

Slaughter and May Podcast
Regulating Digital - Competition and privacy - the best of frenemies?

Intro	<p>Welcome to the first in our series of three podcasts looking at the changing landscape and competing interest around data, big data, competition and regulation.</p> <p>In this podcast Jordan Ellison and Ariel Ezrachi discuss the tension between privacy and competition considerations and whether the GDPR is the most anti-competitive legislation ever passed.</p> <p>Jordan is a competition partner at Slaughter and May's Brussels office and Ariel is the Slaughter and May Professor of Competition Law at Oxford University.</p>
Jordan Ellison	<p>Hi, this is Jordan Ellison from the Slaughter and May Anti-Trust Group. I'm joined today by Professor Ariel Ezrachi from Oxford University and we're going to talk a bit about the relationship between data and big data and competition law. This is a really kind of hot and controversial topic, the subject of kind of new regulation and potential regulation both in Europe and the UK and Asia and lots of places. So it's a tricky subject but we're going to see what sense we can make of it.</p> <p>Thinking about whether big data is the key to competitive markets, whether there's tension between user privacy in data, privacy considerations versus competition considerations, and whether there is such a thing as too much data.</p> <p>So Ariel, I spoke to an anti-trust regulator recently who told me that GDPR was the most anti-competitive piece of legislation ever passed. Why do people say that and do you agree that there is some sort of tension between privacy law like GDPR and competition considerations?</p>
Ariel Ezrachi	<p>Yes, hi Jordan. First, thank you for having me, it's a pleasure to join you on this podcast.</p> <p>I certainly agree there is a tension there and it's helpful to try and explain how exactly do the two areas of privacy and competition interface. I think if you look at the GDPR it was set to protect our data and naturally it creates trade-offs between data protection and other dimensions of welfare, including competition. So you can see a decline in competition for data and some sort of reduction in the dynamism of data markets and some of these effects I think were anticipated from the start, even before the GPDR came into force but some of them are relatively new and they reflect possibly a strategic use, or some might even abuse of the GDPR by some key platforms.</p>

So the most, or the more obvious trade-offs included the beginning the GDPR compliance costs for instance. We know that smaller businesses might find it much more difficult to deal with the risks associated with data collection so the GDPR has an inbuilt benefit for larger companies with deeper pockets.

There is also an increased compliance cost that reduces because of that the number of data suppliers, so that also creates some sort of an impact that favours concentration of data.

Data collaboration is also affected by the GDPR so unless you are vertically integrated or you have operations on multiple markets, if you are a smaller firm usually you would have relied on corporation to achieve data synergies but now because you need to acquire consent and because you remain responsible for the monitoring of the use of the data that you shared, this becomes a much more tricky exercise. So again large multi-sector, multi-product companies do not face these difficulties so again the GDPR favours them. But what has become obvious is beyond these elements that were pretty obvious from the start, large platforms also seize the opportunity to possibly use the GDPR in a way that increased their control over data. So Google, for example was accused by publishers and fellow competitors to use it strategically to reduce competition in the advertising sector and gain access to larger data pools. So just before the GDPR came into force already Google then required publishers to amend their consent, their terms and conditions to include Google as one of the entities that will gain access to the data, and to include provisions that will enable Google to do or engage in analysis beyond just serving to publisher sites.

Google also positioned itself as a controller of personal data so that as well increased its ability to determine the purpose, the means of processing data. And you see also the use of GDPR as some sort of strategic exclusion for instance, if you're a small entity or medium-sized entity you will likely use the default consent management platform that Google offers, and this one already limits your ability to share data with others. So what it does is if you think of the attic industry, it creates a load of pressure on other companies to gain access to data because suddenly publishers will share information with a much more narrow group of companies and more recently there has been a lot of debate on cookies, obviously from a privacy perspective we all benefit when we have less cookies but in essence it gives platforms a significant advantage if platforms can take away cookies, using GDPR in privacy as the rationale for doing so they still gain access to our data because we spend most of our time there. And again, it goes back to the comments which you see and you mentioned Jordan, from the market when people say GDPR in a way starts generating much more distinct anti-competitive effects.

	<p>So I don't know if I would say it's the most anti-competitive regulation but certainly the trade-off starts to be significant and I think this is what happens often with regulation. You have a static tool, very difficult to predict how future dynamics on the market might affect the impact of the tool and I think what we see now is the trade-offs are such that really we need to adjust the regulatory environment to widen the access to data.</p>
Jordan Ellison	<p>Now that's really interesting Ariel and yes I would say for disclosure someone who advises large platforms on these issues, I think the platforms are often genuinely between a rock and a hard place because GDPR really did change a lot of their responsibilities in terms of you know, how widely they could share data and some of those kind of changes had real effects on third parties but it was required by the law. And I think competition regulators and privacy regulators, you know need to be talking to each other to try and somehow mediate some of these tensions.</p>
Ariel Ezrachi	<p>Absolutely. This is the reality of regulation that so often we find that something that looks perfect on paper, the trade-offs are much more significant than one would have expected and I think, I mean the concerns that you have on the market are viable concerns. It doesn't mean there is nothing illegal that was done by the platforms, they comply with the set of regulations sometimes they may use it to their advantage but these are the rules of the game and they operate within the rules of the game. But this is why you see in the past year and even beyond that such a movement to change the regulatory environment so to supplement the GDPR with other instruments that will try on the one hand to provide us as users with privacy and control over our data and on the other hand appreciate the impact this has had on competition.</p>
Jordan Ellison	<p>Yes. Let's talk a bit about that because one proposal that is coming out is let's solve this by requiring big platforms to share data with others so maybe in some anonymised fashion, for example, require that the big data sets that can be used for machine learning, that you know the Amazons and Facebooks of the world are required to share those with, you know, new entrants and smaller players.</p> <p>Do you think that's kind of the key to this? Do you think that that will kind of unlock more competition? What sort of effect do you think that sort of intervention would have?</p>
Ariel Ezrachi	<p>Yes. I think this is certainly seen as one of the key levers that can be used now in order to correct the concentration of data that we see on the market, and data sharing is now really high on the public agenda.</p> <p>You can see how you have a range of instruments that can be used to facilitate data sharing. So the Commission last week proposed new tools for data governance and the start of that there is the whole concept of entire sharing of public data industry, business to business, customers to business, build trust, so this is one aspect of it.</p>

Of course we have ongoing legislation and proposals that are aimed at redesigning access to data and allowing newcomers' access to markets and beyond that, in our little universe of competition enforcement data sharing is a viable remedy and many competition agencies are discussing the possibility of using remedies that require the sharing of data activity. It could be under Article 102, in the case of abuse, if data is deemed essential it can be under Article 101, if you have an agreement that restricts the access to data it can also be, if we think of the UK, part of market investigation or if we think of the equivalent in the EU, under the new competition tool again, the ability to allow access to data. And the risk with all of these ideas is just like competition intervention, if you oppose excessive data sharing you risk that you might shield the incentive to innovate, you might actually facilitate free riding so it can have a negative impact on both ends. You might shield incentive of the platforms to provide us with certain services and invest in improving the services and improving the methods that they are using and you might actually create such an incentive for free riders that they themselves will not invest in engaging in anything that supports better data gathering and so forth.

So what we need to achieve from when we think of data sharing is this balanced approach when you try to leave sufficient incentives for the platforms and try not to harm their key activity, and at the same time create sufficient competitive pressure that reduces barriers to expansion and barriers to entries. In many ways reignite dynamic competition in the market, and I think that if you look at the possible effect that this will have on large platforms it might exactly be that. I mean we don't know specifically how this might look like but if you think of the platform like Facebook and you think that they run their social network, if they are forced to some extent to engage in data sharing, this will not affect their core business because of the network effect, because of the position they hold. You wouldn't expect that to destabilise their position but what it will do is will enable other companies to possibly compete in parallel markets so better products, better targeting of products, if you think of news feeds, media, finance, e-commerce, trading algorithms.

So data sharing is an idea, can be a solution, it is not a solution that is going to reorganise the markets but it might just be what we need in order to open the access to those markets, especially to parallel markets open them for competition.

Maybe one more comment is relevant here because it's important that we also appreciate the limitations of the remedy. Beyond the scope of data that can be designed as part of the remedy or regulation and the nature of access that you get, we have to remember that even if you have a lot of data what you need beyond the big data is the big analytics so if you have small companies that don't have the capacity to engage in sophisticated analytics, the data will not necessarily help them.

	<p>You need the data that will be provided in a form that has minimal friction so it needs to be useable. There is a time dimension, so data that is extremely useful for me in the next hour because I know you were searching for something online might be extremely meaningless in a day or two, and of course there is the issue of the GDPR that you alluded to in your question. What type of data, how detailed the data can be of course there are limits on personal data, although Articles 6 and 9 of the GDPR give us some exemptions generally speaking it's not that, even if you intend to share data, you can easily share all the data that you have.</p>
<p>Jordan Ellison</p>	<p>Yes and I think that that kind of debate about the impact on incentives is fascinating and I think people have talked a lot about will you chill the incentives on the big platforms if you make them share data? So you know, will they keep offering free services and thinking of new free services to attract user attention if they don't kind of get to, you know, keep exclusive use of the data they gather through there.</p> <p>But I think the bit that has been talked about less is the second point you alluded to about will you have some sort of chilling impact on the potential new rivals. I think that's a fascinating idea, if you have, you know, people who, small innovative companies out there who are trying to copy something completely paradigm breaking and the new big thing, and is there a risk that instead of going down, ploughing their own furrow and going to break the paradigm, once there is some sort dead access remedy they almost, their first port of call becomes going to Brussels and trying to get the data in the existing paradigm and you somehow, you know, lose that kind of, you know, real striving to be the next big thing rather than getting access to current big thing. But I, you know, I think this theory is going both ways on that and yes, I think no one has the full answer yet but it will be interesting to see how we rebalance all that going forward.</p>
<p>Ariel Ezrachi</p>	<p>Like with everything, the key is to appreciate that as we try to correct we might also distort, and with any intervention that we think of, this is the real challenge. There is no doubt that there needs to be some sort of adjustment on the market for data, you just have to be extremely careful once you start implementing it because you want to keep the incentives there for both sides and at the same time facilitate entry and expansion.</p>
<p>Jordan Ellison</p>	<p>Yes. So the other side of this is, you know, for the people who say that there's a data problem at the moment and asymmetry and the big platforms having, you know, more data than their challengers. So one possible solution is that data sharing thing you've just talked about.</p> <p>Another solution that seems to be emerging is not making the big guy give it to the small guy but just restricting how the big guy uses data so, you know, both the EU and the UK seem to be looking at this idea of trying to limit a big multi-product company's ability to gather user data on one surface or one product and then join it all up and use that to inform the other products. Now</p>

	<p>that's a way of solving an asymmetry if one exists but it feels to me like it's quite different from normal pro-competitive interventions, because you're not really helping the third party do anything new and you're sort of reducing the capabilities of the existing players. So for me, I'm quite suspicious of this idea but interested in any reflections you have on that.</p>
<p>Ariel Ezrachi</p>	<p>It's a really good question and I think it depends a little bit on context because this is not the data silos and the idea of really trying to limit data sharing within organisation, it is not necessarily an attempt to replace the possibility of data sharing. So I think here the concern is slightly different although we are talking about the idea again is this, we talk about data but here it's about the oversharing I guess of platforms because the understanding is that what happens to day with platforms is they occupy a very privileged positions. So they are gate keepers, they benefit from market power and they operate very large ecosystems with many products and services within, and what happens is that within their own ecosystems they act as quasi-regulators. They set their own rules, they create the rules that govern the autonomy and as they do so, they also set the rules on what happens to data that they harvest or receive within their ecosystem. And the problem that you have is often and this is where I think it is not necessarily a replacement to data sharing, the problem goes to the fact that often the consent is either given as default, or might even be argued as forced consent, and it enabled them to leverage market power from one market to another within their ecosystem.</p> <p>But the theory of harm at the heart of data silos are quite traditional so you can run a theory of harm of exploitative abuse. For example, if you say there is excessive data harvesting or maybe quality degradation of privacy setting, and that is a little bit like the Facebook case that was run by Bundeskartellamt. And you can run an exclusionary argument which is closer to the way you presented it in the question, that what you say is, you are able to leverage market power from one market to another by using information that you gained in one context in a different context and you do not share it with others so you create this anomaly.</p> <p>So I think this can be seen, if you look at it from the exploitative perspective, this can be seen as a standalone remedy regardless of data sharing because it is there to protect us as users. If you look at it from the exclusionary perspective it can be seen as something that supplements the idea of data sharing and you could argue that as long as data separation does not create distortion that outweighs efficiency benefits, then maybe it is a good remedy. And again, if you think of it from the perspective of the companies, of course much will depend on the business model and there will be some technical challenges and there is clearly a cost. There will be fewer economies of scale so there is a loss there in terms of efficiency, so there is a drop in the quality of data that is gathered. But if you think of a platform, one that run's advertising still this should not really effect its ability to sell ads to businesses because it should have sufficient data to run that. And it's even more than</p>

	<p>that because most publishers and advertisers will anyway be locked in to those platforms, because those platforms offer an excellent path to users.</p> <p>So, again, even if this goes ahead and I assume it will become something that we see more often, I don't think it can undermine the core business, but it will be something that will change some of the efficiencies, some of the technical aspects. It will probably also affect the behaviour. I think that the way you react if you're a platform to data silos is you try to increase the stickiness and engagement on your core business so you react by trying to see where you gain the most value and try to generate there the data that you require for that operation. So like anything with enforcement, once you put forward an enforcement instrument businesses adjust immediately and react so I don't think it will be the end of the world, but I do see the benefit for my perspective, mostly because of the exploitative nature of it.</p>
<p>Jordan Ellison</p>	<p>Yes. I think it's going to be, all of this is quite, one can construct theory of harm and constructive offence and both of those things conceptually and in the end it will all be specific I think.</p> <p>It'll be a judgement of whether any, you know, how big is a loss of efficiency and is that loss of efficiency, you know, outweighed by benefits either to consumers or to competitions. I think people on both sides of this debate need to keep thinking about efficiency and innovation. I think that's what everyone is aiming at and some people think you will get that by allowing the big platforms to do as much as they can. Other people think you will get that by creating more opportunities for challengers but I think so long as everyone's kind of focussed on the goal of efficiency and productivity and that sort of growth, the debate can kind of happen within hopefully, fairly agreed ground at least. I think one thing we can say for sure is that whatever happens in ten years' time we'll look back and what we have been thinking about now and laugh at how misguided we all were or, you know, how everything turned out differently from how we expected. I think that's kind of guaranteed for everyone in this debate.</p>
<p>Ariel Ezrachi</p>	<p>I think that this is always been the tradition in competition enforcement. I mean we're extremely wise when we look back at enforcement actions but I completely agree with you that it is about a balanced approach and I believe all involved appreciate that because you really want to retain the key incentives for those who drive innovation, for those who drive the digital eco system but you want to create more opportunities because we all appreciate that too much concentration long-term can have very clear adverse effect on us as consumers. How you go about this, that's an open debate and that's what makes it so interesting, so fascinating.</p>
<p>Jordan Ellison</p>	<p>Yes. Well thank you so much for debating with us today, it's been really fun and let's replay this podcast in 10 years' time and see how our predictions have fared but for now thank you very much.</p>

Ariel Ezrachi	Thank you for having me.
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