Slaughter and May Podcast

Regulating Digital – How can we regulate data in an increasingly digital world?

Narrator	Welcome to the second in our series of podcasts which explore the regulation of the digital landscape and the competing interests around data, big data and competition. It is clear to us that companies wanting to complete their digital transformations need to be ever more aware of the myriad of regulations and regulators in this area. In this podcast, Rob Sumroy speaks to Richard Sargeant about the use, ownership and regulation of data in an increasingly digital world, what blockers and value drivers exist for businesses wanting to innovate in this area and how issues around IP ownership and open data, and the UK's national data strategy, impact these discussions. Rob is head of Slaughter and May's Technology group and co-head of our global privacy practice and Richard is both Chief Operating Officer of Faculty, a leading applied AI company, and a board member of the UK's Centre for Data Ethics and Innovation (CDEI), the body set up by UK Government to advise on the governance of AI and data-driven technology.
Rob Sumroy	Hi, I'm Rob Sumroy and this is the second in our Regulating Digital podcast series where I get to chat with Richard Sargeant, who is the COO of Faculty, the leading applied AI company and adviser to governments, and also a board member of the UK's Centre for Data Ethics and Innovation, the independent adviser to UK Government on all things data and AI. Richard will know, I think, from many years of us working together, that here at Slaughter and May we get quite passionate about this interface between technological advancement and regulatory development. If regulation can help innovation and the safe, fair implementation of technology, then we are all for it; but if regulation and laws stifle innovation or are too unclear, and investors are discouraged from supporting the innovators, then we want to speak out and call for better lawyering or better regulation. So first of all Richard, I would like to welcome you to this podcast and thank you for taking the time to speak with us. I particularly wanted to invite you today because you are in, perhaps, a unique position in this industry, wearing two very important but different hats. As COO of Faculty you see the world through the eyes of the innovators, the algorithm designers, those realising the commercial value of data analytics; and as a board member of CDEI, you look through the prism of government, regulation, ethics and see the importance of implementing a successful and coherent data strategy across the UK. So with that all in mind, I thought I would ask you, if I could Richard, with your Faculty hat on, how would you describe the state of data analytics within the industry at the moment? What's driving investment? What innovations have we seen in data, in AI and in analytics? And I suppose importantly, for those looking at regulation, what are the blockers and hurdles for businesses?

Richard Sargeant	Thanks Rob, it's great to be with you again and I feel like I'm wearing three hats at the moment as a parent during lockdown and striving for survival and the balance of work and life! But, as you say, Faculty works with a range of different firms across sectors (retail, financial services, utilities, engineering), so it's been really interesting for me to compare the patterns of adoption between sectors - and across the board we've seen a clear move away from innovation theatre to a core business transformation. AI has been fashionable for a long time, but frankly it's a relief to see a lot of the work now grounded in the business value that it should deliver rather than just fashion, and I think the road-block that Covid has been for many areas of life, has actually not been so much in evidence when it comes to the use of data. It's perhaps been a spur to all of the firms in those different industries to make better use of that data and to take that data and apply it through data analytics or machine learning systems to solve business problems. So, if I give you a couple of examples: we have been closely involved in using AI with rail firms to support predictive analysis about issues like vegetation encroaching onto railways (a big cause of delays and a safety concern too), right the way through to automated detection of online misinformation, which has been a key threat to issues like getting vaccines out for Covid, all the way through to using machine learning to optimise the operations of search and rescue helicopters. So an enormous variety of things. I think that you asked about the state of the data analytics industry. I think the availability of data is a key blocker for a lot of organisations. It's not really the availability of data as constrained or prescribed by data privacy and data protection regulations, but it's often down to a lack of confidence and clarity on the part of data controllers about what they are allowed to do within the scope of those regulations, over and above the technical complexities of bringing that together. For example during Covid, we have been working with the NHS to create a data store that brings together over 100 different data sources that had all been collected and curated for a long time in different parts of the NHS, but it was as an archipelago, rather than as a centralised store, which really limited the way in which that data could be used to improve patient outcomes and help hospitals operationally by things like ensuring that oxygen, ventilators and protective personal equipment goes to the places that need them most. Covid has really created the urgency that has overcome perhaps the native reticence to share data within a lot of the firms we have contact with.
Rob Sumroy	That's very interesting. You talk about Covid being a spur and it will be interesting to see whether that spur sort of has a long-term impact because when we talk about availability of data being a blocker, I'm wondering also, partly with my IP hat on, whether this could be as a result also of too much focus on ownership of data, where companies, particularly having invested significant amounts in the capture of the data or its purchase or even the synthetic creation of data sets, they feel the pressure to exert their ownership of that data, preventing sufficient access for others to access that data. Is there a perception, perhaps amongst investors in the sector, that data is a really key value-driver and therefore it must be protected on a closed basis

	(almost like source code in the traditional software development model, which again can prevent data sharing that would otherwise enable more innovation)?
Richard Sargeant	It's a really interesting area because data is clearly an asset. There are millions and millions of pounds invested in the collection and curation of data. But data is often mistaken to be the same sort of fungible asset as gold or oil, and that's not true - so if you take half a data set and move it to somewhere else, you don't necessarily take half the value. The value of data is very contextual within the system that is actually using it. Now there is truth in what you say: there could be a lot more innovation created, a lot more, frankly, value delivered to citizens and consumers, if in particular areas there were more data sharing. I think this is true in both the public and the private sector (the difficulty of accessing data between government departments is very high and really is something that needs to be overcome), but it's not the case that just by making some data sets openly available then, deterministically, that transfers all of the value from one place to another. It's a slightly more complex ecology where it's the data, together with the models and the methodology and the integration with business processes, that all come together, to create the value - because it's that system that solves the problem, and that's where the value lies.
Rob Sumroy	OK, thank you. This focus on data ownership or my focus on data ownership then leads me to think about whether there's a role or a need in this digital sector for more open data initiatives. You talk there about opening up government data and I know that that's a focus on, for example, the draft UK data strategy which we will come to talk about in a little while - but just looking at another example, the example of open banking which of course derived from competition regulation which enabled retail banking customers to get hold of their data, and I think to incentivise innovators to break through market barriers and facilitate choice for consumers, so there's plenty of speculation now about whether this model could be deployed by regulators across other markets. Actually the role of competition regulators in the data and digital sectors was, as you know, the topic of the first in this podcast series, when my anti-trust partner, Jordon Ellison, spoke with Professor Ariel Ezrachi from Oxford University, but Richard I am interested to hear from your perspective whether you think that this concept of open banking has been valuable from an AI perspective. For example, has it lead to a propagation of interest in innovating businesses or business models in retail banking, and do you think there could be or should be more of a regulatory push to open up data, particularly to enable the development of emerging technologies and businesses?
Richard Sargeant	It's a really interesting area, Rob, and open banking, particularly within the financial services industry (perhaps relatively conservative as an industry) is likely to still take a while, a number of years, to see the full fruits of this, but I do think that it's been a really valuable initiative, not principally from an AI perspective actually, but more generally from a commercial perspective of

	being able to build businesses by using those regulations to get access to customer data, to allow switching between providers more easily. For example, I know that a number of the challenger banks have spoken warmly of it. And actually, you talk of the application of that open banking initiative to other areas. I think there is quite an interesting connection [to] the data privacy regulations that actually allow access to personal data (things like subject access requests), which have been a little used and somewhat valuable but often supply data in a very human, readable way. People give out PDFs with the contents of emails or records. But with open banking, for me, the key distinction is that it requires that firms make that data available in a machine-readable way and at bulk, at scale, and with a much lower friction of access, and so I think actually there is an interesting connection between data privacy regulations and the availability of data - perhaps by modernising those subject access recommendations or regulations to provide machine-readable information (rather than just human-readable information) – and that could be a spur to innovation. But it's a very experimental area.
Rob Sumroy	And, certainly, that's consistent with criticisms I know from across Europe, the European Commission particularly, as to how the GDPR and the desale processes fail to provide data in the way that maybe it was intended. I mentioned the UK Data Strategy which as we know was put out of consultation at the end of 2020. We also know that within the UK-EU Brexit Deal that we've recently sealed, there is discussion around opening up government data and the benefits that that would bring. I'm interested, Richard, do you think that this sort of opening up of data, and particularly public data, has been a key driver behind the UK government's data strategy? What else is driving the UK government to produce a data strategy at this time?
Richard Sargeant	I think Covid has been a real spur to recognising the value of data and, when we say opening up, often people will hear publication of data sets on platforms such as data.gov.uk, but it's not actually that that has generated a value. It's the internal connection of key operational data sets and sometimes they may be published too, but the benefit of these data sets, when they are operationally critical, being connected across different services, different parts of enterprises or governments, that has really yielded a huge amount of the value. I think that in the UK data strategy, one of the differences between the way that they've framed a lot of the aspirations in that document from previous initiatives is that it is ultimately grounded in the value of the purpose behind that data sharing. It's less about the fact that as an article of faith, you know, open data is a good thing, and more about the very practical examples and illustrations of how, by sharing data more freely, you can generate value and with a moral purpose that everybody agrees with. That moral purpose has often, I think, been occluded by the fact that data privacy and data access regulations are suffused with process (privacy impact assessments and other aspects of regulatory compliance). I think of examples where this has gone

	right - for example if you apply for a driving licence and you can now use your passport photo to give you the ability not to have to send in new forms of pictures - it just strikes everybody as common sense (and why couldn't it have happened before?). There are some areas where it goes wrong - like the Ofqual use of algorithms to grade student papers. In both cases, the critical factor wasn't the processes, the regulatory compliance behind those applications. It was a moral purpose and the validity of that, that was the cause of either celebration or distress.
Rob Sumroy	And I'm glad you've taken us down this route Richard, because you and I have spoken a number of times in the past and this relationship between privacy or the laws that are, good-meaning laws that are inherently there to protect the individual and to provide choice for the individual but perhaps when used in practice, they become more of a triumph of form over substance. It seems to me and others that I've spoken to, looking at the UK's draft data strategy and similar strategies coming out of Europe, that there may be potential conflicts in practice between some of these key value drivers that we've been discussing (like opening up availability of data and maximising the wider use of data both within the public sector and private sector) and the privacy laws. I'm going to ask you, if I may, to swap your hats (feel free to keep your home-schooling hat on at the same time!) but, could I ask you to put your CDEI hat on now? You are on the Board of CDEI which is a really important adviser to the UK government in this area, and I am interested in understanding this relationship between privacy laws on the one hand and other data strategy initiatives and how you see this playing out.
Richard Sargeant	Thanks Rob. So CDEI has been a really interesting and important creation, partly because it's cross sector, it's specialist, but also it looks to combine the advantages from the innovative use of data with the ethical necessity of appropriately protecting personal information and privacy. That balance has come through in a number of pieces of work that the Centre has done - for example, a report on fairness within algorithms - and I think the key way in which progress is likely to be made in this space is not in the issuance of high level principles (I think when I last checked there were over 50 sets of high level principles about how AI should be used ethically, and they all broadly correspond), but really the way to make progress in, for example, the relationship between privacy laws and innovation is in the detail. It's in the specific ways in which algorithms can be made fair or the particular guidance on, as GDPR says, automated decisions ought to be explainable, but it gives very little explanation of how. Organisations like the CDEI (and perhaps regulators too) need, I think, to be really specific on how these regulations can be put into practice, because where guidance is vague or too general it could have a chilling effect on innovation - particularly if there's a threat of regulatory fines for people who get that wrong.

Rob Sumroy	And I'm excited that in our next podcast in a few weeks' time, we are going to look in more depth at some of the issues around privacy, so I probably won't dig any deeper with you at this stage, but I appreciate your thoughts. So we are running out of the time sadly, but just finally and acknowledging this as a very developing area, and with lots of potential legislation coming down the track at UK and EU level – Richard, what do you think, from a longer term perspective, are areas that may require legislating to get people to act in a certain way, and what areas do you think could be left to be driven by the market and accept that people will just behave in that way?
Richard Sargeant	I think that the detail really matters and likely the right treatment will vary depending on which aspect of data and innovation we are talking about. I think the reason the GDPR is taken seriously as law and regulation is because of the force and penalties that back it, but also they say that sunlight is a pretty good disinfectant, and I suspect that a large part of progress in this area is unlikely to come with new regulation so much as more transparency on how data is actually being used, the purposes to which it is being put, and that will result in quite a lot of self-regulation; infringement and enforcement ought to be the exception rather than the rule. But this is such an interesting and emerging area and I think, together with the geo-political constraints and interests of some large technology platforms being American rather than European, that adds another dimension of complexity as to how these regulations can be applied.
Rob Sumroy	Well thank you Richard. It has, as always, been a pleasure chatting with you, through these myriads of interlocking themes. You always bring a fascinating insight in multiple colours with your twin roles so thank you. I would encourage all of you to join us again in a couple of weeks for the next and final podcast in this Regulating Digital series, when members of the Slaughter and May Data Privacy Team will be discussing whether regulation of data privacy is fit for purpose for the digital age and whether our regulators are doing enough to support and promote innovation in data businesses, and how the landscape of data regulation may develop in the coming years. So do please join us for that. Please also mark a date in your diary for the morning of Thursday 25th February, when we will be hosting a Webex panel of guests and experts to discuss all of these themes we've covered in this regulating digital series, including Richard whom I'm delighted will be joining us on that panel, along with experts in the field from the likes of Google, GSK, Brunswick. So that's Thursday 25th February and you can register for the event on the Slaughter and May website, and it will be available for download afterwards if you can't join us at the time. So, Richard, I shall leave you to go off and be a home-schooling parent, and thank you all for listening.