union. These documents tend to be global in scope, identical for users in California, Connecticut, Ireland or Germany. However, their legal status and role are visibly different on both sides of the Atlantic. In the US they are treated as a part of the market relationship between a consumer and a company, either directly as contracts or as practices affecting commerce to be assessed for fairness and potential deception by the Federal Trade Commission. In the EU, on the other hand, they are realizations of administrative requirements to open companies’ data practices to individual and collective scrutiny, in order to ensure that fundamental rights of users are respected. This divergence can be best grasped once one understands the difference between the logic underlying the American and the European personal data governance regimes.

I argue that the American law governing collection, use and sharing of personal information is grounded in the market logic, while the European law in the logic of human rights. It is not just the goals, the tools and particular rules that are different, but the very conceptual and axiological apparatus through which the problem of data processing is treated differs strongly. There are systemic and historical reasons for that. The roots of the American regime lie in private law (tort and contract), governing relations between persons, while the roots of the European regime are in public law (constitutional and administrative), aimed at ensuring that public actors do not violate rights and liberties of the individuals. The public law elements of the American system – enforcement by the FTC – are a correction of the factual imbalance of power between individuals and corporations, while the private law elements of the European system are there to make up for obvious limitations of public oversight and enforcement.

The exercise has theoretical and practical significance. I want to offer a theory of a privacy policy, both positive: what is it, why do companies publish them, what determines their contents?; and normative: what is a good privacy policy, what requirements should it meet? Further, my aim is to enhance the mutual understanding of lawyers in the US and the EU regarding their respective systems. Apart from the theoretical added value, this can be useful both for privacy policy drafters – lawyers preparing these documents for clients wishing to have one global policy – and Privacy Policy Makers – lawyers working on reforms of data protection regimes on both sides of the Atlantic.

The paper will proceed in four parts. First, I explain the difference between “privacy law” and “data processing law”, and outline the importance of the latter in the data driven economy. Secondly, I compare the American and the European system, tracing their historical origin and interpreting them as serving different types of ideals (fair private dealing, and fair public governance, respectively). Thirdly, I provide a theory of a privacy policy, studying the functions it could play (normative and fact-conferring) and the functions it is expected to play in the studied systems. Fourthly, I attempt to show that both systems have well identified some legal challenges, while ignoring others, and that lawyers on both sides of the Atlantic can not only better understand their own regime, but also learn lessons on how to improve it, by carefully studying other models that exist in the world.