Protecting Personal Data and the Environment: Doctrinal Challenges for EU Competition Law in our Day and Age

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Protecting Personal Data and the Environment: Doctrinal Challenges for EU Competition Law in our Day and Age

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Abstract

At first sight, an approach to EU competition law that is more conscious about data protection as well as greener does not seem to share many traits. However, the insistence of both data and environmental protection on non-economic goals defies some of the more established logic of EU competition law. Against the background of the constitutional standing of data protection and environmental sustainability, the contribution analyses the challenges that the digitalisation and greening of the EU economy and society pose for competition law doctrine. It develops a taxonomy based on value alignment, value conflict*, and* value inclusion *to better understand and frame the interaction between public policy goals, such as data protection and environmental sustainability, and competition law. Through its comparative angle, this analysis is the first to allow for insights into synergies that the twin transition to a green and digital economy can harness in the area of EU competition law.*

> "[W]e are in the middle of not one, but two great transitions -
> to an economy that's both digital and green."[1] Margrethe Vestager

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[1] M. Vestager, "Keeping the EU Competitive in a Green and Digital World" Speech (2 March 2020).

Introduction

With its new strategy focused on a digital and green economy, the European Union (EU) wants to achieve a climate-neutral European continent by 2050 and ensure that good and responsible use are made of digital technologies.[2] These ambitious goals also require a thorough reorientation of the Union's competition policy, nudging EU competition law to slowly but surely awaken to the challenges of our times.[3] When presenting its European Green Deal, for instance, the European Commission (the Commission) underlined that "[a]ll EU actions and policies will have to contribute to the European Green Deal objective"[4]—including competition policy.[5]

The specific competition law issues arising in digital markets, in particular the question how to integrate data protection concerns[6] into the competition analysis, have been a focus in EU competition law for a number of years.[7] Currently, we are also witnessing an intensified debate on "green" challenges and how they relate to EU competition law. A growing literature on green competition law is accompanied by recent concrete soft law proposals and legislative amendments. The most prominent examples are the draft horizontal cooperation guidelines published by the European Commission in March 2022,[8] which include a new chapter on how to assess sustainability initiatives among competitors, as well as a new sustainability exemption introduced in the Austrian Cartel Act in late 2021, which provided for an exemption of otherwise anti-competitive agreements based on sustainability grounds.[9]

At first sight, these twin challenges related to data protection and sustainability may not have much in common—apart from their timing. Upon closer inspection, however, it becomes clear that both data protection-conscious and green competition law defy some of the more established logic of EU competition law and require a new outlook that reconciles their individual paths. Common doctrinal challenges and opportunities emerge in particular in the context of integrating into competition law both data protection concerns that prominently emerge in digital markets, and environmental sustainability[10] as one of the primary considerations in the context of greening the European economy.

Against this background, the contribution analyses how competition law doctrine as currently conceptualised is challenged by both the digitalisation and the greening of the EU economy and society,

[2] European Commission, "6 Priorities for 2019–2024" *https://ec.europa.eu/info/strategy_en*.

[3] European Commission, "A Competition Policy Fit for New Challenges" COM(2021) 713 final.

[4] European Commission, "European Green Deal" COM(2019) 640 final p.3.

[5] M. Vestager, "Competition and Sustainability" Speech (24 October 2019).

[6] On the relationship between the right to data protection and the right to privacy, see P. De Hert and S. Gutwirth, "Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action" in S. Gutwirth et al (eds), *Reinventing Data Protection?* (The Netherlands: Springer, 2009), p.6.

[7] Algorithmic collusion, access to data, the introduction of privacy-friendly tech tools that might negatively impact competition, the values of equality and non-discrimination, and various dimensions of sustainability are just a few examples; see e.g. V.H.S.E. Robertson, "Antitrust Law and Digital Markets" in H.D. Kurz et al (eds), *The Routledge Handbook of Smart Technologies* (London: Routledge, 2022).

[8] European Commission, Annex to the Communication from the Commission—Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements [2022] C(2022) 1159 final para.544.

[9] Cartel Act s.2 para.1 Austrian Federal Law Gazette I 61/2005 as amended; V.H.S.E. Robertson, "Sustainability: A World-First Green Exemption in Austrian Competition Law" (2022) *Journal of European Competition Law & Practice* (in print, *https://doi.org/10.1093/jeclap/lpab092*).

[10] As suggested by the United Nations' *Brundtland Report*, sustainable development can be understood as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs"; World Commission on Environment and Development (WCED), "Our Common Future" (Brundtland Report) (1987) para.27. More recently, the same definition has also been adopted by the European Commission; European Commission, "Mainstreaming Sustainable Development into EU Policies: 2009 Review of the European Union Strategy for Sustainable Development" COM(2009) 400 final. In the following, however, the stand-alone term sustainability refers to environmental sustainability.

while proposing solutions to this dual challenge.[11] The choice to consider more closely the values of data protection and environmental sustainability reflects the prominence of these considerations in the ongoing debates on the reform of competition law in the digital and green context respectively. While some of the doctrinal matters that are analysed could also arise in the framework of competition law's interactions with other values, the topic of competition law and sustainability is firmly establishing itself in the competition law discourse and directly follows the lengthy period of debates on data protection and competition. Against this background, the questions that are raised are to what extent sustainability poses a novel challenge and what it can learn from the comprehensive discourse on integrating data protection into competition assessments. The analysis of the nature of both values and how they challenge the competition doctrine have repercussions for how we should approach data protection and environmental sustainability in the framework of competition enforcement in the future: if the two values prove to have a corresponding legal status under EU law, and if similarities are detected in how they interact with competition law, this would imply that one could merge the two discourses and the views on what role sustainability should have in competition law would apply to data protection, and vice versa.

In order to anchor the article in the broader scholarly discussion, the contribution first introduces the competition law discourse on a data protection-conscious and green competition law and provides some high-level insights on integrating public policy objectives into EU competition law. The next main section analyses the constitutional standing of the principles of data protection and environmental sustainability under EU law as well as the normative standards for their integration into other legal areas. The following section then turns to competition law doctrine in order to provide a framework for its interactions with the values of data protection and environmental sustainability. The contribution introduces a new taxonomy to better understand and frame that interaction, consisting of "value alignment", "value conflict" (consistency), and "value inclusion" (coherence).[12] By approaching the topic from a new comparative angle focused on data protection and environmental sustainability, this analysis will, for the first time, allow for insights into synergies that the twin transition to a green and digital economy can harness in the area of EU competition law.

A short primer on public policy considerations for a competition law regime that safeguards personal data and the environment

The current competition law discourse

The European Commission's discourse on competition law's role in supporting the green transition is strikingly similar to the one on data protection: sustainability and environmental protection are not objectives of competition law and so competition rules must not be "in the lead",[13] and yet they are required to contribute to the attainment of a sustainable economy.[14] Similarly, the Commission has regularly relegated data protection concerns to the EU rules on the processing of personal data, but has also recently acknowledged that competition law should play a role where the protection of personal data is seen as a parameter of quality upon which companies compete.[15] It has also continued to stress the role of competition

[11] Although environmental sustainability also plays an important role in the area of state aid, the present contribution focuses on the challenges that arise within competition law.

[12] On the distinction between consistency and coherence and their impact on competition law analysis, see K. Majcher, "Coherence between EU Data Protection and Competition Law in the Digital Market" (unpublished PhD thesis, 2020).

[13] M. Vestager, "The Green Deal and Competition Policy" Speech (22 September 2020).

[14] DG Competition, "Competition Policy Supporting the Green Deal—Call for Contributions" (22 September 2020).

[15] European Commission, "Mergers: Commission Approves Acquisition of LinkedIn by Microsoft, Subject to Conditions" *https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284*.

law to promote innovation in digital markets, a role it may also see for competition law in the green economy.

In substance, data protection-conscious and green approaches to competition law differ considerably. However, they share several important features that can help move forward a joint debate on the twin transition and a competition law framework that is both conscious of data protection concerns and green, allowing these areas of competition law to learn from one another despite their significant differences. One important shared feature relates to the fact that the impact that data protection and environmental sustainability, as public policy goals, may have on competition law is already foreshadowed in the EU Treaties. Data protection-conscious competition law can rely on art.16 TFEU,[16] art.9 of the EU Charter of Fundamental Rights (EU Charter),[17] and the General Data Protection Regulation (GDPR),[18] all of which mandate strict protection of personal data. Similarly, green competition law can invoke art.11 TFEU as well as art.37 of the EU Charter, which require all of the Union's policies—including competition law—to take environmental sustainability into account.

It can be difficult, however, to reconcile a more public policy-focused approach to competition law with the economics-centred understanding of consumer welfare to which competition enforcement in the EU has gradually shifted over the past three decades. While the integration of public policy goals into competition law more generally is discussed in the section below, the article will in the subsequent part turn to the constitutional underpinning of this particular friction.

Public policy goals in EU competition law: opportunities and limitations

Novel market practices and ensuing socio-economic concerns have regularly reignited the debate on the proper scope of competition law, on the integration of public policy objectives into EU competition, and on the aspects of consumer well-being that the law should protect. Social policy values and employment,[19] industrial policy,[20] environmental considerations,[21] and cultural diversity and identity[22] are among the

[16] Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/47.

[17] Charter of Fundamental Rights of the European Union (EU Charter) [2016] OJ C202/391 art.8.

[18] Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation, GDPR) [2016] OJ L119/1.

[19] E.g. *Metro SB-Grossmarkte GmbH & Co KG v Commission of the European Communities* (26/76) EU:C:1977:167; [1978] 2 C.M.L.R. 1; Decision relating to a proceeding under Article 85 of the EEC Treaty (COMP/IV/30.810—Synthetic fibres) [1984] OJ L207/17; Decision relating to a proceeding pursuant to Article 85 of the EEC Treaty (COMP/IV/33.814—Ford Volkswagen) [1993] OJ L20/14; *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (C-67/96) EU:C:1999:430; [2000] 4 C.M.L.R. 446; *Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven* (C-219/97) EU:C:1999:437; [2000] 4 C.M.L.R. 599; *Brentjens Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (C-115/ to C-117/97) EU:C:1999:434; [2000] 4 C.M.L.R. 566.

[20] E.g. Decision relating to a proceeding under Article 85 of the EEC Treaty (COMP/IV/30.863—BPCL/ICI) [1984] OJ L212/1; Decision relating to a proceeding under Article 85 of the EEC Treaty (COMP/IV/31.846—Enichem/ICI) [1988] OJ L50/18.

[21] E.g. Decision relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (COMP/IV/34.252—Philips-Osram) [1994] OJ L378/37; Decision relating to a proceeding pursuant to Article 85 of the EC Treaty (COMP/IV/33.640—Exxon/Shell) [1994] OJ L144/20; Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/IV.F.1/36.718—CECED) [2000] OJ L187/47; Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/34493—*DSD*, upheld in *Der Grune Punkt - Duales System Deutschland* (T-151/01) EU:T:2007:154; [2007] 5 C.M.L.R. 4; *Der Grune Punkt - Duales System Deutschland* (C-385/07 P) EU:C:2009:456; [2009] 5 C.M.L.R. 19.

[22] e.g. Decision relating to a proceeding under Article 85 of the EEC Treaty (IV/428—VBBB/VBVB) [1982] OJ L54/36, upheld in *VBVB and VBBB v Commission of the European Communities* (C-43/82) to (C-63/82) EU:C:1984:9;

public policy considerations that have been invoked in connection with competition assessments in Commission decisions and case law of the Court of Justice of the EU (CJEU). The changes introduced by the Treaty of Lisbon,[23] in particular its greater emphasis on social values and the introduction of cross-sectoral clauses, have equally influenced the debate.[24] The resulting legal picture painted by scholars and enforcers features both optimistic and sceptical attitudes.

A more optimistic view on broadening the objectives of competition law has been expressed in particular in relation to anti-competitive agreements that are covered by art.101 TFEU.[25] The two main avenues for integrating public policy goals consist in (i) excluding certain agreements from the scope of the prohibition contained in art.101(1) TFEU, or (ii) justifying them through an individual exemption under art.101(3) TFEU, which requires the benefits generated by an agreement to outweigh anti-competitive harms. Predictable normative criteria need to be established to resolve potential conflicts between competition and public policy goals, and such balancing needs to be carried out in a transparent manner.[26]

In relation to the enforcement of art.101 TFEU, there are discrepancies in how the Commission and the EU Courts have applied this provision. While the former has over the past years insisted on insulating competition enforcement from non-competition values, including public policy goals, the latter has been more open to balancing various objectives in individual cases and reading the competition provisions in light of the Treaty as a whole.[27] The Commission's sceptical approach is grounded in its more economic approach to competition law, discounting objectives unrelated to efficiency and economic welfare. Disregarding the Court's broader and more holistic reading of art.101 TFEU, the Commission indicated in 2004 that competition law's goal was to protect consumer welfare[28] and that an agreement could only be exempted under art.101(3) TFEU if it generated efficiencies outweighing the anticompetitive effects.[29] The Commission's guidance in this respect does not envisaged benefits other than economic efficiencies as capable of offsetting restrictions of competition, for instance benefits related to the environment, to employment, or to media pluralism. It is only recently that the Commission pointed out in its 2022 draft guidelines on horizontal agreements that efficiency gains that are capable of justifying an otherwise anti-competitive agreement can be conceptualised in a broader way, allowing "for a broad spectrum of

[1985] 1 C.M.L.R. 27; Decision relating to a proceeding under Article 85 of the EEC Treaty (ICOMP/V/27.393 and IV/27.394—Publishers Association-Net Book Agreements) [1989] OJ L22/12.

[23] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

[24] See A.C. Witt, "Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order" (2012) 8 *European Competition Journal* 443.

[25] This optimism, however, comes with the caveat that there is, of course, a need to respect the inherent limitations of this legal field. On public policy goals under Article 101 TFEU, see e.g. Ch. Townley, *Article 81 EC and Public Policy* (Oxford: Hart Publishing, 2009); B. Van Rompuy, *Economic Efficiency: Non-efficiency Considerations Under Article 101 TFEU* (Dordrecht: Kluwer Law International, 2012); K.J. Cseres, "The Controversies on the Consumer Welfare Standard" (2007) 3 *Competition Law Review* 121; Ch. Townley, "Is Anything More Important than Consumer Welfare (in Article 81 EC)? Reflections of a Community Lawyer" (2007–2008) 10 *Cambridge Yearbook European Legal Studies* 345.

[26] E.g. A.P. Komninos, "Resolution of Conflicts in the Integrated Article 81 EC" in C.-D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2004: The Relationship Between Competition Law and the (Liberal) Professions* (Oxford/Portland: Hart Publishing, 2004) p.451.

[27] Witt, "Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order" (2012) 8 *European Competition Journal* 35–38.

[28] European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 paras 13 and 33.

[29] European Commission, Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 para.43.

sustainability benefits resulting from the use of specific ingredients, technologies, production processes to be taken into account",[30] which signifies an important policy shift.

Despite the scholarly and enforcement focus on art.101 TFEU, public policy goals are also discussed in relation to the enforcement of art.102 TFEU, which prohibits the abuse of market power. The first and perhaps less controversial mechanism to include public policy goals is the "objective justification" defence of abusive conduct by a dominant undertaking. Although not explicitly laid down in the Treaty, it has long been established that an objective justification plea corresponding to art.101(3) TFEU is also available under art.102 TFEU.[31] Legitimate public interest objectives as well as legitimate business behaviour and efficiency considerations could thus in theory justify an anti-competitive abuse.[32] Yet, limitations similar to the ones enforcers encounter in the context of art.101(3) TFEU can also be envisaged here. The quantifiability of non-economic values and the objectivity of balancing mechanisms will need to take centre stage in these discussions. The second, more contentious, approach under art.102 TFEU would be to construe a theory of harm based on the violation of public policy goals, i.e. classifying a conduct as abusive by a dominant firm precisely because it harms environmental sustainability or data protection, for example. This approach was adopted in the German Bundeskartellamt's *Facebook* case[33] and will be tested by the CJEU following a request for a preliminary ruling lodged in April 2021.[34] Concerns related to this approach include the *ne bis in idem* rule and the question whether behaviour that is not anti-competitive under a traditional analysis could become so through considerations stemming from other areas of the law.[35]

A corresponding bifurcated approach to integrating public policy goals can be observed in EU merger control, where non-competition values could either underlie a theory of harm (e.g. a merger is declared incompatible with the EU Merger Regulation (EUMR)[36] because it negatively affects data protection) or form part of the defence of otherwise anti-competitive mergers (e.g. a merger that leads to higher prices is cleared because the merged entity will be able to cut emissions). They could also be the focus of the remedies imposed on the merging parties.

Notwithstanding this theoretical possibility, merger practice demonstrates a more cautious attitude. This is partially because of the limitations of the "SIEC test" that requires enforcers to evaluate whether

[30] European Commission, Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2022) 1159 final para.577.

[31] See, e.g. *Sirena Srl v Eda Srl* (40/70) EU:C:1979:236; *United Brands Co v Commission of the European Communities* (C-27/76) EU:C:1978:22; [1978] 1 C.M.L.R. 429; *Tetra Pak International SA v Commission of the European Communities* (T-83/91) EU:T:1994:246; [1997] 4 C.M.L.R. 726; *Post Danmark A/S v Konkurrencerådet* (C-209/10) EU:C:2012:172; [2012] 4 C.M.L.R. 23; *Intel Corp Inc v European Commission* (C-413/14 P) EU:C:2017:632; [2017] 5 C.M.L.R. 18. See also P.J. Loewenthal, "The Defence of 'Objective Justification' in the Application of Article 82 EC" (2005) 28 *World Competition* 455; E. Rousseva, "The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can it Help to Modernise the Analysis under Article 82 EC?" (2006) 2 *Competition Law Review* 27; A. Albors-Llorens, "The Role of Objective Justification and Efficiencies in the Application of Article 82 EC" (2007) 44 C.M.L. Rev. 1727.

[32] P. Lowe, "DG Competition's Review of the Policy on Abuse of Dominance" in B. Hawk (ed.), *International Antitrust & Policy: Annual Proceedings of the Fordham Corporate Law Institute 2003* (New York: Juris Publishing, 2004); T. van der Vijver, "Objective Justification and Article 102 TFEU" (2012) 35 *World Competition* 55.

[33] Bundeskartellamt, *Facebook* (B6-22/16) 6 February 2019.

[34] *Facebook Inc v Bundeskartellamt* (C-252/21), Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 [2021] OJ C320/16.

[35] Here, there is case law in favour of incorporating such concerns into the competition law analysis in Germany, but not beyond. See e.g. German Federal Supreme Court, *Pechstein/International Skating Union* (KZR 6/15) 7 June 2016; German Federal Supreme Court, *VBL Gegenwert II* (KZR 47/14) 24 January 2017.

[36] Council Regulation 139/2004 on the control of concentrations between undertakings (EU Merger Regulation, EUMR) [2004] OJ L24/1.

a merger would significantly impede effective competition.[37] Such a significant impediment is particularly seen in the creation or strengthening of a dominant market position,[38] while harm related to values such as data protection, employment, or media pluralism is not commonly perceived as inherent to the merger analysis.[39] The Commission stressed in *Facebook/WhatsApp*:

> "Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules".[40]

As regards a possible defence of an anti-competitive merger, under the EUMR the Commission is required to take into account "substantiated and likely efficiencies"[41] presented by the parties. This suggests that public policy objectives such as environmental sustainability could be taken into account if the benefits can be translated into (quantifiable) efficiency gains. If this is not the case, justifying an anti-competitive merger based on public policy goals implies a more contentious, yet not legally unsound, analysis.

Normative standards for value integration in EU competition law: the case of data protection and environmental sustainability

As the discourse flourishes on greening competition law and making it more susceptible to considerations of data protection, disagreements on the function of competition law in supporting these economic and societal transformations are also intensifying.[42] Such disputes frequently challenge the foundational assumptions about competition law's legitimate scope and reach,[43] oftentimes relegating debates on how such values can be integrated to the background. In the present section, our aim is to bring this question to the forefront and carve out normative standards for the integration of so-called "non-economic values" into a competition law system that strives to support the digital and green transition. The following section will then build on these conclusions and zoom in on the principles of data protection and environmental sustainability from the specific perspective of EU competition law.

Constitutional standing

Creating solid normative grounds for the discussion on whether and how competition law should respond to increasing pressures to become more sustainable and protective of users' personal data requires a thorough understanding of the constitutional significance of these values. For this reason, the present section addresses normative arguments that speak for a better integration of data protection and environmental sustainability into competition law assessments. We focus on doctrinal and constitutional

[37] EUMR art.2 para.3; OECD, "Public Interest Considerations in Merger Control — Note by the European Union" (14–15 June 2016).

[38] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para.2.

[39] Note, however, that the EUMR explicitly allows national competition laws to assess media pluralism even where the Commission is exclusively competent to deal with a merger; EUMR art.21(4).

[40] Decision declaring a concentration to be compatible with the common market (COMP/M.7217—*Facebook/Whatsapp*), para.164. Similarly, under art.101 TFEU, see the Court's statement in: *Asnef-Equifax Servicios de Informacion sobre Solvencia y Credito SL v Asociacion de Usuarios de Servicios Bancarios (AUSBANC)* (C-238/05) EU:C:2006:734; [2007] 4 C.M.L.R. 6 at [63].

[41] EUMR recital 23.

[42] For the EU, see e.g. L. Peeperkorn, "Competition and Sustainability: What can Competition Policy Do?" (2020) *Concurrences* 40. For the US, see e.g. M.K. Ohlhausen and A.P. Okuliar, "Competition, Consumer Protection, and the Right [Approach] to Privacy" (2015) 80 *Antitrust Law Journal* 121.

[43] Such disagreements over the grounds of law—"theoretical disagreements", as Dworkin calls them—are ubiquitous in legal scholarship and practice. See R. Dworkin, Law's Empire (Cambridge: Harvard University Press, 1986).

considerations due to their fundamental importance in guiding the legal analysis. Going forward, however, it will be important to enrich this perspective with approaches from economics, jurisprudence, moral philosophy, or institutional analysis.

Foundational values of EU law

EU constitutional law[44] positions both data protection and environmental sustainability as normatively important values that span the entire EU legal system. This includes competition law, which is part and parcel of the broader EU legal system, rather than a field solely governed by its own distinctive logic.

Article 16(1) TFEU provides that "[e]veryone has the right to the protection of [their] personal data", something that is echoed in art.8 of the EU Charter. Article 2 and art.6(3) TEU[45] stipulate that the Union is founded on the value of respect for human rights and that fundamental rights constitute general principles of EU law.[46] The right to data protection clearly belongs to the category of fundamental rights. These indications, and in particular art.2 TEU that invokes human rights as EU foundational values, have concrete legal effects.[47] Founding principles, a sub-category of EU law principles, express "an overarching normative frame of reference for all primary law, indeed for the whole of the EU's legal order".[48]Article 2 TEU constitutes "a binding treaty clause and a provision of EU primary law that figures on top of the EU's constitution—in other words, a *Grundnorm* for European integration" that commits the Union, its institutions and its Member States.[49] Other provisions of the EU legal system must be therefore interpreted in keeping with these values.[50] As art.3(1) TEU states, it is the Union's aim to promote them, which implies a proactive attitude. Article 13(1) TEU further requires the Union to set up an institutional framework that is able to promote and advance these values and objectives. In short, it can therefore be asserted that foundational principles enjoy the highest legal standing in the constitutional hierarchy of EU law.

While the fundamental right to data protection is indirectly referenced in art.2 TEU as a human right, that same provision is silent on the status of environmental sustainability as a possible founding value of the EU legal order. It is art.37 of the EU Charter that requires a high level of environmental protection to "be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development", expressing environmental concerns as principles rather than as rights that individuals could invoke.[51] The exact scope and meaning of art.37 remain ambiguous. Principles figuring in the Charter differ from the general principles of EU law that the Court has developed in its jurisprudence,[52] for the

[44] Under EU law, its primary legal framework that consists of the Treaties, the EU Charter, and the case law of the CJEU, will be understood as EU constitutional law, even if this terminology is not free from controversies. The Treaties on which the EU rests can indeed be characterised as having a "constitutional character": *Parti Ecologiste Les Verts v European Parliament* (C-294/83) EU:C:1986:166; [1987] 2 C.M.L.R. 343 at [23]. See also e.g. A. von Bogdandy, "Founding Principles of EU Law: A Theoretical and Doctrinal Sketch" (2010) 16 E.L.J. 95, 96.

[45] Treaty on European Union (TEU) [2016] OJ C202/13.

[46] On data protection as a fundamental right, see G. González Fuster and R. Gellert, "The Fundamental Right of Data Protection in the European Union: In Search of an Uncharted Right" (2012) 26 *International Review of Law, Computers and Technology* 73.

[47] See, for example, J.C. Piris, *The Lisbon Treaty. A Legal and Political Analysis* (New York: Cambridge University Press, 2010), p.71.

[48] von Bogdandy, "Founding Principles of EU Law: A Theoretical and Doctrinal Sketch", 105 *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427443*.

[49] J. Wouters, "Revisiting Art. 2 TEU: A True Union of Values?" (2020) 5 *European Papers: A Journal on Law and Integration* 255, 258.

[50] Wouters, "Revisiting Art. 2 TEU: A True Union of Values?" (2020) 5 *European Papers: A Journal on Law and Integration* 260.

[51] See Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17 (Explanation on art.37).

[52] A. Sikora, *Constitutionalisation of Environmental Protection in EU Law* (Zutphen: Europa Law Publishing, 2020), p.131.

Charter's principles can generally not be directly invoked by individuals.[53]Article 37 of the EU Charter is based on pre-existing provisions in the Treaties and on national constitutional provisions,[54] and as such does not appear to create new obligations under EU law. Therefore, the provision has been held to lack "autonomous legal authority".[55] Even if this provision cannot be interpreted as a fully-fledged right to a sustainable environment, however, it is considered "a step in the constitutional history of environmental protection in EU law".[56] It also cannot be ruled out that the right to a healthy and clean environment will in the future be more assertively recognised as an enforceable independent element of the EU's human rights catalogue. For now, however, it mainly has the function of "greening" other human rights, such as the right to life or the right to human dignity.[57] Returning to the TEU, that Treaty might not consider environmental sustainability as a foundational value, but it does explicitly frame sustainability as one of the Union's core objectives in art.3 TEU.[58] One can therefore argue that the foundational values indicated in art.2 TEU should be read together with the most significant of the Union's objectives put forward in art.3 TEU,[59] giving sustainable development the status of a quasi-foundational value.

From the above, it follows that data protection as well as environmental sustainability can be relied upon as quasi-foundational values of EU law. Even though environmental concerns are not as such part of the foundational values catalogue, their status as core aims of the EU, as well as their close ties to human rights,—which do form part of the foundational principles,—justify their leading positions in the EU constitutional hierarchy.

The evolution of the EU constitution

Initially grounded in economic interactions, the EU constitution has matured into one that also considers social interests and values. This evolution may also come to bear on the status of foundational principles. Since the Lisbon Treaty, establishing "a highly competitive social market economy"[60] has been one of the EU's core aims. Albeit vague, the term "social" suggests a substantive broadening of the Union's purposes, going beyond purely economic considerations.[61] As for specific values representing the social turn in the evolution of the Union's legal order, environmental sustainability is clearly a prominent example that may be labelled a "societal" or "non-market" concern.[62] Another value in this respect is represented by data

[53] Opinion of AG Cruz Villalón in *Association de médiation sociale* (C-176/12) EU:C:2014:2; [2014] 2 C.M.L.R. 41 at [47].

[54] The principles set out in art.37 of the EU Charter are based on what are currently art.3(3) TEU and arts 11 and 191 TFEU, as well as on the provisions of national constitutions; Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, Explanation on art.37.

[55] E. Scotford, "Environmental Rights and Principles in the EU Context: Investigating Article 37 of the Charter of Fundamental Rights" in S. Bogojevic and R. Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Oxford: Hart Publishing, 2018), p.153.

[56] Scotford, "Environmental Rights and Principles in the EU Context: Investigating Article 37 of the Charter of Fundamental Rights" (2018), p.153.

[57] See, e.g. Council of Europe, "Environment and the European Convention on Human Rights" (December 2020).

[58] Article 3 TEU: the Union "shall work for the sustainable development of Europe based on […] a high level of protection and improvement of the quality of the environment" as well as for "the sustainable development of the Earth".

[59] Wouters, "Revisiting Art. 2 TEU: A True Union of Values?" (2020) 5 *European Papers: A Journal on Law and Integration* 259.

[60] Article 3(3) TEU.

[61] See A. Gerbrandy, "Rethinking Competition Law within the European Economic Constitution" (2019) 57 J.C.M.S. 127, 135.

[62] Gerbrandy, "Rethinking Competition Law within the European Economic Constitution" (2019) 57 J.C.M.S. 131.

protection. Here, the evolution of EU data protection law showcases how the fundamental rights logic prevailed and continues to inform the current framework governing the use of personal data.[63]

As the internal market provisions, competition law is an integral part of the EU's economic constitution.[64] Hence the question for competition law—one that we will get back to—is whether this area of law as currently conceptualised fits the EU's constitutional set-up, where economic and social building blocks exist next to each other. The emergence of the social dimension of the Union implies that "public interests besides the prevention of market power (or its abuse) have entered into equation".[65] Despite this progressive step towards protecting social values, the EU is confronted with the reality of remaining asymmetries between the proclamation of these values and its limited social competences.[66] Indeed, both art.11 TFEU and art.37 of the EU Charter are tied to the Union's limited competences. This points to constitutional limits that might possibly constrain EU competition enforcers in pursuing social policy goals. As confirmed in the case law of the CJEU, however, the EU can act on social values in a functional way, e.g. by using the economic powers it has been granted.[67] The Court has stressed:

> "the pursuit of the EU's objectives, as set out in Article 3 TEU [environmental protection being one of them], is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy".[68]

Consequences of the constitutional standing of data protection and environmental sustainability for EU competition law

Both data protection and environmental sustainability feature prominently as either foundational principles or quasi-foundational principles of the EU legal order, meaning that some form of integration of these values into competition law assessments is required. As no significant differences exist as to the legal status of the two values, a joint analysis as to how they should be considered within other legal areas may be fruitful. One basic question relates to how EU competition law should deal with the hierarchical significance of the principles of data protection and environmental sustainability. Would they prevail in cases of conflict with economic principles, or would they require a specific case-by-case legal weighing, or call for other methods of reconciliation? To address this issue, it is necessary to put this inquiry into the more specific frames of EU competition law doctrine, which the article will do below.

The values of data protection and sustainability, of course, are not alone in their legal status as quasi-foundational values of EU law. Other values of an equivalent status, including further human rights or the value of democracy, also exist. In fact, a list of about twenty such values or principles has been discerned in legal scholarship.[69] While the plurality of values and principles pervading the EU legal order does not impact our conclusion that data protection and sustainability should be integrated into EU

[63] Calling this influence of fundamental rights particularly noteworthy given the history of European economic integration, see T. Streinz, "The Evolution of European Data Law" in P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, 3rd edn (Oxford: Oxford University Press, 2021), Ch.29 (at p.14 in the SSRN version).

[64] Gerbrandy, "Rethinking Competition Law within the European Economic Constitution" (2019) 57 J.C.M.S. 128.

[65] Statement made with reference to art.101(3) TFEU exemption; see B. Baarsma and N. Rosenboom, "A Veritable Tower of Babel: On the Confusion between Legal and Economic Interpretations of Article 101(3) of the Treaty on the Functioning of the European Union" (2015) 11 *European Competition Journal* 402, 403.

[66] D. Damjanovic, "The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy" (2013) 50 C.M.L. Rev. 1685, 1688.

[67] Wouters, "Revisiting Art. 2 TEU: A True Union of Values?" (2020) 5 *European Papers: A Journal on Law and Integration* 260–261.

[68] *Opinion 2/13* EU:C:2014:2454; [2015] 2 C.M.L.R. 21 at [172].

[69] Peeperkorn, "Competition and Sustainability: What can Competition Policy Do?" (2020) *Concurrences* 43.

competition law, it does leave us with the rather perplexing question: how? On this, the integration clauses in EU primary law discussed in the following section provide possible answers.

Integration clauses

The extent to which other areas of law integrate—or should integrate—with principles such as the protection of human rights or sustainability is conditioned both on the constitutional standing of these principles, as discussed above, as well as on the integration clauses stipulated in EU primary law. Such clauses are either specific to a certain Union objective, or horizontal, introducing more general stipulations aiming at ensuring unity between Union policies and actions. Here, comparisons between data protection and sustainability allow for a more comprehensive insight, in particular as the legal discourse on data-related implications for competition enforcement is currently at a more advanced stage.

Principle-specific integration clauses

A principle-specific provision particularly relevant in the current context is art.11 TFEU, which, similarly to the EU Charter, states that "[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". This provision's effect in practice, however, has been underwhelming.[70] For this reason, it has been claimed that art.11 TFEU is "like a historic monument in the Treaty, which everybody looks at, nods at, and then goes away and forgets".[71] The main reason for this insignificant impact may lie with the provision's indeterminacy and its failure to clarify what should happen in the case of an irreconcilable conflict between environmental sustainability and objectives pursued by other EU policies.[72]

Three possible interpretations of the provision can be considered.[73] The first is a weak one, obliging decision-makers to take environmental requirements into account, but leaving them with some discretion as to whether or not to make adjustments to another policy based on such requirements. The second one is stronger, requiring that policymakers observe the principle of environmental protection in defining and implementing EU policies where such a policy choice is feasible. Under the last and strongest alternative, decision-makers must prioritise environmental protection at all times, even where, "in the context of the sectoral policy objectives of the policy area, an environmentally friendly policy option would not otherwise be considered".[74]

A systematic approach to art.11 TFEU would demand the third and strongest interpretation, as the two other ones fail to achieve full substantive integration.[75] In the case of intersections between competition law and environmental sustainability, this would mean that where it is possible to interpret the competition provisions in an environmentally friendly way, and no conflict between competition law and sustainability arises, competition law must always be interpreted in this way. In the case of a clash between sustainability and competition law, however, decision-makers would need to adopt the proportionality principle, as it may be inconsistent with the Treaties to interpret art.11 TFEU in a way that sustainability must always be prioritised in cases of conflict with economic aims, including competition.[76] The practice of balancing is a common judicial method of reconciling opposing interests and rights, even if it can attract criticism

[70] S. Kingston, *Greening EU Competition Law and Policy* (Cambridge: Cambridge University Press, 2012), p.112.

[71] L. Krämer, "Sustainable Development in EC Law" in H.Ch. Bugge and Ch. Voigt (eds), *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008), p.394.

[72] Kingston, *Greening EU Competition Law and Policy* (2012), p.112.

[73] Kingston, *Greening EU Competition Law and Policy* (2012), p.113.

[74] Kingston, *Greening EU Competition Law and Policy* (2012), p.113.

[75] Kingston, *Greening EU Competition Law and Policy* (2012), p.114.

[76] J. Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford: Oxford University Press, 2016), pp.28, 30.

as regards the considerable degree of discretion that might result in subjectivity of the process and value judgements.[77] As regards the balancing practice in EU law specifically, the EU Courts have substantially relied on the proportionality principle, which in EU competition law finds its expression in art.101(3) TFEU and the efficiency defence in art.102 TFEU.

A further question might arise as to whether, under art.11 TFEU, environmental concerns should be integrated into competition law assessments even when there is no conflict—and, if so, how and to what extent. Framed differently, the issue is whether it is mandatory for competition enforcers to proactively promote environmental sustainability, or whether the requirements stipulated in art.11 TFEU should provide guidance only in cases of conflict between protecting the competitive process on the one hand, and protecting the environment on the other one.

Horizontal integration clauses

Apart from the principle-specific integration clause just discussed, the EU legal order also includes a general integration clause. Article 7 TFEU states that "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". While the English version of the Treaty stipulates consistency, other official languages refer to coherence (*Kohärenz* in German, *coherencia* in Spanish, *cohérence* in French, *coerenza* in Italian)—a distinction to which we shall come back.

Article 7 TFEU is a horizontal provision that concerns a wider set of EU principles and policies. This implies that both data protection and environmental sustainability would fall within its scope. Article 7 TFEU also differs from art.11 TFEU in that it expresses the integration principle using a softer language ("shall ensure consistency"). As regards the substantive requirements of consistency stipulated in this clause, they are not entirely clear.[78] Commentators have thus far interpreted it as requiring "an inter-sectoral coordination of the decision maker in respect to common objectives, and the likewise consistent formulation of their political agendas".[79] Thus, the provision should be read in keeping with the Union's objectives such as the ones indicated in the TEU (e.g. art.3 TEU lists the internal market, environmental protection, promoting social justice and equality as the Union's objectives) or in the "mainstreaming" provisions (e.g. art.11 TFEU that stipulates environmental protection).[80] This could ultimately mean that market-related policies, including competition policy, should be conditioned on "non-market" concerns such as data protection and environmental sustainability,[81] even if this requirement is formulated in a rather abstract way.

The substantive requirements flowing from art.7 TFEU, as already mentioned, are not clear enough to allow for the practical use of the concept of consistency. This much-needed clarity has not yet been delivered by the EU Courts, either. In its early jurisprudence, the CJEU concluded:

[77] X. Groussot and G.T. Petursson, "Balancing as a Judicial Methodology of EU Constitutional Adjudication" in S. De Vries, X. Groussot and G. T. Petrusson (eds), *Balancing Fundamental Rights with the EU Treaty Freedoms: The European Court of Justice as a "Tightrope" Walker* (Utrecht: Eleven International, 2012), p.53.

[78] M. Dawson, "Better Regulation and the Future of EU Regulatory Laws and Politics" (2016) 53 C.M.L. Rev. 1209, 1227.

[79] M. Kotzur, "Article 7 [Principle of Coherence]" in R. Geiger, D. E. Khan and M. Kotzur (eds), *European Union Treaties. A Commentary* (Oxford: C.H. Beck/Hart Publishing, 2015), p.214.

[80] Dawson, "Better Regulation and the Future of EU Regulatory Laws and Politics" (2016) 53 C.M.L. Rev. 1227. Among other mainstreaming provisions are social exclusion (art.9 TFEU), non-discrimination (art.10 TFEU) or animal welfare (art.13 TFEU).

[81] Dawson, "Better Regulation and the Future of EU Regulatory Laws and Politics" (2016) 53 C.M.L. Rev. 1227.

> "[E]very provision of Community law must be placed in its context and interpreted in the light of the provisions of [EU] law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".[82]

Over the past years, the CJEU has invoked the notions of consistency and coherence jointly or interchangeably in cases dealing with various subject-matters—ranging from national legislation restricting free movement[83] to the hierarchical ranking of laws within the EU legal system[84] to external relations[85]—and introduced different tests to satisfy their requirements. This has painted a fragmented conceptual picture, leaving an important part of the canvas yet to be completed: that about the actual legal obligations flowing from art.7 TFEU.

To systematise this discussion and make it more tangible, it can be argued that art.7 TFEU can be interpreted as having a narrow meaning, which means that the EU should strive to ensure the lack of contradictions between different laws and policies ("consistency"), or a broad meaning, implying the need to establish positive connections between different values and elements of a legal system, even when there is no conflict. We refer to this broader meaning as "coherence". Given that coherence could be a concept guiding the interpretation of both art.7 as well as art.11 TFEU discussed above, it is analysed in more detail in the following section.

Coherence

While both the environmental protection-specific integration clause of art.11 TFEU and the horizontal integration clause of art.7 TFEU seek to avoid conflicts amongst various EU policies and actions, there is a further dimension to these provisions that merits specific attention in the present context. If the purpose of the integration clauses goes beyond mere consistency (as the non-English language version of art.7 TFEU would suggest), this opens up entire new avenues of interpretation. The legal question then emerges whether, and if so, to what extent, these integration clauses mandate or at least recommend a proactive approach to incorporating the constitutional principles and the Union's objectives into other sectoral policies, such as competition policy. For the purpose of ensuring the clarity of analysis, we propose to refer to this further dimension, which requires a broader reading of the integration clauses, as coherence. Depending on the intensity of the obligations mandated by this principle of coherence, it can take on varying degrees of intensity ranging from a mere recommendation of a proactive approach to an obligation. This dimension of coherence differs from the various interpretations of art.11 TFEU discussed above, as it goes beyond asking what should happen in the event of a clash between (traditional) competition law and sustainability, but also applies where there is no direct clash in the first place. In that sense, the dimension of coherence directly impacts everyday competition law assessments.

While consistency implies the lack of contradictions, coherence is a more demanding principle that requires the presence of positive connections between different elements of the legal system. These two types of integration contain certain parallels to what Nowag terms preventive and supportive integration, the first one meaning that competition law prevents measures that are harmful for sustainability, and the second one that competition law allows measures that support sustainability.[86] Coherence, then, would embrace a logic similar to the idea of supportive integration, albeit with a scope that is substantially more demanding. To illustrate the implications of introducing the dimension of coherence, consider the following:

[82] *CILFIT Srl v Ministero della Sanita* (C-283/81) EU:C:1982:335; [1983] 1 C.M.L.R. 472 at [20].

[83] *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierun* (C-169/07) EU:C:2009:141; [2009] 3 C.M.L.R. 5.

[84] *Hans Werhof v Freeway Traffic Systems GmbH & Co KG* (C-499/04) EU:C:2006:168; [2006] 2 C.M.L.R. 44.

[85] *Commission v Luxembourg* (C-266/03) EU:C:2005:341; *Commission v Germany* (C-433/03) EU:C:2005:153.

[86] Nowag, *Environmental Integration in Competition and Free-Movement Laws* (2016), p.11.

> Suppose a competition authority needs to decide on whether or not a dominant platform's collection of vast amounts of user data is anti-competitive within the meaning of art.102 TFEU. Is it mandatory for said authority to take into account the data protection right of the users subjected to the data collection exercise? And if it is not legally required to do so: Can the authority do so, based on the Treaty's integration clause set out in art.7 TFEU?
>
> Suppose a competition authority needs to assess a private sustainability initiative under art.101 TFEU. Should the authority take into account environmental benefits for society at large when assessing an individual exemption, even if such benefits do not directly accrue to the consumers affected by an anti-competitive agreement and these consumers are not willing to pay for sustainability gains enjoyed by others? And if it is not legally required to do so: Can it do so, based on the integration clause laid down in art.11 TFEU?[87]

This is the legal crux of the question on which our outlook depends as we move forward in this key debate. If coherence is required by the Treaties, and there is a legal obligation to integrate these quasi-foundational principles into competition law (a strong form of coherence), then competition law practice needs to change. If, on the other hand, there merely is scope for integrating these quasi-foundational principles rather than a legal obligation, then competition law enforcers will have more room for manoeuvre (a weaker form of coherence). This wiggle room may then be filled depending on the policy goals currently pursued by the EU. Further questions also arise: if indeed the Treaties are interpreted as imposing a coherence obligation, how can one—in substance—ensure compliance? If, on the other hand, enforcers have a room for manoeuvre, how can one provide for legal certainty and ensure that it is not used in an arbitrary manner? Both a legal obligation to integrate and an optional scope for integration raise further legal questions to which we turn in the following section.

Interaction of values as doctrinal challenges for EU competition law

Over the past three decades, the European Commission's approach to competition enforcement has taken an economic turn and, as a result, efficiencies and economic consumer welfare have become the prominent principles to guide competition enforcement,[88] pushing non-economic considerations to the margins. This development means that the competition doctrine is diverting from its original conception, which assumed a much closer link between the market and its social context.[89] At the same time, the EU is undergoing a social transition, facing us with a rather paradoxical situation.

Building on that earlier vision for competition law, the present section outlines three scenarios about how EU competition law doctrine interacts, or should interact, with data protection and environmental sustainability to more squarely reconcile market concerns with social issues. We introduce three concepts

[87] The draft horizontal guidelines published by the European Commission outline three scenarios when an anti-competitive agreement could be justified under art.101(3) TFEU based on environmental gains: (1) where sustainability achieved through the agreement directly benefits affected consumers (individual use value benefits, e.g. better taste of sustainably grown vegetables), (2) where affected consumers value sustainability gains that accrue to others (individual non-use value benefits, e.g. choosing clothes made of sustainable cotton that help prevent water scarcity in India), and (3) where the agreement generates sustainability-related collective benefits and the affected consumers are part of the group of beneficiaries (collective benefits, e.g. drivers buying less polluting fuel also benefit from cleaner air). A scenario not explored by the Commission concerns collective benefits whereby a sustainability initiative generates significant sustainability gains for others than the affected consumers, and affected consumers are not willing to pay the higher prices that might result from this agreement.

[88] On this, see e.g. A.C. Witt, *The More Economic Approach to EU Antitrust Law* (Oxford: Hart Publishing, 2016); 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.

[89] Gerbrandy, "Rethinking Competition Law within the European Economic Constitution" (2019) 57 J.C.M.S. 130.

to describe various modi operandi: “value alignment”, “value conflict” (consistency), and “value inclusion” (coherence). This three-fold categorisation allows for a comprehensive analysis of both fundamental questions related to competition law’s ultimate values as well as of more granular and practical issues of their application and enforcement. In addition, a comparative approach to these scenarios that juxtaposes data protection and sustainability in a concrete competition law context is key to evaluate whether these values, given that they enjoy a near-identical constitutional standing under EU law and challenge competition law in similar ways, can be subjected to a similar antitrust legal framework going forward.

Value alignment: the optimal premise

The first and the least controversial scenario is value alignment. This encompasses instances where the objectives pursued by competition law alone—be they economic consumer welfare (currently favoured in competition enforcement[90]), market integration or free competition—find themselves aligned with the principles of data protection and/or environmental sustainability. Such instances are seemingly the least controversial as they would require no balancing nor further rethinking of competition law for the purpose of integrating social values. In this section, we will identify and compare instances where this hypothesis holds for either or both discussed principles. This will allow us to then exclude such “easy” scenarios and concentrate on the more demanding aspects of consistency and coherence.

Broadly stated, legal alignments with competition law understood along the lines described above are more likely to materialise whenever data protection and sustainability result from the process of undistorted competition and can be subsumed under the concept of economic consumer welfare, i.e. through low prices, better quality, greater output and innovation.

In the modern economy, personal data (e.g. individuals’ traits and attributes such as gender, interests, age, or reservation prices) is routinely collected and processed by businesses in the course of providing online services, and has an unprecedented economic value. From the perspective of the individual, sharing their personal data can be welfare-enhancing or diminishing, depending on the specific market context.[91] Self-interested data subjects should, from the economic viewpoint, be interested in having control over their personal data as this control can tilt the balance of economic power between them and other agents (e.g. companies) that seek access to their personal information.[92] In particular, data subjects’ control over their personal data would allow them to strategically share their data (e.g. to obtain discounts or increase accuracy of their search results) or to strategically conceal it (e.g. to avoid price discrimination), thereby increasing their economic welfare. Besides this economic dimension that resonates with the traditional competition law rationale, there are also dignity-related and further non-economic incentives that generate the need for assuming greater control. Such a concept of control must be understood as individual autonomy and informational self-determination, which aims at empowering individuals vis-à-vis other agents. This understanding, despite its many flaws, is one of the central tenets of the substantive provisions and overall architecture of EU data protection law.[93] Among mechanisms in law designed to achieve these objectives

[90] On the more economic approach endorsed in EU competition law, see the references in fn.85 as well as European Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the Treaty to abusive exclusionary conduct by dominant undertakings (Guidance Paper) [2009] OJ C45/7.

[91] A. Acquisti, “The Economics of Personal Data and the Economics of Privacy”, OECD Background Paper (2010) 3.

[92] A. Acquisti, C. Taylor and L. Wagman, “The Economics of Privacy” (2016) 54 *Journal of Economic Literature* 442, 445.

[93] O. Lynskey, “Deconstructing Data Protection: The “Added-Value” of a Right to Data Protection in the EU Legal Order” (2014) 63 *International Competition Law Quarterly* 569; O. Lynskey, *The Foundations of EU Data Protection Law* (Oxford: Oxford University Press, 2015). Another concept that underpins EU data protection law is fairness, which is broader than the concept of control and can be understood as a system of checks and balances that ensures lawful personal data processing. On this, see e.g. H. Kranenborg, “Commentary on Article 8” in S. Peers et al (eds),

are, for example, user consent,[94] transparency and the provision of information,[95] the right to rectification and erasure,[96] access to personal data[97] and data portability.[98]

The issue of control is approached differently from the standpoint of profit-maximising companies. As their primary objective is to monetise user data, providing individuals with increased control is typically not in their self-driven interest. According to the neoclassical theory of perfect competition, access to relevant and complete information leads to economic efficiencies and improves competitive market processes.[99] Based on this premise, Chicago School scholars asserted that the protection of privacy generates inefficiencies in the marketplace as it conceals potentially relevant information from other economic agents.[100] Companies have therefore increased incentives to exploit individuals' bounded rationality and unawareness of how their data is being handled, which might lead to misalignments of interests between themselves and self-interested individuals. Here, the "privacy paradox", whereby users express a high preference for personal data protection, a preference which is not reflected in their actual online behaviour,[101] plays into the hands of businesses that want to best exploit user data.

Although widespread in digital markets, these misalignments cannot be generalised as an inherent characteristic of digital markets, or one that is bound to pervade. Indeed, there is an increasing trend to consider data protection as a competitive advantage. What aptly illustrates this point is the recent traction that privacy-focused encrypted messaging apps, such as Signal and Telegram, have gained following the much-criticised announcement of intended updates to WhatsApp's terms and conditions, which would lead to greater sharing of personal data with its parent company Facebook (now: Meta) outside of the EU.[102] Understood in this way, data protection can be conceptualised as a quality dimension of online services, one that is increasingly recognised by businesses as important to embrace more fully. On a microlevel, competition law in this sense goes hand in hand with the GDPR's concepts of data minimisation and data portability, both aspiring to stimulate competition on data protection. At the same time, it needs to be recognised that the data protection-orientation of businesses results not only from individuals' demand, but also from external factors such as the need to comply with strict legal obligations laid down in the GDPR. GDPR obligations therefore also shape competition in the EU.

From a comparative perspective, a trend corresponding to competition on data protection can also be discerned within the field of sustainability. Similarly to data protection, putting environmental sustainability high on the corporate agenda is partially motivated by increasing consumer demand for eco-products and services,[103] although the phenomenon of the "eco-paradox"—the fact that despite expressing environmental

The EU Charter of Fundamental Rights: A Commentary (Oxford: Hart Publishing, 2014), p.229. Data minimisation is a further concept incorporated in the GDPR, see GDPR art.5(1)(c).

[94] GDPR arts 6(1)(a) and 7.

[95] GDPR arts 12 and 14.

[96] GDPR arts 16 and 17.

[97] GDPR art.15.

[98] GDPR art.20.

[99] Acquisti, "The Economics of Personal Data and the Economics of Privacy" OECD Background Paper (2010) 4.

[100] R.A. Posner, "The Right of Privacy" (1977) 12 *Georgia Law Review* 393; R.A. Posner, "The Economics of Privacy" (1981) 71 *American Economic Review* 405. See also G.J. Stiegler, "An Introduction to Privacy in Economics and Politics" (1980) 9 J.L.S. 623.

[101] See P.A. Norberg, D.R. Horne and D.A. Horne, "The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors" (2007) 41 *Joournal of Consumer Affairs* 100; A.P. Grunes, "Another Look at Privacy" (2013) 20 *George Mason Law Review* 1107, 1112.

[102] K. O'Flaherty, "Is It Time to Leave WhatsApp—and Is Signal the Answer?" *The Guardian* (24 January 2021).

[103] Emerging studies show that consumers are willing to pay more for greener products, and that this trend is on the rise. See e.g. "Consumer Willingness to Pay A Premium for "Green" Products Climbs, Albeit Slowly" Marketing Charts (24 April 2017) *https://www.marketingcharts.com/industries/cpg-and-fmcg-76738*.

concerns, individuals infrequently act on those concerns—is not rare.[104] Besides pressures created by consumer demand, there are also a number of external factors that might trigger business interests in sustainability, for example incentives coming from financial investors who increasingly expect their portfolios to be climate change-friendly.[105] In the case of sustainability, external incentives might also be matched by internal ones: it is in a company's own interest to innovate in order to find efficient greener solutions.[106]

A further concrete case of value alignment can be seen in the recent *Car Emissions* case, where the Commission concluded that German car manufacturers colluded so as not to compete on quality and innovation for car emission cleaning technology.[107] While this type of behaviour clearly has a negative impact on innovation, it is also detrimental to the environment as green innovation is being hindered.[108] Here, the traditional values of competition law and of sustainability therefore align nicely. Similarly, the Commission is currently investigating a potential abuse of a dominant position in the Greek wholesale electricity market "that might have distorted competition and slowed down investment into the generation of greener energy."[109] This is another example of a value alignment.

Corporate transitions to business models oriented towards data protection and sustainability hold the potential to gradually align social values and human rights with the idea of preserving competitive market processes, and in this way, also traditional EU competition law as such. Although such scenarios of value alliance are a positive step towards ensuring a competitive social market economy, as stipulated in art.3(3) TEU, they have not yet fully materialised. There are important similarities and points of divergence between data protection and sustainability that relate to companies' incentives to further innovate and ensure that competition contributes to a socially responsible digital and green transition of the EU. Among important commonalities are first-mover disadvantages entailed by both transitioning to data protection-conscious and green business models. On a more positive note, they are also similar in that demand for data protection- and eco-friendly products and services seems to be on the rise.[110] Legal compliance with data protection and environmental regulatory frameworks is an external factor that might drive competitiveness. In addition, profit-seeking companies might be willing to undergo a green transition

[104] As sustainability benefits are long-run, the rationale behind the eco-paradox might have to do with "hyperbolic discounting", which is a tendency for people to choose smaller-sooner rewards over larger-later gains, as well as "moral discounting", that is excusing environmentally harmful behaviour in one situation by referring to good behaviour in another. See on this, M. Ristaniemi and M. Wasastjerna, "Sustainability and Competition: Unlocking the Potential" (2020) *Concurrences* 53, 59. On consumer preferences for sustainability products, see P. Aghion et al, "Environmental preferences and technological choices: Is market competition clean or dirty?" (2020) Working Paper 26921 National Bureau of Economic Research.

[105] A. Ross, "The Confusing Investment Path to Saving the Planet" *Financial Times* (23 October 2020), *https://www.ft.com/investingtosavetheplanet*.

[106] See E. Rousseva, "Foreword" in *Concurrences On-Topic, Sustainability and Competition Law* (2020) 30, 30.

[107] Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (COMP/AT.40178—Car Emissions) [2021] OJ C458/16.

[108] Also see the press statement by M. Vestager in European Commission, "Antitrust: Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars" *https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581*: "Competition and innovation on managing car pollution are essential for Europe to meet our ambitious Green Deal objectives. And this decision shows that we will not hesitate to take action against all forms of cartel conduct putting in jeopardy this goal".

[109] European Commission, "Antitrust: Commission Opens Investigation into PPC's Behaviour in the Greek Wholesale Electricity Market" *https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1205*; PPC (COMP/AT.40278—*Greek wholesale electricity market*) Commission Decision pending.

[110] As regards data protection, this trend has been reported in, for example, Eurobarometer, "General Data Protection Regulation—Charter of Fundamental Rights" (May 2019); Infogroup, "How Different Generations Think About Their Data" (March 2020). Regarding sustainability, see e.g. Eurobarometer, "Attitudes of European Citizens towards the Environment" (March 2020).

for the sake of profit-making. This internal profit-maximisation factor seems to be largely absent in the context of data protection, where more data leads to more market power.[111] Another factor distinguishing the two is that achieving better environmental performance might require companies to enter into cooperation agreements with rivals. This might raise competition law concerns under art.101(1) TFEU, as discussed in more detail in the subsequent section. Hence, achieving competitiveness through sustainability might trigger more legal hurdles as compared to competitiveness through data protection, even though the setting of data protection standards or other forms of data protection-related cooperation might in the future raise legal questions.

Although there are instances where data protection and sustainability find themselves aligned with the traditional goals of competition law, no full alignment exists with either of those values in question. It is therefore time to move to the more controversial territory of how competition law should interact with these values in cases of conflict, as well as how its doctrine can more positively integrate them.

Value conflict: striving for consistency

As an antithesis to the first scenario, there is value conflict or inconsistency between currently embraced competition values on the one hand, and data protection and/or sustainability on the other. Such a scenario materialises when companies' market conduct positively impacts the former value to the detriment of the latter, or vice versa, thereby leading to inconsistency amongst the values incorporated in the Treaties. For instance, a merger may lead to economic efficiencies because a digital platform can obtain additional up-to-date personal data through its acquisition and further individualise its services, but the same merger may also have the potential to significantly impede data subjects' right to data protection, as arguably occurred in the recently cleared *Google/Fitbit* merger.[112] In line with the conclusions on the constitutional status of data protection and sustainability as well as the integration clauses of arts 7 and 11 TFEU, cases of conflict between competition objectives and the values in question require an act of balancing that makes way for consistency amongst them. If one adopts a holistic perspective on EU law and takes the Treaties' central provisions on the EU's quasi-foundational principles seriously, such balancing in cases of conflict must be regarded as an obligation on the part of competition enforcers, rather than an optional step.

Yet, current EU competition law practice shows that the legal reality differs from this normative take on the issue. Illustrative of this reality are the Commission's merger decisions in digital markets, where, in the majority of instances, possible negative effects that mergers would have on individuals' right to data protection have been discarded as irrelevant and not falling within the scope of competition law.[113] While this has some backing in the Court's case law, which in *Asnef-Equifax* indicated that "any possible issues relating to the sensibility of personal data are not, as such, a matter for competition law",[114] this finding does not prevent competition enforcers from interpreting EU competition law in line with the Treaties' integration clauses. Similarly, a company that infringes environmental protection standards will

[111] See e.g. M.E. Stucke, "Should We Be Concerned About Data-opolies?" (2018) 2 *Georgetown Law Technology Review* 275.

[112] Decision declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (COMP/M.9660—Google/Fitbit) [2021] OJ C194/7.

[113] In addition to the recent *Google/Fitbit* Decision, see *Facebook/WhatsApp* Decision; Decision declaring a concentration to be compatible with the common market (COMP/M.8124—*Microsoft/Linkedin*); Decision declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (COMP/M.8788—Apple/Shazam) [2018] C 417/4. Both in *Google/Fitbit* and in *Apple/Shazam*, the European Data Protection Board raised awareness of the negative implications for privacy of each of these mergers: EDPB, "Statement of the EDPB on the data protection impacts of economic concentration" (27 August 2018); EDPB, "Statement on privacy implications of mergers" (19 February 2020).

[114] *Asnef-Equifax* (C-238/05) EU:C:2006:734 at [63].

not directly be held accountable for this behaviour under EU competition law, but competition enforcers could be asked to incorporate sustainability into their competition assessments when analysing an agreement on a sustainability initiative.

At this point, it is important to stress that requiring competition agencies to balance different costs and benefits is neither a challenge to their independence nor does it turn them into environmental or data protection regulators: it is very much part of these enforcers' everyday task.[115] In this sense, our interpretation of the Treaty provisions as making balancing mandatory for competition enforcers seems far from controversial. At the same time, important limitations and hurdles related to measurability and quantifiability of various benefits and harms need to be acknowledged.

In fact, EU competition law already has at its disposal a number of balancing mechanisms that can be deployed to weigh up harms and benefits. In the context of agreements, for instance, a balancing mechanism exists under art.101(3) TFEU, which indicates that agreements, decisions of undertakings and concerted practices are in line with competition law if they contribute "to improving the production or distribution of goods or to promoting technical or economic progress". This criterion, however, only holds when (1) consumers receive a fair share of the resulting benefit, (2) the agreement is indispensable to the attainment of stated objectives and (3) it does not eliminate competition. This provision proves particularly relevant in the context of environmental sustainability, as achieving this aim through private initiatives might require competitors to join efforts and cooperate.[116] Such joint efforts have included agreements to improve recycling,[117] incentivise sustainable chicken production[118] or increase the efficiency of washing machines.[119] Despite cooperation being one avenue to achieve sustainability objectives, competition law authorities must remain vigilant about the problem of "green washing".[120] In many instances, sustainability can be best achieved through competition rather than collusion, and cooperation initiatives that claim to deliver environmental benefits must undergo a careful scrutiny. In the literature, there has already been considerable analysis of making art.101(3) TFEU "greener",[121] and Austria has added a legislative sustainability exemption to the mix, as mentioned above. The specific challenges that this balancing might pose to competition enforcement—e.g. how to measure environmental benefits—will be compared to corresponding challenges triggered by balancing competition with data protection. Besides art.101(3) TFEU, balancing can also be conducted under art.102 TFEU under the so-called objective justification as well as in merger review, as described in more detail above.

[115] G. Monti, "Four Options for a Greener Competition Law" (2020) 11 *Journal of European Competition Law & Practice* 124, 132.

[116] For an analysis of cooperation initiatives that might fall outside the scope of Article 101(1) TFEU prohibition, see J. Nowag and A. Teorell, "Beyond Balancing: Sustainability and Competition Law" (2020) *Concurrences* 34.

[117] *DSD* Decision. The Commission indicated in this case that cooperation agreements were necessary for "the establishment of a new, functioning market in the recovery of sorted plastic and composite packaging" (para.114).

[118] Dutch Authority for Consumers & Markets, *Chicken of Tomorrow* (13.09195.66) 26 January 2015.

[119] CECED Decision [2000] OJ L187/47. Other examples, as indicated by Holmes, are agreements among supermarkets to develop systems to increase recycling, suppliers aiming to reduce their use of plastics and packaging, or suppliers and retailers joining their efforts to make fishing more sustainable: S. Holmes, "Climate Change, Sustainability, and Competition Law" (2020) 8 *Journal of Antitrust Enforcement* 354, 356.

[120] C.A. Ramus and I. Montiel, "When are Corporate Environmental Policies a Form of Greenwashing?" (2005) 44 *Business & Society* 377; M.P. Schinkel and L. Treuren, "Green Antitrust: Friendly Fire in the Fight Against Climate Change" (2021) Amsterdam law School Legal Studies Research Paper No. 2020-72 Amsterdam Center for Law & Economics Working Paper No.2020-07.

[121] See e.g. K. Coates and D. Middelschulte, "Getting Consumer Welfare Right: The Competition Law Implications of Market-Driven Sustainability Initiatives" (2019) 15 *European Competition Journal* 318; Holmes, "Climate Change, Sustainability, and Competition Law" (2020) 8 *Journal of Antitrust Enforcement*; A. Gerbrandy, "Solving a Sustainability-Deficit in European Competition Law" (2017) 40 *World Competition* 536; G. Monti and J. Mulder, "Escaping the Clutches of EU Competition Law—Pathways to Assess Private Sustainability Initiatives" (2017) 42 E.L. Rev. 635.

A further dimension that competition law doctrine needs to consider is the question of remedies, both for competition infringements[122] and for merger control. In both cases, behavioural remedies can either be imposed on the infringers or accepted as binding by the parties. Here, competition law enforcers may be called upon to design remedies that do not only achieve the economic efficiencies that are strived for by the parties, but that are also in line with sustainability and data protection. For instance, a remedy that requires data sharing may well solve certain competition issues (in a strict sense), but will raise new legal questions as to its compatibility with the GDPR and the right to data protection. This value conflict will need to be resolved in order to allow for an application of competition law that is consistent with the overarching Treaty objectives.

In the case of a value conflict, competition enforcement needs to be mindful of the requirement to apply EU competition law in a way that does not contradict the foundational values of the Treaty, be it data protection or sustainability—in short: it must ensure consistency. Going beyond this step of value integration, there is value inclusion, which we will consider next. This is then followed by a comparison of the joint challenges of making competition law more consistent and coherent with data protection and environmental sustainability.

Value inclusion: aspiring to coherence

The third scenario, value inclusion, builds on the principle of coherence. It assumes a well-rounded and comprehensive incorporation of data protection and sustainability into competition law, which would imply granting them the status of competition-relevant values in their own right. Value inclusion requires a recalibration of competition law's objectives to positively account for data protection and sustainability considerations. It would signal competition law taking a progressive step, which is not an uncontroversial endeavour. Although not yet considered in EU competition law practice, some signs of moving towards this approach can be discerned in enforcement strategies of national competition authorities, notably of the German Bundeskartellamt, at least in the case of data protection.[123] As regards sustainability, the Commission's Executive Vice-President Vestager has noted that companies should "take responsibility, not just for the quality of their products, but for their effect on the world around them".[124] Although statements of this type are indicators of how policy thinking is evolving within the Commission, they should not be mistaken for signs of a potential competition revamp.

As discussed above, the principle of coherence can take on a strong form or a weaker form. In its weaker form, it allows for the integration of quasi-foundational principles into competition law. In its strong form, it imposes a legal obligation on competition enforcers to integrate quasi-foundational principles into their competition assessments. Returning to the two examples considered above, in the case of the data collection, the competition authority could either decide to take data protection principles into account in its assessment (weaker form of coherence), or be obliged to do so (strong form of coherence). The same question would pose itself again when the competition authority designs a remedy to restore a competitive marketplace. Especially at the remedy stage, it becomes clear that the weaker form of coherence would clearly miss the mark: it cannot be within a competition authority's discretion to impose remedies that lead to a competitive marketplace but that, at the same time, violate basic principles of data protection. In fact, this could result in a value conflict in which consistency must be assured.

When considering the private sustainability initiative discussed above, the competition authority could again either decide to take sustainability principles into account in its assessment (weaker form of

[122] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[123] Bundeskartellamt, *Facebook* (B6-22/16) 6 February 2019.

[124] M. Vestager, Chillin' Competition Conference (Brussels, 20 November 2018).

coherence), or be obliged to do so (strong form of coherence). When we get to the stage of designing a competition remedy, it cannot well be imagined that it should be within a competition authority's options to impose a competition remedy that goes against environmental protection laws, as this would also violate the principle of consistency. However, where no such infringement of environmental protection laws is at issue, a remedy could be designed in a way that it either supports a sustainability goal or not. Here, the strong form of coherence would mandate that it does, while the weaker form of coherence would leave this within the discretion of the competition authority.

Value inclusion in the weaker form of coherence raises the issue of how it can be ensured that the competition authority does not exercise its discretion in an arbitrary manner. Value inclusion in the strong form of coherence, on the other hand, must ensure that the competition authority's legal obligation to strive for coherence is complied with. In both cases, it will be for the Court to watch over the compliance with these principles. It would seem that a strong form of coherence will produce results that are both more in line with the EU constitutional framework and are more readily justiciable. A caveat that needs to be added at this point is that ensuring either weak or strong coherence between EU competition law and other policy objectives might risk negatively impacting the "internal" consistency or coherence within competition law. The question whether preserving such internal consistency and coherence should be given a priority over effectively accounting for public policy goals and more accurately anchoring competition law in the EU constitutional framework requires an uneasy balancing of very different stakes. Although it is important to ensure legal certainty and predictability, they might not outweigh the benefits to society and the effectiveness of the EU legal system as a whole that can be achieved by more coherence between competition law and other policy aims.

Common challenges for a consistent and coherent transformation of EU competition law

This section develops a blueprint for competition law's socio-economic transformation by mapping, in a comparative way, the challenges it will face to consistently and coherently incorporate data protection and environmental sustainability. As the discourses on data protection and sustainability in competition law run in parallel, identifying such points of convergence and divergence between the two values creates opportunities for mutual learning. It will also help to establish the most challenging legal hurdles to which more scholarly and policy attention could then be turned.

The first common challenge pertains to measuring consumer harm and benefits related to data protection and environmental sustainability. While price is a central anchor of competition law analysis and often used as the anchor for measuring consumer harm and benefits, this is much more nuanced in both data protection-conscious and green competition law. One of the challenges encountered in digital markets—where data protection concerns regularly surface—are so-called zero-price markets in which users do not pay for a digital platform service (like online search) with a monetary price, but with their attention and data. While there now is broad agreement that zero-price markets are susceptible to competition enforcement,[125] the implications of zero-price markets for the substantive competition law analysis require further exploration.

Green competition law encounters similar issues related to non-price parameters. Where a sustainability initiative creates positive environmental externalities but leads to a higher monetary price, the question arises whether and how competition law can take such a trade-off into account in terms of consumer

[125] M. Eben, "Market Definition and Free Online Services: The Prospect of Personal Data as Price" (2018) 14 *I/S Journal of Law and Policy for the Information Society* 224; Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (COMP/AT.39740—Google Search (Shopping)) [2018] OJ C 9/08, paras 158 and 198.

welfare. The question also poses itself to what extent negative externalities on the environment that arise through a business collaboration can be considered. Similar to the network externalities that are difficult to gauge for data protection-conscious competition law, environmental externalities are difficult to gauge for green competition law.[126] While it is, in theory, possible to quantify the value of personal data[127] as well as of environmental costs and benefits,[128] it is perhaps not warranted under all circumstances.[129]

Because EU competition law has become so centred on economic efficiencies, devising methods to measure and quantify consumer harm or benefits can be identified as a legal hurdle related to both data protection and sustainability.[130] Translating these principles into the language of economics, which boils down to putting a price tag on personal data or sustainability initiatives or determining individuals' willingness to pay for more private or eco-friendly market offerings, has been suggested as one way to solve the problem of measurement.[131] Although some cases (e.g. *Chicken of Tomorrow*) have relied on this type of methodology,[132] doubts remain as to the accuracy of such tests. For example, individuals' valuations of privacy is subjective and can therefore trigger concerns about legal certainty and the clarity of the standard of proof.[133] There might be harms or benefits associated with data protection that are essentially non-economic in nature, and while they could be expressed in monetary terms, this would not do justice to their quality as a fundamental right.[134] This can also be said for sustainable development, which comes to bear on future generations and makes it difficult to factor these benefits into a price-centric analysis. There may also be disagreement, of course, over whether or not a certain behaviour is actually harmful to the environment. To use a recent example from the area of state aid, there can be a controversy over whether a nuclear power plant may pose a threat to the environment or not—as arguably lay at the basis of the *Hinkley Point II* case.[135] Here, a lack of clear benchmarks can make it difficult to attribute the necessary weight to environmental protection principles.

An alternative way of conducting competition assessments is to use benchmarks derived directly from other areas of law. Where data protection is concerned, competition enforcers can already rely on a broad range of detailed legislation—including the GDPR, ePrivacy Directive,[136] and proposed ePrivacy Regulation[137]—that contain a number of shared principles and standards (such as the principle of data

[126] J. Crémer, Y.-A. de Montjoye and H. Schweitzer, *Competition Policy for the Digital Era* (April 2019), p.43.

[127] See e.g. OECD, "Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value" OECD Digital Economy Papers No 220 (2 April 2013).

[128] R. Inderst, E. Sartzetakis and A. Xepapadeas, "Technical Report on Sustainability and Competition" (2021), a report commissioned by the Dutch and Greek competition authorities.

[129] For a critical view, see W. Kerber, "Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection" (2016) 11 *Journal of Intellectual Property Law & Practice* 856, 857.

[130] See Directive 2018/1972 establishing the European Electronic Communications Code [2018] OJ L321/36, Recital 16; Directive 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1 art.3(1). These directives acknowledge that user data (and attention) can be considered remuneration in digital markets, therefore leaving the path of strict price measurements.

[131] H. Kalimo and K. Majcher, "The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace" (2017) 42 E.L. Rev. 210.

[132] Dutch Authority for Consumers & Markets, *Chicken of Tomorrow* (13.09195.66) 26 January 2015.

[133] Kalimo and Majcher, "The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace" (2017) 42 E.L. Rev. 230; K. Bania, "The Role of Consumer Data in the Enforcement of EU Competition Law" (2018) 14 *European Competition Journal* 38, 65.

[134] Kerber, "Digital Markets, Data, and Privacy: Competition Law, Consumer Law and Data Protection" (2016) 11 *Journal of Intellectual Property Law & Practice* 857.

[135] *Austria v European Commission* (C-594/18 P) EU:C:2020:742; [2021] 1 C.M.L.R. 37.

[136] Directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive) [2002] OJ L201/37.

[137] European Commission, "Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications (ePrivacy Regulation)" COM(2017) 10 final.

minimisation) that can serve as yardsticks for a competition assessment.[138] Sustainability, of course, poses a greater challenge in this respect, as there is no comprehensive EU legal framework that could be used as a frame of reference. However, the Taxonomy Regulation could provide a first joint nomenclature for analysing sustainable business practices.[139]

Another challenge for making competition law consistent and coherent—and a dimension on which data protection and sustainability show some resemblance—is the nature of the benefits they generate. An intuitive presumption is that data protection primarily provides benefits to individuals, as opposed to the society as a whole. For instance, an encrypted messaging app that does not suck up users' data is of direct benefit to these individual users. However, society-wide harms produced by data-related decisions of individuals should also be acknowledged.[140] As Viljoen notes in her contribution advocating a "relational" framework for data governance, an individual's "actions in the data political economy necessarily impact others in uneven ways over which one has no direct control".[141] This flows from the fact that in the digital economy, data production becomes almost intrinsically relational. As Viljoen observes, businesses regard data flows as particularly useful when they relate individuals to one another, and data about larger sets of individuals is relied on "to develop models to predict and change behaviour, to gain intimate consumer or competitor knowledge for market advantage, and to retain greater surplus value".[142] In the words of Kaminski, "my decision to stay on social media affects how online advertisers someday will profile you".[143]

Such a collective understanding of harm, which complements the notion of individual harm, also pervades the sustainability-related discourse. For instance, where a sustainability initiative amongst producers of mouth-nose-masks leads to cleaner water and cleaner air around the sites of production, this directly benefits the entire population living around those sites. However, these may not be the same consumers buying the mouth-nose-masks.[144] Those who buy the mouth-nose-masks, however, may indirectly benefit by leaving behind a cleaner environment. In this sense, both environmental sustainability as well as data protection present a substantial challenge for competition law as they require it to reflect on how it can approach collective benefits.

The third point of comparison, and one in which sustainability slightly differs from data protection, is that sustainability generates long-term benefits rather than immediate gains. Hence, a sustainability-related benefit might not immediately flow from a sustainability initiative, but can take time to manifest itself. Sometimes, it will only be future generations that will be able to enjoy such benefits. Data protection benefits, on the other hand, typically accrue to individuals straight away, although long-term implications should not be excluded. The essential challenge that both competition enforcers as well as companies would need to face when it comes to non-immediate sustainability-related benefits turns on performing inter-generational assessments. For example, in the course of completing self-assessments of agreements, what evidence can companies produce to prove a positive impact of sustainability agreements on future generations of consumers?

[138] See V.H.S.E. Robertson, "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data" (2020) 57 C.M.L. Rev. 161, 180.

[139] Regulation 2020/852 on the establishment of a framework to facilitate sustainable investment (Taxonomy Regulation) [2020] OJ L198/13.

[140] M.E. Kaminski, "The Case for Data Privacy Rights (Or 'Please, A Little Optimism')" (2022) *Notre Dame Law Review* online, Forthcoming, U of Colorado Law Legal Studies Research Paper No.22-7.

[141] S. Viljoen, "A Relational Theory of Data Governance" (2021) 131 *Yale Law Journal* 573, 653.

[142] Viljoen, "A Relational Theory of Data Governance" (2021) 131 *Yale Law Journal* 653.

[143] Kaminski, "The Case for Data Privacy Rights (Or 'Please, A Little Optimism')" (2022) *Notre Dame Law Review* online, Forthcoming, U of Colorado Law Legal Studies Research Paper No.22-7.

[144] For a similar comparison on the identity of consumers, see Monti, "Four Options for a Greener Competition Law" (2020) 11 *Journal of European Competition Law & Practice* 128.

The final challenge that can be detected in relation to both sustainability and data protection is how to account for consumers' bounded rationality. Assuming that competition law takes the step to positively incorporate data protection and sustainability considerations within the coherence framework set out above, the challenge it would need to address is how it should approach individuals' bounded rationality. As explained earlier, both the privacy paradox and the eco-paradox imply that even if consumers express their concern about protection of their data or environmental harms, they might not always (be in a position to) choose market offerings that are beneficial to them in these respects. The dilemma that this poses for competition enforcers is whether this matter should be left for arguably irrational consumers to decide, or whether competition law should apply a more paternalistic/maternalistic approach to nonetheless promote these values.[145]

Conclusion

As the EU is attempting to turn the Union into a greener and more data protection-conscious economy, EU competition law, as an inherent part of European economic policy, needs to know where its responsibilities and options lie in this respect. The particular combination of both goals may well shape the way in which competition law will be enforced and soft law guidance will be provided to companies in Europe in the future. The taxonomy developed in this contribution—based on value alignment, value conflict, and value inclusion—can help in addressing the doctrinal challenges that EU competition law faces as it faces the possibility of adopting an approach that is more susceptible to both data and environmental protection.

Data protection and environmental sustainability, however, are not alone in their status as quasi-foundational values. Further values will enter the equation, such as consumer protection[146] and democracy.[147] This raises questions on how to integrate each additional value into competition policy. While we set out paths for competition law to achieve greater consistency and perhaps even coherence amongst the values contained in the EU Treaties, as the number of values to include grows, so does the complexity of this important exercise. This is an issue to which future research should be devoted.

One overarching policy goal has, since the Founding Treaties,[148] served as a common focal point to bring the EU's Member States closer: the internal market principle. This goal has more than once trumped other, more economics-oriented policy goals in the enforcement of competition law.[149] If it is indeed the

[145] In this respect, the Commission already considered over two decades ago that "the reduction in the use of raw materials and of plastic waste and the avoidance of environmental risks involved in the transport of ethylene will be perceived as beneficial by many consumers at a time when the limitation of natural resources and threats to the environment are of increasing public concern". Commission Decision of 18 May 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (COMP/IV/33.640—*Exxon/Shell*) at [71].

[146] Article 12 TFEU forcefully states that "[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities", something that is also required under art.169 TFEU and art.38 of the EU Charter. On this, see BEUC, "Sustainability and Competition" DAF/COMP/WD(2020) 72. Calling for a closer integration of state aid law—as part of EU competition law—and consumer protection based on art.12 TFEU, see K.J. Cseres and A. Reyna, "EU State Aid Law and Consumer Protection: An Unsettled Relationship in Times of Crisis" (2020) Amsterdam Law School Legal Studies Research Paper No.2020-32.

[147] See V.H.S.E. Robertson, "Antitrust, Big Tech, and Democracy: A Research Agenda" (2022) 67 *Antitrust Bulletin* 259.

[148] See e.g. art.3(3) TEU: "The Union shall establish an internal market".

[149] For instance, the internal market rationale has served as the basis of competition law infringements that are specific to the EU, like impeding parallel trade amongst Member States or prohibiting distribution agreements that hinder the completion or functioning of the internal market; see *GlaxoSmithKline Services Unlimited v Commission of the European Communities* (C-519/06 P) EU:C:2009:610; [2010] 4 C.M.L.R. 2 at [59] (with reference to earlier cases); *Etablissements Consten Sarl v Commission of the European Communities* (C-56/64) EU:C:1966:41; [1966] C.M.L.R. 418; Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning

profound conviction of the EU and its Member States that the Union should protect individuals' data as well as the environment, then competition law can look to the internal market mantra as a successful blueprint for bringing a central policy goal to life within the context of the existing EU competition law rules.

of the European Union to categories of vertical agreements and concerted practices (VABER) [2010] OJ L102/1, art.4(b); European Commission, Guidelines on Vertical Restraints [2010] OJ C130/1, para.50 ("market partitioning" as a restriction by object). More recently, the Commission has prioritised a digital single market, leading to e-commerce and consumer Internet of Things sector inquiries in the area of competition law as well as to an increased awareness of obstacles to market integration in the digital realm that should (also) be tackled by EU competition law; see European Commission, "A Digital Single Market Strategy for Europe" COM(2015) 192 final; European Commission, *Final Report on the E-Commerce Sector Inquiry* COM(2017) 229 final; European Commission, Commission Decision initiating an inquiry into the sector of consumer Internet of Things related products and services C(2020) 4754 final.