

## Impact case study (REF3)

<b>Institution:</b> London School of Economics and Political Science		
<b>Unit of Assessment:</b> 18 - Law		
<b>Title of case study:</b> In pursuit of effective data protection		
<b>Period when the underpinning research was undertaken:</b> 2014-2019		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b> Orla Lynskey	<b>Role(s) (e.g. job title):</b> Associate Professor of Law	<b>Period(s) employed by submitting HEI:</b> 2012 to present
<b>Period when the claimed impact occurred:</b> 2014-2020		
<b>Is this case study continued from a case study submitted in 2014?</b> No		
<p><b>1. Summary of the impact</b> (indicative maximum 100 words)</p> <p>Dr Orla Lynskey's research has directly influenced major legal and policy proposals seeking to secure effective data protection in digital markets, particularly those with dominant market players. Specifically, her research has had a significant impact on the European Data Protection Supervisor's recommendations to ensure a coherent approach to digital rights in the context of big data processing. It has also informed and influenced policy debate and recommendations regarding the assessment of data-driven mergers and abuses of market power in digital markets. In addition, engagement with the research by civil society organisations, notably the European Consumer Organisation and Privacy International, has helped to ensure they are better able to defend the interests of those they represent. By influencing substantive and institutional reforms designed to ensure coherence between data protection and competition law frameworks, her research has contributed to the process of establishing a more robust protection of fundamental rights.</p>		
<p><b>2. Underpinning research</b> (indicative maximum 500 words)</p> <p>The data protection framework is premised on the belief that individuals should have certain rights in relation to their personal data and its processing. Lynskey's pioneering monograph, <i>The Foundations of EU Data Protection Law</i> [1], argued that, given the scale and complexity of data processing operations in the online sphere:</p> <ol style="list-style-type: none"> <li>(1) these rights, and control over personal data more generally, are called into question;</li> <li>(2) individuals alone cannot ensure effective data protection;</li> <li>(3) given the dominant role of powerful digital companies such as Facebook and Google, more cross-cutting, holistic approaches to such protection are required.</li> </ol> <p>The conclusion stemming from this research was that the market structure in which an individual is asked to exercise their data protection rights can have a significant impact on the effectiveness of these rights. For example, one could query whether consent is "freely given" when there is no competition in the market (i.e. no alternatives) and the service in question is of social and professional importance to individuals. By paying more attention to structure, one could observe two inter-related dynamics. First, that there is a significant concentration of ownership of digital consumer-facing platforms in the hands of few providers; and, second, that with respect to data protection, there is little competition or differentiation between digital platforms and service providers. As a result, although the data protection framework seeks to facilitate choice and control over data and, more generally, to promote a fair data processing environment, these aims are jeopardised by the failure to acknowledge data protection considerations in competitive assessments.</p> <p>In subsequent research, Lynskey elaborated on what a more holistic approach to the attainment of effective data protection online would entail, arguing that competition law should be applied in a way that assists in the achievement of this aim. The approach advocated has three dimensions [2] [3].</p> <p>First, the "consumer welfare" standard used by competition authorities to guide enforcement, which currently focuses on ensuring lower prices, more choice, and better quality products, should be interpreted to include data protection considerations. Lynskey's research argues that the level of data protection offered to individuals forms part of the overall "quality" of a product (e.g. weak data protection safeguards would be an indicator of poor quality). Her claim is that competition authorities should use data protection law as a normative benchmark against which to measure</p>		

this aspect of quality and that this should be utilised in merger or “abuse of dominance” (Article 102 TFEU) assessments.

Second, in addition to the incorporation of such non-price considerations in the consumer welfare lens in mergers, Lynskey’s analysis shows that data-driven mergers and acquisitions (such as Facebook’s acquisition of WhatsApp) should be subject to a non-competition assessment alongside the competitive assessment of the merger, drawing an analogy with the “media plurality” assessment undertaken in media mergers pursuant to the discretion granted to EU Member States by Article 21 of the EU Merger Regulation.

Third, her research recommends that regulators engage in institutional cooperation in order to ensure a coherent approach between different regulators working in data-related fields, such as consumer protection, competition, and data protection law.

Lynskey’s was the first research to propose such an approach, and while it was vigorously contested at the time in the competition law and policy community, the first and third elements outlined above are now widely accepted, while a recent announcement from the Competition and Markets Authority suggests that the second will now also be implemented in the UK.

Finally, in more recent work [4] [5] [6] Lynskey examined whether control over personal data contributed to the power of digital companies - “data power” - and whether the role of data portability initiatives in data protection and competition law could act as a constraint on this power.

### 3. References to the research (indicative maximum of six references)

[1] Lynskey, O. (2015). *The Foundations of EU Data Protection Law*. Oxford University Press. ISBN: 9780198718239.

[2] Costa-Cabral, F. and Lynskey, O. (2015). The internal and external constraints of data protection on competition law in the EU. LSE Law, Society and Economy Working Papers, 25/201. London School of Economics and Political Science. DOI: 10.2139/ssrn.2703655. Available at: <http://eprints.lse.ac.uk/64887/>.

[3] Costa-Cabral, F. and Lynskey, O. (2017). Family ties: the intersection between data protection and competition in EU Law. *Common Market Law Review*, 54(1), pp. 11-50. Available at: <http://eprints.lse.ac.uk/68470/>.

[4] Lynskey, O. (2017). Aligning data protection rights with competition law remedies? The GDPR right to data portability. *European Law Review*, 42(6), pp. 793-814. Available at: <http://eprints.lse.ac.uk/80859/>.

[5] Lynskey, O. (2017). The power of providence: the role of platforms in leveraging the legibility of users to accentuate inequality. In Moore, M. and Tambini, D. (Eds.) *Digital Dominance: Implications and Risks* (Chapter 7). Oxford University Press. ISBN: 9780190845117. Available at: <http://eprints.lse.ac.uk/84413/>.

[6] Lynskey, O. (2019). Grappling with “data power”: normative nudges from data protection and privacy. *Theoretical Inquiries in Law*, 20(1), pp. 189-220. DOI: 10.1515/til-2019-0007.

[1] forms part of OUP’s *Oxford Studies in European Law* series and was commended by Merlin Gömann in *Common Market Law Review* for laying “a strong groundwork for the normative understanding of European data protection law” and as a “fundamental analysis of the right to data protection in the European Union” by Herke Kranenborg in *International Data Privacy Law*.

[2] was cited extensively in a European Data Protection Supervisor Opinion (2016), while [3] has been cited in various policy documents (below). [6] was an invited contribution to a special issue with contributions from eminent academics in the field of data protection and privacy.

### 4. Details of the impact (indicative maximum 750 words)

Lynskey’s research has had an impact on the European Union’s data protection authority, UK policymakers, and civil society organisations by demonstrating the significance of the relationship between data protection and competition law and elucidating the attendant areas of concern. These stakeholders have benefitted through the subsequent shaping of robust legal and policy positions and proposals and, in the case of civil society organisations, by being better able to defend the interests of those they represent and to define best practice for and enhance the knowledge of their staff.

### **Shaping the European Data Protection Supervisor's recommendations, which acted as a catalyst for global legal and policy reform**

The European Data Protection Supervisor (EDPS) is the EU's independent data protection authority. An important part of its remit involves developing a vision for the future development of data protection law and providing policy guidance to address new challenges in the field. As such, it is one of the most influential data protection authorities worldwide.

In March 2014, the EDPS published a preliminary opinion, *Privacy and competitiveness in the age of big data*. The aim of this initiative was to identify whether the lack of competition in important consumer-facing digital markets (e.g. social networking services and search engines) was having a negative impact on data protection and to make relevant recommendations. A substantially developed and revised final Opinion was subsequently published in September 2016: *The EDPS Opinion on coherent enforcement of fundamental rights in the age of big data* [A]. This final Opinion was both explicitly and implicitly shaped by Lynskey's research.

The 2014 preliminary opinion contained only three brief paragraphs over 38 pages discussing "data protection as a factor in consumer welfare". It noted that "*it may be necessary to develop a concept of consumer harm, particularly through violation of rights to data protection, for competition enforcement in digital sectors of the economy*" but did not elaborate on what this "harm" might be or how it could be assessed. In developing this claim and setting out recommendations, the final Opinion cites [2] to support its recommendation that data protection standards can be used "*to determine 'theories of harm' relevant to merger control cases and to cases of exploitative abuse*" of a dominant position [A]. The Opinion also cites this research [2] to support the claims that "*there are circumstances in which data protection can provide a relevant normative benchmark for competition law*", and that there is competition law "*precedent for using another field of law*" to find a restriction of competition [A].

Lynskey has also been instrumental in shaping the policy of the EDPS on this topic through sustained formal and informal engagement with key members of its staff. Following publication of the preliminary opinion, she was invited to participate in a closed workshop hosted by the EDPS at the European Parliament in June 2014, designed to develop the ideas set out in the preliminary opinion, and was one of two participants (the other being US economist, Dr Jan Whittington) asked to consider "consumer welfare and consumer protection". In September 2015, she was invited to speak at the EDPS-European Research Academy's "Competition rebooted" conference, again to develop these themes. Following publication of the final Opinion, she has continued to engage with the EDPS on this issue, including chairing the keynote conference session in January 2017 where the EDPS launched the Digital Clearing House. The Digital Clearing House is a forum which enables competition, data protection, and consumer protection authorities to meet, exchange insights and discuss best practices, consistent with the third outlined recommendation of the Lynskey research [2] [3]. The Head of the Private Office of the EDPS has described Lynskey's research as "essential" to the development of its policy in this area, benefitting its understanding of competition and data protection law in three key ways:

- "*The notion of a positive obligation on the part of the European Commission qua competition authority to uphold the Charter of Fundamental Rights*
- *Potential of 'media pluralism' rules in merger control to be a model for 'platform pluralism' in digital economy*
- *Use of GDPR as a standard to assess whether abuse of dominance has taken place under TFEU Art 102.*" [B]

### **Influencing policy debate and recommendations regarding the assessment of data-driven mergers and abuses of dominance prohibited by Article 102 TFEU**

Following the EDPS initiative, the question of whether and how data protection and competition law intersect became a prominent issue in domestic and international institutions. The House of Lords Select Committee on Communications conducted a broad inquiry into "Regulating in a Digital Environment" in 2018-19. It dedicated a chapter of its final report to "market concentration". Lynskey presented oral evidence to the Select Committee based on the conclusions of [2] and [3]. These papers argued for increased scrutiny of data-driven mergers and acquisitions. In particular, they argued that, beyond a competition assessment, such mergers could be made subject to a parallel non-competition assessment of their impact, using the parallel assessment for media mergers as an analogy. Lynskey's oral evidence was cited with approval in the final

report [C] and was used to support the recommendation (paragraphs 148-9) that “*in its review of competition law in the context of digital markets the Government should consider implementing a public-interest test for data-driven mergers and acquisitions*”.

Subsequently, in August 2020, Lynskey was contacted by the Competition and Markets Authority's Digital Taskforce "Futures" workstream, to provide input on the possible establishment of a Digital Markets Unit, a recommendation of the Furman Review. The Digital Taskforce is specifically focused on exploring how digital markets might evolve over the next 5-10 years. In September 2020, Lynskey participated in an expert interview, during which she again emphasised to the Digital Taskforce the need to include data protection as part of a wider merger assessment [2] [3]. The following month, in a significant shift in UK policy, the new Chief Executive of the CMA announced the intention to amend the merger regime to accommodate a separate assessment of non-competition concerns such as data protection [D].

A 2016 House of Lords EU Select Committee report, “Online Platforms and the Digital Single Market” [E], also cited evidence submitted by Lynskey and based on research published in [1]. Regarding the data protection/competition law intersection, the report noted how the dominance of digital platforms and their control of information flows renders it more difficult for individuals to exercise their rights effectively online [E, paragraph 171], and lamented the fallacy of relying on individuals to protect their own rights in this hugely complex context [E, paragraph 216].

Lynskey's work has also directly informed OECD policy discussions on this topic and the work of its “best practice roundtables”. These are organised by the OECD's subject-specialist committees, convened to guide the application of the law in member countries. [4] is cited several times in a 2017 background report on non-price effects in merger control [F], while Lynskey herself drafted and presented to committee a paper on “Considering Data Protection in Merger Control Proceedings” in June 2018 [G]. This paper was subsequently cited alongside [3] in the background note to the “Consumer data rights and competition” roundtable.

In 2020 Lynskey was invited to become a non-governmental advisor to the International Competition Network, a network of competition authorities, presenting on competition law and data privacy at its inaugural workshop. Additionally, in November 2018, she was the sole UK-based legal academic invited to provide evidence to the Federal Trade Commission hearings on “Privacy, Big Data and Competition” as part of the FTC's “Hearings on Competition and Consumer Protection in the 21st Century”; and in October 2019 she presented on a panel alongside FTC Commissioner Rohit Chopra and the now-EDPS Wojciech Wiewiórowski at the annual meeting of the International Conference of Privacy and Data Protection Commissioners.

### **Informing the policy positions and building capacity of civil society organisations**

The intersection between data protection and competition law, first articulated by this research, has been shown to be of growing relevance to many diverse stakeholders in recent years. Lynskey's engagement has been crucial in bringing this emergent area of law to the attention of civil society organisations, notably BEUC (the European Consumer Organisation or “Bureau Européen des Unions de Consommateurs”) and Privacy International, enhancing the effectiveness of their advocacy, and helping them to formulate robust policy positions in response to a rapidly evolving digital environment.

Lynskey's academic contribution has helped BEUC, the umbrella group for 44 independent consumer organisations from 32 countries, to bridge the gap between the fields of competition law and data protection law and gain an understanding of the core legal and policy issues at stake, ultimately ensuring it is better able to represent and defend the interests of European consumers. Agustin Reyna, BEUC's Head of Legal and Economic Affairs, highlighted three areas in which the organisation has benefitted: 1) influencing its position regarding the upcoming review of EU Competition Law, as expressed in the response to the European Commission's consultation on the “Shaping of Competition Policy for the Digital Era”; 2) Lynskey's data power research [4] [5] [6] has provided BEUC with “*useful arguments about how to approach enforcement of Article 102 TFEU regarding abuse of dominant position and restriction of competition in digital markets*”; and 3) her interdisciplinary approach has “*opened a discussion about how agencies should cooperate to address infringements that could simultaneously lead to the undermining of the fundamental rights to data protection and privacy while at the same time leading to a disruption of competition when practices are applied by dominant undertakings*” [H].

Reyna notes that these are just a few examples of how this research has "helped [BEUC] to develop policy positions to defend the interest of consumers before the EU decision-makers".

In 2020 BEUC appointed Lynskey as one of four academic advisors on its "Consumer Protection 2.0" project. This work seeks to reshape consumer protection law to address the challenges of current digital markets.

Privacy International has similarly benefitted from Lynskey's research in its submissions to competition authorities. In its submission to the Federal Trade Commission on privacy, big data, and competition, [2] and [3] were cited in support of several key claims: that in a competitive market we should expect that companies would compete to offer privacy-friendly services, and that market power may be preventing the emergence of such competition [I]. Her work informed its submissions to the European Commission on "shaping competition law in an era of digitisation" [I], while she has also provided an expert statement for inclusion in its submission to the European Commission regarding Google's proposed acquisition of Fitbit. Lynskey's engagement with Privacy International has also extended to training and capacity-building initiatives, offering guidance on the data protection/competition law intersection to staff and affiliated students, and leading sessions at the organisation's conferences. Privacy International had not previously had cause to concern itself with competition law and so its engagement with the Lynskey research has been important to navigating these nascent concerns.

Overall, Lynskey's research has been crucial to the increased attention to - and acceptance of - the relationship between data protection and competition law. This is now beginning to manifest itself in decisional practice, notably so in an apparent shift in stance from the European Commission in its merger decisions. In the Facebook/WhatsApp merger decision (2014), it referred to data protection only once and clearly stated that "any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules". However, in its later Microsoft/LinkedIn decision (2016) the Commission refers to data protection on 26 occasions, explicitly acknowledged privacy as "an important parameter of competition" [J], and considered the impact of the transaction on consumer privacy [J, paragraph 350].

The increased scrutiny of Google's acquisition of Fitbit by competition authorities on the basis of data protection considerations represents further progress and may lead to data protection concerns being factored in before, rather than after, such a data-driven acquisition.

##### 5. Sources to corroborate the impact (indicative maximum of 10 references)

[A] Opinion 8/2016: EDPS Opinion on coherent enforcement of fundamental rights in the age of big data, 23 September 2016.

[B] Supporting statement from Head of the Private Office of the EDPS, 19 February 2020.

[C] House of Lords, Select Committee on Communications, *Regulating in a digital world*, March 2019.

[D] Digital Markets: using our existing tools and emerging thoughts on a new regime, UK Government, 9 October 2020.

[E] House of Lords, Select Committee on European Union, *Online Platforms and the Digital Single Market*, April 2016.

[F] OECD, "Considering non-price effects in merger control – Background note by the Secretariat", 6 June 2018

[G] OECD, "Non-price Effects of Mergers – Note by the United Kingdom", 6 June 2018.

[H] Supporting statement from Head of Legal and Economic Affairs, BEUC, 6 November 2019.

[I] Privacy International, "Submission to the US Federal Trade Commission on the intersection between privacy, big data, and competition", August 2018; and "Submission to the European Commission consultation on 'shaping competition policy in the era of digitisation'", September 2018.

[J] Case M.8124 – Microsoft/LinkedIn, Regulation (EC) No 139/2004 Merger Procedure, 6 December 2016.