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Bryan Mercurio and Ronald Yu: Regulating Cross-Border Data Flows – Issues, Challenges and Impact

Anthem Press, London 2022. pp. 94. ISBN-13:978-1-83998-428-0. £ 20.99

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Perhaps one of the greatest challenges of the data-driven economy is that posed by cross-border data flows. Since the value of data lies not in its accumulation, but rather in its movement, controlling the movement of data is seen as key to maximising its value. While data is by nature fluid, contrary to this, regulatory frameworks aspire to resolve data-related eventualities by caging it within borders. Regulation of cross-border data flows is increasingly becoming the cornerstone to data governance approaches along the continuum of national, supranational and international policymaking. However, the lack of a globally developed standard and the absence of an internationally harmonised framework for cross-border data flows is causing turmoil.

This book acknowledges the same and takes a territorial approach to the issues, challenges and impact of regulating cross-border data flows. While taking, what they refer to as a *jurisdictional approach* focused on Hong Kong, the authors Bryan Mercurio and Ronald Yu rely on the research and findings from the project titled “Regulating Cross-Border Data: A Public Policy Framework for Hong Kong”. Professor Mercurio received financial support for the project from the Hong Kong Policy Innovation and Coordination Office’s Public Policy Research Funding Scheme. For this reason, the book focuses on themes most likely to echo with Hong Kong policymakers and is to be appreciated as a publication connected to the aforementioned project. Be that as it may, parts of the book leading up to the Hong Kong-specific recommendations intend to provide an omnirelevant analytical approach applicable to other jurisdictions grappling with holding their own when it comes to data governance issues. Therefore, whilst standing at a concise 94 pages including references, the book may be read in three parts by the reader. The first comprises the Preface and Chapters 1 and 2 introducing the data governance

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problem in general and key considerations for cross-border data flows in particular. The second part explains the competing models of data governance encompassed in Chapter 3. And lastly, the third, more Hong Kong-specific part, is detailed in Chapters 4 and 5.

The first part embarks on the task of breaking down the data governance problem in the context of a global data-driven economy. The book introduces in Chapter 1 the importance of data by showcasing its inalienable role for contemporary technologies, both present as well as forthcoming. It summarily lists use cases for cross-border data flows and relies on secondary literature to provide statistical credibility to the importance of such data flows for the global economy and the transformation of international trade. Thus, establishing the importance of data and cross-border data flows for all jurisdictions as participants in the global economy. The question then arises as to how jurisdictions might approach data regulation and cross-border data flows. This is tackled in Chapter 2, titled “Key Considerations”.

In order to formulate a policy on cross-border data flows, the book proposes as a first step understanding the nature of data itself and how data flows are the *sine qua non* of value creation in the data-driven economy. Furthermore, the authors highlight aspects of cross-border data flows which render them a tricky subject matter to regulate. That cross-border data flows comprise different categories of data, most notably personal and non-personal data, complicates matters. Next comes the important decision of choosing open or restricted flows, followed by the emphasis on unintended consequences of a sub-optimal policy on cross-border data flows given the data-related interdependencies existing within a jurisdiction.

The second part is a crucial contribution directed at the policymakers of all jurisdictions, whereby Chapter 3 provides a succinct overview of laws and policies of major jurisdictions such as Japan, the US, the EU and China. Against this backdrop, the authors delve into the attempts by some jurisdictions to incorporate their domestic frameworks into Free Trade Agreements (FTAs). Here, one might defer to the importance of ascertaining key considerations in regulating data flows, as the analysis of FTAs negotiated by these major jurisdictions shows how the treatment of cross-border data flows pertains to their domestic priorities. This is an important takeaway for jurisdictions without any framework for cross-border data flows to consider before entering into FTAs containing a host of provisions going beyond personal data issues, such as those prohibiting mandatory disclosure of source code and other obligations regarding intellectual property implicating cross-border data flow concerns. Readers will benefit from the nuanced comparative analysis of leading FTAs emphasising the subtle differences in the drafting of exceptions to relevant provisions. Further, the authors tell a cautionary tale of the “by default” policy on cross-border data flows for these rule-taker jurisdictions emerging from their FTA commitments and patchwork of domestic rules.

The third and final part covers the analysis of Hong Kong’s laws and policies in the light of its FTA commitments in Chapter 4, and the book finishes with recommendations for Hong Kong’s policymakers for developing a data governance framework for cross-border data flows in Chapter 5. Chapter 4 highlights that although Sec. 33 of the Personal Data Privacy Ordinance (PDPO) lays down a stringent regulatory framework for cross-border transfer of personal data beyond

Hong Kong, 25 years on, interestingly enough the provision is yet to come into force. According to the authors, this phantom provision along with its FTA commitments has emerged as Hong Kong's "by default" policy on cross-border data flows. They also analyse the limiting role of copyright law *de lege lata* in Hong Kong for cross-border data transfers in view of the need for training data in Artificial Intelligence. To this end, the approach taken by the EU, UK and Singapore of a text and data mining exception is appreciated by the authors.

Although the brevity of the book makes it almost necessary to touch upon topics without going into much depth, the first part would have benefited from some further insights on emerging tendencies and specific challenges of regulating non-personal cross-border data flows, typically in the shadow of the discourse on personal data flows.¹ The reader is also left wanting more of the analytical approach promised in the Preface, where the authors mention but do not provide a clear structure of the interconnectedness between priority issues for a government and their impact on various components of the economy, to be further broken down into factors. Contrary to expectations, the chapter on Key Considerations also falls short of elucidating how exactly key considerations for policymakers should be arrived at. There is only a fleeting mention of considering the impact of a future policy framework on an open-ended list of topics such as national business competitiveness, innovation, security, privacy, competition, trade, evolving regulatory regimes, etc. Here it is important to draw attention to Professor Mercurio's article on the same topic preceding publication of the book, which clearly states key considerations along with a brief description for policymakers contemplating a strategy on cross-border data flows.² In the book, Chapter 4 also outlines the three key considerations for Hong Kong identified in the aforementioned article, viz., national competitiveness, business attractiveness and regulation. However, these considerations seem to be derived from Hong Kong's unique and primarily economic concerns as a financial and logistics hub, making it difficult to extrapolate them to other jurisdictions without adjustments.

While contemplating the broader relevance to other jurisdictions of the recommendations in Chapter 5, a key point of dissonance to the overarching argument of the book emerges in the first recommendation. On the one hand, the book lays the groundwork for jurisdictions to identify a clear strategy and encourages developing their unique and comprehensive framework for cross-border data flows instead of "by default" policies driven by FTA commitments. On the other hand, it recommends the augmenting of FTA provisions related to cross-border data flows, where the resulting agreement is to serve as a blueprint and provide a strong foundation for a comprehensive framework. Making further FTA commitments before putting in place a policy framework would be akin to putting

¹ For a critical view of the EU's emerging approach to cross-border flows of non-personal data, see Drexel et al. (2022) Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission's Proposal of 23 February 2022 for a Regulation on Harmonised Rules on Fair Access to and Use of Data (Data Act) (25 May 2022), SSRN Electronic Journal, <http://dx.doi.org/10.2139/ssrn.4136484>, p. 68.

² Mercurio (2021) On the importance of developing a coherent policy facilitating and regulating cross-border data flows. Int. T.L.R. 27(2):97–104, p. 99.

the cart before the horse. Doing so essentially pre-empts a public consultation process before making foreseeably binding commitments.

The book clearly proclaims policymakers in Hong Kong as its audience and is sure to be well-received in Hong Kong policy circles for its thoroughness in highlighting key considerations at play and a pragmatic set of recommendations. The observations in this book review are for the benefit of readers beyond the jurisdiction of Hong Kong – be they policymakers or legal policy academic scholars. It is for them to take up the task of developing the analytical framework capable of discerning the key considerations for their respective jurisdictions regarding cross-border data flows. Further research may also benefit from venturing beyond the purely economic approach taken in the book.

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