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and Data Protection Law in the Digital
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by

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The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace

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☞ Abuse of dominant position; Certainty; Comparative law; Competition law; Data protection; EU law; Fairness; Jurisprudence; Personal data

Abstract

In the rapidly proliferating digital marketplace, the business model of numerous companies is based on the processing of vast amounts of personal data. The data economy has triggered controversies regarding the intersection between EU competition law and data protection law. This article embarks on a conceptual analysis of “fairness”, and tests the hypothesis that there exist commonalities between the two fields of law. The hypothesis is based on the fact that both competition and data protection law make explicit reference to the concept of fairness in defining infringements, and that EU law in general terms is subordinate to the principle of coherence. The article concludes, however, that although the concept is, to some extent, applied coherently in the two fields, its ability to offer legal certainty for the actors in the digital economy remains limited unless and until the administrative and judicial authorities elaborate its precise contents more fully. A joint elaboration could offer opportunities to move from “deliberate isolation” towards “constructive coherence”.

Introduction

Personal data have become the core asset of many companies operating in the digital marketplace. Business models based on the monetisation of personal data abound, yet from a legal perspective, this emerging digital economy gives rise to difficult controversies. A recent point of culmination is the treatment of personal data at the intersection between EU competition law and data protection law. This article aims to analyse the extent to which the approaches to the treatment of personal data in these fields are, as is often claimed, incompatible, or at least clearly distinct.¹ The assertion is tested through a (counter)

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¹ Commission Decision of 3 October 2014 (Case COMP/M.7217—Facebook/WhatsApp) [2014] OJ C7239 at [164]. The perceived incompatibility is also reflected in the lack of co-operation between competition and data protection authorities. The EDPS has observed that “overall there is a quite fragmented scenario in enforcing EU rules, with competent authorities not necessarily talking to each other whilst dealing with cases featured by considerable overlaps

hypothesis that there are, in fact, common and coherent elements between the fields of data protection and competition law. The analysis is conceptual, focusing on the notion of *fairness*. Fairness could bring under scrutiny also other, interrelated, issue areas of the digital economy.² This article is nonetheless devoted to a detailed analysis of the interlinkage between data protection and competition law, as it has received considerably less attention than for example the general relationship between competition law and consumer protection.³

The article's hypothesis concerning the interplay between competition and data protection law is based on the facts that both fields make explicit reference to the concept of fairness in defining infringements and that EU law is in accordance with art. 7 TFEU subordinate to the principle of consistency. Consistency has, alongside comprehensiveness and continuity, been conceptualised to constitute coherence. This understanding of coherence leads to a view of the law as a meaningful whole, with mutually supportive and interdependent components. It is a normative and systemic notion where points of law fit together.⁴

To test its hypothesis of coherence, the article will first determine the meaning of fairness in the primary, secondary and case law applicable to these two fields. It will then explore whether there is conceptual coherence on fairness across such findings. Findings of overlaps and coherence in the law and its application across the two fields in support of the hypothesis would indicate that the competition and data protection authorities dealing with the digital sector would be able to base their decision-making practices on a more elaborate, common pool of understanding. The article concludes, however, that although there are aspects of coherence in how fairness features in the substantive competition law and data protection provisions, the concept's ability to offer legal certainty for the actors in the digital economy remains limited unless and until the administrative and judicial authorities elaborate its precise contents more fully. Suggestions on how such elaboration could take place in a mutually accessible and beneficial manner are provided in the concluding section.

Data processing in two-sided markets

The analysis in this article concerns markets in which personal data form a key business asset. Companies operating in these markets, such as Facebook and Google, employ a business model that in economic terms can be defined as "two-sided". The theory on two-sided markets was formulated in the seminal article of Rochet and Tirole,⁵ and has been subsequently developed further by these and a number of other

in terms of substance": EDPS, "Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data" (23 September 2016), p.9.

²EDPS, "Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data" (23 September 2016), p.8. Fairness, as noted by the EDPS, is a fundamental criterion for lawful trading practices in consumer protection law, which is therefore, next to EU competition and data protection law, a component of a legal triangle applicable to the data economy.

³The intersection between competition law and consumer protection is discussed in e.g. K. Cseres, *Competition Law and Consumer Protection* (Alphen aan den Rijn: Kluwer Law International, 2005); G. Monti, "The Revision of the Consumer Acquis from a Competition Law Perspective" (2007) 3 *European Review of Contract Law* 295; A. Albers-Llorens, "Competition and Consumer Law in the European Union: Evolution and Convergence" (2014) 33 *Yearbook of European Law* 163.

⁴S. Berteau, "Looking for Coherence within the European Community" (2005) 11 *E.L.J.* 154. The notion of coherence is itself subject to elaborate research and debate. See further, on the methodological approach adopted in this article, the subsection "Focus on the concept of fairness" below, and on the notion of coherence more generally, e.g. N. MacCormick, "Coherence in Legal Justification" in A. Peczenik, L. Lindahl and G. van Roermund (eds), *Theory of Legal Science* (Dordrecht/Boston/Lancaster: Reidel, 1984); N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1994); S. Prechal and B. van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford: Oxford University Press, 2008).

⁵J.-C. Rochet and J. Tirole, "Platform Competition in Two-sided Markets" (2003) 1 *Journal of the European Economic Association* 990.

authors.⁶ Their definition provides that a “market with network externalities is a two-sided market if platforms can effectively cross-subsidise between different categories of end users that are parties to a transaction.”⁷ The creation of benefits and the market structure is therefore based on positive indirect network effects, whereby the users on at least one side of the market benefit from an effect similar to economies of scale. Such network externalities emerge when “the value obtained by one group of customers increases with the number of customers of the other group”.⁸ For example, the more users there are in a mobile operating system, the more demand there is to develop applications for that system, and vice versa. To function, a two-sided market thus needs to have both sides “on board”.

As Koops has noted, business models that generate revenue from user-data-based profiling and advertising are the most prominent two-sided strategies in the online context.⁹ In an advertising-based business model, personal data are first collected by companies on the consumer market side, subsequently used to create comprehensive profiles of digital consumers, and finally monetised on the advertising market side.¹⁰ In order to attract a large number of consumers whose profiles to monetise, digital users are usually offered a service or a product for free. Hence, the transactions in digital settings can be conceived as occurring in exchange for personal data. From the viewpoint of the companies, the price strategies in such two-sided settings can be characterised as being of a “divide-and-conquer” nature, “subsidizing the participation on one side (divide) and recovering the loss on the other side (conquer)”.¹¹ The accumulation of personal data, which may be symptomatic of the companies’ market power and their ability to expand, raises questions about competition in the market in question. The concerns have concretised in the context of merger control, in challenges against companies managing substantial amounts of personal data. A prime example is the *Facebook/WhatsApp* case,¹² which related to the impacts of the merger between the two companies in strengthening the position of Facebook in the online advertising market.¹³ Additionally, the investigation of Facebook’s practices by the German Federal Cartel Office (Bundeskartellamt) in the context of abuse of dominance further demonstrates the emerging relevance of data protection-related concerns in the competition law analysis.¹⁴

The focus in this contribution is on art. 102 TFEU, which relates to the unilateral behaviour of companies in a position of economic strength. The key passages of art. 102(a) stipulate that a prohibited abuse of a

⁶The most important contributions: B. Caillaud and B. Jullien, “Chicken & Egg: Competition among Intermediation Service Providers” (2003) 34 *RAND Journal of Economics* 309; D. Evans, “The Antitrust Economics of Multi-Sided Platform Markets” (2003) 20 *Yale Journal on Regulation* 325; J.-C. Rochet and J. Tirole, “Two-Sided Markets: A Progress Report” (2006) 37 *RAND Journal of Economics* 645; M. Armstrong, “Competition in Two-sided Markets” (2006) 37 *RAND Journal of Economics* 668; D. Evans and R. Schmalensee, “The Industrial Organization of Markets with Two-Sided Platforms” (2007) 3 *Competition Policy International* 151.

⁷Rochet and Tirole, “Platform Competition in Two-sided Markets” (2003) 1 *Journal of the European Economic Association* 990, 1018.

⁸L. Filistrucchi, D. Geradin and E. van Damme, “Identifying Two-Sided Markets”, Working Paper 01, Dipartimento di Scienze Economiche, Università degli Studi di Firenze (2012), p.4.

⁹B.-J. Koops, “The Trouble with European Data Protection Law”, Symposium Article (2014) 4 *International Data Privacy Law* 250, 252.

¹⁰See OECD, *Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value* (2013), p.10. The report specifies that the identified four-step “personal data value chain” consists of collection and access, storage and aggregation, analysis and distribution and use of data.

¹¹Caillaud and Jullien, “Chicken & Egg” (2003) 34 *RAND Journal of Economics* 309, 310.

¹²Case COMP/M.7217—*Facebook/WhatsApp* [2014] OJ C7239.

¹³Case COMP/M.7217—*Facebook/WhatsApp* [2014] OJ C7239 at [167]. According to two possible theories of harm, the position of Facebook could be strengthened by “(i) introducing advertising on WhatsApp, and/or (ii) using WhatsApp as a potential source of user data for the purpose of improving the targeting of Facebook’s advertising activities outside WhatsApp”.

¹⁴Press release of Bundeskartellamt (2 March 2016), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568 [Accessed 15 February 2017].

dominant position may consist of “directly or indirectly imposing *unfair* purchase or selling prices or other *unfair* trading conditions”.¹⁵ In the light of what was explained above, personal data are an intrinsic part of prices and trading conditions more generally speaking in the two-sided digital marketplace. The accumulation of personal data leads also to concerns relating to privacy and the use of such data for unwarranted purposes. Under EU law, the collection and processing of personal data are subjected to strict conditions. Market operators who collect and manage personal information must comply with all the data protection principles and respect a set of rights of data subjects. Article 8 of the EU Charter on Fundamental Rights (the Charter),¹⁶ which has the same legal value as the Treaties,¹⁷ stipulates that personal data “must be processed *fairly* for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law”.¹⁸ Article 8 expands the protection offered by the Charter’s art.7, which establishes the right to privacy.¹⁹ Additionally, art.6 of the Data Protection Directive²⁰ and art.5 of the new General Data Protection Regulation²¹ (the GDPR) set the requirement on the Member States to ensure that personal data is processed fairly and lawfully.

Focus on the concept of fairness

Methodologically, this article uses an analytical positivist backdrop to its exploration of the point of intersection between EU competition and data protection law. The analysis focuses on the concept of fairness. Analytical positivists understand concepts as linguistic devices for effective communication on legal matters. There are no “correct” definitions or meanings for legal concepts. Their definitions are, rather, functional and case-dependent, and help in revealing potential teleological differences between actors, sectors, policy choices or normative systems.²² Applied through a single common concept, analytical positivism thus can direct the research to the underlying differences in the economic and non-economic ends of action on personal data across two fields of law. This kind of deconstruction of personal data can be useful in refining the complex relationships between competition law and data protection.

Reflecting the principle of coherence of EU law, fairness as a concept common to two fields of EU law can as a starting point be assumed to display similar meanings. This assumption needs, however, to be carefully subjected to potential sources of divergence. In particular, the divergence of legal concepts in EU law that relates to their grounding in dissimilar national legal cultures and linguistic settings has received substantial scholarly attention.²³ The concept of fairness certainly does not escape such cultural divergences, and indeed the conclusions of the present analysis reflect such divergences. At the same time

¹⁵ Emphasis added.

¹⁶ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

¹⁷ Article 6(1) TEU.

¹⁸ Emphasis added.

¹⁹ P. Hustinx, “EU Data Protection law: The review of Directive 95/46/EC and the Proposed General Data Protection Regulation”, pp.4–5, https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15_Article_EU_EN.pdf [Accessed 15 February 2017]. On the discussion about the distinction between the right to privacy and the right to data protection, see e.g. O. Lynskey, “Deconstructing Data Protection: the ‘Added-value’ of a Right to Data Protection in the EU Legal Order” (2014) 63 *International & Comparative Law Quarterly* 569; and J. Kokkot and C. Sobotta, “The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR” (2013) 3 *International Data Privacy Law* 222. See also, in this context, G. González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Cham: Springer International Publishing, 2014).

²⁰ Directive 95/46 [1995] OJ L281.

²¹ Regulation 2016/679 (General Data Protection Regulation (GDPR)) [2016] OJ L119/1.

²² N. Jääskinen, “Back to the Begriffshimmel? A Plea for an Analytical Perspective in European Law” in *The Coherence of EU Law* (2008).

²³ See e.g. S. Prechal and B. van Roermund, “Binding Unity in EU Legal Order: An Introduction” in *The Coherence of EU Law* (2008).

these kinds of divergences are methodologically mitigated by the delimitation of the analysis to English language texts of EU primary and secondary law and CJEU jurisprudence. The national data protection and competition law provisions, the transposition of EU law to national law, as well as the respective authorities' decision-making practices, are taken into account in this article only to a limited extent.

Besides limiting the analysis to the Union layer of the EU's multi-level governance system, potential divergences in the conceptual interpretations of fairness are also reduced by focusing on a single empirical context: the modern digital market and its consumers. This reflects the analytical positivist undertones of scrutinising legal concepts through their practical implementation, not in the abstract. Further, as the flexible concept of fairness can be found in varying legal occurrences, with potentially "different meanings in different contexts",²⁴ the above methodological measures are applied to reduce the divergence adequately for the purposes of the proposed conceptual analysis.

Fairness is a part of the value basis of the European societal model and has been defined in that context as "free of bias or prejudice" and "impartial, just and equitable".²⁵ As such, it is an essential element of the European society based on the rule of law, and underpins democracy, equality and justice of art.2 TEU. It would appear logical that these intellectual underpinnings of fairness in both fields bear similarity.

As the previous section illustrated, the notion of fairness figures prominently in the central legal provisions, be they accumulated personal data assessed from the viewpoint of EU competition or data protection law. In fact, as the analysis will demonstrate, fairness can be classified on a general level as an objective in both fields of law. This potential conceptual commonality over fairness appears intriguing in light of the controversies that have arisen as regards the points of intersection between EU competition law and data protection rules.

Data protection advocates suggest that the adequacy of traditional competition frameworks of analysis may need to be revisited in view of the increasing value of personal data to digital companies.²⁶ The EDPS has issued in this context two opinions highlighting the synergies between the legal frameworks for data protection, competition and consumers.²⁷ Competition law circles appear more reluctant to accept such an idea, and tend to reject possible interlinkages between the two areas of law. According to Ohlhausen and Okuliar, for example, combining the two could lead to "confusion and doctrinal issues in antitrust".²⁸ The European Commission has asserted in the *Facebook/WhatsApp* decision that any privacy related concerns "do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules".²⁹ Although the Commission restated this tenet in the context of Microsoft's acquisition of LinkedIn, it also acknowledged that privacy related concerns,

²⁴R. Nazzini, *Normative Theory of Competition Law* (Oxford: Oxford University Press, 2011), p.21.

²⁵*Black's Law Dictionary*, 7th edn (St Paul, MN: West Publishing Co, 1999), p.615.

²⁶EDPS, "Preliminary Opinion of the European Data Protection Supervisor, Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy" (Brussels, March 2014). See also A. Grunes and M. Stucke, "No Mistake About It: The Important Role of Antitrust in the Era of Big Data", University of Tennessee Legal Studies Research Paper No.269 (2015).

²⁷EDPS, "Preliminary Opinion of the European Data Protection Supervisor, Privacy and competitiveness in the age of big data" (March 2014); EDPS, "Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data" (23 September 2016). See also Stucke and Grunes, "No Mistake About It", University of Tennessee Legal Studies Research Paper No.269 (2015).

²⁸M. Ohlhausen and A. Okuliar, "Competition, Consumer Protection and The Right [Approach] to Privacy" (2015) 80 *Antitrust Law Journal* 121, 138. See also K. Coates, *Competition Law and Regulation of Technology Markets* (Oxford: Oxford University Press, 2011), p.394. Coates states that competition law does not serve the purpose of protecting "all citizens' interests against every possible violation of those interests".

²⁹Case COMP/M.7217—*Facebook/WhatsApp* [2014] OJ C7239 at [164].

“can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality, and the merging parties compete with each other on this factor.”³⁰

The topic has also spurred interest of national competition authorities, which has resulted in the recent publication of a joint study by the French Competition Authority (Autorité de la concurrence) and the German Federal Cartel Office (Bundeskartellamt) assessing possible competition law issues related to the possession and use of data.³¹ In their view, requirements from other bodies of law can be considered, at least as context, when conducting a competition law assessment.³²

The debate can be seen as a part of the more general discussion about defining the objectives of law in pluralistic societies, where numerous societal values are promoted in parallel. Should the objectives of each field of law be limited to the protection of those values that are specific to the field in question in a narrow sense, or should the objectives be defined more broadly? Are there values that may be common to different fields of law? And is there a hierarchy, where some objectives or values are more a tool or proxy to protect other, more fundamental values? Framed against such general questions, this article may be seen as “inductive”. By focusing in detail on a specific case, namely on the notion of fairness in the context of the intersection between competition law and data protection law in digital markets, it may be able to offer also observations of a more general nature. Such general, systemic observations are, however, only tangential to the analytical legal positivist quest to scrutinise whether the notions of fairness in the two fields are overlapping, and if they may be interpreted in a coherent manner in assessing personal data related two-sided markets in the digital economy. Further, to the extent that differences can be detected, the article contains an exploratory investigation of how competition and data protection could possibly cross-fertilise each other’s notions of fairness within the common factual context of the digital economy.

Structure of the article

The article is structured as follows. After this introduction, the second section provides a more comprehensive analysis of fairness in the context of the general objectives of data protection law and competition law. After presenting fairness as a key value underlying EU data protection law, it subsequently juxtaposes fairness and welfare and provides a brief analysis of the interrelations between the two values as objectives of EU competition law. The third section embarks on the scrutiny of the way in which fairness features in the details of the specific provisions of two areas of law. It focuses first on the requirement of “fair data processing” as established in the EU secondary data protection legislation and in art.8 of the Charter. Then follows an analysis of art.102(a) TFEU. By drawing insights from the decisions of the Commission and the EU Courts, the section aims to establish possible interpretations of unfair trading conditions and of unfair prices under art.102(a) TFEU when evaluating competition in the digital, data-driven marketplace. Finally, the concluding part scrutinises the synergies between the conceptualisations of fairness in EU competition and data protection law. It is argued that, although limited conceptual coherence regarding fairness can be observed, there also remain more ambiguous and even

³⁰ Press Release: IP/16/4284, “Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions” (6 December 2016); Commission Decision of 6 December 2016 (Case COMP/M.8124-Microsoft/LinkedIn [2016] OJ C8404). In n.330 of the Decision, the Commission noted that the market investigation has revealed that “privacy is an important parameter of competition and driver of customer choice in the market for PSN [professional social network] services”.

³¹ Autorité de la concurrence and Bundeskartellamt, “Competition Law and Data” (10 May 2016), http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2 [Accessed 15 February 2017].

³² Autorité de la concurrence and Bundeskartellamt, “Competition Law and Data” (10 May 2016), p.23, http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2 [Accessed 15 February 2017].

contentious aspects to the interrelationship. The ambiguities call for further and increasingly co-ordinated actions by administrative and judicial authorities for the benefit of actors engaged with personal data in the digital market place.

Fairness—a value and objective in EU data protection law and EU competition law?

Fairness as a value underlying EU data protection law

The Data Protection Directive, which is still the key piece of secondary legislation at EU level, explicitly embraces the objective of an individual's fundamental right to privacy with respect to the processing of personal data.³³ The new GDPR formulates the objective in a modified way, specifying that it “protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data”.³⁴ The right to protection of personal data constitutes a fundamental right enshrined in art.8 of the Charter. It overlaps and is closely linked to the Charter's right to respect for private and family life laid down in art.7.³⁵

As regards the conceptual underpinnings of EU data protection law, the tenets advanced in this context have been the broad concept of fairness, and the more narrow idea that the right to data protection seeks primarily to accord individuals an enhanced *control* over their data. These views seem to be affected by one's acceptance or rejection of the significance of the right to informational self-determination. This right was initially, and rather influentially, formulated by the German Constitutional Court as,

“the authority of the individual to decide himself, on the basis of the idea of self-determination, when and within what limits information about his private life should be communicated to others.”³⁶

Lynskey, for example, perceives data protection law from such a control-oriented viewpoint and argues that the right to self-determination, which contributes directly to the promotion of self-development and the individual's right to personality, “remains a central tenet of the right to data protection”.³⁷ Kranenborg observes, however, that the notion of informational self-determination “is not how data protection is generally considered in the Council of Europe and the EU”.³⁸ He advocates a more comprehensive view, construed in terms of fairness. Fairness frames a vision of EU data protection rules constituting an “elaborated and conclusive system of checks and balances which ensures lawful processing of personal data”.³⁹ As such, fairness supports and reflects other objectives of data protection, such as preventing power symmetries and striking the right balance between the rights and interests of data subjects and of data controllers, that the checks and balances also promote. The same view is adopted by Hustinx, the EU's former European Data Protection Supervisor, who also refers to the system of checks and balances, and claims that the right to the protection of personal data is intended to guarantee a broader structural protection of individuals.⁴⁰

³³ Directive 95/46 art.1(1).

³⁴ GDPR art.1(2).

³⁵ See e.g. Lynskey, *The Foundations of EU Data Protection Law* (2015), pp.89–130.

³⁶ Judgment of 15 December 1983, BVerfGE 65, 1-71, *Volkszählung*.

³⁷ Lynskey, “Deconstructing Data Protection: the ‘Added-value’ of a Right to Data Protection in the EU Legal Order” (2014) 63 *International & Comparative Law Quarterly* 569.

³⁸ H. Kranenborg, “Commentary on Article 8” in S. Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing, 2014), p.229.

³⁹ Kranenborg, “Commentary on Article 8” in *The EU Charter of Fundamental Rights* (2014), p.229.

⁴⁰ Hustinx, “EU Data Protection law”, p.17, https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2014/14-09-15_Article_EUI_EN.pdf [Accessed 15 February 2017].

Fairness and the individual's control of data are nevertheless not contradictory or mutually exclusive. The premise that fairness is a value that overarches EU data protection law does not preclude the assertion that individuals' adequate control of data is also a key component of this field of law. To the contrary, the individual's control seems to form a precondition for achieving fairness, while fair processing of data feeds into improved control. Fairness thus can be perceived as having the status of an overarching value in EU data protection law. This in turn implies that the rules and principles enshrined in the EU data protection legislation are constructed with the attainment of this final objective in mind.

Conceptualisation of fairness as an objective in EU competition law

In EU competition law, the concept of fairness can be discussed from a substantive and a procedural viewpoint.⁴¹ The discussion below demonstrates that in the substantive considerations, fairness figures as a foundation or an objective of competition law, but it is very rarely in a stand-alone role and its contents are not well defined.

The EU competition authorities, courts and the scholarship have, according to Lianos, considered as objectives of EU competition law economic welfare, market integration, the protection of consumers, fairness and the principle of the freedom to compete.⁴² Although these objectives may co-exist, welfare and economic efficiencies have become the prominent ones in guiding competition enforcement,⁴³ which has triggered uncertainty as regards the treatment of the other values and their marginalisation. Indeed, the scholarship can currently be roughly divided into those who understand competition law to have one primary objective—(economic) welfare—and those to whom it has a plurality of objectives, of which fairness can be one.⁴⁴

Ahlborn and Padilla have divided competition law objectives into three groups, namely fairness, welfare and efficiency, and market integration.⁴⁵ These authors advance a broad claim that “fairness goals” include “fairness, the protection of economic freedom, the protection of rivalry and the competitive process and the protection of small and medium-size firms”.⁴⁶ The “fairness goals” were in their view incorporated into EU competition law from ordoliberalism,⁴⁷ which understands competition as an open and dynamic system that promotes competitive rivalry between individual producers and freedom of choice for individual

⁴¹L. Parret, “The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives” in D. Zimmer (ed.), *The Goals of Competition Law*, ASCOLA Competition Law series (Cheltenham: Edward Elgar, 2012), p.74.

⁴²I. Lianos, “Some Reflections on the Question of the Goals of EU Competition Law”, CLES Working Paper Series 3/2013, p.13, available at <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-3-2013> [Accessed 6 March 2017].

⁴³On the discussion about the objective of consumer welfare in EU competition law see e.g. K. Cseres, “The Controversies of the Consumer Welfare Standard” (2007) 3 *Competition Law Review* 121; P. Akman, “‘Consumer Welfare’ and Article 82 EC: Practice and Rhetoric” (2009) 32 *World Competition* 71; B. van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-efficiency Considerations under Article 101 TFEU* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2012); N. Kroes, “European Competition Policy—Delivering Better Markets and Better Choices”, SPEECH/05/512 (15 September 2015).

⁴⁴Lianos, “Some Reflections on the Question of the Goals of EU Competition Law”, CLES Working Paper Series 3/2013, p.3.

⁴⁵C. Ahlborn and A. Padilla, “From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law” in C.-D. Ehlermann and M. Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Oxford: Hart Publishing, 2008), pp.61–62.

⁴⁶Ahlborn and Padilla, “From Fairness to Welfare” in *European Competition Law Annual 2007* (2008), p.61.

⁴⁷Ahlborn and Padilla, “From Fairness to Welfare” in *European Competition Law Annual 2007* (2008), p.64.

consumers.⁴⁸ Schweitzer, however, conceptualises fairness more narrowly and as distinct from the ordoliberal goal of protecting competition: “the insertion of fairness concerns in the design of competition rules was always strictly opposed by ordoliberals”.⁴⁹ Irrespective of this disagreement, fairness concerns the *process* rather than the ultimate outcomes of competition.⁵⁰

The contents of the fairness objective remain relatively unclear, as it may encompass values as different as equality of opportunities, a fair distribution of outputs or of capabilities.⁵¹ Fairness can also be linked to welfare economics as a part of the distributive justice concerns, forming a consideration within the Social Welfare Function.⁵² The scholarship, however, often considers fairness and welfare as juxtaposed competition law objectives that are in a tense relationship. Ahlborn and Padilla have claimed that the positive “transition from the pursuit of fairness to a consumer welfare standard” has led to a situation where “a fairness-based antitrust rule will necessarily be pronounced inferior to a welfare-driven rule, unless both coincide”.⁵³ Similarly, Kaplow and Shavell have critiqued the reliance on fairness in a broader context of social policies. They claim that the notion of fairness is detached from welfare considerations, in that evaluations based on fairness may include aspects other than an individual’s well-being, and in some cases completely disregard welfare considerations.⁵⁴ Fairness considerations are not evaluative principles in their own right, but proxies that can assist in identifying legal rules that increase individuals’ well-being.⁵⁵ This would imply that the pursuit of fairness in competition law is legitimate when it simultaneously increases (economic) consumer welfare.⁵⁶

A different approach can nevertheless also be adopted. In his commentary on the function and essence of fairness, Zimmer has rejected reducing competition law to the single objective of consumer welfare, and rather concentrated on the process of competition: “The law protects competition as such because it is deemed, by way of *presumption*, to have favourable effects of one sort or another.”⁵⁷ Consequently, the “infrastructural” function of law is to lead to a set of rules that is fair and equitable in that it guarantees that legitimate expectations of different market actors are realised, which will in turn further “the aggregate

⁴⁸ P. Behrens, “The Ordoliberal Concept of ‘Abuse’ of a Dominant Position and its Impact on Article 102 TFEU” in P. Nihoul and I. Takahashi (eds), *Abuse Regulation in Competition Law*, Proceedings of the 10th ASCOLA Conference Tokyo, 2015 (forthcoming), p.12.

⁴⁹ H. Schweitzer, “The Scherman Act and Abuse of a Dominant Position Under Article 82” (Panel Discussion) in *European Competition Law Annual 2007* (2008), p.18. The same view is expressed in Behrens, *Abuse Regulation in Competition Law* (forthcoming).

⁵⁰ See Lianos, “Some Reflections on the Question of the Goals of EU Competition Law”, CLES Working Paper Series 3/2013 (2013), p.11.

⁵¹ Lianos, “Some Reflections on the Question of the Goals of EU Competition Law”, CLES Working Paper Series 3/2013 (2013), p.31.

⁵² See M. Adler and C. Sanchirico, “Inequality and Uncertainty: Theory and Legal Applications” (2006) 155 *University of Pennsylvania Law Review* 279; M. Adler, “Future Generations: a Prioritarian View” (2009) 77 *George Washington Law Review* 1478.

⁵³ Ahlborn and Padilla, “From Fairness to Welfare” in *European Competition Law Annual 2007* (2008), p.55. See also M. Motta, *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 2004), pp.25–26; Motta has noted that although the objective of fairness could collide with economic welfare objective, they are not always in contradiction as some practices could be both unfair and welfare detrimental.

⁵⁴ L. Kaplow and S. Shavell, *Fairness Versus Welfare* (Cambridge, MA: Harvard University Press, 2002), p.39.

⁵⁵ Kaplow and Shavell, *Fairness Versus Welfare* (2002), p.44.

⁵⁶ See Van Rompuy, *Economic Efficiency* (2012), p.55; R. Nazzini, *The Foundations of European Union Competition Law: The Objectives and Principles of Article 102* (Oxford: Oxford University Press, 2011), p.145.

⁵⁷ D. Zimmer, “On Fairness and Welfare: The Objectives of Competition Policy” in *European Competition Law Annual 2007* (2008), p.106. See also *GlaxoSmithKline Services Unlimited v Commission* (C-501/06 P) EU:C:2009:610; [2010] 4 C.M.L.R. 2 at [63]. In relation to art.101 TFEU, the Court claimed that “Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such”.

well-being of individuals”.⁵⁸ Zimmer’s conceptualisation resonates with that of Nazzini, according to which fairness in competition law should be comprehended as having a formal function.⁵⁹ Fairness relates to the process in which all market participants are given “equal opportunities to benefit from the market”.⁶⁰ In his opinion “[a]n economic agent is unfairly prejudiced when he is harmed by anti-competitive behaviour”. Yet, also Nazzini has concluded that a free-standing concept of fairness cannot entirely define anti-competitive behaviour and that further criteria need to be identified.⁶¹ Motta, who has used the concept of fairness and equity interchangeably, has introduced a further distinction between *ex ante* equity implying equal initial opportunities of firms in the marketplace, and *ex post* equity representing equal outcomes of market competition. As competition law should ensure the existence of the level playing-field for all companies, he has claimed that only *ex ante* equity is consistent with competition policy.⁶²

These dilemmas pertaining to the competition law objectives of economic welfare and fairness are epitomised by the dynamics of the new digital market. The European Data Protection Supervisor has opined that the reach and dynamic growth in online offerings require the development of a new harm concept, reflective of violations of the right to data protection.⁶³ Indeed, consumer detriment or harm that digital companies with market power can cause through their data-related conduct *may* be interpreted also in terms other than economic welfare *stricto sensu*. Such non-economic considerations that surface in the digital market include precisely the protection of data and privacy. Economic consumer welfare as the sole objective of EU competition law would rather result in the rejection of non-economic normative privacy considerations. From the US perspective, Ohlhausen and Okuliar have recently supported such a rejection and claimed that there are unnecessary risks in any attempts to unify the fields of competition and consumer protection law, in particular as regards the Internet economy. Such endeavors could undermine the recent consensus that has evolved in antitrust enforcement. The decision-making practice could drift from the thorough methodological approaches of last decades back towards the inclusion of subjective non-competitor elements.⁶⁴ These authors consider competition law to offer “at best a convoluted and *indirect* approach to protecting people’s expectations of privacy online”.⁶⁵

To conclude, the analysis in this section illustrates how fairness is referred to in both data protection and competition law as a general objective. There remain vagueness and inherent differences in how this objective is conceptualised, although some similarities also come forth: the aim of fairness in EU competition law may offer an example of *indirect* protection of personal data and privacy. This may particularly be the case in markets where privacy and data protection constitute the parameters of competition. It can be assumed that, whenever this is the case, ensuring fairness for different market participants would result in the development of privacy-friendly products and services, and hence lead to favourable outcomes for consumers.⁶⁶ The commonalities may seem even broader for those who share the

⁵⁸ Zimmer, “On Fairness and Welfare” in *European Competition Law Annual 2007* (2008), pp.106–107.

⁵⁹ Nazzini, *Normative Theory of Competition Law* (2011), p.22.

⁶⁰ Nazzini, *Normative Theory of Competition Law* (2011), p.24.

⁶¹ Nazzini, *Normative Theory of Competition Law* (2011), p.24. See Motta, *Competition Policy: Theory and Practice* (2004), p.26.

⁶² Motta, *Competition Policy: Theory and Practice* (2004), p.26.

⁶³ EDPS, “Preliminary Opinion of the European Data Protection Supervisor, Privacy and competitiveness in the age of big data” (March 2014), p.32.

⁶⁴ Ohlhausen and Okuliar, “Competition, Consumer Protection and The Right [Approach] to Privacy” (2015) 80 *Antitrust Law Journal* 121, 156.

⁶⁵ Ohlhausen and Okuliar, “Competition, Consumer Protection and The Right [Approach] to Privacy” (2015) 80 *Antitrust Law Journal* 121, 156 (emphasis added).

⁶⁶ See e.g. Van Rompuy, *Economic Efficiency* (2012); O. Odudu, “The Wider Concerns of Competition Law” (2010) 30 *Oxford Journal of Legal Studies* 599; C. Townley, *Article 81 EC and Public Policy* (Oxford: Hart Publishing, 2009).

contested views that competition law is not limited to promoting economic welfare, but may also pursue non-economic objectives.

Fairness in substantive EU data protection law—“fair data processing”

Fairness, apart from featuring in the more general discussions on the core values of EU data protection law, is also explicitly referred to in the legal instruments of the Union. Fairness is enshrined in art.8 of the Charter and in the secondary legislation. Article 6(1)(a) of the Data Protection Directive, which is in the section expressly containing the “Principles relating to data quality”, states that Member States shall provide that data must be processed fairly and lawfully. The GDPR also features fairness of data processing as one of its basic principles referred to in art.5(1)(a). By analysing these specific legal provisions, the discussion can be narrowed down to more concrete and tangible points on the expressions of fairness in EU data protection law.

Provision of information to the data subject

To clarify the relatively broad requirement of data to be processed fairly, Recital 38 of the Data Protection Directive stipulates that for,

“the processing of data to be fair, the data subject must be in a position to learn of the existence of a processing operation and, where data are collected from him, must be given accurate and full information, bearing in mind the circumstances of the collection.”⁶⁷

The detailed list of what such accurate and full information may represent, and what therefore can be considered a prerequisite for achieving fairness under EU law, is presented in art.10 of the Directive. The list includes the controller’s identity, the purposes of the processing, as well as “any further information” necessary to guarantee fairness, such as the recipients or categories of recipients of the data, whether the data subject’s answers to questions regarding him/her are voluntary, and the consequences of failing to reply such questions. Fairness can therefore be determined as one of the essential concepts enshrined in the EU Data Protection Directive.

The EU is in the process of finalising its reform of data protection law. The objective of the EU is to “strengthen online privacy rights and boost Europe’s digital economy”.⁶⁸ The update concerns precisely the way in which the rapid technological developments have allowed companies to make use of personal data in unprecedented and dramatically increased ways, hence potentially threatening the protection of personal information.⁶⁹ The GDPR thus represents “an evolution of the existing EU model”⁷⁰ and intends to guarantee a higher level of protection. Fairness of data processing is referred to alongside lawfulness and transparency in art.5(1)(a). Recital 39 of the GDPR provides additional elucidation that fair and transparent processing imposes on the controller the obligation to provide, among others, information concerning the purposes of the processing and the identity of the controller. It furthermore stipulates that “the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of personal data.” It needs to be noted that, unlike the Data Protection Directive, the GDPR treats fairness and transparency as two separate requirements. Hence,

⁶⁷ Directive 95/46, Recital 38.

⁶⁸ See http://ec.europa.eu/justice/data-protection/reform/index_en.htm [Accessed 15 February 2017].

⁶⁹ GDPR, Recitals 6 and 7.

⁷⁰ A. Mantelero, “Competitive Value of Data Protection” (2013) 3 *International Data Privacy Journal* 229, 231.

under the Regulation fairness should be comprehended as embracing more than, or something different from, transparency in the provision of information to the users of digital services.⁷¹

Fairness and the requirement of consent

As explained in the previous section, the interpretation of the principle of fair data processing relates essentially to the requirement to provide information about the processing to the data subject. Consequently, fair processing of data can be linked to the requirement of a company to obtain from a data subject a valid consent, which needs to be specific, informed and freely given.⁷² Consent of the data subject is one of the essential legal bases for the conclusion of data processing transactions between data-based companies and digital users, and hence a criterion for legitimising such operations in EU data protection law.⁷³ Consent is defined in the Data Protection Directive as any indication of wishes through which “the data subject signifies his agreement to personal data relating to him being processed”.⁷⁴ It is a requirement separate from the obligation to provide information. As observed by Borgesius, “[o]btaining data subject consent must be distinguished from data protection law’s requirements regarding information to be given to the data subject”,⁷⁵ since a data controller cannot obtain consent merely by providing information about the processing.

The principle of fairness is relevant when considering the requirement of *informed* consent, which stipulates that the user is to be provided with a proper amount of information of relevant quality about the conditions that he is agreeing to.⁷⁶ Although the provision of information has its own value relating to fairness of data processing as explained in the previous section, it is also a dimension of consent. Such transparency “is not enough to legitimize the processing of personal data, but it is an essential condition in ensuring that consent is valid”.⁷⁷ It is acknowledged that the factors rendering information appropriate are the quality of information, i.e. that it is understandable and conspicuous, as well as its accessibility and visibility.⁷⁸ Kuner has noted that if the standard terms and conditions that the user is supposed to accept and consent to are presented in a way that does not give him “a reasonable opportunity to review and understand them before accepting”, for instance on account of their length or lack of transparency, the consent may be invalid.⁷⁹

A slightly broader interpretation of fairness may be observed in the UK Data Protection Act. The Act stipulates that in establishing fairness of data processing, it is necessary to consider the method used to obtain personal data. It is particularly important to assess whether individuals are deceived or misled with respect to the purpose or purposes of data collection.⁸⁰ Interestingly, in this context, the European Data Protection Supervisor in the opinion issued in March 2014 draws parallels between the individual’s right to be provided with information concerning data processing “in an intelligible form” and “misleading

⁷¹ W. Maxwell, “Principles-based Regulation of Personal Data: the Case of Fair Processing” (2015) 5 *International Data Privacy Law* 205, 208.

⁷² Directive 95/46 arts 2(h) and 7(a).

⁷³ Directive 95/46 art.7(a); Article 29 Data Protection Working Party, “Opinion 15/2011 on the definition of consent” (13 July 2011), p.4.

⁷⁴ Directive 95/46 art.2(h).

⁷⁵ F. Borgesius, “Personal Data Processing for Behavioural Targeting: which Legal Basis?” (2015) 5 *International Data Privacy Law* 163, 171.

⁷⁶ C. Kuner, *European Data Privacy Law and Online Business* (Oxford: Oxford University Press, 2003), p.67.

⁷⁷ Article 29 Data Protection Working Party, “Opinion 15/2011 on the definition of consent” (13 July 2011), p.9.

⁷⁸ Article 29 Data Protection Working Party, “Opinion 15/2011 on the definition of consent” (13 July 2011), p.20.

⁷⁹ Kuner, *European Data Privacy Law and Online Business* (2003), p.67.

⁸⁰ UK 1998 Data Protection Act Sch.I, Pt II, art.1(1); P. Carey, *Data Protection: A Practical Guide to UK and EU Law* (Oxford: Oxford University Press, 2015), p.72.

omissions”⁸¹ introduced in art.7 of the Unfair Commercial Practices Directive.⁸² According to the latter, the practice is misleading, and thus unfair, if “it omits material information that the average consumer needs, according to the context, to take an informed transactional decision”, or if the company “hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information”.

Another way in which the validity of the consent may be relevant in the broader construction of fairness in EU data protection law is the requirement that consent be *freely given*. The essence of this precondition is that freedom of choice should not be compromised through, for example, “deception, intimidation, coercion or significant negative consequences if he/she does not consent”.⁸³ Freedom of choice relates to the notion of imbalance of power and unequal bargaining power which are directly recognised in the GDPR:

“[C]onsent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller.”⁸⁴

As argued by Maxwell, the way in which fairness will be construed in EU data protection law is likely to be influenced by the interpretation of this concept in European consumer protection law.⁸⁵ It brings to the fore considerations of good faith and “significant imbalance in the rights and obligations of the parties”.⁸⁶

This section’s analysis of the provisions on “fair data processing” interpretation leads to the conclusion that fairness can be associated with the requirement to provide information to data subjects on, among others, the identity of a data controller, the existence and purposes of processing. There also exist evident connections between fairness in the processing of data and the obligation of the companies to obtain the consent of digital users.⁸⁷ The conduct of digital companies that may compromise fairness, and hence harm final users in terms of data protection, can entail ambiguity or a lack of transparency, yet is not limited to that. It may also be conceptualised in a broader manner as a means to assess the misleading or deceptive nature of behaviour or of coercion in an asymmetric power-relationship. The following section aims to explore the meaning of fairness in competition law, and more specifically in art.102(a) TFEU. This will subsequently lead us to identify possible synergies in the conceptualisations of fairness between the two fields of data protection and competition.

Fairness in substantive EU competition law—abuse of dominant position

Besides fairness in terms of the process of competition, which was discussed in the section on fairness in the context of the objectives of EU competition law, the second dimension of the concept is fairness towards consumers.⁸⁸ Along these lines, Gerber has conceptualised fairness as a two-dimensional concept that encompasses horizontal and vertical aspects,⁸⁹ the latter implying fairness towards trading partners

⁸¹ Article 29 Working Party, “Opinion 15/2011 on the definition of consent” (13 July 2011), p.25.

⁸² Directive 2005/29 [2005] OJ L149.

⁸³ Article 29 Working Party, “Opinion 15/2011 on the definition of consent” (13 July 2011), p.12.

⁸⁴ GDPR, Recital 43.

⁸⁵ Maxwell, “Principles-based Regulation of Personal Data” (2015) 5 *International Data Privacy Law* 205, 210.

⁸⁶ Maxwell, “Principles-based Regulation of Personal Data” (2015) 5 *International Data Privacy Law* 205, 210.

⁸⁷ Directive 95/46 art.2.

⁸⁸ Motta, *Competition Policy: Theory and Practice* (2004), p.24. Motta observed that: “Competition laws might also incorporate objectives such as fairness and equity, forcing firms to behave in a certain way both with respect to customers and to rivals.”

⁸⁹ D. Gerber, “Fairness in Competition Law: European and U.S. Experience”, prepared for presentation at a Conference on Fairness and Asian Competition Laws (5 March 2004), p.2.

or final consumers.⁹⁰ Parret has made a similar observation in that “[f]airness can come in when competition law protects competitors, the customers or the consumers”.⁹¹

The article focuses within competition law on art.102(a) TFEU,⁹² where fairness is expressly referred to. Article 102(a) introduces a prohibition to “directly or indirectly impos[e] *unfair* purchase or selling prices or other *unfair* trading conditions”,⁹³ which are classified as exploitative abuses. Exploitative behaviour entails causing direct harm to consumers, in distinction from exclusionary conduct through which companies intend to “exclude rivals from making an effective challenge to its dominant position”⁹⁴ and in effect harm consumers indirectly. Despite the explicit reference to fairness towards consumers in art.102(a) TFEU, its conceptualisation and the debate on the factors that need to be evaluated to determine behaviour as fair or unfair is underdeveloped, or at least unsystematic.⁹⁵ Those types of abuses that harm the consumer directly have until very recently received limited attention in EU competition law, as is apparent from the scarcity of cases. The Commission has not provided any official statements to clarify the situation in this respect, either, and has focused its Guidance on art.102 enforcement priorities⁹⁶ almost entirely on exclusionary abuses. Some authors advocate that exploitative abuses should only be referred to in exceptional circumstances.⁹⁷ They give as examples situations where entry barriers are very high and cannot be eliminated,⁹⁸ or when certain conduct results in exclusionary effects simultaneously with exploitative effects.⁹⁹

The speech on exploitative abuses given by Commissioner Vestager in November 2016 constitutes an important evolution in this respect. While competition authorities protect consumers indirectly by keeping market structures competitive, the Commissioner highlighted that they are also “bound to come across cases ... where dominant businesses are exploiting their customers, by charging excessive prices or imposing unfair terms”.¹⁰⁰ The prohibition of unfair conduct towards consumers enshrined in art.102(a) has recently in particular become part of the discussions on the application of EU competition law to the digital companies processing personal data. This may have been inspired by competition law developments at the national level. The recent announcement by the Bundeskartellamt that it has initiated proceedings against Facebook on the suspicion of abuse of dominant position indicates the pertinence of a more comprehensive legal delineation of fairness under art.102 TFEU: the authority’s statement maintains that “Facebook’s use of unlawful terms and conditions could represent an abusive imposition of unfair conditions on users”.¹⁰¹ Thus, the subsequent analysis attempts to establish whether the concept of fairness could be used as a standard for defining competitive harms.

⁹⁰ P. Akman, *The Concept of Abuse in EU Competition Law* (Oxford: Hart Publishing, 2012), p.149.

⁹¹ L. Parret, “The Multiple Personalities of EU Competition Law: Time for a Comprehensive Debate on its Objectives”, in *The Goals of Competition Law* (2012), p.74.

⁹² For a similar focus on art.102 in the context of discussing the objectives of EU competition law, see e.g. Lianos, “Some Reflections on the Question of the Goals of EU Competition Law”, CLES Working Paper Series 3/2013 (2013).

⁹³ Emphasis added.

⁹⁴ B. Lyons, “The Paradox of the Exclusion of Exploitative Abuse”, Swedish Competition Authority, *The Pros and Cons of High Prices* (Stockholm: November 2007), p.66.

⁹⁵ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.146.

⁹⁶ Commission, “Guidance on the Commission’s enforcement priorities in applying Art.82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” [2009] OJ C45/1.

⁹⁷ Motta, *Competition Policy: Theory and Practice* (2004), p.25.

⁹⁸ M. Motta and A. de Streel, “Excessive Pricing in Competition Law: Never say Never?” in Swedish Competition Authority, *The Pros and Cons of High Prices* (2007), p.14.

⁹⁹ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.303.

¹⁰⁰ M. Vestager, “Protecting consumers from exploitation”, Brussels Chillin’ Competition Conference (21 November 2016).

¹⁰¹ Press release of Bundeskartellamt (2 March 2016), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568 [Accessed 15 February 2017].

Fairness of trading conditions

Case law

There are only few instances in which unfair trading conditions have been mentioned in the decisions of the Commission and the EU Courts. Although these interpretations of anti-competitive trading conditions have been criticised for their vagueness and imprecision,¹⁰² they deserve a brief analysis before addressing fairness of companies' conduct in the online market more specifically. This section thus aims to extract the values and notions through which the Commission and the Courts have analysed fairness in varying factual circumstances.

One of the first instances where the Court interpreted unfair trading conditions was the *SABAM* decision concerning copyright.¹⁰³ The Court associated fairness with the notion of "necessity", even in its stringent form of "absolute necessity". It ruled that trading conditions are unfair when a dominant company exploiting copyrights "imposes on its members obligations which are not absolutely necessary for the attainment of its object",¹⁰⁴ since it undermines their freedom to exercise copyright. This interpretation was applied by the Commission in the *GEMA* case,¹⁰⁵ in which it claimed that,

"in an examination of a collecting society's statutes in the light of the Treaty competition rules, the decisive factor is whether they exceed the limits absolutely necessary for effective protection (indispensability test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than need be (equity)."¹⁰⁶

The preliminary reference case, *Alsattel*, determined that contractual practices concerning the unilateral fixation of the prices of supplements through contract modifications, as well as automatic renewals of contracts for a 15-year term, might amount to unfair trading conditions.¹⁰⁷ In this case, the factors of unfairness in the meaning of art.102 TFEU can be defined broadly as "*oppressiveness and one-sidedness of the contract for the consumer*".¹⁰⁸

In *Duales System Deutschland (DSD)*, the Commission decided that DSD, which owned the recycling trade mark GREEN DOT, abused its dominance by applying unfair trading conditions in the market for sales packaging waste in Germany. The Commission substantiated its decision essentially by pointing out that the licence fee was imposed on the customers of DSD irrespective of whether or not they used the company's waste recovery services. Fairness is again linked to the necessity of the clauses in terms of the object of DSD's licensing contract.¹⁰⁹ The Commission explicitly stated, furthermore, that "unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of

¹⁰² K. Cseres, "Towards a European Model of Economic Justice: the Role of Competition Law" in H.-W. Micklitz (ed.), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar Publishing, 2011), p.427.

¹⁰³ *Belgische Radio en Televisie v SABAM SV* (127/73) EU:C:1974:25; [1974] 2 C.M.L.R. 238.

¹⁰⁴ *SABAM* (127/73) EU:C:1974:25 at [15].

¹⁰⁵ Commission Decision of 4 December 1981 (Case IV/29.971-GEMA statutes) [1981] OJ L94/12 at [36].

¹⁰⁶ Commission Decision of 4 December 1981 (Case IV/29.971-GEMA statutes) [1981] OJ L94/12 at [36] (emphasis added).

¹⁰⁷ *Alsattel v SA Novasam* (C-247/86) EU:C:1988:469; [1990] 4 C.M.L.R. 434 at [10].

¹⁰⁸ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.155.

¹⁰⁹ R. O'Donoghue and J. Padilla, *The Law and Economics of Article 102 TFEU* (Oxford: Hart Publishing, 2013), p.856.

proportionality”.¹¹⁰ It referred to the *United Brands* case,¹¹¹ where the ECJ ruled that a dominant company acts in contradiction to the principle of proportionality when it refuses to continue supplies to its customer on account of the latter’s participation in the advertising campaign of the dominant company’s competitor. The Court explained that such a “counter-attack” by a dominant company could be acceptable only if it were “proportionate to the threat taking into account the economic strength of the undertakings confronting each other”.¹¹² Fairness is in both the *DSD* and *United Brands* decisions thus understood “in the sense that the interests of the contracting parties are balanced”¹¹³ in a vertical relationship.

Finally, one of the aspects examined in the *Michelin II* decision concerned the fact that dealers “were forced to enter into quantitative commitments to Michelin ... before they had even received the quantity rebates for the previous year”.¹¹⁴ The Commission considered that this practice was unfair not only because of the weak psychological position of the dealers in the negotiation process, but also because the dealers were unable to reliably estimate their cost prices and therefore could not freely decide on their business strategy.¹¹⁵ Furthermore, the Commission also classified a bonus programme introduced by Michelin as unfair. Although the programme was presented as being based on an agreement, it actually constituted “a requirement unilaterally imposed by the manufacturer to increase purchases of Michelin tyres on the market”.¹¹⁶

It can be inferred from the case law on fairness that this concept has in the context of trading conditions been understood thus far as representing a set of values or factors rather than a single determining quality. As observed by Akman, fairness has been applied as “an umbrella notion” that is also dependent on the contextual circumstances of a particular case.¹¹⁷ The notions through which the EU authorities have aimed to define fairness of market conduct have so far been absolute necessity, one-sidedness, equality, proportionality, balance of interests, transparency, objectivity and certainty.¹¹⁸ Despite these attempts to provide definitional clarity, Akman has highlighted that “the underlying question of what is meant by ‘(un)fairness’ under Article 102 is left unanswered” and “the *content* of the concept is left vacuous”.¹¹⁹

Fairness of “personal data trading conditions” in the digital sector

In the digital marketplace the relationships between companies processing data and digital consumers who surrender their data have certain peculiarities when compared with the more traditional contractual relations discussed above. The preliminary question that arises is whether the relations that underlie the business model concentrated on profiling and advertising may be interpreted as trading conditions within the meaning of art.102(a). The economic value of personal data in the digital setting is the primary incentive for companies to enter into transactions with digital users, and the conditions determining such transactions are stipulated in the privacy policies and practices that usually require users’ consent. Although there is no consensus on whether the provision of services in exchange for consent regarding data processing

¹¹⁰ Commission Decision of 20 April 2001 (Case COMP/34493-DSD) [2001] OJ L166/4 at [112]. The decision was upheld on appeal: *Der Grüne Punkt-Duales System Deutschland GmbH v Commission* (T-151/01) EU:T:2007:154; [2007] 5 C.M.L.R. 4; *Der Grüne Punkt-Duales System Deutschland GmbH v Commission* (C-385/07 P) EU:C:2009:456; [2009] 5 C.M.L.R. 19.

¹¹¹ *United Brands Co v Commission of the European Communities* (27/76) EU:C:1978:22; [1978] 1 C.M.L.R. 429.

¹¹² *United Brands* (27/76) EU:C:1978:22 at [190].

¹¹³ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.155.

¹¹⁴ Commission Decision of 20 June 2001 (COMP/E-2/36.041/PO—Michelin) [2001] OJ L143 at [223].

¹¹⁵ Commission Decision of 20 June 2001 (COMP/E-2/36.041/PO—Michelin) [2001] OJ L143 at [223].

¹¹⁶ Commission Decision of 20 June 2001 (COMP/E-2/36.041/PO—Michelin) [2001] OJ L143 at [265].

¹¹⁷ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.157.

¹¹⁸ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.156.

¹¹⁹ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.157.

creates in fact a contractual relationship,¹²⁰ these digital exchanges are unquestionably commercial in nature. Solove argues that “under the market approach, this practice can be justified as an information trade”.¹²¹ Accordingly, the conditions through which online companies engage in data processing could be classified as trading conditions, and, although potentially not purely contractual, may be examined under art.102 nonetheless.

The next phase of the analysis is to determine the meaning of fairness with respect to “personal data trading conditions” in competition law. As explained above, the EU Courts and the Commission have constructed fairness through the concepts of transparency, absolute necessity, one-sidedness, equality, proportionality, balance of interests of contracting parties, oppressiveness, objectivity and certainty. The analysis below relies on some of these notions in an attempt to establish the meaning of fairness of trading conditions in the online market under art.102(a) TFEU. Reference is also made to data protection law principles and conceptualisations.

First, regarding the concept of transparency, it may be argued that a company processing data can be condemned on the basis of fairness of trading conditions under art.102(a) TFEU where it provides unclear, or even misleading or deceptive information about data-related conditions for using a service. Similar reasoning can be found in the statement published by Bundeskartellamt. It has indicated that the terms of service formulated in a way that it is difficult for consumers to understand and evaluate data collection conditions could be problematic under competition law.¹²² The scholarship observes that in fact art.102 TFEU does not contain an outright prohibition of “dishonest or misleading conduct through fraud”.¹²³ Yet, it notes that “a general prohibition may be inferred from the recognition of the character of unfairness of other trading conditions as any type of dishonest or unfair business strategy broadly defined.”¹²⁴ Such a conceptualisation of fairness in competition law would align with the understanding of the data protection law provision requiring “fair data processing”. As explained in the section “Fairness—a value and objective in EU data protection law and EU competition law?” above, this principle is primarily concerned about the provision of information to consumers as well as the prohibition of misleading or deceptive practices.

However, what should be the threshold triggering such competition law liability? Valuable insights may be derived from the *AstraZeneca* case,¹²⁵ in which the EU Court of Justice decided that the company’s notification of misleading information to patent offices with the intention of maintaining its monopoly violated art.102. Following the Court’s reasoning, a company’s conduct does not need to result from a position of economic strength to be classified as an abuse of dominance. Hence, no causal link needs to be shown.¹²⁶ Although the case concerns an exclusionary rather than exploitative abuse, it may provide

¹²⁰ The case brought in 2013 by the Federation of German Consumer Associations; requested was an action for injunction against Google concerning certain clauses in its Terms of Use and Privacy Policy. See M. Kuschewsky and C. Ryckman, “European Consumer Legislation and Online Privacy Policies: Opening Pandora’s Box?” (9 February 2015), <http://www.insideprivacy.com/international/european-union/european-consumer-legislation-and-online-privacy-policies-opening-pandoras-box> [Accessed 16 February 2017].

¹²¹ D. Solove, “Privacy and Power: Computer Databases and Metaphors for Information Privacy” (2001) 53 *Stanford Law Review* 1393, 1448.

¹²² Press release of Bundeskartellamt (2 March 2016), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568 [Accessed 15 February 2017].

¹²³ A. Chiriță, “The EU Control of Unfair Competition Practices: the Interpretation of Unfair Pricing” in *The German and Romanian Abuse of Market Dominance in the Light of Article 102 TFEU* (Baden-Baden: Nomos, 2011), p.365.

¹²⁴ Chiriță, “The EU Control of Unfair Competition Practices” in *The German and Romanian Abuse of Market Dominance in the Light of Article 102 TFEU* (2011), p.365.

¹²⁵ *AstraZeneca v Commission* (C-457/10 P) EU:C:2012:770; [2013] 4 C.M.L.R. 7.

¹²⁶ *AstraZeneca* (C-457/10 P) EU:C:2012:770 at [267]. Interestingly, the press release issued by the Bundeskartellamt in relation to possible abuse of dominance by Facebook states that the German authorities need to establish a connection between an infringement and market dominance; Press release of Bundeskartellamt (2 March 2016), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568 [Accessed 15 February 2017].

suggestions as regards the benchmarks for competition liability. The ECJ emphasised that a dominant undertaking does not have to be infallible and that not “each objectively wrong representation made by such an undertaking” constitutes abuse of its position.¹²⁷ The ECJ, however, decided that AstraZeneca’s conduct was incompatible with competition on the merits and its special responsibility because it was *consistent* and *linear*, *highly* misleading, featuring a *manifest* lack of transparency, and deliberate.¹²⁸ The transposition of these liability conditions to data-related market practices would suggest that a digital company with market power behaves unfairly, and therefore exploits consumers and violates art.102(a) TFEU, if it *deliberately*, *consistently* and *manifestly* employs a misleading strategy with regard to data processing practices. Consumer harm could be constructed through the deterioration in the quality of a service, which such market conduct would cause.

Secondly, the fairness of data-related trading conditions understood in terms of proportionality and necessity deserves to be considered. In both the *SABAM* and *GEMA* decisions, fairness was considered compromised when dominant undertakings imposed requirements that were not necessary in relation to the objectives they sought to attain. Proportionality and absolute necessity may thus place limits on what types and how much data a company can collect and process in light of the purpose of their collection. Such an interpretation manifests similarities to the concept of data minimisation, which constitutes one of the essential principles both in the Data Protection Directive and in the GDPR. Whereas art.6(1)(c) of the Directive stipulates that in line with this principle data must be “adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed”, the GDPR establishes a more restrictive requirement, providing in art.5(1)(c) that personal data should be “limited to what is necessary in relation to the purposes for which they are processed”. It needs to be highlighted, however, that in this context the notion of fairness pertaining to trading conditions in competition law art.102(a) would not correspond to the meaning of fairness in the data protection principle of “fair data processing”. Data minimisation and fair data processing constitute in data protection law two different principles establishing separate requirements for data controllers. The notion of necessity has been also introduced in art.7(4) of the new GDPR in the context of freely given consent. The GDPR requires that the provision of a service is not made conditional on consent to the processing of data that is in fact not necessary for the contract between the parties.¹²⁹ The collection and processing of information thus need to be proportionate, even necessary, to the provision of the purchased service. This GDPR provision is similar to the “bundling prohibition” (*Koppelungsverbot*) in the German Federal Data Protection Act,¹³⁰ which ultimately originates from the German law on unfair competition and competition law.¹³¹

Finally, the conceptualisation of fairness through the notions of one-sidedness and oppressiveness in competition law is more debatable. In the context of data processing, Mantelero argues that there are indeed substantial limitations to users’ self-determination. He notes that not only do the data controllers present information about data processing in privacy policies that are long, vague and subject to change, but also because of the presence of few big market players (Facebook, Google, Twitter) and high concentration of online services, users must accept conditions offered by such companies so as not to lose the opportunities that the Internet services provide.¹³² The oppression created by dominant players is exacerbated in two-sided markets owing to network effects. Also, Schwartz observes that negotiations in the privacy market may be unfeasible due to data collectors’ bargaining power and ability to influence

¹²⁷ *AstraZeneca* (C-457/10 P) at [99].

¹²⁸ *AstraZeneca* (C-457/10 P) at [93].

¹²⁹ GDPR art.7(4). Recital 43 of the GDPR additionally stipulates that “consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case”.

¹³⁰ Bundesdatenschutzgesetz (BDSG) §28, Abs.3b.

¹³¹ Gesetz gegen den unlauteren Wettbewerb (UWG).

¹³² Mantelero, “Competitive value of data protection” (2013) 3 *International Data Privacy Journal* 229, 232.

the playing field that individual decisions are determined by.¹³³ Yet, it needs to be emphasised that art.102 TFEU prohibits the *abuse* of market power, not market power itself. As noted by the Court, “a finding that an undertaking has a dominant position is not in itself a recrimination”.¹³⁴ Accordingly, the argument that a digital company violates art.102 TFEU simply because it has greater bargaining power and its conduct is one-sided would be very difficult to substantiate under EU competition law. Economic strength entails a special responsibility on the part of a company to ensure that its conduct does not impair competition, but it does not affect its business freedom to unilaterally set fair and non-exploitative terms of the bargain, such as prices and trading conditions. Insofar as such terms are substantively fair, the aspects relating to the abilities of consumers to negotiate seem to be of limited relevance in establishing an abusive conduct under art.102 TFEU. Yet, if such one-sided conduct amounts to drastic breaches of fairness standards in terms of data protection, the arguments might bear more weight.

The analysis suggests that consumer detriment identified through the concept of fairness of digital trading conditions under art.102 TFEU can be linked at the initial stage of data processing to the notions of transparency, and misleading or deceptive behaviour. Additionally, fairness can, through the requirement of (absolute) necessity and proportionality, be evoked as regards the types and amounts of data collected by the digital companies for specified purposes. Notwithstanding these possible conceptualisations of fairness of trading conditions, there is, however, a caveat relating to this type of exploitative abuse. It would imply departing from the established case law and moving towards an “open-ended” or “nebulous” notion of abuse,¹³⁵ thereby broadening the scope of art.102. Additionally, as competition law authorities may not be best placed to assess market practices relating to the use of personal data, enhanced co-operation between competition and data protection authorities would need to be envisaged. The EDPS, for example, has proposed to facilitate the creation of a Digital Clearing House, which “would be a voluntary network of contact points in regulatory authorities at national and EU level who are responsible for regulation of the digital sector.”¹³⁶

Unfair prices under Article 102(a) TFEU

Excessive prices in EU competition law

Besides unfair trading conditions, the wording of art.102(a) TFEU covers also abuses of a dominant position that consist of “directly or indirectly imposing unfair purchase or selling prices”. The notion of unfair prices has been interpreted in EU law as excessive prices.¹³⁷ Excessive pricing is, however, an abuse that is difficult to prosecute. The difficulty relates to the complexity of distinguishing between high, yet still tolerable, and unreasonably high prices.¹³⁸ Put differently, the dilemma pertains to the methods employed to discern and prove an excessive price.¹³⁹

¹³³ P. Schwartz, “Property, Privacy, and Personal Data” (2004) 117 *Harvard Law Review* 2056, 2081.

¹³⁴ *NV Nederlandsche Baden-Industrie Michelin v Commission* (322/81) EU:C:1983:313; [1985] 1 C.M.L.R. 282 at [57].

¹³⁵ R. O’Donoghue, “The Death of the Theory of Everything Under Article 102?”, Global Competition Law Centre Conference (Brussels, February 2016). O’Donoghue indicated the cases relating to *Google*, *Slovak Telecom* and *Pay for Delay* as examples of moving towards open-ended notion of abuse.

¹³⁶ EDPS, “Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data” (23 September 2016), p.15.

¹³⁷ OECD, *Excessive Prices* (2011), p.54; *United Brands* (27/76) EU:C:1978:22; [1978] 1 C.M.L.R. 429; Commission Decision of 25 July 2011 (Case COMP/C-1/36.915—Deutsche Post AG) [2001] OJ L331.

¹³⁸ G. Monti, *EC Competition Law* (Cambridge: Cambridge University Press, 2007), p.218; J. Faull and A. Nikpay, *The EU Law of Competition* (Oxford: Oxford University Press, 2014), p.192.

¹³⁹ Motta and De Streeel, “Excessive Pricing in Competition Law” in Swedish Competition Authority, *The Pros and Cons of High Prices* (2007), p.32.

To provide guidance, the Court specified in the *United Brands* judgment that a company does not comply with EU competition law if it is “charging a price which is excessive because it has no reasonable relation to the economic value of a product supplied”.¹⁴⁰ The Court put forward two cumulative conditions to classify a price as excessive, which were subsequently followed by the Commission in the *Port of Helsingborg* decision,¹⁴¹

“whether the difference between the costs actually incurred and the price actually charged is excessive and, if the answer to this question is in the affirmative, to consider whether a price has been imposed which is either unfair in itself or when compared to competing products.”¹⁴²

Unfair “data prices” in the digital market

Rochet and Tirole argued in their pioneering article that the crux of two-sided markets is that it is not only the price level of the products that is decisive, but predominantly the price structure. The price structure of a market, i.e. which side is subsidised, is dependent on the size of indirect network effects and the cross-price elasticities between the two sides. The economic theory thus establishes that a two-sided platform offers services and products “below average variable cost, below marginal cost, or even below zero”¹⁴³ on a subsidy side and recoups its losses on a paid side of the market. In other words, the cross-market network externality benefits as mediated by the elasticities needed to outweigh the losses.¹⁴⁴ Only one side of the market can be rationally discounted at a time.¹⁴⁵ The profits of a two-sided platform and the volume of transactions more generally thus depend on the decomposition of the prices between the two sides, not only on the prices independently. Thus, Parker and Van Alstyne claim that the product coupling across two-sided markets can increase consumer welfare at the same time as it boosts the company’s bottom line. The definition of an optimal price structure is at the core of a successful business strategy for a platform

These economic features need to be incorporated into competition analyses of potentially unfair pricing strategies in order to reach sound conclusions. This is so specifically when confronted with allegations of one-sided predation on the subsidised market side and/or excessive pricing on the paid side. Accordingly, while evaluating pricing on the subsidised market side, a “presumption that below-cost pricing by two-sided platforms is anticompetitive is simply not valid”,¹⁴⁶ as firms have a prospect to recoup the (predatory) losses.¹⁴⁷ Correspondingly, high prices can emerge in stable market equilibrium on the paid side of the market,¹⁴⁸ yet should not be classified as excessive under the assumption that there are corresponding below-costs prices on the other side.

Competition law evaluations of pricing strategies on the free market side may, however, need to be reconsidered in the digital environment if one assumes that data is a currency and transactions in the online

¹⁴⁰ *United Brands* (C-27/76) EU:C:1978:22 at [250].

¹⁴¹ Commission Decision of 23 July 2004 rejecting the complaint of Scandlines Sverige (Case COMP/A.36.570/D3—*Scandlines Sverige v Port of Helsingborg*).

¹⁴² *United Brands* (C-27/76) EU:C:1978:22 at [252]; See, Monti, *EC Competition Law* (2007), pp.218–219.

¹⁴³ Evans and Schmalensee, “The Industrial Organization of Markets with Two-Sided Platforms” (2007) 3 *Competition Policy International* 151, 176.

¹⁴⁴ G. Parker and M. van Alstyne, “Two-Sided Network Effects: A Theory of Information Product Design” (2005) 51 *Management Science* 1494, 1498.

¹⁴⁵ Parker and Van Alstyne, “Two-Sided Network Effects” (2005) 51 *Management Science* 1494, 1501.

¹⁴⁶ Evans and Schmalensee, “The Industrial Organization of Markets with Two-Sided Platforms” (2007) 3 *Competition Policy International* 151, 176.

¹⁴⁷ OECD, *Excessive Prices* (2011), p.13.

¹⁴⁸ Evans and Schmalensee, “The Industrial Organization of Markets with Two-Sided Platforms” (2007) 3 *Competition Policy International* 151, 176.

marketplace are performed in exchange for data.¹⁴⁹ Auer and Petit note that in two-sided markets where there is a free service on the subsidy side, users often pay a “hidden, non-monetary price”¹⁵⁰ in the form of giving away personal data.

In a similar fashion, Gebicka and Heinemann claim that the character of the remuneration for social media services is not monetary, but rather the consumer surrenders her attention and personal data in exchange for a service. Consequently, “an undue increase in the use of personal data” or “an unreasonable expansion of the data use policy” could be paralleled with price exploitation.¹⁵¹ Indeed, personal data have become a crucial intangible asset for companies. As Vestager argues, they are “the new currency of the Internet”.¹⁵² Possible art.102 TFEU violations pertaining to excessive pricing on the allegedly free market side merit examination, and the analysis needs to factor personal data into price exploitation.

The first stage of the unfair pricing test delineated by the CJEU in the *United Brands* judgment entails performing price-costs comparisons to verify whether the price is excessive. To evaluate the fairness of “data prices” under art.102 TFEU, we first need to establish the monetary price of personal data on the subsidised side of the market. In this respect, the methodologies envisaged in the OECD report *Exploring the Economics of Personal Data*¹⁵³ appear insightful. In particular, the methodology based on market valuation can prove to be helpful. It stipulates that the value of personal data can be estimated, for example, by analysing “the financial results of a company such as market capitalization, revenues and net income on a per-user or per-record basis”.¹⁵⁴ Another indicator of market valuation is the market price for data, delineated as a “price per data entry offered on the market by data brokers”,¹⁵⁵ who often mediate business transactions between data collectors and advertisers.¹⁵⁶ Once the monetary value of personal data has been analysed against the costs of providing digital goods or services, competition assessments need to determine whether the difference is excessive, and indicates an anti-competitive price exploitation of consumers.

Moving to the second prong of the *United Brands* fairness test, the price will need to be either “unfair in itself or when compared with competing products” to constitute an infringement. Unfairness “in itself” would require the specification of what the notions of “undue” or “unreasonable” collection of data connote.¹⁵⁷ Referring once more to the OECD, the exploitation threshold could be estimated through individual valuations of personal data and privacy as revealed in surveys and economic experiments. They would establish the amount of money that should be offered to individuals for disclosing personal data or the price that they would be willing to pay to have their data protected from disclosure.¹⁵⁸ In the alternative, the fairness of “data prices” charged by a dominant company could be established by making comparisons

¹⁴⁹ W. Kotschy, “The Proposal for a New General Data Protection Regulation—problems solved?”, Symposium Article (2014) 4 *International Data Privacy Law* 274, 280. She noted that “everybody knows that nowadays free internet services are paid for by providing data”. See also A. Acquisti, “The Economics and Behavioral Economics of Privacy” in J. Lane et al., *Privacy, Big Data, and the Public Good: Frameworks for Engagement* (Cambridge: Cambridge University Press, 2014), p.80.

¹⁵⁰ D. Auer and N. Petit, “Two-Sided Markets and the Challenge of Turning Economic Theory Into Antitrust Policy” (2015), p.6, SSRN, https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2552337 [Accessed 16 February 2017].

¹⁵¹ A. Gebicka and A. Heinemann, “Social Media & Competition Law” (2014) 37 *World Competition* 149, 165.

¹⁵² M. Vestager, quoted in J. Kanter, “Antitrust Nominee in Europe Promises Scrutiny of Big Tech Companies” (3 October 2014), <http://bits.blogs.nytimes.com/2014/10/03/antitrust-nominee-in-europe-promises-eye-on-big-tech-companies/> [Accessed 16 February 2017].

¹⁵³ OECD, *Exploring the Economics of Personal Data* (2013).

¹⁵⁴ OECD, *Exploring the Economics of Personal Data* (2013), p.20.

¹⁵⁵ OECD, *Exploring the Economics of Personal Data* (2013), p.20.

¹⁵⁶ EDPS, “Preliminary Opinion of the European Data Protection Supervisor, Privacy and competitiveness in the age of big data” (March 2014), pp.10–11.

¹⁵⁷ See Gebicka and Heinemann, “Social Media & Competition Law” (2014) 37 *World Competition* 149, 165.

¹⁵⁸ OECD, *Exploring the Economics of Personal Data* (2013), p.30.

with the prices imposed on digital users by competing undertakings, i.e. the amount of personal data that are collected and processed by a similar digital service.

There may thus be methods to satisfy the analytical requirements of the *United Brands* excessive pricing test in the context of art.102 TFEU, even if the test obviously has also inherent limitations.¹⁵⁹ Because it does not determine what “excessive” is, nor the ratio between the costs and price that is excessive,¹⁶⁰ it does not by itself establish a clear definition of fairness. The second prong of the test on whether the price is unfair in itself or when compared with competing products remains admittedly subjective.¹⁶¹ In the digital market, similar issues may arise. Referring, for example, to individual valuations of privacy while estimating anti-competitive price excess may be equally subjective and can therefore trigger concerns pertaining to legal certainty and the clarity of the standard of proof.

Comparative analysis of fairness in data protection and competition law

Fairness as an overarching objective

On the general level, the analysis has revealed that fairness is a value that both data protection and competition law undertake to protect. In EU data protection law, fairness can be comprehended as the basis of its system of checks and balances to protect the consumer. The narrower concept of data control and the individual’s right to self-determination complement fairness as the basis of data protection law. A similar teleological bifurcation characterises EU competition law. Consumer welfare and efficiency have become the prevalent objectives and have pushed other aims, including fairness, to the background. Fairness is usually referred to indirectly as a notion signifying the need to protect the process of competition in the Union.

Thus, although both fields make reference to the overarching objective of fairness and are ultimately concerned about the protection of individuals’ interests, the contents of the objectives are not fully coherent. The divergences, in other words, work against the hypothesis that, as things currently stand, the two fields of law could constitute a systemically coherent whole.

Fairness in the central legal provisions

On a more concrete level, fairness appears in the central constitutional passages of both data protection and competition law. The competition law, art.102(a) TFEU, prohibits the imposition of “unfair prices” and “unfair trading conditions” by companies in a dominant market position, while art.8 of the EU Charter of Fundamental Rights establishes that personal data must be processed “fairly”. The principle of fair data processing is additionally enshrined in secondary data protection legislation, namely in art.6 of the Data Protection Directive and in art.5 of the General Data Protection Regulation. The analysis then aimed to establish commonalities between the, admittedly rather vague, definitional elucidations of fairness in these concrete provisions.

The proxies of fairness in data protection terms included transparency and the provision of accurate and full information to consumers concerning data processing operations. Fairness could also be linked to the obligation of companies to obtain the consent of digital users. These notions of fairness could

¹⁵⁹ Commission Decision of 23 July 2004 (Case COMP/A.36.570/D3—*Port of Helsingborg*) at [142].

¹⁶⁰ N. Wahl, “Exploitative High Prices and European Competition Law: a Personal Reflection” in *The Pros and Cons of High Prices* (2007), p.60.

¹⁶¹ O’Donoghue and Padilla, *The Law and Economics of Article 102 TFEU* (2013), p.758. They claim that “it is unclear what competing products should be taken into consideration ... how one can make sure that one is comparing like with like, and what adjustments should be made if prices charged by competitors are also excessively high or, conversely, predatory”.

complement competition law by providing insights into defining “unfair trading conditions” in the analysis of abuse of dominance in the digital marketplace.¹⁶² Interpretations in data protection could be useful for EU competition law, in particular because the doctrine on abuses enshrined in art.102(a) TFEU is underdeveloped.¹⁶³ A data protection perspective could in other words be informative in defining consumer harm more precisely, where non-transparent, misleading or deceptive conduct constitutes exploitation of consumers under art.102(a) TFEU.

The normative content of fairness in the competition law context of art. 102(a) is not necessarily limited, however, to the non-transparent, misleading or deceptive practices of market operators. It can be understood as an umbrella concept that is dependent on the contextual circumstances. The fairness of trading conditions in competition law could for example possibly be interpreted through the related concepts of proportionality and (absolute) necessity, as applied to data processing. Similarly, the prohibition of unfair prices, which can in the digital context harm consumers in the non-economic form of excessive “data prices”, might also be effectively linked to the necessity and proportionality concepts. This would imply an understanding of fairness that is coherent with, but more comprehensive, than what the principle of “fair data processing” in art.6 of the Data Protection Directive and art.5 of the GDPR cover. Proportionality and necessity in competition law could then find their counterparts in the data protection principle of data minimisation. Data minimisation imposes the obligation on a data controller to limit personal data collection to what is adequate, relevant and necessary in relation to a specified objective.

To summarise, it is possible to identify occasional commonalities regarding the notion of fairness in the specific provisions of EU data protection and competition law provisions. There is thus some limited scope for mutually beneficial interpretations across the two fields. Yet in more general terms, the range of interpretations of “fairness” in the various practical, data protection related contexts, appears wide indeed. The notion is characterised by a considerable degree of legal indeterminacy. The hypothesis regarding the commonality and coherence of the elements of fairness in the specific provisions of data protection and competition law does not hold for a large part.

Conclusions—fairness as a limited means to increase coherence between EU competition law and data protection law

The objective of this article was to analyse the common assertion that the approaches to the processing of personal data in the fields of EU competition law and data protection are incompatible, or at least clearly distinct. The assertion of incompatibility was tested through the hypothesis that there are, in fact, common and coherent elements between the two fields. The methodological approach of the analysis was conceptual, focusing on the notion of fairness. The hypothesis was formulated on the basis of the fact that fairness figures explicitly in both competition and data protection law in defining infringements, and that EU law in general terms is subordinate to the principle of coherence.

To test its hypothesis, the article first identified the normative content of fairness in the primary, secondary and case law applicable to these two fields. It then explored whether there is conceptual coherence in relation to fairness in such findings. Coherence would display itself as increased systemic synergy and positive connections between several factors within the fields.¹⁶⁴ This would offer a useful standard for compatible, potentially even combined, legal assessments. Conceptual and teleological coherence in the

¹⁶² Autorité de la concurrence and Bundeskartellamt, “Competition Law and Data” (10 May 2016), p.23, http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2 [Accessed 15 February 2017].

¹⁶³ Akman, *The Concept of Abuse in EU Competition Law* (2012), p.146.

¹⁶⁴ See A. Missiroli, “European Security Policy: the Challenge of Coherence” (2001) 6 *European Foreign Affairs Review* 177.

approaches would thus have the potential to increase the predictability of the decisions, and to thereby improve legal certainty for the actors operating in the digital economy.

Nevertheless, the hypothesis regarding the commonality and coherence in the application of the notion of fairness could be verified only to some extent. The findings on the concrete fairness-related provisions of data protection and abuse of dominant position were analogous with the observations on fairness as an overarching objective across the two fields. Under the current state of law and decision-making practice on both sides, the analytical positivist scrutiny revealed only limited commonalities and coherence.

There is, however, clear potential for the commonalities and coherence across the fields to evolve, both from practical and theoretical perspectives. Fairness would promote in both fields the willingness of individuals to engage in market operations. The current void between data protection and competition law diminishes through cases such as the Bundeskartellamt's *Facebook* case. The impreciseness of fairness is in this sense an advantage in that it renders the concept adaptable to changing contexts. The legislator, the administrators in each field, and ultimately the judiciary are able to provide for more definitional clarity, so as to enhance legal certainty on the scope of (in)appropriate actions in the digital environment. A concrete way to proceed in such path could be to create a common, systematically structured and searchable repository of policy documents, in particular administrative and judicial decisions, from both fields. The repository could reside within the proposed Digital Clearing House,¹⁶⁵ and its management could be assigned to—and optimally shared by—experts from both fields. The advantages would not be limited to the confines of the present article, i.e. the usage of individual core concepts such as fairness or the issue of abuse of dominant position. It could overcome the initial threshold that the involved decision-makers are simply not aware of the relevant actions taken in the adjacent field more generally speaking, nor of other institutions and persons with the accumulated expertise. Facilitated awareness-raising could lead to more positive interaction and concrete collaborative efforts across the fields. If successful, this strategy could start moving the state of play from the “deliberate isolation” of the two fields of law towards that of “constructive coherence”. The development would reflect a more holistic view of competition law, seemingly endorsed by the Lisbon Treaty, that seeks to incorporate multiple public policy concerns.¹⁶⁶ With such a pluralistic ethos, there would thus seem to be prospects even for further exploring the commonalities across other interlinked fields of the digital economy, such as consumer protection and copyright law.

¹⁶⁵ EDPS, “Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data” (23 September 2016), p.15.

¹⁶⁶ Lianos, “Some Reflections on the Question of the Goals of EU Competition Law”, CLES Working Paper Series 3/2013 (2013), pp.37–41, 61.