Data protection vs. Digital Single Market - Can the Juncker Commission square the circle?

Romain Bosc and Colin Blackman

With the proposed General Data Protection Regulation (GDPR) aiming to harmonise data protection law across the European Union, its role in shaping the future digital ecosystem is essential. The single set of rules will apply new stringent requirements on both economic operators and public authorities regarding the processing of data, and may also have significant effects on third parties outside Europe. In the context of increasing "platformisation" of the industry and enhanced personalisation of services enabled through data analytics, both relying on an extensive processing of personal and non-personal data, creating legal certainty has become urgent for users and companies alike. While significant changes have been proposed by the European Parliament and the Council to adapt the European Commission's initial 2012 proposal for a new regulation, the main challenge still remains for regulators to strike the right balance between the interests of consumers and industry.

In this context, the CEPS Digital Forum seminar, organized on November 9th with the support of IAB Europe, looked at the conflicting aspects lying between the proposed GDPR, and the implementation of the Digital Single Market strategy. How does the GDPR articulate with the DSM in the realisation of a single European market for data? What are the "hard choices" for regulators in creating a vibrant digital economy while guaranteeing high data protection standards? What could be the trickle down effects on innovation?

The Juncker Commission brought in a new approach to ensuring integrated policy-making across the different departments, with a strong commitment to break down the silos hampering an effective digital union. Rosa Barcelo (Head of Digital Privacy and Data Protection Unit, DG CNECT, European Commission) follows the legislative process of the GDPR, in particular in the context of fast developing "cloud computing" and the "Internet of Things" technologies. She also has a strong interest in cybersecurity, and therefore follows closely the work surrounding the Network and Information Security (NIS) Directive. In her view, DG CNECT is trying to find a pragmatic way to create a dynamic and competitive digital economy in Europe through a more market-driven approach. She notably stated that the GDPR was a pre-condition for the creation of a digital single market. Its adoption was needed before initiating any further legislative proposals, as foreseen by the many ongoing public consultations and in the process of reviewing the overall telecommunications rules.

Concerning the institutional policy coordination, the so-called *"Groupe de relations inter-institutionnelles"* (GRI) is the in-house process through which the Commission can adjust its positions internally and react to the current negotiations on any legislative and administrative aspects with the other institutions and in particular with the European Parliament and the Council. At a later stage, the GRI brings in together members from all the Commissioner's cabinets tasked with monitoring inter-institutional affairs. In the wake of the CJEU ruling the invalidation of the Safe Harbor provisions, GRI is particularly helpful helping to shape a joint vision that avoids the traditional antagonism between

business needs and fundamental rights. Part of the working plan tabled for 2016 is the initiative on "free flow of data", on which DG CNECT holds a leading position, and supports the removal of data localisation requirements for non-personal data. Distinguishing personal and non-personal data is indeed tremendously challenging, therefore, seamless coordination between DG CNECT, DG JUST and DG GROW is needed. Ms Barcelo cautiously stated that the legislative work should probably better proceed gradually. Her services will soon launch a public consultation in view of the revision of the E-privacy Directive only once the GDPR is adopted. On the question of whether the two pieces should be merged, she replied that this was still being discussed. In view of the length of the policy cycle and the importance of certain E-privacy provisions (for instance the confidentiality of communications), she thought it would be particularly sensitive to re-open the GDPR negotiations to include additional provisions. Thus, she thought it would be preferable to adapt the E-privacy text in a second phase in order to build a coherent framework.

Max von Abendroth (Executive Director, EMMA) recalled that, over the past few years, about 50% of their audience had moved online, even though about 80% of the sector's revenues came from the printed press. While online press services are self-financing, mainly through advertising, journalistic content has always been, and is increasingly dependent on the way data are gathered and processed. Those two aspects being critical for journalistic purposes and for upholding freedom of press more generally, he stated that in the context of the digital transition for press services, concerns were arising for many sectors alike. He notably raised the question of whether the practices of investigation would still be possible without an applicable exemption for journalistic purposes, in particular on explicit consent request from data subjects. He referred to the recent disclosure on tax evasion and so called "tax-rulings", which required a large amount of data processing and analysis. He also argued that European SMEs were victims of a lack of a level playing field, deploring the fact the tentative harmonisation had left room to legal uncertainty. In his view, innovation and competitiveness are being killed by the absence of a genuine risk-based approach to data protection. Many data-driven business models, for instance digital marketing companies, are put at risk. Therefore, he urged regulators to be caution in order not to reinforce foreign companies while damaging European players.

Daniel Knapp (Senior Director Advertising Research, HIS) gave the audience a brief history of the statistical analysis, its purposes and the many organisational improvements it delivered to our contemporary societies, by making sense of the surrounding world. He notably showed how the evolution and the role of probability and science progressively moved the focus from averages to individuals, and replaced the marketing of sameness with the marketing of difference. He also described the changes in the system of relationships along the value-chain between ad services, content production and distribution and users. According to his presentation, 59% of online advertising in Europe will be generated through programmatic transaction models by 2019, therefore re-architecting entirely the industry and diverting value to those who manage, store and interpret data. As a result, the value moves away from content creators and audience builders to the middlemen tapping into data-centric advertising technologies. With data becoming a central node in the new advertising ecosystem and in reaction to the recent studies showing that a majority of consumers want more control over what marketers can learn about them, he also presented concrete examples of how companies are implementing new approaches to reconcile data and privacy beyond ad-blocking, notably through more transparency-oriented and opt-in/opt-out systems. He finally made the point that when users do not set their own preferences, advertising is randomly based on averages, it is therefore needed to shift from the "data or no data" dilemma to the question of whether data are harmfully discriminating users. Given the strong European heritage based on human rights, he saw an opportunity for start-ups to build a comparative advantage in developing innovative processing tools.

Lenard Koschwitz (Director European Affairs, Allied for Startups) reminded EU legislators how far we were from a truly online single market, and urged the Commission to act more pragmatically to prevent EU startups moving their headquarters away from Europe to thrive and scale up faster in the global market. The idea of having a one-stop-shop for data protection or VAT would be key in this process. Data not being a static commodity, it should be treated as a dynamic flow where explicit consent and legitimate interest should not prevent innovations being developed in Europe, for instance in using data generated by social media, just as Spotify successfully initiated. New ways should also be implemented for consumers to give and transfer consent more practically. He notably argued that personalisation, when applied in a transparent and accountable way, was beneficial for both consumers enjoying better services, and companies competing in very dynamic markets. Data portability is also something to which more attention should be paid, as well as "smart disclosure", in the way that data should be made available to the public and help deliver improvements to the overall society.

Estelle Massé (Policy Analyst, Access Now) called for a balanced tradeoff between business opportunities and transparency for consumers. While Access Now has been supportive of the overall spirit enshrined in the proposed GDPR, she thinks that putting users back in control of their own personal data is also critical in restoring trust without which any digital growth would be possible. Similarly, profiling practices are the most concerning issue in her mind, having a great enabling potential but also potentially damaging in the way it would discriminate users. Hence, a successful compromise should aim at data minimization, purposes limitation, as well as finding an efficient mechanism for explicit consent, especially as regards third party involvement. As regards data localisation, she supports the view that data localisation, in principle, threatens the infrastructure of the Internet itself which is based on data flow. However, she distinguished the principle of mandatory data localisation from data security measures and temporary data localisation, meaning that data should basically be stored in the EU and ensuring that for any transfer to be allowed, the country through which the data transit should apply the equivalent level of protection as domestically. This should be the default legal rule in order to prevent any harmful use of data or any breach in EU citizen's fundamental rights.

The following Q&A discussions focused on the practical ways to reconcile polarised interests and conflicting perspectives, notably in implementing light touch regulation or co-regulation mechanisms. The audience raised questions on legitimate interests and legitimate or illegitimate discrimination, notably in the case of "dynamic pricing" practices on which the Commission is also carefully paying attention to. Some objective criteria may be retained to analyse how dynamic pricing is applied and to identify underlying legitimate interests. More importantly, it is transparency in the process that is required in order to be able to define lawfulness and accountability for all stakeholders. A question arose more broadly on the overall purpose of the regulation and its capacity to harmonise a high level of protection throughout the EU28, whereas it contradictorily contains many provisions allowing Member States to divert from the common line. To this question, the answer was that the coordination work based on inter-services consultations is crucial, particularly in the process of adopting implementing and delegated acts, as well as in defining spaces for codes of conduct. More practically on the role of data protection authorities (DPAs), a European Data Protection Board, consisting of national DPAs should ensure the harmonised application of data protection law and take binding decisions depending on cases of country specific or Europe-wide relevance. In order to allegedly "reduce costs and provide legal certainty", a single decision will be taken through the supervisory board in important transnational cases involving several national authorities.

The precise role of the Commission and other details on this one-stop-shop mechanism are still being discussed, but the overall idea is to allow a company with subsidiaries in several member states to limit its contacts to the DPA in the member state where it is established. Still, among the many controversies, the exceptions where member states can make their own rules are subjects to many critics from both digital right advocates and from private companies. Hence, some participants raised concerns as regards a one-size-fits-all approach to scrutiny of processing that DPAs might be unable to enforce, which might in the end, handicap Europe in the global digital economy. More specifically as regards consent notification, the discussion focused on consumer empowerment, in which digital literacy plays an important role. Isn't there a shift towards a culture of data? How do we understand the changing relationship between consumers and their data in the digital ecosystem? For sure, this requires guarantees and trust that could be revitalised through regulatory tools but not exclusively.