

Private Power, Online Information Flows and EU Law: Mind the Gap, by Angela Daly, Hart, 2016, ISBN: 978-1-50990-063-3, 162 pp, £50.00

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In this informative, diligent and useful study, Angela Daly focuses her attention on how regulators and the law attend to the issue of user autonomy. She calls for the promotion and protection of user autonomy (user control over their own data and what is done with it) as an informing ethos for regulation. With competition, regulation has been one-way: producers to consumers. However, online information has a ‘prosumer’ construct; that is, users are both producers and consumers of information. This is a fundamental challenge to the traditional regulation methods. Daly contends that, with power over information production and consumption being concentrated in the hands of private corporations, there has been a detrimental impact on users’ autonomy (the legal and regulatory framework goal) due to the neoliberal basis of existing European Union law and regulation.

Part of the Hart Studies in Competition Law series, this book is not exclusively a competition law monograph. There is a mixed interaction with the discipline. Competition law itself is inadequate insofar the internet is ‘more than just an economic marketplace.’ Some difficulties may be addressed by competition law’s concentration on for-profit corporations. Still, this legal discipline ‘is not a panacea for all issues involving such an accumulation of private economic power on the Internet, and the approach to thinking of competition law as the only or one of the only permissible checks on this private economic power is misguided.’ And so, Daly advocates for user autonomy as a guiding principle rather than consumer protection, something more commonly found in competition discourse.

Given this view of competition law, the tremendous interdisciplinarity within this investigation should be expected. Though legal analysis dominates, influences of economic and other social science literature can be found. If there is one suggestion on this apt mixture, it is that communications theory may have proven to be useful in further dissecting the intersection. Interdisciplinarity alludes to the conflation of issues that are presented by online information flows. To that point, consider Daly’s statement that the internet is now ‘a heavily commodified space which has seen the emergence of for-profit actors performing a “gatekeeping” function over data flows, both for their own economic benefit as well as for the state’s surveillance and law enforcement capabilities’. Within this phrase, there are the commercial interests that facilitate information flows overlaying its consumer (or ‘prosumer’ as it has been called) driven use. All the while, the regulatory framework is clearly evident.

Chapters 1 and 7 provide an introduction and conclusion, respectively. The book primarily consists of case studies: internet provision, internet search engines, mobile devices and the cloud. Each chapter consists of a competition analysis followed by discussion of the intersecting areas relating to data flows such as data protection, privacy, freedom of expression. Her focus is user autonomy which is separated into three components – competition/dominance; privacy and data protection; free expression. To the well-informed reader, there may be much space devoted to outlining the relevant frameworks and issues. However, it is contended that this is a benefit to readers unfamiliar with the European Union regulations, whether that be in the areas of data flows or competition. There is an economy in elaboration that should not deter even the well-informed audience.

Chapter 2 sets out the theoretical aspects of the study and offers a tremendous amount for consideration. An engaging line of study in the book is the interaction between competition law and data. Competition law presumes a passive consumer without production capabilities. It is a challenge to engage with a platform that positions people as both creators of content as well as passive consumers. Daly admits some hesitation with the conceptual suppleness of competition law. It is an area accustomed to quantitative data. Calling for it to develop a capacity for qualitative data presents a notable hurdle. It may be wondered, then, why competition law would be engaged. To this, Daly calls attention to the fact that this is an area dealing with a consolidation of private economic power. It is the ‘one regime *available*’ and is not advanced as the appropriate means of engagement.

A slight difference in approach to the legal framework (avoiding *ex ante* regulation of private companies as information gatekeepers) can be seen in Chapter 3 when investigating net neutrality. One example is the European Union’s General Data Protection Regulation (GDPR), effective May 2018. The GDPR in some ways goes farther than its predecessor, the 1995 Data Protection Directive. Daly hedges on the significance of the relative increase in activity here as being tardy, given the rapid developments in information and communication technology. The caution anticipates the next case study, internet search engines. Here, the limitations of competition law may be most readily apparent. The economic strength of Google’s information monopoly raises certain concerns. And yet, the absence of engagement of non-economic areas by competition law (or other legal disciplines) leaves a troubling gap for user autonomy.

The brief concluding chapter would seem to be a by-product of the current state of fluctuation in which we find ourselves. As noted, the General Data Protection Regulation can be one possibility for further development. And yet, Daly’s argument, as stated in the introduction, remains in the conclusion: ‘the law and regulation which does apply to the given situation ... fall short of fully protecting and promoting user autonomy in this context of corporate dominance over online information flows.’ The discussion in between the commencing and concluding chapters, then, elaborates on the ‘how’ of the legal (and political) framework failure; and there is much to this. Points for further consideration are identified. Consumer protection as a means of entrenching user autonomy is one example. As well, self-help methods involving peer to peer design are noted. The outcome, then, is to pursue approaches outside of legal and regulatory structures. While suggesting a code-based alternative, Daly is careful to distinguish this from the well-known theory articulated by Lawrence Lessig. Admitting that these alternatives ‘are not perfect in their enhancement of user autonomy’ and that there may be obstacles to full participation, Daly argues that these are ‘*better* options than law and regulation in the sense that they are immediately available and already embody user autonomy values.’

Private Power offers an accessible study to an intricate area. User autonomy is certainly a principle that is easy to endorse. The difficulty is how to do so. For this reason, the multiple case studies and textured theoretical framework Daly sets out goes some way in demonstrating how such a framework may be developed. She also gives appropriate attention to the significant challenges faced in establishing this course. There is an intriguing synergy of challenges when we look at Daly’s study of information flows and the on-going issues of online speech. Just as when we speak of freedom of speech, so too does the discussion engage with freedom of information. Stemming from the CJEU’s decision in *Google Spain*, there is a question as to whether or not other jurisdictions or courts would view privacy as data protection being preserved at the expense of a more robust freedom of expression. It may be that the matter is

more about access to information in the CJEU's conception. However, the difficulty with this is that the premise of free speech is the sharing of information through remarks. It may be difficult to parse freedom of expression from freedom to information. This is a challenging balance as it may be that freedom to information forms an end-run around privacy. However, a statement suggesting that freedom of expression is to be subservient to a right of privacy will encounter some significant challenges in response. This is one of the many points for further discussion stemming from Daly's study.