Slaughter and May Podcast
Regulating Digital – Can privacy laws enhance digital innovation?

Narrator	Welcome to the third podcast in our regulating digital series. In today's podcast Natalie Donovan will be speaking to Rob Sumroy and Duncan Blaikie about whether our current privacy rules are fit for purpose in an increasingly digital age. Whether the ICO is doing enough to encourage innovation in the digital space and how in practice businesses can innovate in a privacy compliant way. Rob is head of Slaughter and May's technology practice and Co-Head of our Global Privacy Group. Duncan is a tech and privacy partner who has advised on numerous innovative data projects and Natalie is a Counsel PSL at the firm and former in-House lawyer at a Global Technology Company.
Natalie Donovan	Welcome to our Third Regulating Digital Podcast. My name is Natalie Donovan and today I will be speaking to Rob Sumroy and Duncan Blaikie, both partners in Slaughter and May's Global Privacy Practice. So welcome to you both. In this series of podcasts we are looking at changing regulation in the digital space and potential conflicts between data protection and competition regulation but today I would like us to focus in a little more on the privacy angle. Now as you know we act for a variety of clients and whenever we discuss innovating with data unsurprisingly there is a lot of focus on privacy compliance and GDPR compliance so Rob maybe if I could start with you how in practice do you think the GDPR and now obviously the UK GDPR is working in an increasingly digital world?
Rob Sumroy	Thanks Nat. As we know one of the main purposes of GDPR when it was introduced was to update the previous European privacy regime to make it fit for purpose in this new digital world that we find ourselves in so I think if used properly GDPR can definitely enhance successful innovation. It can help build consumer and regulator trust with things like increased transparency, privacy by design, tools that have been introduced by GDPR like privacy impact assessments requiring organisations to consider privacy at the start of any project so I think if done well privacy compliance can definitely act or be used as a differentiator in the market.
Natalie Donovan	Yes, I mean that is certainly something the information commissioner believes. I know she has said on a number of occasions that good data protection should enable innovation.
Rob Sumroy	Yes, that's right I mean recently she said it enables innovation and I think because people's trust in how their personal data is used plays a roles in their overall confidence and support for the services they are buying. That is what she said and it is certainly something we are seeing with our clients, a definite recognition that trust both regulator and customer trust in how data is being treated is needed for new products or services to succeed. That said, I think in practice there are definitely some aspects of the current regime and I am thinking here things like data minimisation or profiling and the regulations around automated decision-making where it really can be difficult to align

	market practice with the GDPR and companies, clients of ours, simply do not know how to fully comply with the law.
Natalie Donovan	That is interesting as there is obviously some flexibility around how to comply given that the law is principle-based. Duncan are you seeing those same issues or is that flexibility helpful in your view?
Duncan Blaikie	Yeah I mean I think flexibility is certainly important when you are looking at the use of new technologies or new ways of using data. I mean if you say Nat that the GDPR kit that principle-based technology neutral approach of the old data privacy regime and in many ways that can be seen as a positive for innovation. It focuses on legislating the harm rather than the technology and makes that legislation more flexible I guess as long as you are complying with the principles it doesn't really matter what your product or process looks like or the technology that you are using but I think a principle-based approach can create some uncertainty. Some of our clients particularly those on the emerging tech side are looking to develop innovative data products and services but as Rob mentioned they don't always have that certainty that they are going to be okay from a privacy perspective and I think that can become particularly important or challenging when you are thinking about things like securing funding or getting customer buy-in for your product or service.
Natalie Donovan	So I guess given these issues, how can regulation be developed in a way that works for organisations of varying sizes and which both incentivises innovation whilst still giving individuals that choice they need about how the data is used.
Rob Sumroy	So maybe I'll take this one. I mean from my perspective I am very certain as to what the starting point here is which is clear guidance. Clear guidance on how to apply the law is what we need so that I think that is two-fold; first of all the guidance needs to be on the right topic so if you take the ICO it means they need to upskill on developing areas of technology to ensure that as a regulator they understand what they are regulating and how the market which is a fast-moving new market how it is developing and what guidance is needed but also that guidance needs to be operationally relevant and that is something that our clients tell us they need. We hear it often that means tackling more difficult scenarios in the guidance case studies for example rather than sticking maybe to more obvious examples which we sometimes see. Now I don't want to be too negative here because I do think the ICO is trying to strike the right balance so if you take AI as an example at the moment, the ICO identified AI as one of its top 3 strategic priorities and you can see that. There's been a real focus on AI within the ICO with some new AI guidance. Only last week the ICO has appointed a new director of technology and innovation who I understand joined the ICO from the World Economic Forum where he was known to have promoted a more agile innovation friendly approach to regulation and I think we think his appointment is a positive step by the ICO. The ICO has also shown that they are happy to work with technical experts. On the two recent pieces of AI guidance, they worked with the Alan Turing Institute on Project Explain which produced the guidance on explaining decisions made with AI and then there was also Dr Reuben Binns

	who had been engaged by the ICO as part of a fellowship scheme designed to deepen the ICO's knowledge around AI and he helped develop the recent guidance on AI and data protection and also worked on the AI auditing framework project more generally so they've definitely shown a keenness to get technically capable people in at the regulator and then I think the other positive thing that I've seen and have been happy to see from the ICO is that they've been trying to engage with different stakeholders in this area so running the innovative informal consultations on the AI auditing framework where they published blogs and encouraged dialogue and feedback off the back of those blogs and also I think targeting their guidance at particular groups which has been good to see. So if you read the explaining AI decisions guidance that I just mentioned that they did jointly with Turing, that's got different sections aimed at different audiences so some is aimed at senior management, some is aimed at the technology teams which I think in theory is really positive I think you know in practice maybe you know some of the information is very useful for lawyers and advisers, I'm not yet convinced that it's couched in the right terms for boards and directors but you know in principle I think it's a really positive approach.
Natalie Donovan	Which I mean all sounds generally pretty positive. I know from our previous discussions that we've had that you are also aware of some of the practical issues when trying to apply all of this.
Rob Sumroy	Yes. I think you're right there are some issues. Sticking again with the AI theme whilst I've mentioned all of the guidance that the ICO is producing, there's a lot out there and I that can make it difficult to apply in practice. So just take for example there are three main pieces of AI guidance from the ICO, the two I've already mentioned and then the third one being sort of the initial guidance that was last updated back in 2017 but what we don't have is any sort of clear understanding as to how they're all supposed to work together in practice other than the ICO effectively saying read them all, apply them all and then recognise there might be some overlap. I think that's not particularly helpful when we're looking for small companies that are trying to innovate particularly they've got all of this guidance they're long documents, I mean 80 to 100 pages plus they overlap. The most recent AI guidance for example acknowledges that explainability is a key issue that's covered in detail in Project Explain guidance produced with Turing but then the ICO goes on to say this new guidance includes some additional considerations about AI explainability within an organisation, so you therefore have to read the two pieces of guidance together which as I say from our perspective we don't think is particularly helpful in practice.
Natalie Donovan	Yeah, agreed. So I suppose a key take-away here is probably that while principle-based law needs guidance to help organisations know how to apply it, too much overlapping guidance becomes unhelpful and organisations can get may be a bit swamped by it.
Duncan Blaikie	Yeah I would agree with that. You know particularly they need to be factoring in you know things like the more general ICO guidance that's out there you know things like you know the data-sharing codes you know those are all still going to apply to your AI issues. As well as you know guidance from other

| | supervisor authorities where you know the EU law is still going to be relevant for your particular product or service so you almost need a matrix I guess of all those different pieces of guidance to work out what's required and I think this is one of the reasons maybe as Professor Ezrachi mentioned in one of the earlier podcasts in this series that the GDPR is seen by some as you know one of the most anti-competitive pieces of legislation that exists and it's hard enough for large organisations you know who often have teams of advisers to work through that maze of guidance so how can we expect an SME, a start-up or scale up company you know with an innovative data idea who has very little compliance resource to be able to do it. And yet, it's not just the data privacy regulators here who are producing materials in this area. We know the EU has been busy in this space and there's guidance from bodies such as the CDEI and some of sector specific regulators as well. So looking at the FCA for example, we know they're also working with Turing on AI related transparency projects for financial institutions and that work is covering some similar themes to the ICO guidance that we've touched on but it's still in the way using slightly different terminology or categorising concepts in a slightly different way.

I think coordination within the ICO and between the ICO and other regulators and bodies is going to be key here and that's both to make sure that the correct guidance is produced you know and that the different pieces of guidance are sort of all working together and it's also just to help ensure that there's a consistent approach to regulation and guidance across the different regulators and I think that's particularly important at the moment given the interest we know the CMA and FCA are taking in digital development.

Now I would say that's not to say the ICO isn't alive to these sort of issues, we know they are already involved in a number of multi-jurisdictional and cross-regulator groups to sort of increase that cooperation element but I think it's just an area where there's always going to be room for and a need for more action and more coordination. |
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| **Natalie Donovan** | Yeah, it's going to be interesting I think to see how increased cooperation with the ICO and the CMA develops and initiatives like the recent Digital Regulation Cooperation Forum have kind of being set up to ensure they have a joined up understanding and approach in these areas of overlap and obviously that's all relevant to this wider theme of our podcasts series. |
| **Duncan Blaikie** | Yeah agreed, I mentioned the ICO have been working more generally with other regulatory bodies like the FCA and the CMA, and you know they have various MoUs in place which are really helpful,they set out general principles of cooperation and how data is are going to be shared between those bodies but I think a more coordinated approach with the CMA in particular I think is quite important at the moment, given the areas of focus are increasingly starting to overlap, and I think we are starting to see this, I know last month I think the CMA report on algorithmic harms for example, that specifically called out working with the ICO and other regulators in this space. |

Natalie Donovan	Which again all sounds like positive steps in the right direction. So maybe to move things on now - we've touched on guidance and cooperation. Are there any other regulatory developments you are seeing the ICO make that help incentivise innovation? Rob – I'm thinking here maybe the sandbox is an obvious example that springs to mind.
Robert Sumroy	Yeah thanks, the sandbox is definitely an area where it's good to see the ICO being innovative, sandboxes themselves are not new, because we know the FCA in the UK has been running theirs for some years now, but certainly within the privacy arena, I think the ICO was the first regulator to run a sandbox and it's really interesting to see the issues that the ICO is looking at through its sandbox. We understand that the ICO recently selected some new projects to join the sandbox which they say should help organisations comply with their Data Sharing Code and the Children's Code. Previous projects in the sandbox have looked at a wide range of issues, from bias in algorithmic decision-making to facial recognition in airports, and I think the sandbox is definitely a way for the ICO to show that it supports innovation and new, innovative data uses. It helps organisations get free ICO advice and assurances that their new products have tackled potentially tricky data protection concerns upfront, things like privacy by design in practice in effect, and with the ICO's blessing, and it's also a great horizon scanning tool for the ICO. We helped the ICO early on in putting the sandbox together and I know that they saw that then as a great way for them to sort of keep on top of new data uses that were being proposed by innovators. And of course it's also really helpful for advisers like us and businesses thinking of trying similar projects to learn from the experiences of those involved in the programme because reports are published detailing progress on an ongoing basis. So I think for those thinking of applying to the sandbox, one thing that is worth bearing in mind is the public nature of participation, it's not necessarily always helpful for the organisations concerned. I'm thinking here of the example with Heathrow Airport where the ICO's report about their project to automate part of the passenger journey through the airport openly discussed the various challenges in the process, and I think described one of Heathrow's consent collection methods as "largely inadequate". , Heathrow later informed the ICO that they were going to postpone their plans to use this boarding pass consent process, so that's not necessarily a bad thing, because it stopped them spending more money on something which the regulator would ultimately have frowned upon, but it is obviously a very public way of going about that.

Anyway, so that's the sandbox and I think moving off the sandbox, another area for me I think of real interest when thinking about innovative data use and management is the developing area of data trusts. |
| **Natalie Donovan** | Yeah and data trusts and data stewardship more generally certainly seems to be an area that's currently receiving a lot of focus and a lot of research going into it. |
| **Robert Sumroy** | Yes, it's something that was mentioned in the recent Data Strategy which referenced both the UK's previous AI review, which stated that organisations needed better access to data and one of the key recommendations in that |

	government data strategy was the development of data trusts for data sharing, but also referenced Government investment in research in this area, such as the Open Data Institute's project. Interestingly there is not currently a huge amount on data trusts on the ICO's website. They were briefly mentioned in the consultation draft of their recent data sharing code of practice but that text didn't make its way into the final version. There is quite a nice neat description of data trusts in a 2019 ICO consultation response which describes them as taking the concept of a legal trust and applying it to data, so I don't think it's supposed to be a legal trust per se and the ODI research suggests that trust law isn't appropriate here, but the ICO describes data trust as providing a legal structure that allows for independent third party stewardship of data. The idea behind data trusts is that they facilitate sharing between multiple organisations but do so in a way that ensures that proper privacy protections are in place, that there is governance of data and that ensures that interested parties are represented fair sharing of the value that can be derived from that data. So that's sort of what the ICO discussed it as and the ICO goes on to say that data trusts really have the potential to greatly increase the competitiveness of digital markets. So look, I think there will be lots more discussion this year. I think 2021 will be a year where we see a lot of discussion about how data stewardship, data trusts, and other methods to steward and govern data will work in practice, how they can be structured and ultimately how they can help encourage innovative data use in a way which is compliant with privacy.
Natalie Donovan	Thanks Rob, so just to start wrapping up, we've been looking at what the regulators with data trusts, and what the Government can do, but Duncan what do you think organisations can do to successfully innovate with data in a privacy compliant way?
Duncan Blaikie	I think a few key things, first of all really understanding what you're doing as a business with your data. Are your tech people and your business people joined up on the type of processing that is going to take place. Does everyone know what their common goal is and the technology or data that you're going to be using. And I think that to the extent all the way up to a governance level as well, does your board or management fully understand that business model to enable them to make the correct risk management decisions. Are they able to fulfil their explainability and transparency obligations? These are all key factors in the UK GDPR especially when you're looking at innovative data uses, and it might sound a bit trite, but if you're not able to be transparent if you don't fully understand what you're doing with your data. The second thing you can do is make use of the tools and the regulatory guidance that's available. We've been saying this for a while, but if you only see privacy compliance as a tick box exercise or something that you can deal with at the end of the process, it's not going to work. We've seen businesses trying to rectify compliance at the back end of the project and it's either really costly or it's something that just doesn't work. If you can engage with some of those compliance requirements at the outset of your project, it can actually help you innovate and develop the particular product or service, and ultimately sell that to customers in a really positive way as we all know people are becoming increasingly aware of and

	protective of their privacy rights, so if you're able to structure your product in a way that shows you've taken those concerns to heart, that's a really positive step. One really important early step in this process is your data privacy impact assessments. You need to be doing those properly. Those assessments really force you to understand how your data is going to be processed in connection with your project. The different types of risks involved and how you're supposed to be or how you could be mitigating those risks.

I think, thirdly look at the current enforcement trends. You're trying to learn from the mistakes of others here. Assessing how regulators are looking at particular practices or products or sectors, what are they expecting from those organisations that they're regulating. Understanding the particular issues that are going to affect regulators I think can be really informative and helpful when you're developing your particular business model. I think lastly, gage with the consultation process when you can. As Rob mentioned earlier, the ICO is trying to work really hard with stakeholders to develop its guidance and has got some quite interesting ways of doing that. So, if it's difficult or challenging for you to commit to that process, see whether there's a trade body or some other entity that might be able to do that on your behalf. I think we've seen first-hand that the ICO is really good at taking action and response to consultation feedback, so it is really worthwhile engaging if you feel strongly about a particular area of guidance. |
Natalie Donovan	Thanks Duncan. So maybe Rob if I could ask you for one final thought to sum up the issues we've been discussing today.
Rob Sumroy	Thanks. We're seeing increasing overlap in these areas of privacy, data and competition regulation. I've just been discussing the need for increased cooperation amongst regulators and government, but that extends down into organisations too. So for us at the firm, we're working more closely than ever before with our competition team and have set up a cross-stream Regulating Digital Group to help coordinate this work, so I think for our clients too, we'd say that you need to be thinking in a less siloed way and ensure that the correct tech business compliance privacy teams are all talking and understanding what each are doing in this area.
Natalie Donovan	Which is actually a nice way to finish as it prompts me to mention the webinar that our Regulating Digital Group is hosting on the 25 February, so details for that are on our website along with the other podcasts in this series. I suppose, now I would just like to say thank you to Rob and Duncan for your time today and say that we hope to see you at the webinar on the 25th.