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**Article (Accepted version)  
(Refereed)**

**Original citation:**

Costa-Cabral , Francisco and Lynskey, Orla (2017) *Family ties: the intersection between data protection and competition in EU Law*. Common Market Law Review, 54 (1). pp. 11-50. ISSN 0165-0750

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Available in LSE Research Online: November 2016

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# Family Ties: The Intersection between Data Protection and Competition in EU Law

Francisco Costa-Cabral and Orla Lynskey\*

## Abstract:

Personal data has become the object of trade in the digital economy, and companies compete to acquire and process this data. This rivalry is subject to the application of competition law. However, personal data also has a dignitary dimension which is protected through data protection law and the EU Charter rights to data protection and privacy. This paper maps the relationship between these legal frameworks. It identifies the commonalities that facilitate their intersection, whilst acknowledging their distinct methods and aims. It argues that when the material scope of these legal frameworks overlap, competition law can incorporate data protection law as a normative yardstick when assessing non-price competition. Data protection can thus act as an internal constraint on competition law. In addition, it advocates that following the legal and institutional changes brought about by the Lisbon Treaty, data protection and other fundamental rights also exercise an external constraint on competition law and, in certain circumstances, can prevent or shape its application. As national and supranational regulators grapple with the challenge of developing a dynamic information economy that respects fundamental rights, recognition of these constraints would pave the way for a more coherent EU law approach to a digital society.

## 1. Introduction

*'I do not see the competition portfolio as a lonely portfolio. On the contrary, competition is central to the things we want to create both in and for Europe.'*<sup>1</sup>

The digitisation of data, including personal data, has led to an exponential increase in the scale of personal data processing and the ease with which this processing can occur.<sup>2</sup> Almost every online transaction requires the disclosure of personal data, which can then be aggregated, analysed, and traded for further use. Personal data is so

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<sup>1</sup> Hearing of European Commissioner for Competition Margrethe Vestager before the European Parliament on 2 October 2014 <<http://www.europarl.europa.eu/hearings-2014/en/schedule/02-10-2014/margrethe-vestager>> (unless otherwise stated, all URLs were last accessed 26 October 2016).

<sup>2</sup> Murray, *Information Technology Law* (OUP, 2016), pp. 5-11 and 51-54.

valuable that many companies are willing to forego monetary payment for their digital services in order to gain access to it.<sup>3</sup> Therefore, while personal data is not a currency, it has monetary value. Yet, beyond this economic value, personal data is also intrinsically linked to the dignity, autonomy, and personality of individuals. This dual nature of personal data is acknowledged, and given expression, in European Union (EU) law. EU data protection policy seeks to ensure the free flow of personal data while respecting fundamental rights, in particular the rights to privacy and data protection.<sup>4</sup> This legislative framework is supported by the provisions of the EU Charter of Fundamental Rights (EU Charter), Article 8 of which provides for a ‘right to data protection’.

Critics argue that the EU’s data protection framework is unable to tackle the challenges posed by current personal data processing practices.<sup>5</sup> This framework seeks to grant individuals control over their personal data through mechanisms such as consent, rights to information and rights to access, rectify and delete data.<sup>6</sup> Such individual control is, however, frustrated by information and power asymmetries. While individuals become increasingly ‘transparent’ or ‘legible’ to those processing personal data, data processing practices are opaque and online goods and services are frequently offered on a ‘take-it-or-leave-it’ basis leaving little real scope for choice.<sup>7</sup> Left to its own devices, the market strays away from an optimal level of individual control over personal data.

Against this backdrop, there have been calls for a broader structural approach to personal data protection by fostering closer integration between data protection and other EU law policies that shape markets, including competition law. The European Data Protection Supervisor (EDPS) has advocated that competition law enforcement should consider the data protection rights of consumers and intervene to control market power in the digital economy.<sup>8</sup> Simultaneously, the European Commission (Commission) and national competition authorities (NCAs) are also considering whether competition law enforcement should incorporate data protection and privacy concerns, an issue that has arisen in the context of their focus on ‘big data’.<sup>9</sup>

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<sup>3</sup> Recognising this reality, Article 3(1) of the proposed directive on digital contracts applies when ‘a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data’. COM (2015) 634 Final, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts on the supply of the digital content. See also Hoofnagle and Whittington, “Free Accounting for the Costs of the Internet’s Most Popular Price”, (2014) 61 *UCLA Law Review*, 606.

<sup>4</sup> O.J. 1995, L 281/23. Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art 1(1).

<sup>5</sup> Koops, “The Trouble with European Data Protection Law”, (2014) 4 *International Data Privacy Law*, 250.

<sup>6</sup> Lazaro and Le Métayer, “The Control over Personal Data: True Remedy or Fairy Tale?”, (2015) 12(1) *scripted*, 3.

<sup>7</sup> Cate and Mayer-Schönberger, “Notice and Consent in a World of Big Data”, (2013) 3 *International Data Privacy Law*, 67.

<sup>8</sup> These were the conclusions of the Preliminary Opinion by the EDPS, followed by an Opinion aimed at ‘[m]oving from analysis to action’. EDPS Preliminary Opinion “Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy”, March 2014 29-32; EDPS Opinion 8/2016 “On the coherent enforcement of fundamental rights in the age of big data”, 23 September 2016.

<sup>9</sup> Commissioner Vestager, “Competition in a Big Data World”, 17 January 2016, <[https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-data-world\\_en](https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-data-world_en)>; Joint Report – Autorité de la Concurrence and Bundeskartellamt, “Competition Law and Data”, 10 May 2016,

To many, this debate will look familiar. It has long been argued that certain public policies objectives, or non-economic concerns, are of such importance that they must be considered when applying competition law.<sup>10</sup> In particular, it has been argued that the Commission should expand its interpretation of the notion of ‘consumer welfare’ – the standard it uses to guide its application of the competition rules<sup>11</sup> – in order to incorporate these public policy objectives. This has nevertheless always been resisted on the grounds that the consumer welfare standard is guided by economic principles and that competition authorities lack the legal competence and technical expertise to incorporate non-economic concerns within their remit. Competition experts<sup>12</sup> and, ostensibly, the Commission<sup>13</sup> have thus invoked these arguments again in protest against an interpretation of the consumer welfare standard that would incorporate data protection.

This paper departs from this well-versed discussion<sup>14</sup> and examines the relationship between data protection and competition law from another perspective. It emphasises that data protection and competition law are members of the EU law family. Therefore, while their material scope and normative objectives differ in many ways, the two areas also have significant ‘family ties’. Both policies aim to achieve market integration and share a concern for the welfare of the individual. Furthermore, data protection has a privileged status in the EU family, and may therefore be distinguished from other public policy objectives, as a result of its inclusion in the EU Charter. This paper asserts that these family ties have two consequences for the relationship between data protection and competition law.

First, data protection law can act as an internal influence on substantive competition law assessments. Competition law deals with ‘competitive parameters’, that is to say, the factors to which consumers respond on markets such as price, quality, choice and innovation. Given that companies compete for the acquisition of personal data but rarely specify a price for it, the data protection conditions offered to individuals can reflect the parameters of quality, choice and innovation. While there is an increasing body of economic analysis that sheds light on the how personal data processing

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<<http://www.autoritedelaconurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>>; McLennan: Global Competition Review, ‘Netherlands starts big data probe’, 23 September 2016, <<http://globalcompetitionreview.com/news/article/41893/netherlands-starts-big-data-probe/>> .

<sup>10</sup> Townley, *Article 81 EC and Public Policy* (Hart, 2009).

<sup>11</sup> For instance, O.J. 2009, C 45/7. Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, point 5.

<sup>12</sup> Ohlhausen and Okuliar, “Competition, Consumer Protection, and the Right (Approach) to Privacy”, (2015) *Antitrust Law Journal*, 37-38; Tucker, “The Proper Role of Privacy in Merger Review”, (2015) *2 CPI Antitrust Chronicle*, 2-4.

<sup>13</sup> Commissioner Vestager stated that ‘I don’t think we need to look to competition enforcement to fix privacy problems’, cit. *supra* note 9.

<sup>14</sup> The EDPS appears to have also done so: the Preliminary Opinion calls for ‘a new concept of consumer harm for competition enforcement in digital economy’ which would incorporate the ‘violation of rights to data protection’, but the Opinion does not pursue this line and reverts to the established view that consumer welfare ‘has never been clearly defined, and it has tended to be used to address market structure and economic efficiency and only indirectly addresses individual consumer concerns; such as privacy’. Preliminary Opinion of the EDPS, cit. *supra* note 8, 26 and 32; Opinion of the EDPS, cit. *supra* note 8, 8. See further, Costa-Cabral, “The Preliminary Opinion of the European Data Protection Supervisor and the Discretion of the Commission in Enforcing Competition law”, (2016) *23 Maastricht Journal of European and Comparative Law*, 498-506.

benefits and harms consumers,<sup>15</sup> such economic analysis alone may be unable to determine when competition intervention is desirable in the face of multiple trade-offs. Data protection law – a framework designed to identify and achieve an optimal level of personal data protection – can provide the normative guidance that competition law lacks in relation to non-price competitive parameters. For example, infringements of data protection law, or detrimental changes to important data protection conditions, can indicate consumer exploitation or prohibited methods of competition. Such use of data protection law as a normative benchmark would not expand the notion of consumer welfare to include public policy and non-economic concerns. Rather, data protection would fit within the internal logic of competition law and would, like other areas of law such as intellectual property, simply provide an insight into the normative backdrop for competitive activity.

Secondly, data protection law can impose external limits on the enforcement of competition law, as a result of its status as a fundamental right. The right to data protection could, for instance, preclude the Commission from accepting commitments or remedies from undertakings that would interfere with that right. In such circumstances, data protection acts as an external constraint on competition law: it does not fit within the logic of competition, or align with its objectives. To date, the impact of the right to data protection on competition law has only been explored in relation to the rights of individuals who are subject to competition investigations.<sup>16</sup> The Court of Justice of the EU (the Court) has nevertheless confirmed that the EU Charter constrains the actions of EU Institutions when they adopt legally binding measures.<sup>17</sup> This paper argues that such limitations also apply to the Commission when enforcing competition law. Again, this external constraint does not expand the material scope of competition law to incorporate public policy objectives: in this situation, data protection would not trigger the application of competition law but merely preclude or alter its application.

These three issues – the normative coherence of EU law and the internal and external influence of data protection on competition law – shall be addressed in the three main sections below. This paper seeks, firstly, to contribute to the debate on the market failure at the heart of the digital economy. Markets involving personal data are thriving yet individuals have little control over their participation in these markets and do not benefit from competition on them. Secondly, this paper explores how the EU will integrate its Charter obligation to respect and promote fundamental rights with its existing duties to enforce economic policies.

## **2. Family Traits: the Common Characteristics of Data Protection and Competition Law**

Data protection and competition law both influence the exercise of economic activity and seek to enhance the interests of individuals. They do this, however, at different ends of the same spectrum: data protection law protects the integrity of individual

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<sup>15</sup> O'Brien and Smith, "Privacy in Online Markets: A Welfare Analysis of Demand Rotations", (2014) FTC Bureau of Economics Working Paper No. 323; Gal and Rubinfeld, "The Hidden Costs of Free Goods: Implications for Antitrust Enforcement", NYU Law & Economics Research Paper No 14-44.

<sup>16</sup> Geradin and Kuschewsky, "Data Protection in the Context of Competition Law Investigations: An Overview of the Challenges", (2014) 37(1) *World Competition*, 69.

<sup>17</sup> Joined Cases C-92 & 93/09, *Schecke and Eifert*, EU:C:2010:662.

decision-making regarding personal data processing (for instance, by granting when consent is used as a legal basis for data processing) while competition law safeguards consumers against unlawful exercises of market power. However, these two fields of law intersect when undertakings compete on the basis of data protection, that is to say, when consumers are influenced by the personal data protection conditions governing the processing of their personal data. Their shared objectives then pave the way for data protection law to influence substantive competition law assessments.

## 2.1. The Hybrid Nature of the EU Data Protection Framework

EU data protection law is comprised of a mixture of primary and secondary law. Article 16 TFEU provides an explicit legal basis for EU data protection legislation while Article 8 of the EU Charter sets out a right to data protection. At present, the 1995 Data Protection Directive regulates personal data processing, however a General Data Protection Regulation (the GDPR)<sup>18</sup> will replace this Directive in May 2018. The GDPR seeks to clarify existing rights and obligations while introducing changes to improve compliance and enforcement. This secondary law must be interpreted in light of the EU Charter rights to privacy and data protection.<sup>19</sup>

The EU data protection framework has a broad scope of application, as it applies to personal data processing conducted by natural and legal persons and public and private bodies, with limited exceptions.<sup>20</sup> Personal data is defined as any information relating to an ‘identified or identifiable individual’<sup>21</sup> and processing as ‘any operation or set of operations which is performed upon personal data, whether or not by automatic means’.<sup>22</sup> Personal data processing is permissible provided it has a legal basis and also complies with certain safeguards.<sup>23</sup> The most well-known legal basis for processing is the consent of the individual ‘data subject’, however there is no hierarchy amongst the six legal bases listed. Processing is therefore equally legitimate if, for instance, it is necessary for compliance with a legal obligation or for the performance of a contract.<sup>24</sup> Of the safeguards, the so-called ‘purpose limitation’ principle should be highlighted. According to the principle, personal data must be ‘adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed’.<sup>25</sup>

The framework also provides individual data subjects with rights over their personal data, for instance, the right to information regarding the processing of their personal data,<sup>26</sup> the right to delete personal data in certain circumstances<sup>27</sup> and the right to access personal data.<sup>28</sup> Through this framework, data protection determines the boundary between permissible and impermissible personal data processing and, in so doing, reconciles individual rights with other societal interests.

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<sup>18</sup> O.J. 2016, L 119/1. Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46.

<sup>19</sup> Case C-73/07, *Satamedia*, EU:C:2008:727; Case 362/14, *Schrems*, EU:C:2015:650.

<sup>20</sup> For instance, Directive 95/46, cit. *supra* note 4, Art. 3; GDPR, cit. *supra* note 18, Art. 2.

<sup>21</sup> Directive 95/46, cit. *supra* note 4, Art. 2(a); GDPR, cit. *supra* note 18, Art. 4(1).

<sup>22</sup> Directive 95/46, cit. *supra* note 4, Art. 2(b); GDPR, cit. *supra* note 18, Art. 4(2).

<sup>23</sup> Directive 95/46, cit. *supra* note 4, Arts. 6 and 7; GDPR, cit. *supra* note 18, Arts. 5 and 6.

<sup>24</sup> Directive 95/46, cit. *supra* note 4, Art. 7; GDPR, cit. *supra* note 18, Art. 6.

<sup>25</sup> Directive 95/46, cit. *supra* note 4, Art. 6(1)(c); GDPR, cit. *supra* note 18, Art. 5(1)(b).

<sup>26</sup> Directive 95/46, cit. *supra* note 4, Arts. 10 and 11; GDPR, cit. *supra* note 18, Arts. 13 and 14.

<sup>27</sup> Directive 95/46, cit. *supra* note 4, Art. 12(b); GDPR, cit. *supra* note 18, Art. 17.

<sup>28</sup> Directive 95/46, cit. *supra* note 4, Art. 12(a); GDPR, cit. *supra* note 18, Art. 15.

Underpinning this legal framework are hybrid normative objectives: an economic objective, and a rights-based objective. From the outset, the EU data protection regime has sought to achieve the free flow of personal data between Member States.<sup>29</sup> Indeed, the legal basis for the 1995 Data Protection Directive was the ‘catch-all’ internal market provision for harmonisation, Article 100a EEC (now Article 114 TFEU).<sup>30</sup> However, this free flow of personal data could only be achieved by ensuring that Member States offered an adequate, and harmonised, level of fundamental rights protection to individual data subjects. Data protection’s economic and fundamental rights objectives are therefore mutually reinforcing.

## **2.2. The normative concerns of data protection and competition law**

### *Recognising divergence in scope and method*

The competition law provisions apply to ‘undertakings’, that is any entities engaged in economic activity.<sup>31</sup> Undertakings are prohibited from colluding to restrict competition under Article 101 TFEU, from abusing a dominant position under Article 102 TFEU, and from engaging in a concentration that significantly impacts upon effective competition pursuant to the EU Merger Regulation (EUMR).<sup>32</sup> Competition law, therefore applies to all economic activity. The scope of data protection law can thus be distinguished as it, firstly, only applies to the activity of personal data processing (and not other economic activity), and, secondly, it applies irrespective of whether the personal data processing is an economic or non-economic activity.<sup>33</sup>

The nature of the harm that data protection and competition law seek to address can also be distinguished. Competition law seeks to avoid economic harm, namely a negative impact on the parameters of price, quality, choice and innovation which affect efficiency or consumer welfare. While data protection law can also prevent such economic harm (for instance, by tackling information and power asymmetries), this is not the sole objective of the data protection rules. These rules also seek to prevent harm to fundamental rights, such as privacy, non-discrimination and freedom of association. There are therefore many circumstances in which data protection and competition law will have no mutual influence. For instance, even if an undertaking’s data processing policy complies with competition law, it may entail a violation of the right to privacy. Equally, not all competition law concerns are data protection concerns: for instance, personal data processing plays no role in many markets.

It is also important to acknowledge that the methods employed in each field are distinct and, in this regard, data protection law appears more akin to consumer protection law. Ohlhausen and Okuliar distinguish between competition law and consumer protection law by suggesting that ‘antitrust laws are focused on broader macroeconomic harms, mainly the maintenance of efficient price discovery in markets, whereas the consumer protection laws are preoccupied with ensuring the

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<sup>29</sup> The free flow of personal data was ancillary to trade in other goods and services and personal data was not viewed as an object of trade in its own right. COM (90) 314 final, Communication on the protection of individuals in relation to the processing of personal data in the Community and Information Security, 2.

<sup>30</sup> Lynskey, *The Foundations of EU Data Protection Law* (Oxford, 2015), pp. 46-89.

<sup>31</sup> Joined Cases C-180 to 184/98, *Pavlov*, EU:C:2000:428, para. 74. Certain provisions of the GDPR also apply to ‘undertakings’, such as ‘binding corporate rules’ (Art. 47) and ‘general conditions for imposing administrative fines’ (Art. 83).

<sup>32</sup> O.J. 2004, L 24/1. Regulation 139/2004 on the control of concentrations between undertakings.

<sup>33</sup> Case C-101/01, *Lindqvist*, EU:C:2003:596, para 31 and paras 37-48.

integrity of each specific contractual bargain'.<sup>34</sup> Similarly, Averitt and Lande argue that antitrust caters for the availability of consumer choice while consumer protection law provides consumers with the relevant information for the effective exercise of this choice.<sup>35</sup> From this perspective, data protection and competition law (like consumer protection and competition law<sup>36</sup>) intervene to influence market conduct at different points on the same spectrum. Competition law applies to correct market failures that are external to the individual, such as undertakings colluding, while data protection law applies to correct internal failings, such as information and power asymmetries that prevent individuals from controlling their personal data.

These divergences may explain why data protection and competition law have been applied concurrently to date. For instance, in *Asnef-Equifax*<sup>37</sup> the Court considered whether banks restricted competition by exchanging information about the solvency of potential borrowers. The Court declared that 'any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law'.<sup>38</sup> The Commission took a similar stance in its merger decisions in *Google/DoubleClick*<sup>39</sup> and *Facebook/WhatsApp*,<sup>40</sup> refusing to take into consideration the potential data protection implications brought about by the merging of the parties respective datasets. For example, the Commission stated in *Google/DoubleClick* that its decision referred 'exclusively to the appraisal of this operation with Community rules on competition'.<sup>41</sup> Thus, both the Commission and the Court appear to exclude data protection considerations from the application of competition law.

This paper suggests that these findings do not – and should not – preclude data protection from influencing competition law. This is for two reasons. First, in these cases, the EU Charter was not invoked and there was no discussion of the external influence of data protection law on competition law. This issue will be developed in Section 4. Secondly, such statements fail to recognise that the level of data protection offered to individuals is also subject to competition. Thus, even the aspects of data protection law that ostensibly relate to non-economic concerns – such as the conditions governing the processing of sensitive personal data – may be parameters of competition. Data protection law can help competition law judge the extent of such competition.

#### *Competition on data protection conditions*

Undertakings compete to provide the 'best' goods and services to consumers. It is standard economic practice to differentiate between the offerings of undertakings on

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<sup>34</sup> Ohlhausen and Okuliar, op. cit. *supra* note 12, 121.

<sup>35</sup> Averitt and Lande, "Using the 'consumer choice' approach to antitrust law", (2007) 74 *Antitrust Law Journal*, 176.

<sup>36</sup> Albers-Llorens, "Competition and Consumer Law in the European Union: Evolution and Convergence", (2014) *Yearbook of European Law*, 1. The processing of personal data may also raise issues of unfair competition, the harmonisation of which by EU law has been limited to consumer protection, namely protecting consumers against misleading marketing practices. Stucke, "The Court of Justice and the Unfair Commercial Practices Directive", (2015) CMLRev 724.

<sup>37</sup> Case C-238/05, *Asnef-Equifax*, EU:C:2006:734.

<sup>38</sup> *Ibid.*, para. 63.

<sup>39</sup> Case COMP/M.4731, *Google/DoubleClick*.

<sup>40</sup> Case COMP/M.7217, *Facebook/WhatsApp*.

<sup>41</sup> *Google/DoubleClick*, cit. *supra* note 39, point. 368.



the basis of a number of competitive parameters: price, choice, quality and innovation.<sup>42</sup> In *Post Danmark I*<sup>43</sup> the Court stated that:

‘Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation’.<sup>44</sup>

There is now a growing consensus that consumer decision-making may be influenced by the level of ‘privacy’ offered to individuals when acquiring goods or services. Authors have thus argued that undertakings can engage in ‘competition on privacy’,<sup>45</sup> with such competition viewed as an element of competition on quality.<sup>46</sup>

While it is important to recognise ‘competition on privacy’ in the digital environment, we suggest that the concept of ‘competition on data protection’ is preferred in the EU context. Data protection and privacy are heavily overlapping yet distinct concepts. While data protection law incorporates informational privacy, it does not incorporate aspects of privacy such as intrusions on physical seclusion, for instance. Moreover, aspects of data protection law – such as its unconditional application to personal data in the public domain, or the rights it grants, such as rights of access to data, data security standards and the (new) right to data portability<sup>47</sup> – are not captured by ‘privacy’. References to ‘competition on data protection’ should therefore be understood as representing the multitude of factors regulated by data protection law that may influence consumer decision-making including, but not limited to, privacy concerns.

This overlap in material scope – competition on data protection – is the starting point for our proposal that data protection law can act as a normative benchmark for competition law. Moreover, in addition to this material overlap, both policies also share common objectives. These common objectives lend further support to the case for their coherent application when both policies are engaged by a competitive practice.

#### *Common objectives*

Data protection should act as a normative benchmark for competition law, and the two policies should be applied in a holistic manner, when their material scope intersects. The fact that both policies share common objectives lends support to such a holistic approach: both promote market integration, seek to protect individuals, and tackle power asymmetries.

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<sup>42</sup> O.J. 2004, C 31/5. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, point 8; O.J. 2004, C 101/97. Guidelines on the application of Article 81(3) of the Treaty, point 21; Enforcement Guidance on Article 102 TFEU, cit. *supra* note 11, point 5.

<sup>43</sup> Case C-209/10, *Post Danmark I*, EU:C:2012:172.

<sup>44</sup> *Ibid.*, para. 22. See also the references to these competitive parameters in Case C-67/13, *CB*, EU:C:2014:2204, para. 51; Case C-382/12, *MasterCard*, EU:C:2014:2201, para. 93; and Case C-413/06 P, *Bertelsmann*, EU:C:2008:392, para. 121.

<sup>45</sup> Ohlhausen and Okuliar, op. cit. *supra* note 12, 36; Kimmel and Kestenbaum, “What’s Up with WhatsApp? A Transatlantic View on Privacy and Merger Enforcement in Digital Markets”, (2014) *Antitrust*, Fall, 51; Tucker, op. cit. *supra* note 12, 4.

<sup>46</sup> Kimmel and Kestenbaum, op. cit. *supra* note 45, 53; Grunes and Stucke, “No Mistake about it: The Important Role of Antitrust in the Era of Big Data”, (2015) University of Tennessee Legal Studies Research Paper No. 269, 4.

<sup>47</sup> GDPR, cit. *supra* note 18, Art. 20.

Both data protection and competition law seek to advance market integration. As mentioned above, the Data Protection Directive was enacted as an instrument of market integration. The GDPR shall further this market integration objective by replacing the Directive with a Regulation to ensure more substantive harmonisation and introducing a new EU agency to ensure uniform data protection enforcement and thus procedural harmonisation.<sup>48</sup> Competition law promotes market integration by preventing private parties from erecting barriers to trade between Member States through mechanisms such as territorial allocation, national discrimination, and restrictions on exports or on parallel trade.<sup>49</sup> Data protection law is therefore an instrument of positive integration while competition law works largely through negative integration.

Similarly, both share a concern for the welfare of the individual. Competition law is concerned about individuals as aggregate consumers. The basic assumption of competition law is that competition between undertakings increases consumer welfare: consumers prefer better goods and services, and undertakings succeed in the market by offering them.<sup>50</sup> Data subjects – the direct beneficiaries of data protection law – are natural persons and thus include consumers. If consumers are sensitive to data protection conditions,<sup>51</sup> meaningful competition can enhance data protection and foster it as a competitive advantage.<sup>52</sup> While data protection will provide baseline protection for individuals, competition can enhance the options available to consumers.<sup>53</sup> Although ‘informational self-determination’ is not the sole concern, or an absolute objective, of data protection law, the data protection regime displays a normative preference for individual control over personal data.<sup>54</sup> This is very relevant for competition law since it is this control that allows consumers to express their preferences accurately. Therefore, data protection and competition law are in normative agreement: good data protection conditions facilitate individual control over personal data and more meaningful competition between undertakings on the basis of such conditions.

Finally, both fields of law are concerned with power asymmetries. The individual is often in a weak position relative to undertakings. Data protection therefore protects the individual throughout the data processing cycle, by ensuring that there is a legal basis for processing, data protection safeguards are respected and that the individual can exercise rights vis-à-vis the data controller at all times. Competition law also seeks to safeguard consumers against undertakings’ market power as it is market power which allows undertakings to deviate from consumer preferences.<sup>55</sup> Therefore, when undertakings maintain or reinforce their position vis-a-vis individuals in one

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<sup>48</sup> GDPR, cit. *supra* note 18, Art. 68(1).

<sup>49</sup> See Joined Cases 56 & 58/64, *Consten*, EU:C:1966:41.

<sup>50</sup> The Court has acknowledged that competition law safeguards both the interests of the consumer and competition ‘as such’, and that there is a link between the two. See Joined Cases 501, 513, 515 & 519/06 P, *GlaxoSmithKline*, EU:C:2009:610 and *Post Danmark I*, cit. *supra* note 43, para. 20.

<sup>51</sup> Authors comment upon a so-called ‘privacy paradox’: while many users express concerns about privacy, few actually act on them for reasons discussed *infra*. See Cofone, “The Value of Privacy: Keep the Money Where the Mouth Is”, RILE Working Paper Series No 2014/15.

<sup>52</sup> Preliminary Opinion of the EDPS, cit. *supra* note 8, 33.

<sup>53</sup> The EDPS comments that ‘[c]ompetition and the possibility to change the service one is using is the single most effective power of a consumer to influence the market of services available to them’. Opinion of the EDPS, cit. *supra* note 8, 12.

<sup>54</sup> See Lynskey, op. cit. *supra* note 30, pp. 177-229.

<sup>55</sup> Therefore, competitive parameters are usually mentioned in relation to definitions of market power, see the references *supra* note 44.

field of law, this may have consequences for the other: less control over personal data may result in (more) market power, and market power may allow undertakings to impose unfair data processing conditions on individuals.<sup>56</sup> The protection offered to individuals by both fields of law is thus mutually reinforcing.

Data protection and competition law are therefore distinct but intertwined fields of law that share several normative concerns. These shared normative concerns have prompted a call from the EDPS for the competent authorities in each field to work together,<sup>57</sup> notably through a proposed Digital Clearing House.<sup>58</sup> The next section will analyse situations where competition authorities can take the lead in this process by allowing data protection law to act as a normative yardstick against which non-price competitive parameters can be reliably measured.

### 3. A Little (Normative) Help from Data Protection Law

As undertakings can compete on data protection, it follows that they may also distort such competition through anti-competitive behaviour. This section suggests that data protection can have a normative influence in assessing such anti-competitive behaviour. This claim is developed in two stages. First, it illustrates that substantive assessments of competition on data protection must incorporate an assessment of how personal data is acquired. Secondly, it suggests that competition law lacks the normative tools to assess non-price parameters in competition on data protection. Data protection law provides guidance to competition law on how to make these competitive assessments, and is therefore internalised by competition law rules.

#### 3.1. Competition on data protection and market power

##### *Determining market power based on personal data*

Whether personal data can lead to market power in certain goods and services is currently the subject of much debate by competition law experts.<sup>59</sup> Little attention has however been paid to the (reverse) question of how market power in goods and services may influence competition on data protection. Personal data is now a commodity that is as valuable – if not more valuable – than those goods and services.<sup>60</sup> Competition for the acquisition of personal data must therefore be distinguished from competition for other goods and services where it serves as an input.<sup>61</sup> In other words, the relevant question (for our purposes) is not whether personal data allows undertakings to gain market power in ancillary markets, but how

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<sup>56</sup> ‘Where there is a limited number of operators or when one operator is dominant, the concept of consent becomes more and more illusory’, Preliminary Opinion of the EDPS, cit. *supra* note 8, 35.

<sup>57</sup> Opinion of the EDPS, cit. *supra* note 8, 8.

<sup>58</sup> *Ibid.*, 15.

<sup>59</sup> See, for instance, Evans, ‘Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms’, (2016) University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 753, 23; Gal and Rubinfeld, op. cit. *supra* note 15, 36; Manne and Sperry, ‘The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework’, (2015) 2 *CPI Antitrust Chronicle*, 8; Sokol and Ma, ‘Understanding Online Markets and Antitrust Analysis’, July 2016, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2813855](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2813855)>.

<sup>60</sup> The EDPS comments that ‘control of data could be the missing element which explains the remarkable inflation in the market value of successful companies in the digital section’. Opinion of the EDPS, cit. *supra* note 8, 6.

<sup>61</sup> *Ibid.*

power in ancillary markets influences the decision of individuals to agree to personal data processing.

It is therefore necessary to begin by differentiating this inquiry from the current focus on whether personal data contributes to market power in other goods and services. A joint report of the French and German NCAs states that ‘the issue of data possibly contributing to market power is most likely to arise and is, in many respects, the most interesting one from a competition standpoint’.<sup>62</sup> This is because merger control requires an assessment of the market power resulting from a concentration and concentrations may involve undertakings with access to significant personal data sets. The issue of whether personal data sets can constitute a barrier to entry, or otherwise lead to market power, also arises in the context of Articles 101 and 102 TFEU. This issue is particularly contentious in the data-driven digital economy, as dynamic competition may lead to the replacement of existing markets by new markets through waves of creative destruction.<sup>63</sup> This paper does not seek to contribute to this contentious debate. The definition of relevant markets for ancillary goods and services, and whether personal data constitutes a barrier to entry in such markets, are factual questions to be settled on a case-by-case basis. In this context, data protection law merely provides a descriptive legal background for this assessment.

### *Two-sided markets*

The flourishing doctrine on two- (or multi-) sided markets is also of limited relevance when assessing the extent to which undertakings compete on data protection.<sup>64</sup> Two-sided markets are generally characterised by indirect feedback effects between the two sides: the more users on one side, the more users on the other. This theory has been used to understand markets where online services are offered for free, like search engines and social networks: it has been postulated that undertakings do not profit directly from the market on the user side, but from the market on the advertising side.<sup>65</sup> Services that are free at the point of user access are subsidised to attract users as a result of the positive feedback between the number of users and the advertising sold. Dynamic competition in these ‘markets for attention’ can, according to Evans, easily upset market power by consumers taking their attention elsewhere.<sup>66</sup>

This theory attributes an important albeit limited role to personal data. It is often stated that personal data is the currency that pays for ‘free’ services in two-sided markets.<sup>67</sup> However, this data is mostly seen as a vehicle for targeted advertising, leading competition analysis to focus solely on the advertising market:<sup>68</sup> the viability of the undertaking depends on such advertising, and the revenue from this advertising

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<sup>62</sup> Joint Report of the German and French NCAs, cit. *supra* note 9, 25. Indeed, most of the joint report is dedicated to this issue. See, with the same emphasis, Preliminary Opinion of the EDPS, cit. *supra* note 8, 33; Commissioner Vestager, cit. *supra* note 9.

<sup>63</sup> Joint Report of the German and French NCAs, cit. *supra* note 9, 29.

<sup>64</sup> See, in general, Evans, op. cit. *supra* note 59; Stucke and Ezrachi, “When Competition Fails to Optimise Quality: A Look at Search Engines”, (2015) Research Paper No 268; O’Brien and Smith, op. cit. *supra* note 15.

<sup>65</sup> Stucke and Ezrachi, op. cit. *supra* note 64, 7-8.

<sup>66</sup> Evans, op. cit. *supra* note 59, 28.

<sup>67</sup> Opinion of the EDPS, cit. *supra* note 8, 6.

<sup>68</sup> *Ibid.* Providers of free services may thus escape being considered in a dominant position, as the market for advertising may be larger than that of the free service. Gebicka and Heinemann, “Social Media & Competition Law”, (2014) 37(2) *World Competition*, 155-156.

would, in turn, subsidise the free services offered.<sup>69</sup> For instance, in the *Google/DoubleClick* merger, the Commission did not analyse the impact of the concentration on competition for free services thereby ignoring the role of data protection on the side of the free service.<sup>70</sup> Even when competition on the market for free services is analysed, it is only considered in light of its consequences for the advertising side – and not for competition on data protection. For instance, in *Facebook/Whatsapp* the Commission acknowledged that ‘competition on privacy’ exists. It stated that ‘apps compete for customers by attempting to offer the best communication experience’, including ‘privacy and security, the importance of which varies from user to user but which are becoming increasingly valued, as shown by the introduction of consumer communications apps specifically addressing privacy and security issues’.<sup>71</sup> Hence, the Commission observed that following the announcement of Facebook’s acquisition of WhatsApp many users changed services due to privacy concerns.<sup>72</sup>

Despite these empirical findings that competition on data protection did exist for these free services,<sup>73</sup> the Commission did not consider the effects of the merger on such competition. While the parties were not actual competitors and their activities did not overlap on the relevant markets,<sup>74</sup> the Commission did investigate the effects of the merger on advertising: namely, the possible introduction of online advertising to WhatsApp, and whether Facebook could improve its advertising based on WhatsApp data.<sup>75</sup> The Commission was thus concerned with whether Facebook could improve its competitive position in the advertising market.<sup>76</sup> The Commission even noted that the extension of online advertising to WhatsApp would be seriously limited by ‘dissatisfaction among the increasing number of users who significantly value privacy and security’.<sup>77</sup> Yet, despite this recognition of the importance of data protection for consumers, the Commission did not consider the effects of combined activities for the competition on data protection – namely, as discussed below, whether Facebook could alter WhatsApp’s data protection conditions to the detriment of the consumer and remove an innovative constraint on its own data protection conditions.

#### *Competition for the acquisition of personal data*

The role of personal data emphasised in the context of two-sided markets is therefore unduly limited. The value of personal data goes beyond its use as an input for advertising: it is the raw material from which multiple digital business models may be fashioned.<sup>78</sup> We therefore suggest that it may be relevant and necessary to investigate

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<sup>69</sup> Stucke and Ezrahi, op. cit. *supra* note 64, 15. Much of the reticence to engage with free services comes from the (disputed) idea that they are always positive for consumer welfare. Newman, “Antitrust in Zero-Priced Markets: Foundations”, (2014) University of Memphis Research Paper No. 151., 49.

<sup>70</sup> Preliminary Opinion of the EDPS, cit. *supra* note 3, 27.

<sup>71</sup> *Facebook/Whatsapp*, cit. *supra* note 40, point 87.

<sup>72</sup> *Ibid.*, footnotes 79 and 174.

<sup>73</sup> Certainly in the communication services offered by WhatsApp, but the change by users following Facebook’s acquisition shows that consumers were also aware of that factor in the social network services offered by Facebook.

<sup>74</sup> Only Facebook was active in the market for online advertising services and they were not considered close competitors in the free services provided. See *Facebook/Whatsapp*, cit. *supra* note 40, points 107, 158, and 165.

<sup>75</sup> *Ibid.*, footnote 167. Indeed, one of the reasons why the Commission determined that they were not competing was because of their different privacy policies. *Ibid.*, footnote 102.

<sup>76</sup> *Ibid.*, point 187.

<sup>77</sup> *Ibid.*, point 174.

<sup>78</sup> Opinion of the EDPS, cit. *supra* note 8, 6.

whether a market for personal data acquisition exists as a distinct market. Facebook paid WhatsApp USD 19 billion for its service, despite the Commission's finding that the acquisition would not influence the advertising market. Somewhat belatedly, the Commission now recognises:

'The issue seems to be that it's not always turnover that makes a company an attractive merger partner. Sometime, what matters are its assets. That could be a customer base or even a set of data'.<sup>79</sup>

Personal data can be acquired by a merger, or even traded as a commodity in dedicated markets,<sup>80</sup> but at some point it will have to have been obtained from data subjects. The acquisition of personal data is thus distinct from personal data's potential role as a barrier to entry in ancillary markets or from its role on the revenue/advertising side in two-sided markets.

Broadly speaking, competition for the acquisition of personal data may be driven in two distinct ways: there may be competition on the basis of the data protection offered, or competition on the basis of the goods and services associated with the data processing. In most instances, associated goods and services are viewed as the primary driver of competition with competition on data protection treated as a secondary aspect of that competition (like the privacy concerns in the market for communication services in *Facebook/WhatsApp*). Thus, authors treat poor privacy as degradation of the quality of the good or service provided.<sup>81</sup> Nonetheless, competition on data protection might also be an independent factor for the acquisition of personal data.

The extent of competition on data protection is an empirical question: it depends on whether consumers value such protection when they decide whether to consent (directly or through associated contracts) to personal data processing. This is part of market definition. Consumers naturally also value the associated good or service, and the definition of both markets coexists insofar as they satisfy particular demands: a market for the good or service, based on consumer preferences, and a market for the acquisition of personal data, based on its value for undertakings. These two markets are nevertheless connected, as the demand for the good or service may relieve undertakings from competitive constraints on the data protection conditions offered. Many undertakings in a digital economy thus compete for valuable personal data, each one through their own particular service and the power they hold in relation to it. This is the reverse of personal data constituting a barrier in the markets for other goods and services: here, it is market power in those ancillary markets that would condition the acquisition of personal data.

### *Imperfect choice*

Is it possible for competition for goods and services to completely subsume competition for the acquisition of personal data based on data protection? This would occur if consumers did not care at all about data protection. That was ostensibly the case in *Asnef-Equifax* since the Court did not consider whether borrowers would be sensitive to banks sharing information about their solvency. Furthermore, the

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<sup>79</sup> Commissioner Vestager, "Refining EU Merger control system", 10 March 2016, <[https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system\\_en](https://ec.europa.eu/commission/2014-2019/vestager/announcements/refining-eu-merger-control-system_en)>. The Commission and NCAs are thus considering revising their notification thresholds to capture such mergers even if the entities involved generate low turnovers at the time.

<sup>80</sup> Opinion of the EDPS, cit. *supra* note 8, 6.

<sup>81</sup> See the references *supra* note 46.

provision of free services accompanied by incomprehensive or largely ignored data processing conditions might lead to the impression that data protection is not a genuine concern for consumers.<sup>82</sup>

While the answer to this query would depend on an empirical assessment, this impression that data protection is not a genuine concern for consumers might be misleading. Behavioural evidence regarding the ‘free effect’<sup>83</sup> and the power of defaults<sup>84</sup> suggests that consumers’ interest in data protection is distorted by other factors. These phenomena may contribute to the existing ‘privacy paradox’: while many users express concerns about privacy, few actually act on them.<sup>85</sup> However, even those few are enough to raise competitive concerns. Not all consumers care about the same things, and data protection might particularly affect the marginal consumers which keep market power in check.<sup>86</sup> Those consumers might also constitute a separate market governed by competition on data protection.<sup>87</sup>

Moreover, undertakings may already be exercising their market power to foment consumers’ supposed lack of interest for data protection: competition on this parameter may be suppressed and therefore the current data protection conditions offered do not reflect the competitive level. An analogy could be made to situations where an undertaking has already exercised its power to impose high prices, and thus the current price does not reflect a competitive price.<sup>88</sup> As explored below, high prices can be likened to detrimental data protection conditions such as excessive data retention, inadequate data security, or diminished control over personal data. In other words, impenetrable processing conditions offered on a take-it-or-leave-it basis might result from market power, particularly in relation to associated goods and services. Therefore, while competition on data protection may appear idealistic, it may be market power that is preventing such competition from emerging.<sup>89</sup>

### **3.2. Data protection as a normative yardstick**

#### *The need for normative guidance*

It has been argued by some authors that ‘competition on privacy’ is an aspect of competition for certain goods and services so that anti-competitive behaviour that harms privacy can be equated to a degradation of quality in these goods and services.<sup>90</sup> The value of this work is that it places harm to privacy within competitive parameters, thereby avoiding the objection that competition law is used to achieve

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<sup>82</sup> Manne and Sperry, op. cit. *supra* note 59, 5.

<sup>83</sup> Gal and Rubinfeld, op. cit. *supra* note 15, 9 and Newman, op. cit. *supra* note 69, 31.

<sup>84</sup> Stucke and Ezrachi, op. cit. *supra* note 64, 35.

<sup>85</sup> Cofone, op. cit. *supra* note 51.

<sup>86</sup> See O.J. 1997, C 372. Commission Notice on Market Definition, point 17. On adapting market definition to tests based on quality, see Gebicka, op. cit. *supra* note 69, 158, and Stucke and Ezrachi, “The Curious Case of Competition and Quality”, (2015) 1 *Journal of Antitrust Enforcement*, 4.

<sup>87</sup> All that it is necessary is for those consumers to be able to be effectively discriminated – and, by definition, personal relates to data subjects that are identified or identifiable. O.J. 1997, C 372. Commission Notice on Market Definition, point 43. Privacy-enhancing technologies, as referred in *Facebook/WhatsApp*, would constitute an easy way to set such consumers apart. See *Facebook/WhatsApp*, cit. *supra* note 40, point 87 and footnote 79.

<sup>88</sup> When defining markets for the purpose of investigating abuses of dominance, the Commission states that ‘the fact that the prevailing price might already have been substantially increased will be taken into account’. Commission Notice on Market Definition, cit. *supra* note 87, point 19.

<sup>89</sup> Potential competition is sufficient to trigger competition rules, as demonstrated in *IMS* in relation to a product which was only used internally. Case C-418/01, *IMS*, EU:C:2004:257, para. 44.

<sup>90</sup> See *supra* notes 45 and 46.

non-competitive aims. These authors nevertheless treat ‘competition on privacy’ as normatively neutral: the quality of privacy would be no different than the quality of any other goods or service. To some extent, controlling market power will be beneficial for competition irrespective of the character of the product. However, by failing to ‘reach out’ to data protection law for normative guidance on how to assess anti-competitive behaviour, ‘competition on privacy’ is also open to criticism.

Critics have suggested that ‘competition on privacy’ does little to help disentangle alleged ‘anticompetitive quality effects from simultaneous (neutral or pro-competitive) price effects’,<sup>91</sup> particularly if consumer preferences are split between privacy and a good and service provided against the disclosure of personal data.<sup>92</sup> In other words, the degradation of quality can be balanced by improvements in other competitive parameters, thereby casting doubt on whether a competition authority should investigate such a practice. Moreover, the exact point when this degradation in quality should trigger intervention is hard to determine: what if, for instance, despite the degradation in privacy the undertaking still offered a superior quality product overall?<sup>93</sup> Sceptics thus fear that there are no ‘limiting principles’ once privacy harm is pursued.<sup>94</sup> This criticism of ‘competition on privacy’ results from the absence of a concrete benchmark on which to base a decision to intervene (or not),<sup>95</sup> and may well lead to paralysis.

A normative framework is needed to help guide this analysis. Consumer decisions reflect whether competition exists, but they cannot determine whether particular conduct is anti-competitive. For example, if consumers are charged high prices as a result of collusion, abuse or a merger, they would still pay what they believe a good or service is worth to them.<sup>96</sup> It is the normative framework of competition law that allows these situations to be sanctioned, and thus treated differently to naturally high market prices. If the agreement to permit personal data processing had a price it would fit more easily within this framework: many goods and services compete on non-price parameters, but this is reflected in the price (for instance, a decrease in quality for a given lower price).<sup>97</sup> Personal data, however, is often processed in exchange for goods or services that are free or do not reflect the value of the data.<sup>98</sup> As such, competition law is bereft of normative tools to assess how data protection conditions reflect non-price parameters.

Data protection law can provide competition law with the normative tools it lacks. Legitimate and lawful data processing must have a legal basis and respect specified safeguards. Where personal data processing relies on consent as a legal basis, data

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<sup>91</sup> Manne and Sperry, op. cit. *supra* note 59, 3.

<sup>92</sup> *Ibid.*, 6.

<sup>93</sup> Stucke and Ezrachi, op. cit. *supra* note 64, 40.

<sup>94</sup> Ohlhausen and Okuliar, op. cit. *supra* note 12, 40.

<sup>95</sup> The idea of ‘competition on privacy’ is an attempt to solve this conundrum by implicitly resorting to the normative content of the right to privacy. However, authors do not make anti-competitive behaviour dependent on a breach of privacy law nor, as mentioned above, is data protection synonymous with privacy.

<sup>96</sup> That is demonstrated in the demand curve modelled by economists for any market.

<sup>97</sup> Stucke and Ezrachi, op. cit. *supra* note 86, 2.

<sup>98</sup> We are referring in the latter case to the disclosure of personal data often required for online transactions without improving them or lowering their price commensurate with the data’s value. Commissioner Vestager has stated that consuming free services against the provision of data ‘doesn’t have to be a problem, as long as people are happy that the data they share is a fair price to pay for the services they get in return’. “Making data work for us”, 9 September 2016, <[https://ec.europa.eu/commission/2014-2019/vestager/announcements/making-data-work-us\\_en](https://ec.europa.eu/commission/2014-2019/vestager/announcements/making-data-work-us_en)>.



processing conditions are akin to any other market offer. Terms offered to individuals – such as the level of data security provided, the extent and purposes for which personal data will be processed, and the information and control provided over personal data – are all likely to be improved by competition, or to deteriorate in the presence of market power. Furthermore, infringements of the rights granted by data protection law provide a clear negative normative marker: these are situations which are considered normatively censurable regardless of consumer preferences.

Data protection law can therefore serve as a normative yardstick for assessing competition on data processing in all its dimensions – not only quality<sup>99</sup> but also choice and innovation.<sup>100</sup> This claim is predicated on competition law being open to normative influence from other fields of law. Yet, such normative influence is possible as competition law is a member of the EU law family: its values are partly its own, partly those of its siblings. In pursuing their shared objectives, both fields of law should be applied in a coherent and mutually reinforcing manner. As illustrated below, national law and intellectual property law also exert such a normative influence on competition law. There is no reason to deny data protection such a role. While critics may suggest that this instrumentalises competition law to achieve data protection law, the ‘internal’ role proposed for data protection in this section is compatible with the aims of competition law and, indeed, merely helps competition law to achieve these aims in circumstances where price is not the only relevant competitive parameter.

#### *Article 101 TFEU*

Agreements between undertakings to set prices or divide markets, and thereby stop competing, are prohibited as restrictions by object under Article 101 TFEU.<sup>101</sup> If undertakings collude by aligning their data protection conditions so as to effectively end competition between them in relation to this protection,<sup>102</sup> Article 101 TFEU would prohibit such conduct. Such alignment would, like exchanges of information and other restrictive forms of coordination, remove ‘the degree of uncertainty as to the operation of the market’.<sup>103</sup> Article 101 TFEU could therefore apply to industry efforts to self-regulate competition on data protection, such as agreements on personal data collection and sharing. Competition law could capture the alignment of data protection conditions in this way without any apparent input from data protection law: the reduction of uncertainty such alignment of data protection conditions would entail would be sanctioned in the same way as the alignment of any other competitive parameters.

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<sup>99</sup> The EDPS comments that ‘[p]rivacy and standards of data protection and data security are parts of this quality parameter’. Opinion of the EDPS, cit. *supra* note 8, 13.

<sup>100</sup> This even applies to price in relation to discrimination, an area where personal data might play an important role. Opinion of the EDPS, cit. *supra* note 8, 6, and Miller, “What do we worry about when we worry about price discrimination? The law and ethics of using personal information for pricing”, (2014) *Journal of Technology and Policy* 41, 70. Competition law has the normative tools to deal with discrimination based on personal data if it is outright prohibited (as with discrimination based on nationality) or if the focus is on its effects on market power. However, if harm to consumers must be assessed (such as with potentially exploitative individual price discrimination) this will be equally difficult without the normative indications of data protection law. See Manne and Sperry, op. cit. *supra* note 59, 6.

<sup>101</sup> *CB*, cit. *supra* note 44, para. 51.

<sup>102</sup> Concluding that private incentives for developing privacy standards also involve the risk of anti-competitive collusion, see O’Brien and Smith, op. cit. *supra* 17, 38.

<sup>103</sup> Case C-8/08, *T-Mobile*, EU:C:2009:343, para. 35.

However, data protection law can also serve as a defining benchmark for restrictions by object pursuant to Article 101 TFEU. Restrictions by object are defined as ‘by their very nature ... harmful to the proper functioning of normal competition’.<sup>104</sup> Competition law assessments of what constitutes ‘normal competition’ may require a complex assessment of how certain markets should operate and can be influenced by other fields of law that regulate or influence such competition.<sup>105</sup> For instance, in *Allianz Hungária*<sup>106</sup> when assessing whether an agreement between insurance companies and dealers was restrictive by object, the Court used national law as its benchmark to determine the degree of independence required of dealers vis a vis insurance companies according to the ‘the proper functioning of the car insurance market’.<sup>107</sup> Without this guidance from national law, it would be impossible to know whether dealers were supposed to act in the interests of insurance companies or consumers.

This reliance by the Court on national law illustrates that when Article 101 TFEU does not have the normative tools required to assess competitive parameters, it can reach out to other areas of law for normative guidance. In essence, *Allianz Hungária* shows that certain levels of quality, choice, or innovation to which consumers are entitled can be determined by norms outside of competition law.<sup>108</sup> This is consistent with the general logic of Article 101 TFEU: anti-competitive agreements are null and void and give rise to civil liability<sup>109</sup> to allow background conditions that have been distorted by force of agreement to reassert themselves.<sup>110</sup>

Data protection law can be deployed in an analogous manner as it is this law that specifies the desired level of data protection for consumers. Agreements between undertakings that infringe data protection law would come under particular scrutiny,<sup>111</sup> since it is clear that they fall below that level.<sup>112</sup> Nevertheless, as set out above, it would always be necessary that the infringement hinders competition on data protection – as it is in relation to the alignment of data protection conditions. This defuses potential objections that Article 101 TFEU would be used to enforce compliance with data protection rules (ruled out by the Court in *Asnef-Equifax*). Although it is not their main purpose, data protection rules also provide the normative

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<sup>104</sup> *CB*, cit. *supra* note 44, para. 51.

<sup>105</sup> This was the case with the exchange of information in *Asnef-Equifax*, which was not considered restrictive by object for reasons related to the working of the credit market and where the Court mentioned the existence of similar schemes in other Member States. *Asnef-Equifax*, cit. *supra* note 37, paras. 46-48.

<sup>106</sup> Case C-32/11, *Allianz Hungária*, EU:C:2013:160.

<sup>107</sup> *Ibid.*, para. 47.

<sup>108</sup> Opinion of the EDPS, cit. *supra* note 8, footnote 83. The German and French NCAs also note the influence of national law in *Allianz Hungaria*, closely followed by the German case law that links abuse of dominance with ‘the laws regulating general conditions and terms of trade’. Joint Report of the German and French NCAs, cit. *supra* note 9, 23.

<sup>109</sup> Voidness is expressly set out in Article 101(2) TFEU, while liability for competition damages was first explored in relation to Article 101(1) TFEU. Case C-453/99, *Courage*, ECLI:EU:C:2001:465, para. 26.

<sup>110</sup> Thus, in *Genentech* the Court rejected that a licence agreement could restrict competition if it could be freely terminated. Case C-567/15, *Genentech*, ECLI:EU:C:2016:526, Para. 40

<sup>111</sup> Agreements that lead to a lower level of data protection without constituting an infringement of data protection law could also fall under Article 101 TFEU as restrictions by effect, similarly to the second kind of exploitation discussed in relation to Article 102 TFEU.

<sup>112</sup> Like horizontal price-fixing cartels, it can be said that such infringements are so likely to have negative effects on the parameters of data protection competition that it is redundant to prove those effects. *CB*, cit. *supra* note 44, para. 51.

framework for the processing of personal data for competitive purposes. Data protection infringement can thus fall outside ‘normal competition’.

#### *Article 102 TFEU*

Data protection law may play its biggest role as a normative yardstick under Article 102 TFEU, which prohibits, amongst others, ‘unfair purchasing or selling prices or other unfair trading conditions’. Article 102 TFEU therefore prohibits ‘exploitative’ abuses, whereby dominant undertakings charge consumers excessive prices or otherwise exploit them. The Court has equated excessive prices to deviations from the ‘economic value’ of a good or service.<sup>113</sup> The difficulty of determining the fair ratio between price and economic value has nevertheless raised a host of problems which have prevented exploitative abuses from being sanctioned and left many authors arguing that the prohibition of exploitative abuses should not be applied at all.<sup>114</sup> Describing the current understanding of exploitative abuses, Gal concludes that ‘it is unclear what the appropriate benchmark is in most circumstances’.<sup>115</sup> Data protection law can provide such a normative benchmark for identifying exploitation in relation to non-price parameters. This has been expressly acknowledged by the German and French NCAs, who observe in their joint report:

‘looking at excessive trading conditions, especially terms and conditions which are imposed on consumers in order to use a service or product, data privacy regulations might be a useful benchmark to assess an exploitative conduct’.<sup>116</sup> The EDPS has, in a similar vein, emphasised that fairness is a criterion of both exploitative abuses and personal data processing, and has suggested that its proposed Digital Clearing House should develop guidelines on harm to consumers resulting from abusive exploitation.<sup>117</sup>

There are two ways in which data protection provides a normative yardstick against which to judge exploitation in the context of personal data processing. In these circumstances, as under Article 101 TFEU, the exploitation would need to relate to competition on data protection. First, the failure to honour rights granted by data protection law, or the infringement of dedicated data protection safeguards, provide clear indications of exploitative conditions.<sup>118</sup> Second, a legal decrease in control over personal data or an increase in the extent of processing – for example, a wholesale change to the initial data processing conditions offered to individuals that users must accept in order to continue using an online service<sup>119</sup> – might be considered exploitative in the same way that a sudden and unjustified increase in price has been considered abusive.<sup>120</sup>

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<sup>113</sup> Case 27/76, *United Brands*, EU:C:1978:22, p. 250 and Gal, “Abuse of Dominance – Exploitative Abuses” in Lianos and Geradin (Eds), *Handbook on European Competition Law*, 13. Excessive prices could apply to disclosing personal data not commensurate with the service provided, as discussed in note 89 *supra*.

<sup>114</sup> See, for all, Gal, *op. cit. supra* note 113, 29.

<sup>115</sup> *Ibid.*, 30.

<sup>116</sup> Joint Report of the German and French NCAs, *cit. supra* note 9, 25.

<sup>117</sup> Opinion of the EDPS, *cit. supra* note 8, 15.

<sup>118</sup> Gebicka and Heinemann argue that Facebook might abusively exploit consumers in relation to the conditions governing the ‘protection of the information shared online’ and its ‘onerous deletion’. Gebicka and Heinemann, *op. cit. supra* note 68, 164-167.

<sup>119</sup> *Ibid.*, 163-164. The EDPS also notes the unfairness of these conditions. Opinion of the EDPS, *cit. supra* note 8, 13.

<sup>120</sup> Case 247/86, *Alsate*, EU:C:1988:469.

The German NCA initiated an investigation of Facebook alleging that Facebook has abused a position of dominance by exploiting consumers.<sup>121</sup> The press release issued by the German NCA, which is the only publicly available official document to date, states that the NCA is investigating suspicions that Facebook's conditions of use are in violation of data protection law, and that Facebook's use of 'unlawful terms and conditions could represent an abusive imposition of unfair conditions on users'.<sup>122</sup> It further states that the German NCA is investigating the connection between this infringement and Facebook's potential dominance.<sup>123</sup> Therefore, it is unclear whether the German NCA will attempt to connect exploitation with exclusion – that is to say, with the reinforcement of market power – or whether it will pursue the latter separately, as an exclusionary abuse of dominance.

As stated from the outset, market power and a worsening of data protection conditions can be mutually reinforcing. The Court has nevertheless established that the conditions of dominance and abuse must be interpreted separately, so that no causal relationship between them is required.<sup>124</sup> A dominant undertaking has a 'special responsibility' not to further distort competition,<sup>125</sup> regardless of whether exploitative conditions contribute to the dominant position or whether they are only made possible by it.<sup>126</sup> In short, an exploitative abuse based on a data protection infringement does not have to be linked with the acquisition or reinforcement of market power.

An exclusionary abuse might however be based on a data protection infringement: dominant undertakings are also under a special responsibility to only resort to 'competition on the merits'<sup>127</sup> and a data protection infringement represents a departure from such competition on the merits. Not all exclusionary abuses (even those involving the use of personal data) will need to resort to data protection law as a normative benchmark. For instance, an undertaking's refusal to grant competitors access to personal data might be considered abusive if it completely excludes competition from the market. An assessment of whether such conduct was exclusionary could be undertaken on the basis of existing case law relating to exclusionary abuses in the market for other goods and services without any normative input from data protection law.<sup>128</sup>

Exclusionary abuses may nevertheless also be assessed by reference to other fields of law, thereby paving the way for data protection law to be used as a normative benchmark. In *AstraZeneca*<sup>129</sup> the Court held that it was contrary to competition on

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<sup>121</sup> Bundeskartellamt, "Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules", 2 March 2016, <[http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02\\_03\\_2016\\_Facebook.html](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html)>.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> In *Hoffman-LaRoche* the Court declared that 'the interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted'. Case 85/76, *Hoffmann-La Roche*, ECLI:EU:C:1979:36, para. 91

<sup>125</sup> *Post Danmark I*, cit. *supra* note 43, para. 23, and Gal, op. cit. *supra* note 113.

<sup>126</sup> This does not mean that a causal relationship does not exist, only that the competition authority is dispensed from proving it in order to establish an abuse of dominance. A competition authority might nevertheless chose to prove so in order to reinforce the economic rationale of pursuing the abuse or the consequences for consumer welfare.

<sup>127</sup> *Post Danmark*, cit. *supra* note 43, para. 25.

<sup>128</sup> *IMS*, cit. *supra* note 89, paras. 38 and 40.

<sup>129</sup> Case C-457/10, *AstraZeneca*, EU:C:2012:770.

the merits to obtain an exclusive right – a patent – by deceiving public authorities.<sup>130</sup> A similar finding could be made if the acquisition of market power was tainted by a data protection infringement,<sup>131</sup> as may be the case in the German NCA’s investigation of Facebook.<sup>132</sup> This would not impose extra obligations on dominant undertakings to abide by data protection law, in the same way that *AstraZeneca* did not impose additional obligations on dominant undertakings in relation to intellectual property law, but simply clarifies ‘competition on the merits’ in light of the appropriate regulatory background.

Indeed, intellectual property law may provide a pertinent analogy to support the influence of data protection law on both exploitative and exclusionary abuses. Competition law treats the conferral of intellectual property rights as rewards for innovation. As such, competition authorities are generally reluctant to treat prices charged pursuant to those rights as exploitative or to pursue refusals to licence as exclusionary, even if consumers have no alternative, as this might chill incentives to innovate. Nevertheless, innovation is a competitive parameter and some abuses of dominance have concerned intellectual property. In such instances, intellectual property law has acted as a normative benchmark for competition law by allowing competition authorities to determine whether rewards for innovation are adequate by reference to intellectual property law.<sup>133</sup> Hence, the Court has deemed it exploitative to charge licence fees when the services protected by a trademark were not used.<sup>134</sup> Furthermore, as *AstraZeneca* illustrates, rewards are inappropriate – and thus abusive – when intellectual property rights are unlawfully acquired. Intellectual property law therefore provides normative guidance to competition law on the appropriate scope and regularity of intellectual property rights.<sup>135</sup> The conditions set by data protection law for the processing of personal data could be similarly imported into such Article 102 TFEU assessments.

### *Merger Control*

Finally, data protection law can be used as normative yardstick for assessing non-price competition in the context of merger control. Under the EUMR, a concentration might be prohibited (or conditions imposed upon it) if, among others, it leads to the creation or strengthening of a dominant position. The Commission exercises these powers in relation to mergers that are likely to increase market power and thus negatively affect competitive parameters.<sup>136</sup> It analyses these prospective mergers by

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<sup>130</sup> *Ibid.*, para. 98.

<sup>131</sup> Whether this would require effects on the market structure or, similarly to *AstraZeneca*, be considered abusive *per se* is an open question.

<sup>132</sup> The German NCA states, after referring to allegedly unfair conditions by Facebook, that ‘[i]f there is a connection between such an infringement and market dominance, this could also constitute an abusive practice under competition law’. Bundeskartellamt, cit. *supra* note 121.

<sup>133</sup> By establishing that refusals to licence will only be considered abusive in ‘exceptional circumstances’ the Court has determined that they generally are. *IMS*, cit. *supra* 89, para. 35. It remains to be seen whether refusals to licence which prevent the exercise of the right to portability may integrate these exceptional circumstances.

<sup>134</sup> Roughly speaking, trademarks guarantee the reputation of the holder, which is not at stake when its services are not used. Case C-385/07 P, *Griine Punkt*, EU:C:2009:456. Similarly, royalty schemes which do not adhere to a patent’s duration have also been considered restrictive under Article 101 TFEU in certain circumstances. See the analysis of that case law in Opinion of A.G. Whatelet in *Genentech*, cit. *supra* note 110, points 85-97.

<sup>135</sup> Prices charged for spare parts under design rights have also been considered open to exploitative abuses. Case 238/87, *Volvo Veng*, EU:C:1988:477.

<sup>136</sup> Guidelines on the assessment of horizontal mergers, cit. *supra* 42, point 10.

investigating whether the concentration leads to the removal of competitive constraints or to a higher level of transparency and coordination in the market.<sup>137</sup> Although the interests of consumers are only one of the factors that the Commission should take into account,<sup>138</sup> market power is defined as the possibility to act independently of consumers and thus to worsen competitive parameters.<sup>139</sup>

As in the context of exploitative abuses, a price increase by a merged entity is equivalent to a deterioration of non-price conditions, and again, competition law lacks normative tools to assess this deterioration in relation to data protection conditions. Data protection law can provide such normative references. Indeed, the guidelines that the EDPS proposes that the Digital Clearing House should enact to determine harm to consumers would apply both to exploitative abuses and merger control.<sup>140</sup> It is however more difficult to conclude *ex ante* that a merged entity will worsen data protection conditions than *ex post* when the consequences of the abuse have already been felt. Nevertheless, in *Tetra Laval*<sup>141</sup> the Court found that the Commission should investigate whether a merger leads to ‘conditions in which abusive conduct is possible and economically rational’.<sup>142</sup> Therefore, a competition authority should examine the parties’ potential data protection conditions post-merger, both as an indication of market power and as a possible source of abuse.

The Commission did not take the opportunity in *Facebook/WhatsApp* to examine competition on data protection conditions, as discussed above. Arguably, pursuant to *Tetra Laval*, the Commission should have investigated the possibility that WhatsApp’s data protection conditions would be degraded post-merger. These data protection conditions have indeed been subsequently changed.<sup>143</sup> However, because the Commission declared that ‘privacy-related concerns’ fell outside the scope of its review,<sup>144</sup> it could not subject the approval of merger to conditions in this regard.<sup>145</sup> In any event, the Commission’s reasoning in *Facebook/WhatsApp* that the parties’ activities did not overlap on a relevant market is unsatisfactory. The data protection concerns that the merger raised, dismissed as non-economic, hinted at the true competitive problem: both Facebook and WhatsApp actively acquired personal data, and not only did Facebook acquire a competitively relevant asset (which the Commission now recognises to be the driver of the acquisition)<sup>146</sup> but it may have also effectively neutralised WhatsApp’s innovation on better data protection conditions.<sup>147</sup> Thus, the EDPS has used this merger as an example of when cooperation between data protection and competition authorities may be desirable in order to anticipate such developments.<sup>148</sup>

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<sup>137</sup> Ibid., points 17-19.

<sup>138</sup> EUMR, cit. *supra* note 32, Art. 2(1).

<sup>139</sup> See *supra* note 42.

<sup>140</sup> Opinion of the EDPS, cit. *supra* note 8, 15.

<sup>141</sup> Case C-12/03, *Tetra Laval*, EU:C:2005:87.

<sup>142</sup> Ibid., para. 74.

<sup>143</sup> Opinion of the EDPS, cit. *supra* note 8, 10.

<sup>144</sup> *Facebook/WhatsApp*, cit. *supra* note 40, point 164.

<sup>145</sup> O.J. 2003, L 1/1, Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Art. 9(1).

<sup>146</sup> See *supra* note 79.

<sup>147</sup> Newman comments that ‘[a] monopolist in a zero-price market may impose a naked restraint on innovation by rivals’, referring to Microsoft’s targeting of Netscape. Newman, op. cit. *supra* note 69, 39.

<sup>148</sup> Opinion of the EDPS, cit. *supra* note 8, 10.

#### 4. Obeying the House Rules: the Role of the EU Charter of Fundamental Rights

Section 3 illustrates how data protection law can exert a normative influence on competition law when the material scope of application of both intersects, and data protection problems are simultaneously competition law problems. In this section, it is suggested that even in the absence of such substantive overlap, data protection can exert an influence on competition law procedures and remedies. In such circumstances, data protection acts as an external constraint on competition law: it does not fit within the logic of competition, or align with its objectives.

The most evident way that data protection can exert such an external influence on competition law is by blocking the application of competition law. In *Wouters*,<sup>149</sup> the Court accepted that a ban on an association between lawyers and accountants constituted a decision by an association of undertakings that restricted competition. However, it held that this ban must be examined in light of its objective, namely to ensure that 'the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience'.<sup>150</sup> The Court held that the restriction of competition that the ban entailed was inherent in the pursuit of that objective and thus ultimately concluded that there was no breach of Article 101(1) TFEU (ex Article 81(1) EC). In this way, an external public policy objective prevented the application of competition law.

Data protection law could also be invoked to justify a potential infringement of competition law in certain circumstances. For instance, the EDPS has called for the enactment of 'standards for transparency and intelligibility of contractual terms in online services'.<sup>151</sup> Similarly, standards may be required to ensure the good functioning of aspects of the GDPR, such as the right to data portability.<sup>152</sup> Any self-regulating standard-setting operation may necessitate an agreement between competitors and therefore entail a potential violation of Article 101 TFEU. Data protection could then be invoked to justify such a violation. In this capacity, data protection would act as an external constraint on the application of competition law. Given that this type of external influence is not new, it is unlikely that it would be contested.<sup>153</sup>

However, this section sets out how the EU Charter may necessitate a more extensive, external influence by data protection on other policies, including competition law. This claim proceeds in two parts. First, it suggests that the Commission has a positive

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<sup>149</sup> Case C-309/99, *Wouters*, EU:C:2002:98. This analogy may nevertheless be limited, insofar as undertakings required to breach competition law in order to comply with data protection legislation may rely upon the 'State compulsion' doctrine as a defence. Joined Cases C-359 & 379/95, *Ladbroke*, EU:C:1997:531, para. 33. This defence has however been interpreted stringently, and does not apply where undertakings have a margin of appreciation. Therefore, an undertaking would not be able to rely on it if its actions enhanced the effectiveness of the data protection rules but were not required by the letter of data protection law.

<sup>150</sup> Case C-309/99, *Wouters*, para. 97. The Court subsequently clarified that such restrictions had to be proportionate to the objectives pursued. Case C-519/04 P, *Meca Medina and Majcen v. Commission*, ECLI:EU:C:2006:492, para. 45.

<sup>151</sup> Preliminary Opinion of the EDPS, cit. *supra* note 8, 26 and 83.

<sup>152</sup> GDPR, cit. *supra* note 18, Art. 20.

<sup>153</sup> Opinion of the EDPS, cit. *supra* note 8, 10 and footnote 45.

obligation to respect and promote the EU Charter. This obligation is explicitly set out in the wording of the EU Charter and affirmed by the jurisprudence of the Court as well as the actions of the European Commission. Then, secondly, the implications this obligation entails for EU competition law are outlined.

#### 4.1. The Commission's Obligation to Respect the EU Charter

The Commission's obligation to respect and promote the EU Charter stems from the wording of Article 51(1) EU Charter, the case law of the Court and the institutional structure and stance of the Commission in the aftermath of the Lisbon Treaty. Article 51(1) of the EU Charter sets out its scope of application. It states:

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

This provision sets out an obligation for EU institutions and bodies to respect EU Charter rights and for Member States to respect these rights when 'implementing EU law'. It is this latter obligation vis-à-vis Member States that has received most attention in the doctrine.<sup>154</sup> The Court has had the opportunity to consider the meaning of the term 'implementing EU law' on a number of occasions<sup>155</sup> and this jurisprudence has itself generated much commentary.<sup>156</sup> However, the obligation that Article 51(1) of the EU Charter imposes on EU Institutions has not yet been the subject of similar debate and is viewed by many as uncontroversial.<sup>157</sup> Ward notes that once it is established that an entity falls within one of the categories listed in Article 51(1)<sup>158</sup> 'it is incontrovertible that any act produced by it having legal effects vis-à-vis third parties must comply with the Charter'.<sup>159</sup> As all EU institutions and

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<sup>154</sup> Eeckhout, "The EU Charter of Fundamental Rights and the Federal Questions", 39 CML Rev. (2002), 945; Knook, "The Court, the Charter, and the vertical division of powers in the European Union", 42 CML Rev. (2005), 367; Leczykiewicz, "Horizontal Application of the Charter of Fundamental Rights", 38 EL Rev. (2013), 479; Egger, "EU Fundamental Rights in the National Legal Order: the Obligations of Member States Revisited", (2006) 25 *Yearbook of European Law*, 515; Rosas, "The Applicability of the EU Charter of Fundamental Rights at National Level", (2013) *European Yearbook of Human Rights*, 97.

<sup>155</sup> Joined Cases C-411 & 493/10, *N. S. and M. E.*, EU:C:2011:865; Case C-617/10, *Fransson*, EU:C:2013:280; Joined Cases C-483/09 and C-1/10, *Gueye and Salmerón Sánchez*, EU:C:2011:583; Case C-279/09, *Deutsche Energiehandels*, EU:C:2010:811; Case C-370/12, *Pringle*, EU:C:2012:756; Case C-390/12, *Pfleger*, EU:C:2014:281.

<sup>156</sup> Iglesias Sánchez, "The Court and the Charter: the Impact of the Entry into Force of the Lisbon Treaty on the ECJ's approach to Fundamental Rights", 49 CML Rev. (2012), 1565; Lenaerts, "The Court of Justice of the European Union and the Protection of Fundamental Rights", (2011) 31 *Polish Yearbook of European Union Law*, 79; Morano-Foadi and Andreadakis, "Reflections on the Architecture of the EU After the Treaty of Lisbon: the European Judicial Approach to Fundamental Rights", (2011) 17 *European Law Journal*, 595.

<sup>157</sup> For instance, writing in an extra-curial capacity von Danwitz (and Paraschas) state that '[w]hile the European Union and its institutions are clearly bound by the Charter, the extent of the Charter's applicability with respect to the Member States is much less evident'. von Danwitz and Paraschas, "A fresh start for the Charter: Fundamental Questions on the application of the European Charter of Fundamental Rights", (2012) 35 *Fordham International Law Journal* 1396, 1399.

<sup>158</sup> The entity must be an EU Institution as defined in Article 13(1) TEU, or a body, office or agency of the Union.

<sup>159</sup> Peers and Others, *The EU Charter of Fundamental Rights: A Commentary* (Hart, 2014), 1426. The main point of contention on this matter will, according to Ward, be whether hybrid agencies such as the



organs are bound by the EU Charter, their failure to respect the EU Charter rights when enacting legally binding acts (including decisions) can be challenged via Article 263 TFEU, or before the national courts pursuant to the preliminary reference mechanism,<sup>160</sup> and will result in a declaration that the act is unlawful.<sup>161</sup>

This obligation incumbent on EU institutions to respect the EU Charter is manifest in the Court's jurisprudence. Provisions of secondary legislation adopted by the EU institutions must respect EU Charter rights. For instance, in *Volker und Schecke*<sup>162</sup> the Court declared for the first time that provisions of secondary legislation that required the publication of the names of certain Common Agricultural Policy beneficiaries were invalid as they interfered with the EU Charter rights to data protection and privacy. In its later *Digital Rights Ireland*<sup>163</sup> judgment the Court declared the entire Data Retention Directive invalid as a result of its failure to comply with the same rights. Thus it is clear that the failure of the EU legislature to respect the EU Charter rights will result in the invalidity of their legislative measures. Equally, a failure of the European Commission to respect EU Charter rights when adopting a legally binding decision would lead to the invalidity of this decision.

This existence of a cross-cutting obligation on Institutions to respect and promote EU Charter rights also follows from the structure, mandate and actions of the Commission, particularly following the entry into force of the Lisbon Treaty. Commission decision-making is collegiate and pursuant to its Rules of Procedure,<sup>164</sup> 'Commission decisions shall be adopted if a majority of the number of Members specified in the Treaty vote in favour'. As a result, even decisions and legislative acts with a strong link to one limb of the Commission (a particular 'Directorate General' (DG) and Commissioner) must be approved collectively by the College of Commissioners. Indeed, the lawfulness of Commission decisions is dependent on this collective decision-making. The Court has previously held that the Commission cannot delegate the power to adopt competition decisions to the Commissioner responsible for competition policy and that acts of the Commission that are not adopted in a collegiate manner are unlawful.<sup>165</sup> Furthermore, the Commission has now appointed a 'First Vice-President' responsible for 'Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights'. This appointment signals that 'it is a top priority for the new College to safeguard the values of the Union, and particularly the rule of law and fundamental rights'.<sup>166</sup> Indeed, all members of the Commission pledged to uphold the Charter in a solemn declaration before the Court of Justice.<sup>167</sup> These mechanisms – collegiate decision-

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European Institution of Innovation and Technology would be bound by the EU Charter as a Union 'agency'.

<sup>160</sup> Article 267 TFEU.

<sup>161</sup> See, for instance, SEC (2011) 567 final, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments', 4. This document states: 'Respect for fundamental rights is a legal requirement, subject to scrutiny of the European Court of Justice. Respect for fundamental rights is a condition of the lawfulness of EU acts'.

<sup>162</sup> *Schecke and Eifert*, cit. *supra* note 17.

<sup>163</sup> Joined Cases C-293 & 594/12, *Digital Rights Ireland*, EU:C:2014:238.

<sup>164</sup> O.J. 2000, L 308/26.

<sup>165</sup> Case C-137/92 P, *BASF*, EU:C:1994:247, para. 71.

<sup>166</sup> Editorial, "Safeguarding EU values in the Member States – Is something finally happening?", 52 CML Rev (2015) 619, 623.

<sup>167</sup> Each Commissioner stated: 'I solemnly undertake [...] to respect the Treaties and the Charter of Fundamental Rights of the European Union in the fulfilment of all my duties'. IP/14/2511, "Juncker

making, Vice-Presidential oversight and a Commissioner pledge to respect the EU Charter – point to the conclusion that a holistic approach should be taken to Commission decision-making, and that various fields of EU policy-making should not be treated as hermeneutically sealed silos.

The Commission has sought to put this crosscutting obligation to respect fundamental rights into practice by adopting a ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’.<sup>168</sup> A key component of this strategy is to ensure that the EU is ‘exemplary’ in using the EU Charter ‘as a compass for the Union’s policies’.<sup>169</sup> While the Commission seeks to achieve this aim primarily by conducting fundamental rights impact assessments of legislative proposals,<sup>170</sup> it has also explicitly stated that:

Non-legislative measures adopted by the Commission, such as decisions, are also subject to checks on their compatibility with the Charter during drafting, even if there is no impact assessment.<sup>171</sup>

In light of this legal context, the Commission’s stance in *GoogleDoubleClick* and *Facebook/Whatsapp* that any data protection infringements its decisions may entail should be subject to a subsequent, distinct data protection assessment (as outlined above) is no longer tenable. The practical consequences of this finding shall now be outlined.

## **4.2. Implications for competition law**

### *Limiting the Commission’s remedial discretion*

The Commission’s horizontal obligation to respect and promote the EU Charter has several implications for competition law. Most evidently, the Commission must comply with this substantive obligation to respect EU Charter rights when adopting legally binding competition law decisions. For instance, the Commission could not give binding force to commitments offered by an undertaking to remedy an alleged breach of competition law<sup>172</sup> if these commitments entailed an interference with the right to data protection. An example taken from a NCA will illustrate this point.

The French NCA initiated legal action against GDF Suez, a gas supplier with a dominant position in the market for gas sales at regulated tariffs. GDF Suez was accused of abusing its dominant position by, inter alia, using customer data that it acquired while it was a public service operator to its competitive advantage. The French NCA adopted an interim measure ordering GDF Suez to disclose customer data – including personal data, such as customer contact details and consumption profiles – to competing energy suppliers in order to enable them to compete

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Commission takes oath of independence at the European Court of Justice”, <[http://europa.eu/rapid/press-release\\_IP-14-2511\\_en.htm](http://europa.eu/rapid/press-release_IP-14-2511_en.htm)>.

<sup>168</sup> COM (2010) 573 final.

<sup>169</sup> It pointed to three ways in which this could be achieved: by strengthening the culture of fundamental rights at the Commission; taking the Charter into account in the legislative process; and, ensuring that Member States respect the Charter when implementing EU law. COM (2010) 573 final, 4-10.

<sup>170</sup> It provides practical guidance on how this impact assessment can be achieved in a Commission Staff Working Document. SEC (2011) 567 final, 3.

<sup>171</sup> COM (2010) 573 final, 6.

<sup>172</sup> Regulation 1/2003, cit. *supra* note 146, Art. 9(1).

effectively.<sup>173</sup> This remedy, designed to protect competition, raised data protection concerns and thus the NCA worked in conjunction with the French data protection authority (CNIL) in order to ensure that the data sharing agreement respected data protection law. GDF Suez was ordered to send postal or electronic communication to all affected data subjects in order to obtain their consent to the data sharing and to provide data subjects with the opportunity to object within 30 days. In this way, a potential infringement of the data protection rules in order to secure an end to anti-competitive conduct was avoided, and the normative objectives of the right to data protection (including individual control over personal data) respected.

A second potential implication for competition law that this horizontal obligation to respect the EU Charter may necessitate is that the wide margin of discretion enjoyed by the Commission when accepting commitments,<sup>174</sup> and the limited review of this discretion due to the complex economic assessments it may entail,<sup>175</sup> may no longer be sustainable when the EU Charter is engaged. It follows from the Court's case law in *Schrems*<sup>176</sup> and *Digital Rights Ireland*<sup>177</sup> that a strict standard of review of acts of EU institutions, including Commission decisions, will be applied when EU Charter rights are engaged.<sup>178</sup> The Treaty competition law provisions are not exempt from this obligation and therefore Commission competition decisions that engage EU Charter rights may also be subject to this strict standard of review.

While the Commission's obligation not to infringe the EU Charter right to data protection is clear, the extent of its obligation to respect and promote the EU Charter is ambiguous. The institutional and substantive changes brought about by the Lisbon Treaty – outlined above – point to an obligation on the Commission's part, beyond its obligation not to breach the EU Charter, to take affirmative actions to ensure that all areas of EU policy-making are compliant with the EU Charter. The judgment of the General Court in *Front Polisario*<sup>179</sup> ostensibly confirms this perspective. In that judgment a decision of the Council of the EU ('Council') to enact a trade agreement between the EU and Morocco, including the disputed territory of Western Sahara, was annulled as a result of the Council's failure to incorporate a fundamental rights assessment into its decision. The General Court, ruling at first instance, held that when exercising its large margin of appreciation, the Council should have examined all relevant elements to ensure that there were no indications that the trade agreement would ultimately be detrimental to the fundamental rights of the Western Saharan territory inhabitants.<sup>180</sup>

*Front Polisario* is under appeal at the time of writing. While the Advocate General opined that the General Court judgment should be set aside for lack of standing, he nonetheless stated that he could see no convincing reason why the EU institutions 'are

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<sup>173</sup> Décision n° 14-MC-02 du 9 septembre 2014 relative à une demande de mesures conservatoires présentée par la société Direct Energie dans les secteurs du gaz et de l'électricité, <<http://www.autoritedelaconurrence.fr/pdf/avis/14mc02.pdf>>.

<sup>174</sup> Case C-441/07 P, *Commission v Alrosa Company Ltd.*, EU:C:2010:377, paras. 60-61.

<sup>175</sup> *Ibid.*, para 67.

<sup>176</sup> *Schrems*, cit. *supra* note 19.

<sup>177</sup> *Digital Rights Ireland*, cit. *supra* note 164.

<sup>178</sup> In *Schrems* the Court held that when the Commission adopts a decision regarding the adequacy of the third country data protection measures, the Commission's discretion is reduced and the Court's review of the requirements of secondary legislation, read in light of the Charter, must be strict. *Schrems*, cit. *supra* note 19, para. 78.

<sup>179</sup> Case T-512/12, *Front Polisario*, EU:T:2015:953.

<sup>180</sup> *Ibid.*, para. 246.

not required, before the conclusion of an international agreement, to examine the human rights situation in the other party to the agreement and the impact which the conclusion of the agreement could have there'.<sup>181</sup> Indeed, the Advocate General observed that the Council and the Commission had 'set the bar very high for themselves' by deciding to insert human rights in Impact Assessments.<sup>182</sup>

Irrespective of the substantive outcome of the *Front Polisario* appeal, what is important for our purposes is that the General Court judgment follows the same logic as *Schrems* and *Digital Rights Ireland*: there is an obligation on EU Institutions to ensure that legally binding acts – whether decisions or legislation – respect fundamental rights; the discretion of EU Institutions is limited in this regard and, a failure to comply with this obligation will lead to the annulment of the relevant act. *Front Polisario* goes a step further than *Schrems* and *Digital Rights Ireland* by indicating that, even if fundamental rights are not evidently engaged, there is an obligation on EU institutions to consider the impact of their actions on fundamental rights. If upheld by the Court of Justice, such a finding would have even more significant implications for the potential impact of data protection, and other EU Charter rights, on competition law.

#### *Ex ante or ex post consideration*

This 'mainstreaming' of fundamental rights indicates that the Commission is required to consider how its decisions – including competition law decisions – impact upon fundamental rights. This could be done *ex ante* or *ex post*, or both.

In its *Facebook/Whatsapp* merger decision, the Commission held that the merging entities were not direct competitors on any relevant markets and therefore the transaction would not lead to a significant impediment of effective competition and could be cleared without remedies. The shortcomings of this decision, in particular its failure to examine whether a market for the acquisition of personal data exists and whether competition on data protection on this market would suffer post-merger, were outlined in Section 3. However, in addition to internalising data protection's normative concerns in this way, the Commission could also consider whether data protection law could have an external influence on competition law. Again, precedent for such external influence exists in the context of merger control.

While the Commission has sole jurisdiction to assess mergers within the EUMR, Article 21(4) EUMR provides for a limited exception to this. It allows Member States 'to take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation', provided they are compatible with the general principles and provisions of EU law. Media plurality is included amongst these legitimate interests. Thus although the Commission is obliged to respect the pluralism of the media pursuant to the EU Charter,<sup>183</sup> it fulfils this obligation by allowing Member States to examine the potential impact of a merger on plurality.<sup>184</sup> According to Jones and Davies, this does not confer new rights on Member States: rather, it 'articulates their inherent power to impose, subject to EU law, obstacles to investment or make it subject to additional conditions and requirements, on the basis of public

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<sup>181</sup> Case C-104/16, *Front Polisario*, EU:C:2016:677, para 262.

<sup>182</sup> *Ibid.*, para 263.

<sup>183</sup> EU Charter, Art. 11(2).

<sup>184</sup> The reason why it is the Member States and not the Commission that conducts this assessment is most likely one of subsidiarity, given that the EU has no explicit competence to regulate freedom of expression.

interest grounds'.<sup>185</sup> Mergers in media markets are therefore assessed in parallel by competition agencies and sector-specific regulatory bodies, with these two agencies assessing the merger according to different substantive standards.<sup>186</sup> Underpinning this intervention is the idea that democracy will be undermined if media power is concentrated in the hands of a limited number of media barons with the potential power to jeopardise the free flow of ideas. The Commission could equally fulfil its obligation to respect the right to data protection in competition law decisions by applying an analogous procedure and allowing a competent body (for instance, the EDPS) to assess the implications of a concentration on data protection. It is important to note that in these circumstances media plurality, or data protection, acts as an external constraint on competition law: the assessment which is removed from the hands of DG Competition is a non-competition assessment.<sup>187</sup> Moreover, should the EDPS (or national data protection authorities) undertake such a non-competition assessment of a competition law transaction to guarantee its compatibility with the data protection rules, this assessment would be in compliance with their institutional 'independence'.<sup>188</sup> This independence merely prohibits data protection authorities from seeking or taking instructions from third-parties; it does not, and should not, prevent data protection authorities from cooperating with one another, or with other regulators and agencies.<sup>189</sup>

Alternatively (or in addition) the Commission could require an ex post assessment of the impact of concentrations on fundamental rights.<sup>190</sup> Such ex post checks are carried out in the context of EU legislative instruments,<sup>191</sup> and there is no legal obstacle to their use to evaluate the effects of a competition decision on fundamental rights. In this way, empirical evidence could be gathered to inform Commission decision-making in areas such as mergers in data-driven markets. Indeed, precedent for such ex-post assessment of mergers by the Commission already exists. Many mergers are passed subject to economic conditions that are verified ex post and, pursuant to the EUMR, the validity of these merger clearance decisions is contingent upon respect for these economic conditions.<sup>192</sup> The Commission could therefore also render the validity of its merger decisions contingent upon respect for data protection conditions stipulated in advance of the merger.

### *Possible objections*

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<sup>185</sup> Jones and Davies, 'Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10(3) *European Competition Journal* 453, 489.

<sup>186</sup> Drexl, 'Competition law in media markets and its contribution to democracy – a global perspective', (2016) Max Planck Institute for Innovation and Competition Research, Paper No 14-16, 14.

<sup>187</sup> Data protection can, under the logic described in Section 3, also act as an internal constraint on the Commission's prosecutorial and remedial discretion. See Costa-Cabral, *op. cit. supra* note 8, 506-512.

<sup>188</sup> The independence of the EDPS is set out in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L8/1, Art 44. The independence of data protection authorities is established by: Directive 95/46, *cit. supra* note 4, Art. 28(1); GDPR, *cit. supra* note 18, Art. 52.

<sup>189</sup> For instance, the Dutch and Canadian data protection officials conducted a joint investigation and issued a joint report on WhatsApp's compliance with data protection and privacy laws. See Autoriteit Persoonsgegevens, 'Dutch DPA: WhatsApp non-users better protected', 3 November 2015. <<https://autoriteitpersoonsgegevens.nl/en/news/dutch-dpa-whatsapp-non-users-better-protected>> .

<sup>190</sup> This idea was mooted by former FTC Commissioner Pamela Jones-Harbor in the context of the Google/DoubleClick transaction.

<sup>191</sup> COM (2010) 573 final, 6.

<sup>192</sup> EUMR, *cit. supra* note 32, Art. 8(2).

Despite their modesty, these suggestions are likely to meet with objection. First, it could be argued that assessing the impact of a competition law decision on rights such as data protection ‘hijacks’ competition law to achieve data protection aims. Such an objection must however be dismissed as this paper does not propose that a general obligation be placed on the Commission to enforce data protection law through its competition law competences. Rather, it suggests that the Commission cannot use its competition law competences in a manner that breaches the right to data protection or jeopardises its effectiveness. Indeed, the application of competition law rules is limited by the principle of legality.<sup>193</sup> This principle prevents the Commission from using its sanctioning and investigative powers to pursue a data protection complaint in the absence of a competition law infringement foreseeable by the undertakings involved.<sup>194</sup> Therefore, all of the constituent elements of a competition law infringement must be present (for instance, an agreement between undertakings that restricts competition in the case of Article 101 TFEU) before an ex ante or ex post examination of fundamental rights implications could be undertaken, otherwise the Commission would be unlawfully usurping its competition law competences.<sup>195</sup>

It might equally be argued that ‘once everything is relevant, nothing is dispositive’,<sup>196</sup> and that requiring the Commission to factor fundamental rights considerations in its decision-making would set it down a slippery path.<sup>197</sup> Indeed, as outlined at the outset of this paper, one of the reasons why the Commission has rejected the incorporation of public policy and non-economic concerns into its analysis is the fear that their inclusion would open the door to political influence and incommensurable analysis.<sup>198</sup> The proposal set out in this section is however more limited, and is grounded in law rather than politics. Nevertheless, it would apply to other EU Charter rights. Why, for instance, should the enforcement of competition law imperil personal, social or environmental rights? We suggest that if Commission intervention is justified in the data protection context, it should not be withheld simply because this would also force the Commission to protect other rights, when appropriate. The wording of the EU Charter, the jurisprudence of the Court and the structure of the Commission confirm that fundamental rights bind the Commission. The parameters of this new responsibility now need to be defined.

Finally, the argument might be made that DG Competition is ill equipped to carry out the assessments proposed in this paper. This claim must be rejected. Members of DG Competition have succeeded in integrating economic principles into competition law assessments despite initial concerns. If such non-legal principles can be mastered for the purposes of legal assessment, it seems pessimistic to argue that the basic principles of data protection law cannot be mastered by lawyers for the same purpose.

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<sup>193</sup> The principle of legality ‘implies that legislation must define clearly offences and the penalties they attract’. This principle is satisfied when the individual or undertaking is ‘in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable’. Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, EU:C:2007:261, para. 50.

<sup>194</sup> Case C-194/14 P, *AC-Treuhand*, EU:C:2015:717, paras. 41-44.

<sup>195</sup> Case T-271/03, *Deutsche Telekom*, EU:T:2008:101, para. 270.

<sup>196</sup> Easterbrook, “Limits of Antitrust”, (1984) 63 *Texas Law Review* 1, 12.

<sup>197</sup> See, by analogy, Odudu, “The Wider Concerns of Competition Law”, (2010) 30(3) *OJLS* 599.

<sup>198</sup> For instance, in a White Paper dating from 1999, it stated that the purpose of Article 101(3) TFEU is to ‘provide a legal framework for the economic assessment of restrictive practices and not to allow the application of competition rules to be set aside because of political considerations’. O.J. 1999, C 132/1. White paper on modernization of the rules implementing Articles 85 and 86, 57.

Indeed, DG Competition must already respect the data protection principles in its procedures, just as it must respect other fundamental rights. Where more complex assessments are required, DG Competition could be assisted in conducting such assessments by, for instance, the DJ JUSTICE Impact Assessment Steering Group<sup>199</sup> or by the EDPS. Indeed, the EDPS is specifically tasked with ensuring the EU Institutions respect data protection law and has already proposed such a holistic solution to problem solving in the digital environment,<sup>200</sup> as have NCAs.<sup>201</sup>

## 5. Conclusion

The intersection between data protection and competition law mapped in this article indicates that, simply put, data protection concerns should matter for the application of competition law. The impact of data protection law on competition law should go beyond the descriptive role it plays as part of the legal background for competitive assessments, or the procedural role it plays when the Commission is obliged to respect the rights of data subjects in its investigations. Rather, data protection law should have a material influence on competition law. This article has concentrated on how data protection can be used to assess non-price competitive parameters and how data protection law can also condition the exercise of the Commission's competences to enforce competition law.

While it is clear that these regimes pursue autonomous substantive concerns using different methods, it is also apparent that they overlap in limited situations. As members of the EU law family with a shared interest in the protection of the individual, it is reasonable to query how a more holistic approach to their application can be achieved. This is all the more so given that there are structural impediments to effective data protection which cannot be rectified through data protection legislation alone. Nevertheless, there is vocal resistance to such a holistic approach, with formalistic objections to any suggested alterations to ostensibly neutral economic analysis and established enforcement practices. However, personal data is not a commodity to be regulated by raw economic principles. Neither is data protection law a neutral legal background: it contains normative indications that condition expectations and duties whenever personal data is processed, which – irrespective of whether these constraints are acknowledged by ‘competition on privacy’ – extends to personal data's role in the competitive process.

There are two advantages of bringing these indications to the foreground. The first is that competition law inevitably has to apply to competition on data protection, and in tandem with data protection law it can construct a picture of which aspects are better left to the market and which should be set out in regulation. The second advantage is that the EU is currently in uncharted territory. While the EU legal order has long been

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<sup>199</sup> SEC (2011) 567 final, 11.

<sup>200</sup> Opinion of the EDPS, cit. *supra* note 8, 15; the EDPS had already mentioned the idea of an ‘EU clearing house for supervisory authorities to consider whether individual cases may raise questions of compliance with competition, consumer and data protection rules’ in its earlier Opinion, Preliminary Opinion, cit. *supra* note 8, 10.

<sup>201</sup> European Conference of Data Protection Authorities, ‘Resolution of The Spring Conference of data protection authorities’, May 2016, <<http://www.naih.hu/budapest-springconf/files/Resolution---new-frameworks.pdf>>. This Resolution calls for a new framework for cooperation that recognises the ‘synergies between regulatory frameworks for consumer, antitrust and data protection, notably in the digital society and economy’.

underpinned by respect for fundamental rights, the EU Charter provides a visible legal hook with which to challenge the compatibility of the acts of EU Institutions with fundamental rights and thus intensifies their application. The specialisation that is a characteristic of the Commission's administrative action is thus being challenged. The commonalities between data protection and competition law, as well as the indications given by the Court in *Schrems* and *Polisario Front*, provide the ideal testing ground for the Commission's obligation to guarantee the effectiveness of fundamental rights. This is not only a cause of apprehension for entrenched views in competition law. There are also fears, from the data protection law side, about legitimising markets for personal data through the application of competition law, when it is arguable that such markets were neither envisaged nor desired by the data protection framework. However, as with any family, the links between data protection and competition law should not be seen as a weakness, both are stronger together – even if, like fully developed fields of law, they see each other only on special occasions.