

Security and Liberty in Europe: Policymaking in an Era of Value Conflicts

Exclusive MP Meeting at the European Forum Alpbach 2019
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MERCATOR
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DIALOGUE

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contents

| | |
|---|----------|
| about | 1 |
| executive summary | 2 |
| recommendations and observations | 4 |
| parliamentary perspectives | 7 |
| additional resources | 9 |

about the mercator european dialogue

THE NETWORK

The Mercator European Dialogue is a network of 150+ members of parliaments (MPs) from 25+ member states. The network convenes in different European cities and its members participate in regular, multilateral, and thematic activities. Across parties, across political ideologies, across borders. Our network of national parliamentarians aims to be as diverse as Europe itself.

This European network is a project by the German Marshall Fund of the United States in cooperation with the Barcelona Centre for International Affairs, the Istituto Affari Internazionali in Rome, and the Hellenic Foundation for European and Foreign Policy in Athens and is funded by Stiftung Mercator and since 2017 also by the King Baudouin Foundation.



executive summary

On the sidelines of the Political and Legal Symposia of the European Forum Alpbach 2019, 14 members of the Mercator European Dialogue gathered to discuss value conflicts in policymaking with a focus on systematic data collection and use by governments through new technologies.

In its second co-operation with the European Forum Alpbach, the Mercator European Dialogue offered members of the network a scholarship to participate in the Political and Legal Symposia of the Forum. Network members took part in the high-level sessions from August 24 to 27 in which they were able to explore new initiatives and connect with actors based on their field of interest.

In an exclusive side-meeting organized by the Mercator European Dialogue, 14 members of national parliaments from 10 different EU countries, namely Austria, Belgium, Bulgaria, Croatia, France, Greece, Hungary, Luxembourg, Poland and Romania shared perspectives and policy challenges regarding the regulation of data use by governments. The discussion was guided by the question:

Should governments systematically collect individual data of all citizens to advance the public good?

Inspired by the input of Kristin Shi-Kupfer, director of the research area “Public Policy and Society” at the Mercator Institute for China Studies, and Michael O’Flaherty, director of the European Union Agency for Fundamental Rights, participants discussed the opportunities and risks that new technologies offer to governments.

Throughout the discussion, the MPs pointed out that, while data collection has become a necessary tool for governments, there is a need for strong checks and balances to protect the safety of data and prevent misuse. When considering recommendations for policymakers, they highlighted the need for democratic oversight through either parliament or an independent body, as well as the importance of a clearly defined mandate for data collection by governments.





DISCUSSION HIGHLIGHTS

"No collection without protection."

"If we want to discuss the use of data for the public good, we first need to have a clearer definition of what that public good is."

"Data collection only works with democratic institutions, but also only if there is public trust in these institutions."

"Governments' access to data should be restricted with exceptions mandated by parliament."

Note: Any quotes mentioned in this report can be attributed to participants of the event while respecting their anonymity under Chatham House Rule.

recommendations and observations for policymakers across europe

Should governments systematically collect individual data of all citizens to advance the public good? After discussing this question in depth, the participants came up with nine recommendations and observations for policymakers.

1. LEGISLATION ON DATA COLLECTION SHOULD RESPECT THE PRINCIPLES OF PROPORTIONALITY AND CLARITY.

In contrast to the private sector, citizens do not have a choice about their data being collected by public agencies. The right to privacy is protected under Article 8 of the [European Convention on Human Rights](#), which holds that the breach of this right by the government needs to fulfil a purpose that is in accordance with the law and “necessary in a democratic society”. Lawmakers should therefore exercise scrutiny of the laws that allow for the use of data-collection technologies by governments, so that they clearly lay out the scope and clarify the way in which authorities can use their discretionary power.

2. CITIZENS SHOULD HAVE OWNERSHIP OVER THEIR PERSONAL DATA.

The concept of digital sovereignty describes the power of an actor to own and control the use of their data. For citizens to be exert this control, processes of data collection and use should become more transparent. However, there is still an unwillingness of the main data-collecting platforms such as Google or Facebook to share their data, which in turn hinders control and participation by users. Simply making data available is not enough, however. The importance of data protection as well as the potential for voluntary data sharing need to be communicated to citizens so that they can make informed decisions about what data they intend to share and for how long.

- » Smart Data Forum. [Data sovereignty](#). Available [here](#).

3. DATA RETENTION SHOULD BE LIMITED TO THE PERIOD NECESSARY FOR PROCESSING THE DATA AND USING IT FOR THE PUBLIC GOOD.

The European Data Retention Directive, passed in 2006, held that EU member states had to store citizens' telecommunications data for a minimum of six months and at most 24 months, to be made available to police and security agencies upon a court order. The Directive was annulled by the Court of Justice of the European Union (ECJ) in 2014. Since then, there has been no EU legislation to harmonize data retention (and thus data deletion). The judgement of the ECJ lays out that there cannot be any general and indiscriminate data retention scheme, but that such retention needs to be targeted, necessary, and proportionate for the purpose of fighting serious crime. This means that, in practice, it is up to national lawmakers to lay out appropriate data-retention rules. When public agencies collect data on citizens, the storage of such sensitive information should be limited to the period necessary for processing the data and using it for the public good.

- » European Union Agency for Fundamental Rights. (2019). [Fundamental Rights Report 2019](#). Available [here](#).

4. POLICYMAKERS SHOULD HAVE A CLEAR DEFINITION OF THE “PUBLIC GOOD”.

Governments collect citizens' data to map out and understand their needs and ultimately use this knowledge to design service delivery processes that

best fit the demands of the public.¹ The General Data Protection Regulation (GDPR) holds that a citizen's personal data can be processed even without that person having given explicit consent when performing a task in the public interest or in official authority.² However, in the debate about whether and how governments should collect and use private citizens' data, it is difficult to determine the "public interest". Is it in the public interest for the government to improve their services based on data? Or is it rather in the interest of the public for the government to not have access to certain data? Members of parliament have a direct mandate to find a balance between the private interests of their constituents and the state.

"We have the know-how – do we have the know-why?"
– MP at the Mercator European Dialogue, August 25, 2019

5. MORE ATTENTION NEEDS TO BE AWARDED TO THE DIVISION OF POWER.

The function of parliament is to adopt legislation and scrutinize the work of the government in implementing policies. Some MPs pointed out that any breach of the right of privacy by the government should only be authorized through an explicit mandate in the form of concrete legislation being adopted by parliament. When it comes to more targeted interference for criminal prosecution, public authorities should acquire court orders that authorize the specific action of collecting private data on suspected individuals. The issue of data collection falls on the intersection between both the parliamentary and the governmental mandate in a state, which is why other MPs stressed the need for some governmental discretion when implementing policies.

6. DATA COLLECTION METHODS SHOULD BE SCRUTINIZED BY AN INDEPENDENT AUTHORITY.

In 2018, the European Court of Human Rights ruled in the landmark case Big Brother Watch and Others v the

United Kingdom that U.K. surveillance programs had violated the right to privacy of citizens as there had not been sufficient independent oversight over filtering, search, and selection of intercepted communications for examination.³ When bulk data-collection agencies, irrespective of whether they collect metadata or content, give public authorities the ability to collect data without explicit court warrants, there need to be adequate safeguards in place as well as the oversight by an independent authority.

- » **Columbia University. (2019). Big Brother Watch v United Kingdom.** *Global Freedom of Expression – Columbia University*. Available [here](#).

Spotlight: Data Trusts

One idea for independent oversight of an organization's handling of sensitive data could be through the establishment of data trusts.

"A data trust is a legal structure that provides independent stewardship of data. The organizations that collect and hold data permit an independent institution to make decisions about how that data is used and shared for an agreed purpose. The data trust becomes a steward of the data, taking responsibility to make decisions about the data and ensure they support the data trust's purpose."

- » **Open Data Institute. (2019). Data Trusts.** Available [here](#).

7. REGULATING PRIVATE DATA COLLECTION

The GDPR has been in force in the EU since 2018.⁴ By replacing the 1995 Data Protection Directive, the GDPR is seen as a first step in adapting the EU's data protection framework to the digital age and regulating the use of personal data by organizations, institutions, and companies.⁵ However, the implementation of this regulation does not come without its challenges, from smaller companies being overwhelmed by the

1 OECD. (2017). [Government at a Glance 2017](#).

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

3 n.a. (n.d.). [Big Brother Watch v United Kingdom. Global Freedom of Expression – Columbia University](#).

4 European Commission. (2019). [Communication from the Commission to the European Parliament and the Council: Data protection rules as a trust-enabler in the EU and beyond – taking stock](#).

5 European Data Protection Supervisor. (n.d.). [The History of the General Data Protection Regulation](#).

requirements and other unintended consequences, such as the blockage of online content from outside the EU to the European audience.⁶ Enforcement of the Regulation is expected to increase, with companies having enough time to adjust to the new rules and the processes of data-protection authorities becoming more established.⁷

- » Detmering, F. & Splittergerber, A. (2019). [One year of GDPR – How have EU member states implemented and enforced the new data protection regime?](#) *Technology Law Dispatch*. Available [here](#).

8. DATA PROTECTION NEEDS TO BE A PRIORITY.

All EU member states have data-protection authorities that are tasked with monitoring and enforcing the application of the GDPR and relevant national data-protection laws. Further, the European Data Protection Board monitors the practice of data protection in EU member states.⁸ Through the GDPR, all public administrations are required to appoint a data protection office for ensuring that appropriate technical and organizational measures have been implemented to secure personal data.⁹ These measures should include encryption tools where appropriate and create legal liability in the case of a breach. Policymakers should ensure that citizens' data is protected to the highest degree possible, even though this may reduce the accessibility of such data for public agencies.¹⁰

- » Futurity. (2019). [What government and business can do to protect our privacy](#). Available [here](#).
- » Anderson, R. (2019). [Law enforcement needs to protect citizens and their data](#). *TechCrunch*. Available [here](#).

9. FIND LOCAL SOLUTIONS.

Local initiatives can bridge the gap between citizens and public authorities as they offer more opportunities for engagement and can be more responsive to specific needs and demands. There are several local initiatives that aim to give citizens control over their data, such as the DECODE (DEcentralised Citizen-owned Data

Ecosystems) project that implements pilot projects in Amsterdam and Barcelona. In these pilot projects, citizens can actively choose which data to share with their governments. National policies should set guidelines that encourage such local initiatives as they can be beneficial for the diversity and functioning of the European sphere.

- » DECODE. (2019). [The Decode Project](#). Available [here](#).

6 Chivot, E. (2019). [One year on, GDPR needs a reality check](#). *Financial Times*.

7 Detmering, F. & Splittergerber, A. (2019). [One year of GDPR – How have EU member states implemented and enforced the new data protection regime?](#) *Technology Law Dispatch*.

8 European Commission. (n.d.). [Data protection in the EU](#).

9 European Data Protection Board. (n.d.). [Members](#).

10 Anderson, R. (2019). [Law enforcement needs to protect citizens and their data](#). *TechCrunch*.

parliamentary perspectives: MED members share their views

Members of parliament from across Europe share their perspectives on a question of European policy.

Modern information and communication technology (ICT) is able to collect, store, and process exponentially growing amounts of data. It has created an opportunity for the private, as well as the public sector, to incorporate and evaluate private citizen data, and to use this knowledge to adapt services accordingly. For the public sector, this can [increase the efficiency and efficacy of policies](#) and ultimately serve the public good. It can be used to supervise citizen behavior, detect irregularities, regulate social conduct through permissions or prohibitions, and provide targeted services.

ICTs and the knowledge they gather can be further used to implement adaptive policies that respond to complex developments based on real-time data in a way that traditional methods fail to do. One example of how ICTs are incorporated in the public sector is in the emergence of “smart cities”, with more and more cities seeking to address public issues via ICT-based solutions; for instance, by [monitoring real-time traffic or offering customized citizen services](#).

While there are benefits for public administrations to use them to improve citizen welfare, ICTs should not be embraced without reservations. For example, [even anonymously collected data can ultimately be traced back to individuals](#), which means that ICTs pose a threat to the right to privacy. Artificial intelligence (AI) and big data can be potentially abusive and discriminatory to minority groups, and misinterpretations or errors in the models and algorithms applied can have grave consequences for individuals. Even when applied “correctly”, the automated interpretation of big data by AI could lead to [unforeseeable problems](#). What is more, the implementation of public policies that are based on ICTs is often performed by private companies

under public-private partnership. Such outsourcing is controversial as private companies are usually less transparent as to how they collect and process data—and what other profits they draw from it.

Governments have always used data to shape policy, but the precision and volume of information offered by ICTs poses a new question on how much private citizen data governments should have access to. As these technologies offer a seemingly endless range of possibilities, policymakers do not only need to critically reflect on the outcomes they want to achieve, such as greater efficiency of public services, but also on whether the use of ICTs complies with their understanding of what is “right” for governments to do. So far, [the discussion of how ICTs impact public-sector values has been limited](#). The debate has focused on how government surveillance programs in the interest of security violate the [right to privacy and freedom of expression](#). However, concerns also emerge when it comes to the growing use of data by governments in other fields, [such as in “smart cities.”](#)

Members of parliaments in Europe are increasingly faced with the challenge of finding a regulation for the collection and use of data by governments. We asked members of the Mercator European Dialogue parliamentary network: **Should governments systematically collect data of individuals to advance the public good?**

JOŠKO KLISOVIĆ | MEMBER OF PARLIAMENT, CROATIA

“I think they should, under the condition that they enjoy enough trust of the citizens and are able to secure the data from unauthorized access and use. Too often the state data is misused for personal or party purposes,

and therefore the rights of citizens are violated. Citizens will not provide the governments with their consent unless they sufficiently trust in state institutions."

SÉBASTIEN NADOT | MEMBER OF THE NATIONAL ASSEMBLY, FRANCE

"No! What is the public good? Why systematically? First, individuals have, at a moment, to accept this with mindfulness of the possible consequences. Second, we need an independent process of control. Government can't be part of this control (no judge and party). We need a group composed by parliamentarians, experts (here, data scientists), and citizens. In France we don't have this sort of group. So, we have to build it. Otherwise, the answer to the question will continue to be no!"

GABRIELA CRETU | MEMBER OF THE SENATE, ROMANIA

"I think the issue of systematic collection of data by governments comes down to consent and control of the citizens over how personal data is collected. There are clear benefits of collecting big data in order to advance the public good, such as having a clearer perspective on the needs of citizens and allowing those needs to help shape public policy.

However, there are a couple of issues that should be cleared before we support this idea. First, do citizens have control over when, how, and which kind of personal data is collected by the government? Is there enough transparency from the government when it comes to the specific way in which that data is collected and used?

Only if we are able give a positive answer to both questions will we be able to say whether or not governments should collect data for the public good. Otherwise, we are only repeating the same controversies that are already hotly debated when it comes to the use of big data by private actors. The real danger is that, if big data ends up in the wrong hands, society could turn into a real-life social engineering experiment!"

ÁGNES VADAI | MEMBER OF PARLIAMENT, HUNGARY

"There is nothing new in governmental data collection. Governments as representatives of states do not only have the right to do so, they do have the obligation to

collect data for the public good. Why is there still a concern about data collection of governments? I see three aspects which should be examined: reason, scope and control.

As for the reason, the recently applied data-collection methods motivated by security concerns seem to worry our societies. This is the point where democratic politicians should understand that security or the threat to our security is an important factor, but this can undermine citizen trust if it turns out to be based on misperceptions or on a populist approach. This is especially true if the gathered data is used for "personal bad" instead of "public good".

As for scope, responsible politicians should understand that there is a limit. Data collection should always be pinpointed and tightly focused. Too little data doesn't give an overall picture. Too much data lacks priorities.

As for control, democratic politicians are not afraid of civil control. Instead of opposing this, politicians should ask for the help of citizens and civil society to be the generator of control of data collection."

SVEN CLEMENT | MEMBER OF PARLIAMENT, LUXEMBOURG

"Governments need some data about their citizens to function and support their citizens in their daily lives. Yet we need to make sure that data, once collected, has narrowly defined uses and is protected by state-of-the-art methods. The best data protection is still not to gather data, but if the collection is necessary for the public good, then the elected representatives of the data subjects should rule on which data to collect for exactly what usage.

We see in Luxembourg how the government over a period of 30 years created over 1,400 distinct databases of individuals, based on the argument of public good. It is now up to the legislators to rein in that extensive and sometimes abusive behavior of collecting data and asking questions later.

So, yes, governments could systematically collect data to advance the public good, but that data needs to be strictly limited in scope, time, and use, and under permanent supervision of watchdogs. The General Data Protection Regulation is a chance for ethical data use and we should welcome its principles in every new data project."

additional resources



HUMAN RIGHTS AND ALGORITHMIC DECISION-MAKING

- » European Union Agency for Fundamental Rights. (2018). [#BigData: Discrimination in data-supported decision making.](#)
- » European Union Agency for Fundamental Rights. (2018). [Under watchful eyes – biometrics, EU IT-systems and fundamental rights.](#)

CHINA AND THE SOCIAL CREDIT SYSTEM

- » Hoffman, S. (2018). [Social Credit](#). Australian Strategic Policy Institute.
- » Murrell, A. (2018). [Pushing The Ethical Boundaries Of Big Data: A Look At China's Social Credit Scoring System](#). Forbes.

Expert Spotlight: Michael O'Flaherty



Michael O'Flaherty is director of the EU Agency for Fundamental Rights. He has served as chief commissioner of the Northern Ireland Human Rights Commission, member of the UN Human Rights Committee, and head of a number of UN human rights field operations. His publications include volumes on the law and practice of human rights field operations, the professionalization of human rights field work, and human rights diplomacy.

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Expert Spotlight: Kristin Shi-Kupfer



Kristin Shi-Kupfer is the director of the research area on "Public Policy and Society" at the Mercator Institute for China Studies. Prior to taking on this position, she gained experience as a research associate at the University of Freiburg's Institute for Sinology and as a China correspondent at the Austrian news magazine Profil, epd (German Protestant Press Agency), and Südwest Presse. She is an expert on China's digital politics, ideology, media policy, civil society, and human rights.

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science and the humanities. Stiftung Mercator symbolizes the connection between academic expertise and practical project experience. One of Germany's leading foundations, it is active both nationally and internationally. Stiftung Mercator feels a strong sense of loyalty to the Ruhr region, the home of the founding family and the foundation's headquarters.

The King Baudouin Foundation's mission is to contribute to a better society. The Foundation is an actor for change and innovation, serving the public interest and increasing social cohesion in Belgium and Europe. We seek to maximize our impact by strengthening the capacity of organizations and individuals. We also stimulate effective philanthropy by individuals and corporations. The Foundation's key values are integrity, transparency, pluralism, independence, respect for diversity, and promoting solidarity.

The Foundation's current areas of activity are poverty and social justice, philanthropy, health, civic engagement, developing talents, democracy, European integration, heritage and development cooperation.

The German Marshall Fund of the United States (GMF) strengthens transatlantic cooperation on regional, national, and global challenges and opportunities in the spirit of the Marshall Plan. GMF contributes research and analysis and convenes leaders on transatlantic issues relevant to policymakers. GMF offers rising leaders opportunities to develop their skills and networks through transatlantic exchange, and supports civil society in the Balkans and Black Sea regions by fostering democratic initiatives, rule of law, and regional

The King Baudouin Foundation is a public benefit foundation. The Foundation was set up in 1976 on the occasion of the 25th anniversary of King Baudouin's reign.



The Istituto Affari Internazionali (IAI) was founded on 11 October 1965 on the initiative of Altiero Spinelli. The Institute's main objective is to promote an understanding of the problems of international politics through studies, research, meetings and publications, with the aim of increasing the opportunities of all countries to move in the direction of supranational organization, democratic freedom and social justice (IAI Bylaws, Article 1). Its main research areas include: EU Institutions

cooperation.

Founded in 1972 as a non-partisan, non-profit organization through a gift from Germany as a permanent memorial to Marshall Plan assistance, GMF maintains a strong presence on both sides of the Atlantic. In addition to its headquarters in Washington, DC, GMF has offices in Berlin, Paris, Brussels, Belgrade, Ankara, Bucharest, and Warsaw. GMF also has smaller representations in Bratislava, Turin, and Stockholm.

The Barcelona Centre for International Affairs (CIDOB) is an independent and plural think tank based in Barcelona, dedicated to the study, research and analysis of international affairs. Created in 1973 as an International Documentation Centre of Barcelona, it is a private foundation since 1979.

and Politics, the EU's Global Role, Turkey and the Neighbourhood, International Political Economy, Mediterranean and Middle East, Transatlantic Relations, Security and Defense, Italian Foreign Policy, Energy. A non-profit organization, the IAI is funded by individual and corporate members, public and private organizations, major international foundations, and by a standing grant from the Italian Ministry of Foreign Affairs.

CIDOB promotes global governance and good practices – based on local, national and European democratic government – to ensu-

re that people possess the basic elements to live their lives free from fear and in liberty, by facilitating a dialogue that includes all diversities and which actively defends human rights and gender equality. CIDOB is a dynamic community of analytics that works to produce and offer to all political actors – from individual citizens to international organizations – information and ideas to formulate and promote policies for a more secure, free and fair world for everyone.

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