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THE CHARTER OF FUNDAMENTAL RIGHTS, THE AIMS OF EU COMPETITION LAW AND DATA PROTECTION: TIME TO LEVEL THE PLAYING FIELD

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The proliferation of data-driven markets continues to raise questions about their implications for the right to data protection. A recent suggestion is that EU competition law can and should be used to address data protection concerns in the age of big data. However, the European Commission is reluctant to consider data protection issues in EU competition law, maintaining instead that competition law is not the right tool to promote the right to data protection. Yet, following the Treaty of Lisbon, data protection is a fundamental right under Article 16 of the *TFEU* as well as Article 8 of the Charter. Therefore, considering that the EU is under a duty to promote fundamental rights by virtue of Article 51 of the Charter, this paper argues that data protection should be among the objectives of EU competition law.

I. INTRODUCTION

Facebook's acquisition of WhatsApp in 2014 and the Commission's subsequent decision to fine the social network EUR110 million for data breaches resulting from the merger, served as a timely reminder of the challenges posed to data protection in the era of Big Data.[1] Traditionally, the protection of personal data in Europe has been confined to specific data protection legislation.[2] More recently, however, there is a body of literature pointing to European Union ("EU") competition law as a

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1 Madhumita Murgia, "Facebook fined €110 million by European Commission over WhatsApp deal" *Financial Times* (18 May 2017), online: Financial Times <https://www.ft.com/content/a2dadc48-3bb1-11e7-821a-6027b8a20f23>.

2 EC, *Commission Directive 95/46/EC74 of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data*, [1995] OJ, L 281 [*Data Protection Directive*]; more recently, see EC, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, [2016] OJ, L 119/1 [*GDPR*].

potential tool for protecting data rights in online markets.[3] Furthermore, the idea of using competition law to safeguard the right to data protection has been endorsed by several national competition and data protection regulatory bodies in the EU.[4] The European Commission ("Commission"), on the other hand, takes a different view. Margrethe Vestager, Commissioner in charge of competition has maintained that EU competition law is not the tool to fix privacy problems.[5]

The Commission's stance is unsurprising given its long-held understanding of competition policy as an area of law that should be concerned mainly with economic efficiency; in other words, ensuring lower prices, quality, and innovation in markets.[6] Essentially, for the Commission, non-economic values such as data protection fall outside the remit of what EU competition law should seek to achieve. The purpose of this paper is to challenge the Commission's aforementioned position on the interaction between EU competition law and data protection. This will be done via posing the question as to whether the status of data protection as a human right under the European Charter of Fundamental Rights ("Charter") requires the consideration of data protection issues in EU competition law.[7] In other words, does the Charter extend the aims of EU competition law to include the promotion of data protection rights? The paper answers this question in the affirmative. It will be argued that the advent of the Charter as a legally binding instrument, read together with the obligation incumbent on the Union and its institutions to "respect" and "promote" fundamental rights means that those rights must be protected in all areas of Union policy, including EU competition law. In this context, the paper contributes to the existing literature by bringing a human rights aspect to the discussion on the aims of EU competition law. In particular, it elucidates the relationship between this area of law and non-economic public policy objectives such as environmental protection and employment policy. Indeed, whilst much has been written on the aims of EU competition law, the question of whether the Charter and the fundamental rights it seeks to promote should be among the objectives of EU competition law has yet to be addressed.

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3 Violette Grac-Aubert, "A love and hate relationship—Recent developments in data protection and competition law" (2015) 36:5 Eur Competition L Rev 5 224; Christopher Kuner *et al*, "When two worlds collide: The interface between competition law and data protection" (2014) 4:4 Intl Data Privacy L 247; Maximilian N Volmar & Katarina O Helmdach, "Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation" (2018) 14:2-3 Eur Competition J 195 [Volmar & Helmdach].

4 Jones Day European Antitrust & Competition Team, "European Antitrust Enforcers Move on Holders of Big Data" *Kluwer Competition Law Blog* (26 May 2016), online: Kluwer Competition Law Blog <http://competitionlawblog.kluwercompetitionlaw.com/2016/05/26/european-antitrust-enforcers-move-on-holders-of-big-data/>.

5 Margrethe Vestager, "Competition in a big data world", Digital Life Design Conference Munich (2016), online: <https://ec.europa.eu/commission/commissioners/20142019/vestager/announcements/competition-big-data-world_en>. The Commission's position seems to be endorsed by the Court of Justice of the European Union ("CJEU"); see *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios* (Ausbanc), C-238/05, [2006] ECR I-11125 at para 63.

6 EC, *Guidelines on the application of Article 81(3) of the Treaty*, [2004] OJ C 101 at para 16 [*Guidelines on Article 81(3)*].

7 The terms 'Human Rights' and 'Fundamental Rights' will be used interchangeably.

The paper will be divided into three sections. Section one will entail a brief discussion on data-driven markets, the dangers they pose for data protection rights and the potential role for EU competition law in dealing with those threats. It will be argued that EU competition law might be useful in promoting the right to data protection, for example, by providing a structural remedy to data breaches through its ability to prohibit mergers between large data holders. Furthermore, EU competition law is in a position to tackle the power asymmetry between online companies and consumers by characterising data breaches by the former as an abuse of a dominant position—this approach is evident in the recent decision by the German national competition authority (Bundeskartellamt) against Facebook.[8] Section two will consider the interaction between EU competition law and data protection. It will be argued that the structure of the EU treaties requires the aims of EU competition law to go beyond ensuring economic efficiency and to include other policy considerations, of which data protection is one. Section three will maintain that the status of data protection as a fundamental right and the obligation imposed on the EU institutions to "respect and promote" human rights require the mainstreaming of these rights in all areas of Union policy, including for our purposes, EU competition law. Section four concludes the paper.

II. Data-Driven Markets and EU Competition Law

A. *Data-Driven Markets*

In the EU, personal data is defined as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".[9] A notable feature of the technological revolution has been the ability of companies to amass large amounts of the aforementioned personal data, which they can subsequently commercialise. This commodification of personal data has elevated its status as a commercial asset so much so that personal information is now considered "the oil of the 21st century".[10] The high value afforded to personal data has allowed online companies to use it for commercial gain by engaging in new business strategies such as offering more personalised online services or targeted advertising.[11] These new business ventures

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8 Bundeskartellamt (6th Decision Division), Germany, 6 February 2019, *Facebook Inc i a —The use of abusive business terms pursuant to Section 19 (1) GWB*, B6-22/16, online: Bundeskartellamt <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html> [*Facebook Inc i a*].

9 *GDPR*, *supra* note 2, art 4(2).

10 The Economist, "The world's most valuable resource is no longer oil, but data: The data economy demands a new approach to antitrust rules" *The Economist* (6 May 2017), online: The Economist <https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource>.

11 Vicente Bagnoli, "Competition for the effectiveness of big data benefits" (2015) 46 Intl Rev Intellectual Property & Competition L 629.

involve in most cases a "two-sided" dynamic whereby consumers receive "free" access to online services, for example social networks, with the understanding that their personal information will be collected and processed in return.[12] Notwithstanding their benefits for consumers (for example, lower prices or better products), the advent of data markets has raised questions about their implications for data protection rights. The difficulty with online markets here is not only the lack of information for consumers about how and when their data is collected and shared, but also their inability to have a say in this process. Indeed, it has been pointed out that the digital era has turned consumers into "data subjects, whose welfare may be at risk where freedom of choice and control over one's own personal information is restricted by data rich dominant undertakings".[13] The potential inability to address these issues through traditional means has led to suggestions that EU competition law can and should be used as a tool to protect consumers' right to data protection in the digital era.

B. *EU Competition Law and Data Protection*

An important aspect of the EU is the internal market which is defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".[14] The purpose of competition law in the EU is to maintain a level playing field in that internal market by ensuring that economic operators and Member States refrain from engaging in conduct which undermines competition.[15] To do this, Articles 101 and 102 of the *Treaty on the Functioning of the European Union* ("TFEU") prohibit joint and unilateral abusive action which has an adverse effect on trade between Member States. Further, Articles 106 to 109 of the *TFEU* are addressed to Member States who are also precluded from adopting behaviour capable of harming competition. Lastly, the merger regulation[16] provides for an ex-ante control of mergers and acquisitions, and blocks those that are likely to "significantly impede effective competition in the common market or a substantial part of it".[17]

As with any commercial activity, data-driven markets are subject to the EU's competition rules. Competition law is relevant to data markets in several ways. Firstly, the competition provisions might be required to address cases where dominant firms with large datasets leverage on their position in the market to create entry barriers or refuse competitors access to their data.[18] This weakens competition because the dominant

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12 Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (UK: Cambridge University Press, 2014) at 55.

13 European Data Protection Supervisor, "Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy" *European Data Protection Supervisor* (26 March 2014), at para 70, online: European Data Protection Supervisor <https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf>.

14 EC, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, [2008] OJ C 115/47, art 26(2) [*TFEU*].

15 Katalin Judit Cseres, *Competition Law and Consumer protection* (Netherlands: Kluwer Law International, 2005) at 246.

16 EC, *Regulation 139/2004/EC of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)*, [2004] OJ, L 24/1.

17 *Ibid* at para 5.

18 Nicolo Zingales, "New Challenge for Competition Policy and Data Protection: Exerting Regulatory Scrutiny over Search Engines" (2013) 2:2 GSTF JL & Social Sciences 65.

firms' competitors are unable to offer similar services. As a result, consumers are left with very little choice and are therefore susceptible to abuse.[19] Secondly, dominant undertakings might rely on their collected data to improve products in other unrelated markets to the detriment of competitors.[20] This dominance of online market players raises challenges for policy makers, not only in relation to how the rules of the market can be deployed to level the playing field, but also in how to safeguard the rights of consumers—in particular, their right to data protection. This paper is more concerned with the latter, and more specifically, the role of EU competition law in protecting data rights. The proposition that competition law can help to alleviate data protection concerns in data markets is attractive for a number of reasons.[21]

Firstly, in the EU, it is generally agreed that competition law is designed to protect consumers from unfair and abusive conduct by market operators.[22] Data protection rules are also concerned with a similar issue—the protection of consumers and their personal data.[23] In light of this, it can be argued that an effective system of consumer protection can benefit from an integrated approach between the two areas of law whereby EU competition law incorporates data protection considerations.[24] As Costa-Cabral and Lynskey argue, "competition law and data protection are not so impervious, and there are likely to be situations where competition law achieves objectives which data protection would look favourably upon".[25] Secondly, competition law has the ability to address structural problems; for example, by prohibiting mergers between large data holders if the resulting concentration is a threat to data protection.[26] Indeed, one can question the Commission's decision not to consider in more detail the data protection implications of the Facebook/WhatsApp merger

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19 Urlich Schwalbe, "Antitrust Compliance and Abusive Behaviour" in Johannes Paha, ed. *Competition Law Compliance Programmes* (Germany: Springer, 2016) 103 at 110.

20 For more on this, see the recent Commission case against Google: EC, "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service", *EU Commission* (27 June 2017), online: European Commission <http://europa.eu/rapid/press-release_IP-17-1784_en.htm>. For a discussion of the case and others relating to Google, see Richard Hourihan & Joanne Finn, "Google and the six billion dollar fine (s): We have technology, but do we have to rebuild the competition rules?" *Kluwer Competition Law Blog* (18 April 2019), online: Kluwer Competition Law Blog <http://competitionlawblog.kluwercompetitionlaw.com/2019/04/18/google-and-the-six-billion-dollar-fines-we-have-the-technology-but-do-we-have-to-rebuild-the-competition-rules/>.

21 Julia Powles, "The EU is right to take on Facebook, but mere fines don't protect us from tech giants" *The Guardian* (21 May 2017), online: The Guardian <https://www.theguardian.com/commentisfree/2017/may/20/eu-right-to-take-on-facebook-fines-dont-protect-us-from-tech-giants>. For an opposing view, see Richard Craig, "Big Data and competition—merger control is not the remedy for data protection issues" *Taylor Wessing* (July 2014), online: Taylor Wessing <https://unitedkingdom.taylorwessing.com/globaldatahub/article_big_data_competition.html>.

22 Kerber Wolfgang, "Digital markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection" (2016) Joint Discussion Paper Series in Economics Paper No 14/2016.

23 Tamara K Hervey & Jean V McHale, *European Union Health Law: Themes and Implications* (UK: Cambridge University Press, 2015) at 102.

24 Francisco Costa-Cabral & Orla Lynskey, "Family ties: The intersection between data protection and competition law" (2017) 54:1 CML Rev 11 [Costa-Cabral & Lynskey, *Intersection*].

25 Francisco Costa-Cabral & Orla Lynskey, "The Internal and External Constraints of Data Protection on Competition Law in the EU" (2015) London School of Economics and Political Science, Law Department, Law, Society and Economy Working Paper No 25/2015.

26 Simonetta Vezzoso, "Pro-competitive regulation of personal data protection in the EU" in Josef Drexl & Vincent Bagnoli, eds. *State-Initiated Restraints of Competition* (UK: Edward Elgar, 2015) 181 at 207.

in 2014 despite being aware that the two entities could merge their databases after the transaction to the detriment of consumers' right to data protection.[27] The situation was exacerbated by Facebook's alteration of its privacy policy post-merger to allow its collection of WhatsApp data, which as one commentator put it, "led to the deterioration in the quality of WhatsApp service quality due to its decreased privacy security" and a subsequent fine from the Commission.[28] The last and perhaps more far-reaching idea would be reformulating the concept of abuse under Article 102 of the *TFEU*. As the law currently stands, the Commission's enforcement of Article 102 of the *TFEU* focuses on market practices such as the exclusion of other players from the market or the exploitation of consumers through high prices.[29]

Nevertheless, the recent decision by the Bundeskartellamt against Facebook shows that the idea of what constitutes an abuse under competition law is capable of evolving to include not just economic-related abuses but also situations where firms leverage their market power to enforce unfavourable terms and conditions on consumers.[30] The German competition watchdog essentially found that Facebook's violation of the EU's *General Data Protection Regulation* ("*GDPR*") also entailed an abuse of a dominant position contrary to section 19(1) of German competition law.[31] The Bundeskartellamt's method in characterising data protection violations as breaches of competition law is commendable insofar as it addresses the power asymmetry between dominant data holders and consumers.[32] Yet, the Bundeskartellamt's position on the interaction between competition law and data protection does not reflect the view of the EU Commission, whose enforcement of EU competition law focuses on ensuring economic efficiency in markets and less so with non-market issues.

III. A Treaty Obligation to Incorporate Data Protection Issues in EU Competition Law

Since 'modernisation', a process which was designed to shift EU competition law towards a more "economic approach", the Commission argues that the main objective of competition policy is to increase consumer welfare in the form of lower prices,

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27 Susannah Sheppard, "The EU's Traditional analysis of the Facebook, WhatsApp deal, do we like it?" (2015) 25:5 Society for Computers & L 1.

28 Tim Cowen, "Big Data as a Competition Issue: Should the EU Commission's Approach Be More Careful?" (2017) 1:1 Eur Networks L & Regulation Q 14; see also Hanna Stakheyeva & Fevzi M Toksoy, "Merger control in the Big Data world: To be or not to be revisited?" (2017) 38:6 Eur Competition L Rev 265.

29 EC, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, [2009] OJ C 45/7; for an overview of some of the Commission's decisional practice and caselaw of the CJEU, see Romano Subiotto QC & David R Little, "The Application of Article 102 TFEU by the European Commission and the European Courts" (2013) 11:1-2 J Eur Competition L & Practice 95.

30 Volmar & Helmdach, *supra* note 3.

31 *Facebook Inc i a*, *supra* note 8.

32 Francisco Costa-Cabral, "The Preliminary Opinion of the European Data Protection Supervisor and the Discretion of the European Commission in Enforcing Competition Law" (2016) 23:3 Maastricht J Eur & Comparative L 495.

innovation, choice or quality.[33] In its guidance, the Commission insists that political goals—those not relating to economic efficiency—are irrelevant to the application of EU competition law unless "they can be subsumed under the four conditions of Article 81(3) [now Article 101(3)]".[34] The Commission's economic-centred approach has led to a long-running debate on the aims of EU competition law; in particular, the extent to which they should include non-economic goals.[35]

A. *EU Competition Law and Non-Economic Objectives*

Odudu's views reflect those of the Commission. His contention is that EU competition law must pursue a single objective, economic efficiency, on the basis that doing otherwise would be "detrimental to legal certainty".[36] For Motta, using competition law to achieve non-economic goals is counterproductive if those other aims can be attained through other means.[37] One can sympathise with Motta's argument. After all, it would be impractical (if not impossible) for the EU's competition law department to integrate all of the EU's policies in its enforcement of the competition rules.[38] Indeed, the idea that "there are limits as to what competition law can achieve" is certainly understandable.[39] On the other hand, there is also room to argue that incorporating non-economic aims in EU competition law is not always necessary. It is possible that neither party in competition proceedings relies on non-economic aims. In any event, where non-economic matters are raised, the Commission can reject them if they are too minimal and therefore not sufficient to influence the outcome of a case. As a result, the argument that non-economic issues should not influence the application of EU competition law because their inclusion is impractical or leads to uncertainty becomes untenable. This is even more so if such non-economic objectives are particularly significant for European integration. The corollary of this argument is that EU competition law ought to advance all of the EU's objectives, including those that do not pertain to economic development.[40]

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33 Alison Jones & Brenda Sufrin, *EU Competition Law: Text, Cases and Materials*, 5th ed (UK: Oxford University Press, 2014) at 48; for an overview of EU competition law under the "modern economic approach", see Jeremy Scholes, "Competition Law: Introduction, The Modern Economic Approach to Competition Law, And an Overview" in Norbert Reich, Annette Nordhausen Scholes & Jeremy Scholes, eds. *Understanding EU Internal Market* (UK: Intersentia, 2015) 221 at 231.

34 *Guidelines on Article 81(3)*, *supra* note 6 at para 42. See also EC, *White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty*, [1999] OJ C 132 at para 56.

35 Laura Pallet, "Shouldn't We Know What We Are Protecting? Yes, We Should! A Plea for a Solid and Comprehensive Debate About the Objectives of EU Competition Law and Policy" (2010) 6:2 Eur Competition J 339; see also Anne C Witt, "Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order" (2012) 8 Eur Competition J 443; for an overview on the aims of competition law, see Renato Nazzini, *The Foundations of European Union Competition Law: The Objectives and Principles of Article 102* (UK: Oxford University Press, 2011) at 11-49.

36 Okeoghene Odudu, *The Boundaries of EC Competition law* (UK: Oxford University Press, 2006) at 163-174.

37 Massimo Motta, *Competition Policy* (UK: Cambridge University Press, 2004) at 28.

38 Giorgio Monti, *EC Competition Law* (UK: Cambridge University Press, 2007) at 90 [Monti].

39 Okeoghene Odudu, "The Wider Concerns of Competition Law" (2010) 30:3 OJLS 599.

40 Christopher Townley, *Article 81 EC and Public Policy* (UK: Hart Publishing, 2009) at 46. Although Townley's argument focuses on art 81 of the *Treaty establishing the European Community* ("EC") (now

B. *EU Competition Law, the Aims of the EU Treaties and Data Protection*

The EU's objectives are set out in Articles 2 and 3 of the *Treaty on European Union* ("TEU").[41] Article 2 of the *TEU* states that, the "Union's aim is to promote peace, its values and the well-being of its peoples." Article 3 of the *TEU* continues by providing that the EU should work to ensure "a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." The reference to a "social market economy" supports the view that the objectives of the EU go beyond the economic to also include socially oriented policies such as "consumer protection, social rights, labour policy and the environment".[42] As one commentator argues, the wording of Article 3 of the *TEU* points to the need for an "equilibrium" between the economic and social aims of the EU.[43] Indeed, notwithstanding the Commission's economic centred approach, non-economic values such as environmental or employment policy have shaped its decisional practice at times, though this is no longer the case since modernisation.[44]

Similarly, the Court of Justice of the European Union's ("CJEU") jurisprudence on competition law has also been open to non-economic goals.[45] The CJEU's consideration of non-economic aims in cases such as *Wouters, Albany* is notable. As Whish and Bailey note, "competition policy does not exist in a vacuum, but is an expression of the current values and aims of society".[46] Basically, the role of EU competition law within the context of European integration means that it cannot be shielded from other areas of EU policy.[47] Instead, EU competition law should serve as a tool which

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art 101 of the *TFEU*), he maintains that this is also true of art 82 EC (now art 102 of the *TFEU*); see also Giorgio Monti, "*Article 81 EC and Public Policy*" (2002) 39:5 CML Rev 1057 at 1070.

41 EC, *Consolidated Version of The Treaty on European Union,* [2012] OJ C 326/17, arts 2 & 3 [*TEU*].

42 Grainne De Burca & Paul Craig, *EU Law: Text, Cases and Materials*, 5th ed (UK: Oxford University Press, 2011) at 632.

43 Iris Benohr, *EU Consumer Law and Human Rights'* (UK: Oxford University Press, 2013) at 100. For a less optimistic view, see Floris de Witte, "The Architecture of a 'Social Market Economy"' (2015) London School of Economics, Law, Society and Economy Working Paper No 13/2015.

44 See *eg*, EC, *Commission Decision 2000/475/EC of 24 January 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement*, [1999] OJ, L 187/47 at paras 47-55 and paras 55-57; EC, *Commission Decision 2001/837/EC of 17 September 2001 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement*, [2001] OJ, L 319/1 at paras 143-144. For a case involving employment policy, see EC, *Commission Decision 93/49/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV 33.814—Ford/Volkswagen)*, [1992] OJ, L 20/14. For further analysis of some of these cases, see Kim Talus, *Vertical Natural Gas Transportation Capacity, Upstream Commodity Contracts and EU Competition Law* (Netherlands: Wolters Kluwer, 2011) at 257; see also Constanze Semmelman, "The future role of the non-competition goals in the interpretation of Article 81 EC" (2008) 1 Global Antitrust Rev 15; for a different view, see Halil Rahman Basaran, "How Should Article 81 EC Address Agreements that Yield Environmental Benefits" (2006) 27:9 Eur Competition L Rev 479.

45 On this, see for instance *JCJ Wouters, JW Savelbergh, Price Waterhouse Belastingadviseurs BV and Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, [2002] ECR I-01577 at para 97; *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* (Albany), C-67/96, [1999] ECR I-05751 at paras 54 and 59; for more analysis, see Katarina Pijetlovic, *EU Sports Law and Breakaway Leagues in Football* (Germany: Springer, 2015) at 153; Charlotte Janssen & Eris Kloosterhuis, "The Wouters case law, special for a different reason?" (2016) 37:8 Eur Competition L Rev 335.

46 Richard Whish & David Bailey, *Competition Law*, 7th ed (UK: Oxford University Press, 2012) at 20.

47 David Harrison, *Competition Law and Financial Services* (UK: Routledge, 2014) at 6.

can help in attaining the objectives of the Union.[48] This view finds support in the "policy-linking clauses" in Article 7 to 13 of the *TFEU* which impose a requirement on the EU institutions to ensure a "holistic" approach when implementing Union policies.[49] Indeed, Monti is right when he argues that the Treaties "compel the infusion of certain public policy considerations" into competition law.[50] In light of this, the question becomes whether data protection is also a social objective which must be incorporated in the application of EU competition law. For the current author, that question should be answered in the affirmative. Data protection is a significant right which is anchored in the Treaties under Article 16(1) of the *TFEU*, according to which "everyone has the right to the protection of data concerning them". Clearly, if other important non-economic objectives such as environmental matters, employment policy or ensuring the integrity of certain professions have had a bearing on how EU competition law is enforced, a similar approach should be considered with regards to data protection, which should also feature among the objectives that EU competition law seeks to accomplish.[51]

At the same time and more importantly for our purposes, personal data is not just a commercial asset, but is also a value that is "intrinsically linked to the dignity, autonomy, and privacy of individuals".[52] This view is reflected in the fact that data protection is a fundamental right under EU law. In light of this, another question that therefore arises is, whether the significance of data protection as a norm protected by the Charter requires the incorporation of data protection issues in EU competition law analysis in order to ensure the effectiveness of the right to data protection.

IV. A Fundamental Rights Obligation to Address Data Protection Concerns in EU Competition Law

A. *Data Protection as a Fundamental Right*

Anxieties around new technologies and the threat they present for data protection rights are not new. The adoption of the Data Protection Directive in 1995 was born out of the need to ensure adequate protection for consumers at a time when "the processing and exchange of data" within the Union was becoming "considerably easier".[53] Its successor, the *GDPR*, is also designed to "facilitate the free flow"[54] of personal data in the EU's internal market, whilst, at the time, protecting the "fundamental rights and freedoms of natural persons,"[55] in other words, individuals whose data is

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48 Alan Dashwood *et al*, *Wyatt and Dashwood's European Union Law*, 6th ed (UK: Hart Publishing, 2011) at 48.

49 Ioannis Lianos & Arianna Andreangeli, "The European Union, the Competition Law System and the Union's Norms" in Eleanor M Fox & Michael J Trebilcock, eds. *The Designs of Competition Law Institutions: Global Norms, Local Choices* (UK: Oxford University Press, 2012) at 406.

50 Monti, *supra* note 38 at 90.

51 Nadezhda Purtva, "Property in Personal Data: Second Life of an Old Idea in the Age of Cloud Computing, Chain Informatisation and Ambient Intelligence" in Serge Gutwirth *et al*, *Computers, Privacy and Data Protection: An Element of Choice* (Germany: Springer, 2011) at 41.

52 Costa-Cabral & Lynskey, *Intersection*, *supra* note 24.

53 *Data Protection Directive*, *supra* note 2 at para 4.

54 *GDPR*, *supra* note 2 at para 6.

55 *Ibid* at para 10.

collected. A novelty of the *GDPR* is that in its preamble, it expressly recognises data protection as a fundamental right under Union law. The reference to fundamental rights is a reflection of the EU's 'fundamental rights' approach to data protection.[56] The status of data protection as a fundamental right is anchored in Article 8 of the Charter, and has been expressly recognised by the CJEU in a number of significant judgements such as *Scheicke and Eiffert, Digital Rights Ireland* and *Google Spain.*[57] The CJEU's caselaw on the right to data protection has been very welcome; in particular, *Scheicke and Eiffert*, a significant judgement which entailed the first use of the Charter as a "ground for judicial review" of Union legislation.[58] The *Digital Rights Ireland* judgement was seen as a significant victory, not least for the civil liberties organisations and citizens' movements who had challenged the Directive in their respective domestic courts, but also for EU citizens more generally.[59] For Granger and Irion, the ruling signalled a development of the "parameters of constitutional review when fundamental rights are at stake", with the CJEU assigning to the EU "a new responsibility to protect human rights"; and establishing a "strict scrutiny test applicable to EU legislative measures that interfere seriously with human rights". In this instance, the right to data protection.[60] In the same vein, the Court has recognised that threats to data protection rights have evolved to include not just EU legislative measures, but also the activities of private entities and has acted swiftly to safeguard the right to data protection in the internet age, as evidenced by the *Google Spain* case. In light of this aforementioned risk posed to data rights in the digital era and given the potential for EU competition law to address those threats, it is argued that the aims of EU competition law should reflect the Charter's duty that the Union promotes fundamental rights.

B. *The Protection of Human Rights in the EU and the Duty to "Respect and Promote Fundamental Rights"*

The significance of fundamental rights in the EU has grown over the last 20 years.[61] The acceptance of the Charter during the Treaty of Nice was a significant step in

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[56] Maria Tzanou, *The Fundamental Right to data protection: Normative value in the context of counter-terrorism surveillance* (UK: Hart Publishing, 2017) at 16; see also Federico Ferretti, "The Consumer Interest and Data Protection: The Exchange of Consumer Information in the Retail Financial Sector" (2014) 4 Eur Rev Priv L 485.

[57] Joined Cases *Volker and Markus Schecke GbR, Hartmut Eifert v Land Hessen*, C-92/09 and C-93/09, [2010] ECR I-11063; Joined Cases *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, C-293/12 and C-594/12, [2014] ECLI:EU:C:2014:238 at para 56; *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, [2014] ECLI:EU:C:2014:317 at para 80.

[58] Eva Nanopoulos, "It is time, Charter, Rise and Shine" (2011) 70:2 Cambridge LJ 306.

[59] Orla Lynskey, "Joined Cases C-293/12 and 594/12 Digital Rights Ireland and Seitlinger and Others: The Good, the Bad and the Ugly" *European Law Blog* (8 April 2014), online: European Law Blog <https://europeanlawblog.eu/2014/04/08/joined-cases-c-29312-and-59412-digital-rights-ireland-and-seitlinger-and-others-the-good-the-bad-and-the-ugly/>.

[60] Marie-Pierre Granger & Kristina Irion, "The Court of Justice and the Data Retention Directive in Digital Rights Ireland: Telling Off the EU Legislator and Teaching a Lesson in Privacy and Data Protection" (2014) 39:6 Eur L Rev 835.

[61] Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (UK: Oxford University Press, 2014) at 43.

the EU's attempt to develop a clear human rights policy. Prior to the Charter, it fell to the CJEU to gradually construct a system of human rights protection through a number of notable judgements.[62] The CJEU's ruling in *Stauder* was a welcome development—the Court had initially refused to entertain human rights cases against the EU institutions.[63] The pronouncements in *Stauder* that fundamental rights were now "general principles of Community Law" was therefore a welcome and notable development which paved the way for the promotion of EU human rights.[64] Indeed, in the next case, *Internationale Handelsgesellschaft*, decided a year later, the Court elaborated on its judgment in *Stauder*, holding that not only were fundamental rights now an integral part of EU law, but were to be "inspired by the common traditions of the Member States".[65] In the next case, *Nold,* the Court echoed its previous statement that national legal systems would serve as a source of inspiration for fundamental rights protection at EU level. More importantly, however, the CJEU continued that it would also rely on international human rights treaties.[66] Subsequently, in *Rutili*, the CJEU held that one of those Treaties would be the European Convention of Human Rights ("*ECHR*").[67] The Court's reference to the *ECHR* was to be expected given that all the EU's Member States had signed the convention.[68] Further, in drawing inspiration from the *ECHR*, the CJEU had sent a strong message that human rights were no longer "irrelevant or peripheral to the common market" and that the Court "would henceforth entertain claims that such rights had been adversely affected by community acts and policies".[69] The watershed moment in the EU's search for a permanent human rights policy came with the declaration of the Charter in Nice.[70]

The Charter is now legally binding following the Treaty of Lisbon which in Article 6(1) provides that "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." In assigning the Charter with the same value as the Treaties, the EU and its Member States "triggered a human rights protection dynamic across

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62 Eleanor Spaventa, "Fundamental rights in the European Union" in Catherine Barnard & Steve Peers, eds. *European Union Law* (UK: Oxford University Press, 2017) at 226.

63 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, C-1/58, [1959] ECLI:EU:C:1959:4; Joined cases *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I Nold KG v High Authority of the European Coal and Steel Community*, C-36/59, C-37/59, C-38/59 and C-40/59, [1960] ECLI:EU:C:1960:36; *Marcello Sgarlata and others v Commission of the EEC*, C-40/64, [1965] ECLI:EU:C:1965:36.

64 *Erich Stauder v City of Ulm*, C-29/69, [1969] ECLI:EU:C:1969:57 at para 7.

65 *Internationale Handelsgesellschaft mbH v Einfurh-und Vorratsstelle fur Getreide und Futtermittel (Internationale)*, C-11/70, [1970] ECLI:EU:C:1970:114 at para 4; see also *Hauer v Land Rheinland-Pfalz*, C-44/79, [1979] ECR I-03727 at para 14.

66 *J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, C-4/73, [1974] ECR I-00491 at para 132.

67 *Roland Rutili v Ministre de l' intérieur*, C-36/75, [1975] ECR I-01219 at para 32.

68 Federico Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays* (UK: Hart Publishing, 2000) at 87.

69 Gráinne de Búrca, "The Evolution of EU Human Rights Law" in Gráinne de Búrca & Paul Craig, eds. *Evolution of EU Law, 2nd ed (UK:* Oxford University Press, *2011*) *at* 478.

70 Christina Pineda Polo & Monica Den Boer, "The Charter of Fundamental Rights: Novel Method on the way to the Nice Treaty" in Finn Laursen, ed. *The Treaty of Nice: Actor Preferences, Bargaining and Institutional Choice* (Leiden: Martin Nijhoff, 2006) at 503.

the EU."[71] In particular, post-Lisbon, the EU institutions and the Member States are under an obligation to respect and promote fundamental rights, although the duty on the Member States arises only where they are acting within the scope of Union law. Indeed, Article 51(1) of the Charter which states that its provisions "are addressed to the institutions, bodies, offices and agencies of the Union" and that they "shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers." It is this duty in Article 51 which informs the argument advanced in this paper that the aims of EU competition law must evolve to include the promotion of fundamental rights; here, the right to data protection. Indeed, the interaction between fundamental rights and the application of EU Law is not new.

The impact of fundamental rights on the application of EU law is evident in the caselaw of the CJEU, for example its jurisprudence relating to the free movement of goods. Indeed, it is remarkable that fundamental rights were permitted to serve as justifications for Member States' infringements of the EU's free movement provisions even before the Charter had acquired binding status.[72] For example, in *Schmidberger*, the Court allowed Austria to justify its infringement of Article 34 of the *TFEU* by invoking freedom of expression, a fundamental right under Article 11 of the Charter. In its ruling, the Court alluded to the fact that "since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods".[73] It is also noteworthy that the Court chose not to base its decision on the usual Article 36 of the *TFEU* derogations, but instead relied on fundamental rights as an autonomous reason available to Member States when they seek to defend a breach of the free movement rules, thus arguably reaffirming the authority of human rights.[74] The significance of human rights in the EU is also evident from the fact that the CJEU has allowed Member States to justify a restriction on the free movement rules by invoking a

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71 Paul de Hert & Vagelis Papakonstantinou, "Data Protection: The EU institutions' battle over data processing vs individual rights" in Florian Trauner & Ariadna Ripoll Servent, eds. *Policy Change in the Area of Freedom, Security and Justice: How EU Institutions Matter* (UK: Taylor & Francis, 2015) at 178.

72 Robert Pye, "The European Union and the absence of fundamental rights in the Eurozone: A critical analysis" (2018) 24:3 Eur J Intl Relations 3. However, the Court's balancing of free movement provisions with fundamental rights has at times been criticised for putting market goals over human rights; on this, see Daniel Augenstein, "Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law" (2013) 14:10 German LJ 1917; see also cases *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd 1, Byggettan and Svenska Elektrikerförbundet*, C-341/05, [2007] ECR I-11767; *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OU Viking Like Eesti*, C-438/05, [2007] ECR I-10779; for a defence of the Court's caselaw, see Stephanie Reynolds, "Explaining the Constitutional Drivers behind a Perceived Judicial Preference over Fundamental Rights" (2016) 53:3 CML Rev 643.

73 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, C-112/02, [2003] ECR I-05659 at para 74.

74 Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justifications Provisions of GATT, GATS, SPS and TBT Agreements* (Leiden: Martinus Nijhoff, 2010) at 200; see also Andrea Biondi, "Free Trade, a Mountain Road and the Right to Protest: European Economic Freedoms and Fundamental Individual Rights" (2004) 1 Eur Human Rights L Rev 51.

fundamental right with a "national constitutional dimension.[75] In *Omega*, Germany invoked the right to human dignity as a justification for a national measure banning a game known as "laser tag" in which participants shoot a sensory target on the jackets of other players, essentially "playing at killing".[76] For the CJEU, fundamental rights fell within the category of public policy objectives capable of serving as a legitimate interest that can be relied on to justify a restriction on the free movement provisions, here the freedom to offer services.[77]

Post-Lisbon, the Court has continued to draw from the Charter when interpreting EU law relating to economic activity. This was the case in *Association Belge des Consommateurs Test-Achats* where the question referred to the CJEU by the domestic court was the compatibility with EU law of an exemption in Article 5(2) of *Directive 2004/113/EC* allowing insurance companies to determine premiums and benefits based on gender factors. The CJEU held the provision to be invalid as it was incompatible with the rights of non-discrimination and equality between men and women as enshrined in Articles 21 and 23 of the Charter.[78] *Test-Achats*, like the other cases discussed above, suggests that CJEU's incorporation of fundamental rights in its free movement caselaw has brought a "human rights dimension" to the internal market.[79] The Court's approach is commendable for it provides an insight into the potential interaction between human rights and the Treaty's economic objectives. For the current author, taking into account the CJEU's aforementioned caselaw and the advent of the Charter as a legally binding instrument, there is a case to be made in favour of the interaction between EU competition law and data protection given its status as a fundamental right.

C. *The Charter of Fundamental Rights, the Aims of EU Competition Law and the Right to Data Protection: Time to Level the Playing Field*

The Charter "represents the very identity of the EU and constitutes its written parameter of constitutionality".[80] By elevating the Charter to the same legal value as the Treaties, the Union has accepted that the Charter and the rights it seeks to preserve are no longer peripheral to European integration, but form part of the *acquis communautaire*.[81] Another consequence of the Charter's legal value is that it now has

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75 Sybe A de Vries, "Balancing Fundamental Rights Economic Freedoms According to the European Court of Justice" (2013) 9:1 Utrecht L Rev 169 [de Vries]; on the interaction between EU fundamental freedoms and national fundamental rights, see also Nic Schuibhne, "Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law" (2009) 32:2 Eur L Rev 230.

76 John Morijn, "Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution" (2006) 12:1 Eur LJ 15.

77 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-208/09, [2004] ECR I-09609.

78 *Association Belge des Consommateurs Test-Achats ASBL, and Others v Conseil des Ministres*, C-236/09, [2011] ECR I-00773.

79 De Vries, *supra* note 75.

80 Chiara Amalfitano, *General Principles of EU law and the Protection of Fundamental Rights* (UK: Edward Elgar, 2018) at 12.

81 On the potential effect of the Charter on the caselaw of the CJEU, see Stephen J Curzon, "Internal Market Derogations in Light of the New Binding Charter of Fundamental Rights" in Di Federico Giacomo, ed.

the "importance of primary law".[82] In other words, the fundamental rights enshrined in the Charter are as significant to the EU's legal order as the other objectives pursued by the Treaties. This view, it can be argued, is reinforced by the duty in Article 51 of the Charter on the Union to respect and promote fundamental rights. From this, it is not unreasonable to conclude that the promotion of fundamental rights is now an explicit objective of the Union. It follows that those rights should be protected by the Union through its policies. This is because the idea behind the Charter was to establish "a constitutional bedrock for the protection of the fundamental rights of EU citizens."[83] Indeed, it can be contended that elevating the Charter to grant it the same legal value as the Treaties was designed to ensure that fundamental rights were fully entrenched in the EU's legal order, and with this, the potential to influence the application of EU law.[84]

In light of the above, it is argued that the aims of EU competition law must be extended so as to include the promotion of fundamental rights, and for our purposes, the right to data protection. On a practical level, this means relying on the application of EU competition law to ensure the effectiveness of the right to data protection. The interaction between competition law and fundamental rights has traditionally been restricted to procedural issues, for example to guarantee respect for due process in competition proceedings.[85] Yet, it is clear that the protection of fundamental rights is not simply about safeguarding procedural rights. The promotion of human rights also includes ensuring the effectiveness of more substantive rights, for example the right to data protection.[86] The infusion of data protection considerations in EU competition law is necessary because, as one author notes, "[p]rotecting and promoting fundamental rights is not simply a legal exercise, but is the core of all EU policies."[87] This point finds support in the Commission President's promise "to make use of the prerogatives of the Commission" to "uphold fundamental rights".[88] Thus, if the EU is to live up to its values laid down in Article 6 of the *TEU*, fundamental rights

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The EU Charter of Fundamental Rights: From Declaration to Binding Instrument (Germany: Springer, 2010) at 145-159.

82 Marek Safjan, "Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of conflict?" (2012) European University Institute, Department of Law, Working Paper No 2012/22 at 1.

83 John Tillotson & Nigel Foster, *European Union Law: Text, Cases and Materials*, 4th ed (UK: Cavendish, 2003) at 233.

84 Ben Van Rompuy, "The Impact of the Lisbon Treaty on EU Competition Law: A Review of Recent Case Law of the EU Courts" (2011) 1 Competition Policy Intl Antitrust Chronicle 2. On the relationship between the Charter and the Treaties, see Lucia Serena Rossi, "Same Legal Value as the Treaties? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights" (2016) 18:4 German LJ 771 at 772; see also Bruno de Vitte, "The Legal Status of the Charter: Vital Question or Non-Issue?" (2001) 8:1 Maastricht J Eur & Comparative L 181.

85 Ivo Van Basel, *Due Process in EU Competition Proceedings* (Netherlands: Wolters Kluwer, 2011) at 96.

86 Nicholas Bernard, "A 'New Governance' Approach to Economic, Social and Cultural Rights in the EU" in Tamara K Hervey & Jeff Kenner, eds. *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (UK: Hart Publishing, 2003) 247 at 261 [Bernard].

87 Francesca Ferraro & Jesus Carmona, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty*, European Parliament Research Service (March 2015) at 23. [*Fundamental Rights Paper*].

88 Jean-Claude Juncker, "A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change: Political Guidelines for the next European Commission" at 8, quoted in *Fundamental Rights Paper*, *ibid* at 23.

such as the right to data protection, should protect EU citizens in "all areas of EU competence", including therefore, EU competition law.[89]

Essentially, fundamental rights should be "mainstreamed into the activities of all the EU institutions."[90] The Commission has defined mainstreaming, albeit in the context of gender equality, as "mobilising all general policies and measures specifically for the purpose of (realising fundamental rights) by actively and openly taking them into account, at the planning stage."[91] Thus, the benefit of mainstreaming fundamental rights in the implementation of EU law is that it is proactive rather than reactive. Linking this to our example, incorporating data protection considerations in EU competition law ensures that this right is not compromised in the first place, leading to an overall more effective system of human rights protection. Basically, fundamental rights become an "integral part of policy making and implementation, not something that is separated off in a policy or institutional ghetto."[92] It is certainly true that restricting fundamental rights to only a few policies such as non-discrimination "would not unlock the full capacity of fundamental rights and would not fully respect the obligations of the EU and its Member States under the Treaties", and indeed under the Charter.[93] As a result, there is a duty on the Union to mobilise all of its policies in order to fulfil the Charter's potential. The consequence of this for EU competition law is that the objectives it seeks to achieve cannot be isolated from the application of the Charter and the rights enshrined therein, such as our example, the right to data protection.

The idea that the aims of EU competition law must include the promotion of human rights is, in a sense, similar to the point raised in section 2 with regard to the EU's mainstreaming provisions. Essentially, the *TFEU*'s policy-linking clauses require an integrated approach between all the objectives of the Union.[94] In light of this, it is not unreasonable to argue that incorporating the right to data protection in the application of EU competition law is also necessitated by the EU's mainstreaming rules since, as we saw above, the promotion of fundamental rights is now an objective of the EU, especially since the Charter was granted legal value.[95] Consequently, it follows that EU competition law must be used to promote the Charter rights; here,

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89 AG Sharpston quoted in Sionaidh Douglas-Scott, "The European Union and Human Rights after the Treaty of Lisbon" (2011) 11:4 Human Rights L Rev 645 at 674; see also Tim Corhaut, *EU Ordre Public* (Netherlands: Wolters Kluwer, 2012) at 300.

90 Christophe Hillion, "Overseeing the Rule of Law in the EU: Legal Mandate and Means" in Carlos Closa & Dimitry Kochenov, eds. *Reinforcing Rule of Law Oversight in the European Union* (UK: Cambridge University Press, 2016) 59 at 62 [Closa & Kochenov].

91 EC, *Communication from the Commission of 21 February 1996 "Incorporating equal opportunities for women and men into all Community policies and activities"*, COM(96) 67.

92 Olivier De Schutter, "Mainstreaming Human Rights in the European Union" in Olivier De Schutter & Philip Alston, eds. *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (UK: Hart Publishing, 2005) 37 at 44.

93 Gabriel N Toggenburg & Jonas Grimheden, "The Rule of Law and the Role of Fundamental Rights" in Closa & Kochenov, *supra* note 90 at 159.

94 See section II.B above.

95 Mark Bell, "The principle of equal treatment: Widening and deepening" in Gráinne de Búrca & Paul Craig, eds. *The Evolution of EU Law, 2nd ed* (UK: Oxford University Press, 2011) 611 at 631; see also Gabriel N Toggenburg, "The EU Charter: Moving from a European Fundamental Rights Ornament to a European Fundamental Rights Order" in Giuseppe Palmisano, ed. *Making the Charter of Fundamental Rights a Living Instrument* (Netherlands: Brill, 2014) 9 at 27.

the right to data protection. Indeed, considering the duty in Article 51 of the Charter referred to throughout this paper, taking into account the right to data protection in the application of EU competition law becomes a legal requirement when it is apparent that such an approach is beneficial for the promotion of that particular right. In addition, the necessity to rely on EU competition law to protect data rights is also essential and indeed required where it is apparent that failing to do so puts fundamental rights at risk.[96]

The Bundeskartellamt decision against Facebook discussed earlier supports the idea of integrating human rights in the objectives that EU competition law looks to achieve.[97] In deciding that Facebook's collection of personal data from third party websites was without user consent, the German Competition watchdog reasoned that the company's actions were not only in contravention of the *GDPR*, but they also infringed the users' fundamental right to "informational self-determination", a constitutional right under German law.[98] Although the Bundeskartellamt's decision was later suspended by a Higher Regional Court (OLG) of Düsseldorf, the initial decision by the German's competition law enforcer has now been upheld by a Federal Court of Justice.[99] The Bundeskartellamt's approach has provided a useful glimpse into the potential interaction between EU competition law and the protection of fundamental rights. The analysis of the German competition watchdog could serve as a guide for the future enforcement of EU competition law in a manner that seeks to promote the fundamental rights preserved by the Charter and the rights therein.[100]

It has not been the aim of this paper to argue that EU competition law must be used to promote all fundamental rights. Indeed, this might not be possible or indeed practical. However, where competition policy has the potential to serve as a tool to protect various human rights, it is submitted that those fundamental rights should have a bearing on how this area of law is enforced. Clearly, the legally binding Charter dictates a more balanced application of EU law which does not pursue market values to the detriment of human rights and indeed other socially oriented goals. As one author notes, the Charter should be considered as a "step toward articulating the fundamental values of the EU which go beyond market-making and economic integration."[101] After all, the promotion of fundamental rights "constitutes an existential requirement of the EU legal order".[102]

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96 Bernard, *supra* note 86 at 261.

97 *Facebook Inc i a*, *supra* note 8.

98 *Ibid*; Informational self-determination is recognised by the Federal German Constitutional Court as a fundamental right; see Marco Botta & Klaus Wiedemann, "The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey" (2019) 64:3 The Antitrust Bulletin 428.

99 AP News, "German legal ruling deals Facebook Blow in data use"*AP News* (23 June 2020), online: AP News <https://apnews.com/58fc6fe8606d7e22bf3e8a06921f7a70>.

100 On the potential use of Article 102 of the *TFEU* to promote the right to data protection, see Volmar & Helmdach, *supra* note 3.

101 Grainne de Burca & Jo Beatrix Aschenbrenner, "European Constitutionalism and the Charter" in Steve Peers & Angela Ward, eds. *The European Charter of Fundamental Rights: A Commentary* (UK: Hart Publishing, 2004) at 29.

102 AG Maduro quoted in Andrew Williams, "Human Rights in the EU" in Anthony Arnull & Damian Chalmers, eds. *The Oxford Handbook of European Union Law* (UK: Oxford University Press, 2015) at 252.

V. Conclusion

The commodification of personal data has brought data protection issues within the remit of EU competition law and therefore blurs the demarcation between these policy areas. This has raised questions about the extent to which competition law should be used to safeguard the right to data protection in online markets. This paper has advanced the argument that the time has come to reconsider the objectives of EU competition law and to include data protection within the aims that EU competition law seeks to achieve. The paper has maintained that the consideration of fundamental rights is necessitated by the duty imposed on the Union by the legally binding Charter—to respect and promote fundamental rights, of which data protection is one—by virtue of Article 8 of the Charter.

The aim of the paper was to challenge the European Commission's view that EU competition law is designed to promote market values, and that non-economic issues such as data protection should have no bearing on how EU competition law is applied. On the other hand, there is hope that the Commission's stance might soften in the future. Margrethe Vestager has hinted at future developments in the area, noting that the EU will "have to stay vigilant" and potentially deal with cases where privacy issues are used in "an anti-competitive way."[103] The Commission's potentially softening stance is unsurprising considering that the incorporation of data protection concerns in competition law has been endorsed by several national competition authorities in the EU.[104] This approach is also noticeable in other jurisdictions, most notably in Australia where the country's competition regulator (ACCC) has raised data protection concerns over Google's acquisition of Fitbit.[105]

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[103] Margrethe Vestager quoted in Aoife White & Hamza Ali, "Google-Fitbit Probe Isn't for Data Watchdogs, Vestager Says" *Bloomberg* (27 February 2020), online: Bloomberg <https://www.bloombergquint.com/business/google-fitbit-probe-is-for-me-not-data-watchdogs-vestager-says>.

[104] Autorite de la Concurrence & Bundeskartellamt, *Competition Law and Data* (10 May 2016); more recently, the UK's Competition and Market Authority has called for a new competition regime to tackle tech giants; on this see Competition and Markets Authority, "New regime needed to take on tech giants" *UK Government* (1 July 2020), online: UK Government <https://www.gov.uk/government/news/new-regime-needed-to-take-on-tech-giants>.

[105] See Australian Competition & Consumer Commission, "Statement of Issues: Google LLC—proposed acquisition of Fitbit" (18 June 2020) at paras 81-87, online: Australian Competition & Consumer Commission <https://www.accc.gov.au/system/files/public-registers/documents/Google%20Fitbit%20-%20Statement%20of% 20Issues%20-%2018%20June%202020.pdf>.