
At the Junction of Consumer Protection: Dual Role of Data Protection in EU Law

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ABSTRACT

Consumer data extraction in the digital economy raises competition concerns for its potential detriments on consumer welfare. However, competition law seems to lack the normative mechanism to analyse consumer behaviour in handling their personal data. Considering the German competition authority's recent attempt to incorporate data protection law into the competition law assessment, the central question for this article is whether the courts should allow such an attempt, and if so, in what ways. This article argues that data protection law can complement competition law in protecting consumers, while still recognising the integrities of each respective regime. The authors propose that data protection has a dual role to play in the competition framework under different circumstances, either as a non-price benchmark in deciding whether the conduct in question is anti-competitive, or as a threshold requirement in approving pro-competitive conducts.

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INTRODUCTION

The fundamental right of consumer protection is enshrined in European Union (“EU”) competition law, data protection law, and many other legal regimes.¹ While competition law strives to promote consumer welfare via maintaining market efficiency,² data protection law serves to protect the fundamental right of data subjects, including consumers, in having their data processed fairly for legitimate purposes.³ In this data-driven digital economy, consumers commonly share their personal data with companies in exchange for free goods and services. The cycle continues as these companies use the accumulated data to provide better goods and services, thereby gaining greater market power. It is thus not surprising that data protection concerns arise across all three pillars of competition law: prohibition of anti-competitive agreements under Art. 101(1) of the Treaty of the Functioning of the European Union (“TFEU”), abuse of dominant position under Art. 102 TFEU, and merger control.

However, the courts and the European Commission (“Commission”) have been reluctant to incorporate data protection considerations into the competition law framework. In *Asnef-Equifax*,⁴ the European Court of Justice (“CJEU”) expressly stated that ‘any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection’.⁵ The Commission adopted this reasoning in later merger reviews.⁶ National competition authorities, on the other hand, have shown a willingness to rely on the breach of data protection rules in establishing anti-competitive behaviours. For example, the French (*Autorité de la concurrence*) and German (*Bundeskartellamt*) competition authorities previously stated in a position paper that ‘privacy policies could be considered

¹ Charter of Fundamental Rights of the European Union (2012) OJ C362/02 (‘EU Charter’) art 38.

² Commission Notice: Guidelines on the Application of Article 81(3) of the Treaty (2004) OJ C101/97 (‘General Guidelines’) para 13.

³ EU Charter (n 1) art 8.

⁴ Case C-238/05 *Asnef-Equifax v Ausbanc* (2006) ECR I-11125.

⁵ *ibid* para 63.

⁶ *Google/DoubleClick* (Case COMP/M.4731) Commission Decision (2008) OJ C 184/1.

from a competition standpoint whenever these policies are liable to affect competition⁷.

This article argues that data protection considerations should form part of the competition assessment to protect consumers in the data economy. Section I examines the recent *Facebook* case⁸ in Germany and highlights the apparent insufficiencies in the data protection and competition regimes, arguing that it is justifiable for data protection to complement competition analysis. Section II nevertheless warns of the danger of undermining the integrities of the separate regimes. Section III then demonstrates the dual role of data protection in competition assessment, either as a non-price benchmark in deciding whether the conduct in question is anti-competitive, or a threshold requirement in approving pro-competitive conducts.

I. CONSUMER PROTECTION JUSTIFICATION

A. German Facebook Case

In February 2019, the German *Bundeskartellamt* made a decision against Facebook for abusing its market position under the German equivalent of Art. 102 TFEU.⁹ The *Bundeskartellamt* found that Facebook has used consumer data collected from not only Facebook-owned services (such as Instagram), but also from third-party websites that have an embedded interface with Facebook to integrate its products (such as the ‘Like’ or ‘Share’ buttons).¹⁰ In reaching its decision, the *Bundeskartellamt* established Facebook’s abuse by relying on the infringement of the General Data Protection Regulation (“GDPR”). It considered that, as a result of the network effect that Facebook exhibited, users were *de facto* forced to accept the terms allowing Facebook to collect their data from third-party sources on a take-it-or-leave-it basis. Therefore, they had not given their ‘voluntary consent’ under Art. 6 of the GDPR.¹¹ Following the *VBL-Gegenwert*

⁷ *Autorité de la concurrence and Bundeskartellamt, Competition Law and Data* (2016) 24–25.

⁸ *Bundeskartellamt*, ‘Case Summary – Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing’ (15 February 2019) <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4> accessed 3 February 2021.

⁹ *ibid.*

¹⁰ *ibid.* 4.

¹¹ *ibid.* 10.

case,¹² the *Bundeskartellamt* held that, as Facebook's violation was a manifestation of its market power,¹³ its data policy constitutes an abuse of a dominant position in the social network market in the form of exploitative business terms under s. 19(1) of the German Competition Act.¹⁴

On appeal, the German Federal Supreme Court of Justice ('FCJ') affirmed the decision of the *Bundeskartellamt* that Facebook had abused its dominant position,¹⁵ albeit on independent reasoning. The FCJ emphasised the lack of choice on the part of consumers to 'use the network in a more personalised way' or to switch providers (lock-in effect) as constituting the relevant exploitation under competition law.¹⁶ The FCJ placed its focus on the more traditional competitive parameters of price, choice, quality, and innovation in establishing Facebook's abuse,¹⁷ with no regards as to data protection violations. In particular, the FCJ explicitly stated that it is 'not decisive' whether processing and using user data complies with the rule of the GDPR in considering whether Facebook has abused its dominant position.¹⁸

Interestingly, the *Bundeskartellamt* and FCJ reached the same conclusion through different characterisations of the abuse Facebook had committed: either as a violation of the GDPR, or as an impairment of consumer choice. This result may suggest that data protection and competition law share common traits. In particular, they are both concerned with consumer welfare and power asymmetries. They seek to protect the weaker consumers against the undertakings

¹² Federal Court of Justice *VBL-Gegenwert I* KZR 58/11 (2013). The German Federal Court of Justice held that a contract term is abusive under s 19(1) of the German Competition Act if such terms and conditions are a manifestation of market power or superior power of the party using these terms.

¹³ The *Bundeskartellamt* considered that the causality between Facebook's violation of data protection requirements and the manifestation of its market power is established in that 'the restriction of the private users' right to self-determination is clearly linked to Facebook's dominant position', and Facebook's conduct impedes competitors by its inappropriate processing of data (*Bundeskartellamt*, 'Case Summary' (n 8) 11).

¹⁴ *Bundeskartellamt*, 'Case Summary' (n 8) 7.

¹⁵ Press Office of the Federal Court of Justice, 'FCJ provisionally confirms allegation of Facebook abusing dominant position' (2020) 3.

¹⁶ *ibid.*

¹⁷ General Guidelines (n 2) para 21.

¹⁸ Press Office of FCJ (n 15).

in the market in ensuring their rights to ‘informational self-determination’¹⁹ so that they are protected from having their data exploited.²⁰ In the case, the *Bundeskartellamt* also considered that both data protection law and competition law ‘would reach the same conclusion due to largely identical considerations including market dominance’.²¹ However, the two legal regimes are normatively different. Therefore, the authors argue that, contrary to the position that the *Bundeskartellamt* seemed to take, a finding of data protection breach by a dominant undertaking should not automatically constitute a violation of competition law (to be discussed in Section II). Nevertheless, it is argued that data protection considerations could complement competition analysis because there exist certain insufficiencies in how competition law analyses consumers’ behaviours in handling their personal data.

B. Normative Insufficiencies Towards Consumer Protection

On the one hand, data protection law cannot tackle problems relating to the market structure which degrade consumer welfare. On the other hand, competition law focuses on curing macroeconomic harms by maintaining an efficient market,²² and thus it adopts a rather loose concept of consumer welfare, paying attention only to the aggregate consumers.²³ In *Asnef-Equifax*,²⁴ the CJEU had to assess the anti-competitive effect of an agreement between credit borrowers to exchange consumer financial information. In considering whether the consumers could obtain a fair share of the benefit under Art. 101(3) TFEU, the CJEU stated that ‘it is the beneficial nature of the effect on *all consumers* in the relevant markets that must be taken into consideration, not the effect on each

¹⁹ A fundamental right recognised by the German Federal Constitutional Court (BVerfG, Judgment of the First Senate of 15 December 1983 - 1 BvR 209, 269, 362, 420, 440, 484/83 -, [1]-[215], <www.bverfg.de/e/rs19831215_1bvr020983.html> accessed 3 February 2021).

²⁰ Giuseppe Colangelo and Mariateresa Maggolino, ‘Data Accumulation and the privacy-antitrust interface: insights from the Facebook case’ (2018) 8(3) *International Data Privacy Law* 224.

²¹ *Bundeskartellamt*, ‘Case Summary’ (n 8) 11.

²² Maureen Ohlhausen and Alexander Okuliar, ‘Competition, Consumer Protection and the Right (Approach) to Privacy’ (2015) 80(1) *Antitrust Law Journal* 121.

²³ The General Guidelines (n 2) state that ‘[T]he concept of “consumers” encompasses all users of the products covered by the agreement, including wholesalers, retailers and final consumers’.

²⁴ *Asnef-Equifax* (n 4).

member of that category of consumers (emphasis added).²⁵ This decision implies that consumers are categorised into different groups: the elitist (those with perfect credit history), the average, and the vulnerable (over-indebted or low-income people²⁶).²⁷ Even though the information exchange agreement would result in the vulnerable consumers paying more interest or being refused credit, it cannot prevent the satisfaction of the condition that ‘all consumers’ be allowed a fair share of benefit, despite the fact that only the elitist consumers could be said to gain in this situation.²⁸ Conversely, data protection law emphasises the integrity of each instance of data processing and protects the welfare of each and every consumer in specific bargains, irrespective of their personal attributes.

A more fundamental insufficiency of competition law relates to its perceptions towards ‘consumers’. Competition law is based on traditional information economics which postulates a *homo economicus* who is fully rational, free from biases, and seeks to maximise their own utility.²⁹ It assumes that improvements in the more traditional competition benchmarks of price, quality, choice, and innovation will promote consumer welfare and market efficiency. However, these economic assumptions are being challenged by behaviouralism, which attempts to explain the cognitive limitations of consumers in decision-making from a psychological perspective.³⁰ Substantial empirical evidence has shown that consumers are boundedly rational and subject to many biases in their purchasing decisions.³¹ Manufacturers might be attempting to use lower prices and higher product quality as a means to induce an underestimation of product

²⁵ *ibid* para 70.

²⁶ Peter Cartwright, ‘The Vulnerable Consumer of Financial Services: Law, Policy and Regulation’ (2011)

<www.nottingham.ac.uk/business/businesscentres/gcbfi/documents/researchreports/paper78.pdf> accessed 3 February 2021.

²⁷ Federico Ferretti, *EU Competition Law, the Consumer Interest and Data Protection: The Exchange of Consumer Information in the Retail Financial Sector* (Springer Briefs in Law, 2014).

²⁸ *ibid* 102.

²⁹ *ibid* 99.

³⁰ Kati Cseres, ‘The Controversies of the Consumer Welfare Standard’ (2006) 3(2) Competition Law Review 121.

³¹ Herbert A Simon, *Models of Bounded Rationality* (MIT Press 1982). The concept ‘bounded rationality’ was introduced by Herbert Simon to describe that human rationality is not perfect but limited by various factors including our cognitive limitations, time, and information available, etc. See also Jon D Hanson and Douglas A Kysar, ‘Taking Behavioralism Seriously: Some Evidence of Market Manipulation’ (1999) 112(7) Harvard Law Review 1420.

risks, as well as an overestimation of product utility, on the part of the consumer. In the digital economy, it has also been observed that undertakings are able to mass-produce consumer biases through big data and induce consumers to give up their personal data through ‘disclosure ratcheting’.³² The reality is that the data economy is characterised by many market failures.³³ One of which is the so-called ‘privacy paradox’, where consumers are generally concerned about their personal data, but they do not act accordingly to protect it.³⁴ Furthermore, when consumers give their ‘consent’ to the terms or conditions of privacy policies online, they simply do not read them, or they are unable to foresee the consequences of the data collection, or underestimate its impact as a result of information asymmetry and bounded rationality.³⁵

These instances of consumer consent can hardly be considered ‘informed’.³⁶ In the German *Facebook* case, the *Bundeskartellamt* expressed similar concern that ‘voluntary consent to [users’] information being processed cannot be assumed if their consent is a prerequisite for using the Facebook.com service in the first place’.³⁷ Nevertheless, the FCJ was able to rely on the more traditional economic competition parameters (price, quality, choice, and innovation) in finding Facebook’s abuse, because there are limited choices of social network providers in the market, and consumers are left with no other option but to accept Facebook’s use of their data.³⁸

However, beyond the German *Facebook* case,³⁹ there might be circumstances where these traditional competition parameters are insufficient in competition assessment. For example, data protection rules may come into play where users’

³² Ryan Calo, ‘Digital Market Manipulation’ (2014) 82(4) *The George Washington Law Review* 995.

³³ Marco Botta and Klaus Wiedemann, ‘The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey’ (2019) 64(3) *The Antitrust Bulletin* 428.

³⁴ Ignacio Cofone, ‘The Value of Privacy: Keep the Money Where the Mouth Is’ (2015) RILE Working Paper Series No 2014/15 <https://econinfosec.org/archive/weis2015/papers/WEIS_2015_cofone.pdf> accessed 3 February 2021.

³⁵ Botta and Wiedemann (n 33).

³⁶ *ibid.*

³⁷ *Bundeskartellamt*, ‘Case Summary’ (n 8) 11.

³⁸ Press Office of FCJ (n 15) 3.

³⁹ *Bundeskartellamt*, ‘Case Summary’ (n 8).

consent is influenced by behavioural biases or when vulnerable consumers (who would unlikely have given their consent had they known they would receive prejudiced treatments) are excluded in the competition assessment, as in *Asnef-Equifax*.⁴⁰ The GDPR requires that consent to data processing is ‘freely given, specific, informed and unambiguous’,⁴¹ and the data subjects must have full knowledge and control over their data when giving the consent.⁴² In particular, data protection law also takes into account the sufficiency of an ‘opt-out’ option in deciding the validity of the consent,⁴³ considering the power of default terms that manipulate the status quo bias of consumers. Thus, data protection rules are better equipped than traditional competition parameters to assess consumers’ behaviour in handling their personal data.

As a result of the deficiencies of competition law in protecting consumers, data protection law can offer the normative tool to competition law in resolving the structural market problem that harms consumers. However, it must first be recognised that the legal regimes are distinct and separate.

II. INTEGRITIES OF THE SEPARATE REGIMES

Art. 102 TFEU aims to prevent the abuse of a dominant market position. An infringement is established by proof of (1) a dominant market position of the undertaking and (2) an abuse of that position. In the German *Facebook* case,⁴⁴ the *Bundeskartellamt* decision appeared to imply that violation of data protection rules could *automatically* establish the second element as to abusiveness.⁴⁵ In particular, the *Bundeskartellamt* was of the view that both ‘data protection law and competition law consider the aspect of an unbalanced negotiation position... and reach the same conclusion due to the largely identical considerations’.⁴⁶ It seemed to imply

⁴⁰ *Asnef-Equifax* (n 4).

⁴¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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/EC (GDPR) (2016) OJ L/119, arts 6(1)(a) and 4(11).

⁴² Botta and Wiedemann (n 33).

⁴³ *Linguaphone Institute v Data Protection Registrar* (1995) UKIT DA94_31491.

⁴⁴ *Bundeskartellamt*, ‘Case Summary’ (n 8).

⁴⁵ Giuseppe Colangelo and Mariateresa Maggolino, ‘Data Protection in Attention Markets: Protecting Privacy Through Competition?’ (2017) 8(6) *Journal of European Competition Law and Practice* 363, 367.

⁴⁶ *Bundeskartellamt*, ‘Case Summary’ (n 8) 11.

that, once the violation of data protection requirements by a dominant undertaking amounts to a manifestation of its market power, it would be abusive in competition law.⁴⁷

The authors argue that such an approach is undesirable because it appears to treat data protection breaches as harmful to competition. Generally, to prove the requisite abusiveness, the impairment to efficient competition must be identified.⁴⁸ If the breach of data protection provisions is treated as a competitive harm per se, it gives rise to a potential danger of undermining the integrity of competition law.

Data protection infringement cannot be a competitive harm per se: the harm that it causes to competition is difficult to be ascertained due to a lack of quantifiable standards. Therefore, an analogy of consumer data extraction to the pricing of goods and services is difficult to sustain. In the traditional economy, the competitive price can be assessed by the marginal costs and other measurable standards. Thus, through a price-cost analysis, a counterfactual scenario of an efficient market can be constructed. Thereby, it can be ascertained whether the price of products charged by an undertaking is predatory (resultant harm being market foreclosure) or supra-competitive (resultant harm being consumer exploitation). On the other hand, though data has been described as the ‘currency of the Internet’,⁴⁹ there is no appropriate benchmark to assess the competitive quantity of consumer data that undertakings have to collect in competitive markets to provide their goods or services.⁵⁰ As a result, it is hard to qualify whether an undertaking has overly extracted consumer data and whether it generates competitive harm that has exclusionary (on competitors) or exploitative (on consumers) effects. Data protection law does not help either as it is primarily concerned with the legitimacy of the data collection and processing, instead of the amount collected and processed.

⁴⁷ *ibid.* The *Bundeskartellamt* even considered that the causality between violation of data protection requirements and manifestation of market power could be assumed.

⁴⁸ Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009) OJ C45/2.

⁴⁹ Michal Gal and Daniel Rubinfeld, ‘The Hidden Costs of Free Goods Implications for Antitrust Enforcement’ (2016) 80(401) *Antitrust Law Journal* 521.

⁵⁰ Colangelo and Maggolino, ‘Data Accumulation and the privacy-antitrust interface’ (n 19).

The danger here is that, by treating a mere data protection breach as sufficient in itself to constitute an abuse without evaluating the competitive harm, competition law would be used as a veil to achieve data protection aims. It is a principle of Art. 102 TFEU that dominant undertakings should not be punished for their dominance, but only the abuse of dominance.⁵¹ In cases where there is no (or unidentifiable) harm to competition, a dominant undertaking in breach of data protection rules should not be imposed on the more severe competition sanctions as compared to data protection sanctions.⁵² Otherwise, it would amount to punishing the undertaking for being in a dominant market position.

In sum, data protection breaches should not be able to constitute abusiveness or anti-competitive conduct per se. Otherwise, it would enable data protection policy to freeride on the competition remedies available and bypass the need to ascertain the competition harm, thereby undermining the separate integrities of the regimes.

III. DUAL ROLE OF DATA PROTECTION

This section examines how data protection rules can complement competition assessment. In some situations where the conduct raising data protection concerns may be *anti-competitive*, data protection considerations may act as a non-price competition parameter in assessing the harm (Part A).⁵³ In other situations where the conduct in question may actually be *pro-competitive*, such that the two regimes may stand in conflict, data protection should provide a threshold requirement in approving the transaction or in granting competition remedies because of its privileged status as a fundamental right (Part B).⁵⁴

⁵¹ Commission, 'Competition: Antitrust procedures in abuse of dominance' (July 2013), <https://ec.europa.eu/competition/publications/factsheets/antitrust_procedures_102_en.pdf> accessed 3 February 2021.

⁵² The maximum penalty for breach of competition law is 10% of the annual turnover of the undertaking (Council Regulations (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1 ('Regulation 1/2003'), art 23), but that for data protection law is 4% (GDPR, art 83(5)).

⁵³ cf Ferretti (n 27) 113. Ferretti argued that data protection may feature under competition law to account as long-term non-economic interest of consumers, but he did not make a distinction between pro- and anti-competitive conducts.

⁵⁴ cf Francisco Costa-Cabral and Orla Lynskey, 'Family ties: the intersection between data protection and competition in EU Law' (2017) CML Rev 11. While Costa-Cabral and

A. Anti-Competitive Conducts

Data protection concerns may arise where personal data is being traded or exchanged as a commodity among undertakings (issues with Art. 101 TFEU), or given by consumers in exchange for free goods and services (issues with Art. 102 TFEU as in the *Facebook* case), or where the merger of undertakings results in the concentration of consumer data (issues with merger control). In assessing the anti-competitiveness of these conducts, it must be noted that the consumers may be better off because of the improved algorithms' accuracy and the enhanced user experience. As competition law lacks the normative tools to cater to consumer preferences (discussed in Section I), data protection rules may be subsumed into the competition assessment and act as one of the non-price parameters.⁵⁵

The courts and the Commission are involved in a task of weighing interests, in order to decide the competitive effects of the conduct in question. For example, under the Art. 101(3) TFEU exception, the courts and the Commission are engaged in a balancing exercise in comparing the welfare of consumers against the harm to competition.⁵⁶ In the process, data protection considerations can act as a qualitative benchmark to be weighed and balanced with other parameters.

Lynskey similarly advocated that data protection law can act as an internal constraint (i.e. normative benchmark) or an external constraint on competition law, their proposed dividing line was that the former applies only when the two regimes overlap in material scope, i.e., the situation where undertakings engage in 'competition on data protection'. Where they do not overlap, data protection law should act as an external constraint. The focus of this Note, nevertheless, is on the competitive nature of the conducts. When the conduct in question is more anti-competitive, even if the undertakings are not in the competition to provide better data protection, the task of the courts is to decide whether to prohibit such conduct by balancing different interests, and thus no issue of data protection law acting as an external constraint or a threshold requirement in competition law arises. In such a situation, this Note argues that data protection considerations should act as a non-price competition parameter, as opposed to the proposal of Costa-Cabral and Lynskey.

⁵⁵ Ferretti (n 27) 113.

⁵⁶ In Case T-112/99 *Métropole télévision (M6) and Others v Commission* (2001) ECR II-2459, it was held that a 'rule of reason', that is to weigh the pro- and anti-competitive effect of an agreement, is confined to the analysis under the Art. 101(3) exception, but not the Art. 101(1) prohibition itself. However, in Case C-519/04 P *David Meca-Medina and Igor Majcen v Commission* (2006) ECR I-6991, the court seemed to have introduced a rule of reason element to Art. 101(1) where the court balanced the legitimate objectives of an anti-doping rule of the International Olympic with its effect of restricting competition.

For example, the purpose and necessity of data collection,⁵⁷ the legitimacy of consent, and the measures taken by the undertaking to respect consumers right to data portability (such as the ability to switch providers),⁵⁸ right to be forgotten,⁵⁹ and other rights, can be balanced with other considerations such as the improvement in the quality of services, the limitation on consumer choice (e.g., lock-in effect), and reduction in the incentive to innovate. In fact, in the German *Facebook* case, the *Bundeskartellamt* had conducted such a balancing exercise and concluded that ‘the efficiencies in a business model based on personalised advertising do not outweigh the interests of the users when it comes to processing data from sources outside of the social network’.⁶⁰ Taking data protection as a non-price benchmark can offer competition law the normative tool to assess consumer behaviours in the digital economy and cater to the more vulnerable consumers in the assessment of the aggregate consumer welfare.

The courts have been willing to use other legal principles, such as intellectual property rights law⁶¹ and consumer law,⁶² as competitive benchmarks in performing the required weighing of interests. It would not be unprecedented to subsume data protection law into the competition assessment. The objection that competition authorities are ill-equipped to evaluate data protection breaches can also be easily dismissed, since many national authorities have multiple competencies (such as Italian *Autorita` Garante della Concorrenza e del Mercato* (‘AGCM’)) which do not always consult and cooperate with other authorities, as the *Bundeskartellamt* did in the German *Facebook* case.⁶³ In fact, the European Data Protection Supervisor has established a ‘Digital Clearinghouse’ in 2017, allowing the national competition, data protection, and consumer law enforcers to establish cooperation in the digital economy.

Allowing data protection law as a competitive benchmark could have the benefit of resolving the so-called ‘regulatory dilemma’ caused by the separate competences of authorities and the different objectives and structures of the legal

⁵⁷ GDPR art 5.

⁵⁸ GDPR art 20.

⁵⁹ GDPR art 17.

⁶⁰ *Bundeskartellamt*, ‘Case Summary’ (n 8) 1.

⁶¹ Case C-457/10 *Astra Zeneca v Commission* (2012) (2013) ECR I-0000.

⁶² *VBL-Gegenwert I* (n 12) para 65.

⁶³ *Bundeskartellamt*, ‘Case Summary’ (n 8) 8-9.

regimes.⁶⁴ For example, in Italy, the *AGCM* was also concerned with Facebook's transfer of consumer data from third-party websites. However, the Italian *AGCM* diverged from the German *Bundeskartellamt* by characterising Facebook's conduct as an unfair commercial practice rather than an abuse of dominant market position.⁶⁵ The *AGCM* decided that Facebook has misled consumers into believing that they are obtaining a 'free' service, when it is actually 'paid' for with their personal data.⁶⁶ Interestingly, the reasons for the choice of law, it is said, was because consumer law did not raise the complex questions of market definition and dominance. Therefore, it was the 'easier route' than competition law.⁶⁷ The cost, nevertheless, was that the consumer law sanction had an insignificant deterrent effect on Facebook.⁶⁸ This Italian *Facebook* case highlights the dilemma that, while competition law lacks the normative tools to assess the requisite abusiveness involving consumer data extraction, data protection and consumer law target only the affected consumers and are unable to tackle the more structural competition problem which will degrade the welfare of all market participants in the long run. Hence, introducing data protection into the competition assessment may offer a strategic benefit to affect the intended deterrence upon the undertakings since competition sanctions are more severe (up to 10% of turnover)⁶⁹ and diversified (behavioural commitment available).⁷⁰ Nevertheless, it is incumbent to bear in mind that mere data protection infringement may not suffice per se as harm to competition (discussed in Section II), so as to preserve the integrity of competition law.

⁶⁴ Botta and Wiedemann (n 33).

⁶⁵ *AGCM*, 'Facebook fined 10 million Euros by the ICA for unfair commercial practices for using its subscribers' (2018) <<https://en.agcm.it/en/media/press-releases/2018/12/Facebook-fined-10-million-Euros-by-the-ICA-for-unfair-commercial-practices-for-using-its-subscribers%E2%80%99-data-for-commercial-purposes>> accessed 3 February 2021.

⁶⁶ *ibid.*

⁶⁷ Botta and Wiedemann (n 33).

⁶⁸ *ibid.* The maximum fine imposed for violating the Italian consumer law was €5 million (Art. 27(9), *Codice del Consumo*), which is substantially lower than competition law sanction (up to 10% of turnover) for large undertakings like Facebook. In the Italian *Facebook* case, the fine imposed was €10 million on two counts of unfair commercial practice, which has been described as a mere 'drop in the ocean' to Facebook.

⁶⁹ Regulation 1/2003 (n 52) art 23.

⁷⁰ *ibid* art 9.

B. Pro-Competitive Conducts

More difficult questions arise when conducts involving data protection concerns are pro-competition. For example, the exchange of consumer data may promote competition by reducing information monopolies of the dominant undertakings that has the effect of market foreclosure.⁷¹ In these situations, the courts or the Commission may require the information monopolist to share the consumer data that they extracted. However, such a decision may produce conflicting duties between disclosing consumer data under competition law and withholding it under data protection law; thus, data protection can serve as a threshold requirement in approving the data sharing.

In practice, data protection rules can shape the remits of competition competence in relation to the kind and extent of the data sharing. The French *Autorité de la Concurrence*, for example, has ordered GDF Suez to disclose consumer data (including contact details and consumption profiles) to its competitors that it had acquired as a public service operator and used to its own competitive advantage, to ensure efficient competition. To prevent the data protection hazard, GDF Suez was further ordered to obtain the consent of the affected consumers with the opportunity to object.⁷² This decision demonstrated a more rigorous fundamental rights approach towards protecting consumer data. Data protection rules restricted the boundary of the competition remedies to ensure the legitimacy of the data exchange.

In the German *Facebook* case, the *Bundeskartellamt* acknowledged the constitutional origin of data protection⁷³ and considered that ‘constitutional rights have to be included in assessment of interests under competition law’.⁷⁴ Although the *Bundeskartellamt* did not differentiate between anti- and pro-competitive conducts (perhaps because such an issue did not arise), the authors argue that data

⁷¹ Ferretti (n 27).

⁷² *Autorité de la Concurrence*, ‘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’ (2014) <www.autoritedelaconcurrence.fr/fr/decision/relative-une-demande-de-mesures-conservatoires-presentee-par-la-societe-direct-energie> accessed 3 February 2021.

⁷³ *Bundeskartellamt*, ‘Case Summary’ (n 8) 8.

⁷⁴ *ibid* 11.

protection has different roles in dealing with these different conducts, and it cannot simply act as a non-price benchmark to be balanced with other parameters in approving a pro-competitive data exchange. Otherwise, it might create a problematic circularity. Assuming data protection merely acts as a competitive parameter, the circularity would be that Art. 6(1)(c) GDPR permits the transfer of data on the ground of necessity to comply with a legal obligation, but the legal obligation to transfer data is imposed by competition law. Thus, the legality of imposing that obligation hinges on data protection considerations as a benchmark. It amounts to saying that competition law is permitted by GDPR to permit GDPR in compelling the data transfer. An internal conflict of the data protection framework might arise within this circularity: if the courts or the Commission conclude that the interests of certain groups outweigh the data protection considerations and therefore compel the data transfer under competition law, such legal obligations to transfer the data would be allowed under Art. 6(1)(c) GDPR but may contradict the nature of data protection as a constitutional right.

Take *Asnef-Equifax* (discussed in Section I) as an example and assume that the CJEU had taken into account data protection as a non-price parameter in the competition assessment.⁷⁵ If the CJEU were to conclude that the interests of *all consumers* trump the data protection considerations and order the exchange of consumer data between the credit bureaus, such a result would have undermined the constitutional guarantee of data protection. This owes to the fact that it impliedly allows the economic interests of a small group of consumers (the elitist) to override the fundamental data protection rights of a larger group (the vulnerable and the average), who probably would not have consented to the data exchange had they known their positions would be worse off. Therefore, it is argued that data protection cannot merely act as a qualitative parameter in approving a pro-competitive data exchange.

Unfortunately, the CJEU in *Asnef-Equifax* seemed to take compliance with data protection rule as presumed and allowed the exchange of consumer data between credit bureaus.⁷⁶ The CJEU merely noted that there are applicable rules under the relevant national legislation for the affected consumers to check the

⁷⁵ *Asnef-Equifax* (n 4).

⁷⁶ Ferretti (n 27) 110.

information and, where necessary, have it corrected or deleted. They did not investigate whether those rules and legislation were complied with.⁷⁷ In defence of the *Asnef-Equifax* decision, it has been suggested that the statement ‘any possible issues relating to...personal data are not...a matter of competition law’⁷⁸ should be read as a recognition that the different regimes are separate policy areas that pursue different objectives, but not as prevention of enforcing competition law when data protection concerns arise.⁷⁹

A few points are worth noting. The expansive reading of *Asnef-Equifax* appears to be misguided because the effect of the decision was to restrict data protection from forming part of the competition assessment.⁸⁰ Indeed, competition law and data protection law pursue distinctive aims. As such, it is too extreme to claim that violation of data protection rules by a dominant undertaking is an abuse of the dominant position (discussed in Section I). Yet, it would go from one extreme to another to assert that compliance with data protection law precludes its application in the competition framework. In *Astra Zeneca*, it was held that the illegality of abusive conduct under Art. 102 TFEU is unrelated to its compliance or non-compliance with other legal rules.⁸¹ Not to mention it is a logical leap to conclude that data protection law is complied with merely because statutory safeguards were in place for the affected consumers to check their information. To illustrate, the purpose of exchanging the consumer financial data, allegedly the management of the risk of borrower default,⁸² may require scrutiny of whether the purpose limitation provisions⁸³ of data protection law are satisfied.⁸⁴

The more proper approach, as the authors argue, is that the fundamental right of data protection should prevail over economic interests. Data protection is closely linked to other fundamental values, including privacy⁸⁵ and public

⁷⁷ *Asnef-Equifax* (n 4) para 63.

⁷⁸ *ibid.*

⁷⁹ Botta and Wiedemann (n 33) 436.

⁸⁰ *Asnef-Equifax* (n 4).

⁸¹ *Astra Zeneca* (n 61) para 132.

⁸² *Asnef-Equifax* (n 4) para 55.

⁸³ GDPR, art 5(1)(b).

⁸⁴ Ferretti (n 27) 110.

⁸⁵ EU Charter (n 1) art 7.

trust.⁸⁶ It ensures the freedom and autonomy of the data subjects to develop their own personalities and social identities which should not be easily interfered with by any behaviours or preferences motivated by commercial or economic interests.⁸⁷ Failure to give proper respect to the fundamental right of data protection in competition assessment may also carry negative economic consequences. As mentioned in Section I, undertakings collect a large database of transactions with the consumers and induce them to disclose more personal data. Then, the undertakings can spot and manipulate the cognitive styles of the consumers to encourage purchases.⁸⁸ In competition assessment (with no regards to the data protection concerns), such data accumulation or sharing between undertakings may be found to generate economic benefits through ‘matching the right advertisement to the right person’.⁸⁹ However, it has been shown that market manipulation would lead to higher-than-optimal purchasing level and thus harm market efficiency.⁹⁰ Requiring data protection to act as a threshold in approving the data accumulation or data sharing may help to reduce market manipulation as it places the burden on the undertakings to provide justifications, instead of relying on the consumers to make rational decisions over the use of their data.

In practice, the suggested approach in the *Asnef-Equifax* scenario is to require the credit bureaus to satisfy the purpose limitation,⁹¹ data minimisation, and other provisions and to obtain the consent of the affected consumers as threshold requirements before they are allowed to exchange the consumer data to ensure the constitutional legitimacy of the data transfer.

In sum, care must be taken as to the dual role of data protection in the competition framework, especially since there is no clear dividing line between anti- or pro-competitive conduct. For example, a data sharing agreement between undertakings or remedies ordered by the authorities would necessarily involve some degree of reducing uncertainties in the process of competition (the anti-

⁸⁶ Ferretti (n 27) 106.

⁸⁷ Antoinette Rouvroy and Yves Poullet, ‘The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy’ in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer, 2009).

⁸⁸ Calo (n 32).

⁸⁹ *ibid.*

⁹⁰ Hanson and Kysar (n 31) 1553.

⁹¹ *Asnef-Equifax* (n 4).

competitive aspect),⁹² but at the same time lessening the market foreclosure effect of information monopoly (the pro-competitive aspect).⁹³ The effect of the conduct relating to data accumulation or exchange should instead be considered as across a spectrum of competitiveness. Where the conduct in question lies closer to the anti-competitive end, data protection may act as a non-price parameter to determine whether it is permissible. While at the pro-competitive end of the spectrum, it is an additional safeguard to protecting consumer rights.

CONCLUSION

This article examines an aspect of consumer data protection in the digital economy, namely whether data protection principles can be considered in competition law analysis. It is in the authors' opinion that such an approach is justified for the purpose of consumer protection. Nonetheless, for the sake of preserving the integrities of the separate regimes, data protection should not, in itself, suffice to constitute competitive harm that attracts competition remedies. Rather, along the spectrum of competitiveness that conduct may fall within, the courts and the Commission may subsume data protection law into the competition framework accordingly as a qualitative benchmark that has to be balanced with other parameters, or it may serve to restrict the remits of competition competence as a threshold requirement due to its nature as a fundamental right.

⁹² In Case C-8/08 *T-Mobile Netherlands BV v Raad* (2009) E.C.R. I-4529, the Court of Justice widened the 'anti-competitive object' approach to include an exchange of information that reduces or removes the degree of uncertainty as to the operation of the market in question.

⁹³ In *Asnef-Equifax* (n 4), the Court of Justice recognised that the exchange of consumer solvency and credit information between credit bureau could reduce the risk of lending, and therefore its main object was not to restrict or distort competition.

