

## The GDPR, market disrupters and innovators: friends or foes?

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Market disrupters and innovators have often been berated for being unaware of data protection and privacy or for failing to reach the required standards of compliance. Limited human and financial resources are undoubtedly part of the problem here. However, in a number of cases, there also seems to be a perception that innovation and privacy are incompatible. With the General Data Protection Regulation (GDPR) taking effect on 25 May this year and introducing even tougher standards for privacy, not to mention fines of up to 4% of annual worldwide turnover, it is clear that data protection and privacy can no longer be ignored, irrespective of the sector in which a business operates. But is there a silver lining for start-ups and other innovative or disruptive companies?

### What are innovators and market disrupters?

Innovators are companies that focus on the development of new products and services, or approach existing ones with a completely novel approach.

Market disrupters are essentially a subset of innovators that seek to completely uproot and displace the current way business is done in a certain sector, or goods and services are provided. Innovators have been described as 'rational' whereas disrupters are seen as 'irrational' - they turn the way business was done on its head. So, for example, Booking.com and Hotels.com have been able to sell hotel rooms in an innovative and successful way, with the help of intelligent software and algorithms. Airbnb on the other hand, or Uber in the transport/taxi sector, have changed the way in which business was traditionally done in those sectors by thinking 'what if everyone was a hotel or a taxi?'

### How does data protection fit into this?

Market disrupters and innovators often operate in sectors that are very 'data heavy'. So it is perhaps surprising that data compliance has historically been perceived to be more of an afterthought. This has usually been attributed to the fact that start-ups often have limited staff and financial resources, combined with a lack of awareness of certain areas of regulation.

However, there are pitfalls to this approach, as many start-ups and innovators are already recognising. The public's growing awareness and concern about the use of their personal data means that any data compliance issue which reaches the public domain, such as a data security breach, is likely to cause significant reputational damage. In this respect, innovators and disruptors are no different to other, larger organisations. In fact, they may be even more vulnerable to reputational damage as they often rely on recommendations and word-of-mouth for their early growth.

## Is data protection compatible with innovation and disruption?

The aim of EU data protection legislation has never been to hamper innovation and progress. Rather, it seeks to regulate how individuals' personal data are used in that process. But we are now at the eve of important change in the world of data protection. The GDPR will apply in the UK from 25 May this year and introduces stricter controls on data processing and wider rights for individuals. How will this impact innovators and disrupters?

## The impact of the GDPR

It is all too easy to focus on the many additional burdens the GDPR will introduce on organisations. From increased documentation, changes in business processes, operations and cultures to new risk profiles for data compliance, the list can seem endless.

However, although the GDPR, does tighten protection, it does not aim to stifle innovation and technological advances. In fact, quite the opposite is true: the legislators appreciate the value for consumers in the use of their data and understand that the prime goal of innovators and market disrupters is to find new and creative ways to respond to genuine consumer needs. What the GDPR seeks to do in response, is to ensure that there is a legislative framework in place that will advance this, whilst ensuring an appropriate level of protection for those same consumers. This includes taking into account the inherent risk in the processing of personal data, including fraud and involuntary dissemination through hacking. In addition, there is a strong argument that compliance with the GDPR can in fact be good for business, and particularly for start-ups or other innovators.

## GDPR compliance as a business strategy for disruption?

Disruption and innovation need not be mutually exclusive. Smart innovators and start-ups are waking up to the fact that GDPR compliance

can be, if not disruptive in itself, at least a strong business strategy, and even their unique selling point or USP. Some of the key benefits of approaching GDPR compliance in this way include:

### Building consumer trust

Being able to show consumers that data protection and GDPR compliance is at the forefront of a business's strategy is key for consumer trust. As Elizabeth Denham, the Information Commissioner, said in 2017: "*innovation relies on consumer trust*". Consumers have a growing interest in what happens to their personal data. This explains, for example, the rise in platforms such as the 'Hub of All Things' or HAT. HAT is the outcome of a £1.2m multidisciplinary project funded by the Research Council's UK Digital Economy Programme. Available as an app, it allows individuals to manage and share their personal data, which is privately stored in a container that only they can control and access.

Businesses should also bear in mind that competitors may already be taking the lead in terms of GDPR compliance, which may then have an impact on consumers' expectations. For example, individuals are already being contacted by companies asking them for renewed consent to receive marketing. This effectively raises the bar for consumers' expectations. Innovators and disrupters whose business model relies on, or will rely on, the processing of a significant amount of personal data should ensure they keep up to date with consumer expectations in this field. This, in turn, can only enhance consumer trust.

### Cost savings and efficiencies

A key step for businesses in their GDPR compliance journey is understanding what data they have, how long they have had it, whether it is still accurate and why they are keeping it. This has a number of very real commercial advantages. For example, data storage is expensive and therefore storing large amounts of data without understanding whether you really

need it and whether it is still accurate is an expense that is hard to justify, particularly for small businesses and start-ups. As a result, businesses are increasingly investing in data hygiene, significantly limiting, for instance, the period of time they will hold on to unused data until it is deleted.

Setting up a business in a GDPR compliant way may also create savings further down the line. For example, it is much cheaper and quicker to run a data mapping exercise in the early stages of a business or project, when there aren't vast quantities of personal data to audit. GDPR compliant processes around data mapping, data protection impact assessments and record keeping can then be set up at the outset, rather than becoming the resource-hungry tasks that many larger, more established corporates are now having to work through as part of their GDPR compliance programme.

## New opportunities

This is where disrupters and innovators excel: thinking outside the box and finding creative solutions to existing issues and spotting market trends. There is no reason why such thinking cannot be applied to GDPR compliance. For example, there are already start-ups that exist to help other start-ups with becoming GDPR compliant. Regulators are also encouraging compliance through innovation and with the use of innovative technologies. The ICO has launched a Grants Programme (with awards of £20,000 to £100,000) to promote and support independent, innovative research and solutions focused on privacy and data protection issues.

Likewise, many start-ups want to supply services to big EU corporates, and they will need to satisfy those corporates' due diligence on their privacy and information security arrangements. Many tech start-ups compete with US entities and by being GDPR compliant, the EU start-ups have a competitive edge over their US competitors when seeking to supply EU corporates.

## The ICO and innovation: Sandboxes

The ICO has said that it is considering introducing a 'sandbox', which is a regulatory safe space for organisations to test their ideas, services and business models against privacy standards without the usual risk of regulator enforcement action. We have been advising the ICO on this. There are numerous examples of sandboxes around the world in the financial regulatory arena, but few examples solely for privacy. Many innovators and disrupters in the FinTech space have already benefitted from the UK Financial Conduct Authority's sandbox but there is currently no privacy equivalent.

This shows that regulators are also keen to promote innovation. As Elizabeth Denham has said, *"it's not privacy or innovation, it's privacy and innovation"*.

## GDPR compliance: what innovators and disrupters should focus on

Although full GDPR compliance by 25 May 2018 is unlikely for those start-ups starting their journey now, having a process for achieving compliance is vital. If a start-up can demonstrate it is taking GDPR compliance seriously and is working through a well-thought out compliance programme, it would seem an unlikely target for the ICO's maximum fines. Given their limited resources and that 25 May is fast approaching, some of the key aspects of GDPR compliance innovators and disrupters should focus on include:

### 1. Planning a GDPR compliance programme

This is a crucial step that many better resourced organisations have already taken. Data mapping, budget allocation, gap analysis and risk profiling are all components of such a programme. There are tools and templates available in the market, some without charge, which can be helpful where resources are limited.

## 2. Privacy by design

'Privacy by design' seeks to ensure that corporates have privacy and data protection at the core of their thinking when developing their business. Practically speaking, this means companies need to carefully consider the GDPR at every stage of their product development rather than treat it as an afterthought once they have reached the production stage.

For start-ups in the market disruption and innovation sector, this means building their business in a GDPR compliant way from the outset. Here there is an opportunity for such businesses to embed a strong data culture across their organisation from the start. Data protection regulators such as the ICO are therefore keen to help, including through the use of innovation such as the ICO 'sandbox' mentioned above.

## 3. Transparency and control

There is an increasing desire from consumers not only to understand what personal data companies collect, store and use but also to control those processes. This is reflected in the privacy policy requirements in the GDPR, the tightening of

certain rules such as the requirements for valid consent and the expanded rights afforded to individuals. Transparency and control are key building blocks for consumer trust.

Well-known and established innovators or disruptors that rely on personal data for their business model such as Facebook are regularly being questioned by EU data protection authorities on how they are meeting the required transparency requirements. Businesses starting out will not have the resources to deal with such challenges or the subsequent fall out in consumer trust. On the other hand, they are likely to be more agile and free to use innovation for the purposes of enhancing the protection afforded to individuals' personal data.

## 4. Data security

Ensuring personal data are adequately protected is another key priority area, particularly for those businesses relying heavily on consumer data and the use of profiling. Not only will the ICO and the media immediately focus on security breaches, but the potential reputational harm involved in a data breach may do irreversible damage to consumer trust.

### GDPR compliance - Practical steps for start-ups

- Identify your data processing activities and undertake a "data flow" mapping exercise. Highlight any high risk processing (for example, if processing special categories of data, profiling individuals, e-marketing or buying-in data).
- What information do you plan to give individuals about the use of their personal data and how? How can they control such use and interact with you in relation to their data?
- Think carefully about who you share data with. Some third party processors have excellent offerings and/or track records in terms of data protection compliance and can assist with your compliance, others fall far short.
- Consider the internal documentation (policies, template documents, record keeping etc.) you will need and ensure staff are trained to use or follow them.
- Consider the resources you will need such as a data protection officer.
- Make use of any available help, including regulator guidance and reputable online tools.

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## Conclusion

The GDPR poses challenges for all businesses caught by its provisions, but it is easy to see why innovators and disrupters that typically operate in data heavy sectors may be particularly concerned. Elizabeth Denham has said that “Data protection is a critical part of ensuring you have the social license to innovate with data - you have to take the people with you”. The GDPR was never intended to hamper innovation and nor should it be used to do so. High levels of data compliance can be entirely consistent with the aims, objectives and ethical standpoints of innovators. In fact, compliance with the GDPR’s core principles such as transparency, privacy by design, data minimisation and security can lead to real benefits both for consumers and for the business itself. In addition, GDPR compliance need not be a gargantuan task for start-ups, innovators and disrupters. It is possible to prioritise tasks according to their risk profile and the resources at hand.

*Slaughter and May advises on all aspects of data protection and privacy, including GDPR compliance programmes. If you would like further information, please contact Rebecca Cousin, Rob Sumroy or your usual Slaughter and May advisor. Further publications are available on our [website](#).*



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